



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO. 279 OF 2011

(Before D.K.N. Marete)

PATRICK NYORO NJUGUNA.....CLAIMANT

Versus

THE EAST AFRICAN PORTLAND CEMENT.....RESPONDENT

JUDGEMENT

This claim was brought to court vide a memorandum of claim dated 16th February, 2011 and filed on 2nd March, instant. It does not disclose the issue in dispute on its face.

The respondent vide a statement of response dated 4th August, 2011 opposes the claim and prays that the same be dismissed with costs.

The claimant's case is that on or about 1st November, 1979, he was employed by the respondent where he served in various capacities culminating in his posting in the respondent's marketing and sales department and earning a monthly salary of kshs.52,174.00. He avers that he worked diligently for the respondent for a span of over thirty (30) years until 30th April, 2010 when he exited vide a voluntary retirement scheme as follows;

- a. *2 month's salary in lieu of notice for those who had served the company for 5 years and above;*
- b. *Outstanding leave days as at the timer of exit to be paid in cash;*
- c. *Payment of wages, overtime and any other remuneration up to and including the date of exit from service;*
- d. *Severance pay of 25 days for each completed year of service as per the CBA in force;*
- e. *Gratuity pay of 25days pay for each completed year of service for employees who had served the company for 1 – 10 years and 72 days pay for each completed year of service for those who had served for 10 years and above;*
- f. *Incentive, severance payment of 4 months salary for every completed year of service.*

On those terms, the claimant's entitlement was;

- a. 2 month's salary in lieu of notice, Kshs.104,348/=
- b. Gratuity, Kshs.3,756,528/=
- c. 4 month's severance pay for 30 years served, Kshs.6,20,880/=

He therefore accepted the early retirement scheme vide a letter of early retirement dated 31st August, 2009 and this was accepted by the respondent's internal memo dated 15th October, 2009 where it was intimated that the respondent would be ratified of his date of exit and a possible tax exemption on application of the same from the government.

The claimant further submits that at an *inter parties* meeting held on or about 11th December, 2009, the respondent intimated to him that retirement date would be sometimes in January, 2009 upon which he continued to serve as he awaited retirement on 31st January, 2010. Retirement sermons were organized and at a meeting held on 27th January, 2010 the respondent adjourned the exit dated to 30th April, 2010.

By a letter dated 12th April, 2010 the respondent unlawfully and without any basis purported to change the terms of retirement in respect to severance pay wherein it indicated a payment of 4 months salary for the remaining years of service rather than the years served as was in the original offer accepted by the claimant. This change only affected the claimant and a few other employees who were over fifty years of age and had served largest. This was made non negotiable and wholly forced on to the claimant thereby denying him a sum of Ksh.4,450,085.00 and Kshs.1,717,14.00 being severance and PAYE retained.

The claimant disputes the variation of terms and deems the same unfair, unlawful, *mala fides* and in breach of the Employment Act, 2007 on the following grounds;

- a. *It discriminated against employees who were aged 50 years and above, and more particularly the Claimant, irrespective of the number of years served with the respondent;*
- b. *It reduced the severance pay for the Claimant from 30 years of service to 8.68 years;*
- c. *It beached the principle of equal pay for work of equal value;*
- d. *It was in breach of Section 5(2), 5(3) and 5(4) of the Employment Act, 2007;*
- e. *It discriminated against employees purely on reason of age;*
- f. *The timing was solely designed to deny the claimant an opportunity to reject the same.*

He further submits that this was forced onto him and also that exemptions were had from the KRA on tax exemption. On demand by the claimant, the respondent remitted an amount of Ksh.590,195.00 but was refused to remit the balances. He prays for;

- a. *A declaration that the purported variation of the terms of Voluntary retirement scheme by the Respondent was discriminatory, unfair and unlawful.*
- b. *Balance of severance pay, being Kshs.4,450,085/=*
- c. *Retained PAYE, being Kshs.1,717,154/=*
- d. *Interest on (b) and (c) above from dated of filing this claim.*
- e. *Costs of this claim.*
- f. *Any other relief that the court may deem appropriate to grant*

The respondent denies the claim but does not dispute the claimant's submissions on early retirement (Voluntary Early Retirement Scheme) except that when the original terms of this early retirement were varied by the government. The same was communicated to the claimant who accepted the variation and wished to pursue the package vide is letter of 14th April, 2010 – Appendix 6 of the statement of

response. It is on this regard that his retirement benefits were computed and the claimant and peacefully left employment. The respondent therefore denies that the variation of the terms of Voluntary Early Retirement Scheme was unlawful and discriminatory or at all. The claimant in any event accepted the same and opted to retire.

The respondent further denies owing an amount of Ksh.1,717,154.00 being PAYE and submits that tax exemption is the prerogative of the government and not the respondent – Legal Notice No. 178 of 5th November, 2010 provides as follows;

IN EXERCISE of the powers conferred by section 13 (2) of the Income Tax Act, the Deputy Prime Minister and Minister for Finance directs that the lump sum retirement benefits paid to twenty-seven employees of the East African Portland Cement Company who opted for voluntary early retirement with effect from 31st March, 2010 and 30th April, 2010, respectively shall be exempt from the provisions of the Act:

Provided that –

- a. the exemption shall not apply to other pensions benefits paid to the employees;*
- b. an employee who has opted for the voluntary early retirement shall not be eligible for re-employment with the East African Portland Cement Company, in any capacity or under any terms whatsoever before the expiry of three years from the date of retrenchment; and*
- c. the East African Portland Cement Company shall, in addition to complying with any conditions that the Commissioner of Income Tax may impose, furnish the Commissioner in respect of every employee opting for retirement, with the name, date of retirement, the amount paid and a copy of the letter confirming the retirement.*

The same provided the extent of the tax exemption and term of Voluntary Early Retirement Scheme and this was effected by the respondent. He therefore denies the claim and prays that the same be dismissed with costs.

The issues for determination therefore are;

1. Was the variation of the terms of Voluntary Early Retirement Scheme discriminatory, unfair and unlawful?
2. Is the claimant entitled to the relief sought?
3. Who bears the costs of this claim?

The 1st issue for determination is whether the Voluntary Early Retirement Scheme was discriminatory, unfair and unlawful. The parties are agreed on virtually all the terms and sequence of events leading to the voluntary retirement. The only point of departure is the communication on the variation of terms of Voluntary Early Retirement Scheme by the government and the claimant's acceptance of the same. Whereas the respondent adduces evidence of such communication and acceptance vide letters dated 12th April, 2010 by the respondent to the claimant and another dated 14th April, 2010 in response and acceptance by the claimant. The claimant clearly omits this evidence in his claim. The claimant contends that his acceptance of the varied terms was under duress and therefore unlawful. As this is a case of your word against mine, it has to be decided on the basis of available data and the principle of balance of probabilities.

The claimant denies being party to any agreements on the varied terms of the Voluntary Early Retirement Scheme. The respondent brings out documentation to the extent of the claimant's information and acceptance of the scheme. The probable scenario here is that of the respondent. Their version on duress does not come out probable and fails. The claimant was an established career public servant of thirty

years standing and is expected to be clear on the public service and its workings. A claim of duress into accepting the varied retirement scheme is therefore out of the way and unsupported by evidence. He does not get out of his way to rebut evidence of acceptance as adduced by the respondent. I therefore find that the Voluntary Early Retirement Scheme by the respondent was lawful and hold as such.

The 2nd issue for determination is whether the claimant is entitled to the relief sought. Having found a case for lawful early retirement, I find that he has no entitlement under the limb of balance of retirement benefits under the original Voluntary Early Retirement Scheme package.

On the limb of due income tax, I find that the claimant was awarded income tax exemption under the scheme vide Legal Notice No. 58 of 2010. This is not in dispute. The respondent cannot therefore be heard to argue that income tax deducted from the claimant was remitted to the income tax department and therefore the claimant should pursue the same with the department. This is not it. The income tax exemption entitles the claimant to exemption and relief as therein provided. This benefit should have been afforded to the claimant directly on payment of other Voluntary Early Retirement Scheme benefits. The claimant is therefore entitled to the relief on tax unduly deducted and allegedly remitted to the income tax department.

The claim is therefore allowed to this extent and I order as follows;

1. **THAT** the respondent be and is hereby ordered to pay the balance of income tax deducted from the claimant in disregard of the tax exemption by the Minister in Legal Notice No. 178 dated 5th November, 2010.
2. **THAT** the computation of income tax due and owing to the claimant shall take into account the items exempted under the Legal Notice cited in Order No. 1 above.
3. **THAT** the amount of Kshs.590,195.00 admittedly remitted to the claimant shall be borne in mind in the computation of the final amount of tax due and payable to the claimant.
4. **THAT** parties be and are hereby at liberty to apply.
5. **THAT** each party shall bear their own costs in this cause.

This answers all the issues in dispute.

Dated, delivered and signed the 28th day of March, 2014.

D.K. Njagi Marete

JUDGE

Appearances:

1. Mr. Njoroge instructed by Njuguna Partners Advocates for the claimant.
2. Gladwel Mumia instructed Federation of Kenya Employers for the respondent.