



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI
CAUSE NO. 2069 OF 2012

ALICE M. YOBERA.....CLAIMANT

VERSUS

THE BOARD OF GOVERNORS, ARYA VEDIC

PRIMARY AND SECONDARY SCHOOL....1ST DEFENDANT/RESPONDENT

ARYA STRI SAMAJ NAIROBI.....2ND DEFENDANT/RESPONDENT

JUDGEMENT

The claimant herein filed this Claim seeking unpaid gratuity in the sum of Shs. 542,754/- in a Statement of Claim dated 11th October 2012 and filed in Court on 12th October 2012.

The Respondents replied to the Statement of Claim through a Defence/Respondent's Witness Statement of Mrs. Sushil Sharma the Chairperson of the Management Committee of the Respondents on 28th January 2013. On 17th September 2013 the Respondent's filed another Defence/Respondent's Witness Statement by Edwin Obote Ochami which apart from the name of the signatory is identical to the 1st witness statement by Mrs. Sushil Sharma.

The case was heard on 28th May 2013 and 17th September 2013. The Claimant testified in her behalf and was represented by Mr. Mutuku instructed by Mbugua & Mbugua Advocates while the Respondents were represented by Mr. Mwangi instructed by J.K. MWANGI & Co Advocates. The Respondent called Mr. Edwin Obote Ochami, the Respondent's Deputy Head Teacher as their witness.

The facts of the case are not disputed. The Claimant Alice Marjorie Yobera joined the employment of the Respondent as a Primary School teacher in January 1989 after retiring from the Government at the age of 50 years. In 2001 the school introduced a gratuity scheme for teachers at the rate of 15% of basic salary after completion of 5 years continuous service.

The gratuity was reduced to 12% by letter addressed to all staff dated 8th October 2002 which the Claimant signed on 15th October 2002. On 1st September 2004 the Respondents phased out the gratuity scheme and introduced a contributory pension scheme with both the employer and employee contributing 10% of basic salary per month. The Claimant was not enrolled into the pension scheme as she was more than 65 years old and the scheme rules provided for membership for employees only up to the age of 65 years. When the gratuity scheme was phased out all employees including the Claimant were paid their gratuity accrued up to the date of introduction of the pension scheme.

The Claimant retired in August 2009 and was not paid either gratuity or pension.

She claims gratuity from September 2004 to August 2009. The Respondents declined to pay her on the grounds that gratuity was phased out in September 2004 and since it is a gratuitous payment that is not provided for by law, the claimant is not entitled to the same.

In the written submissions the Respondent submits that the gratuity scheme was phased out by agreement of all employees, that there was no breach of contract when the Respondents withdrew the benefit which was conferred on the Claimant by discretion and that it is the Fund Manager and not the Respondents who fixed the terms of the scheme to exclude the Claimant, and therefore the claim is brought against a wrong party. The Respondents further submit that the claim for gratuity is statute barred as it should have been brought by September 2010, 6 years after the scheme was phased out.

The Claimant submits that the Respondents agreed on gratuity as part of the Claimant's terms of service, the Claimant was not involved when the gratuity scheme was phased out and that replacing the gratuity scheme with a pension scheme in which the Claimant was not involved amounts to discrimination.

The issue for determination is therefore whether or not the Claimant is entitled to payment of gratuity.

The Employment Act 2007 at Section 5 prohibits discrimination except in the circumstances set out in subsection (3). Section 5(2) states that an employer shall promote equal opportunity in employment and strive to eliminate discrimination in any employment policy or practice. Subsection 3 (b) prohibits discrimination in respect of recruitment, training, promotion, terms and conditions of employment, termination of employment or other matters arising out of the employment.

Subsection (7) (c) defines employment policy and practice" to include any policy or practice relating to recruitment procedures, advertising and selection criteria, appointments and the appointment process, job classification and grading, remuneration, employment benefits and terms and conditions of employment, job assignments, the working environment and facilities, training and development, performance evaluation systems, promotion, transfer, demotion, termination of employment and disciplinary measures.

Section 26 (2) provides that where the terms and conditions of a contract of service are more favourable than the law such favourable terms and conditions of service shall apply.

I have considered the pleadings, the evidence and the written submissions. I have also considered the relevant law.

The letter introducing the pension scheme which is undated and is signed by the Claimant does not state that she would be excluded from the scheme or that the scheme has an age limit of 65 years. The letter simply states that the pension Scheme was replacing the gratuity Scheme. The Claimant's signature on the letter therefore does not agree to her exclusion from the scheme. She only agreed to a replacement of gratuity scheme with Pension Scheme as communicated in the letter. The replacement having not been made in her case, the only logical conclusion was that she remained in the gratuity Scheme. Holding otherwise would be subjecting her to discrimination in that other staff members had a retirement benefit while she did not. This is her case, the gratuity scheme was never replaced with the pension scheme.

The argument by the Respondent that it was the scheme managers who replaced the gratuity scheme is misplaced as the employer was the sponsor of the scheme and the managers only manage a scheme on behalf of the sponsor. The sponsor determines the terms of the scheme, not the managers. The Respondents argument that the Claimant had brought the wrong person to court is also not maintainable as the Claimant was an employee of the Respondents and not the scheme Managers.

It was the Respondent's who introduced the scheme and not the scheme managers. The Claimant did not have any relationship with the scheme Managers as she was not member of the scheme. She can therefore not maintain a claim against the managers of the scheme.

For the foregoing reasons the Claimant is entitled to gratuity at the rate of 12% of basic salary from September 2004 to August 2009 when she left employment. This is because she had agreed to the reduction of the pension from 15% to 12% by appending her signature to the letter effecting the change and by not filing any complaint against the change.

I therefore award the Claimant the sum of Shs 434,204.64 /- being 12% of her actual monthly salary in accordance with the payslips produced in court and as set out at paragraph 10 of the claim.

I further award the Claimant her costs of this claim. The Claimant shall be entitled to interest on both awarded amount and costs from the date of judgment

Orders accordingly.

DATED DELIVERED AND SIGNED IN OPEN COURT ON 31st MARCH 2014.

HON. LADY JUSTICE MAUREEN ONYANGO

JUDGE

In the presence of:

Wandaka hold brief for Mbugua for the Claimant

No appearance for the 1st Respondent

No appearance for the 2nd Respondent