



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT MOMBASA

CAUSE NO. 96 OF 2013

KENYA HOTELS & ALLIED WORKERS UNION

CLAIMANT

v

SOUTHERN PALM BEACH RESORT

RESPONDENT

RULING

1. The Kenya Hotels & Allied Workers union (Union) lodged a Memorandum of Claim against Southern Palms Beach Resort (Respondent) on 25 April 2013 and the issue in dispute was stated as *wrongful/unfair termination of Zebedeo Ogwankwa Onyansi (Grievant)- shop steward on ground of trade union activities/affiliation.*
2. The Respondent filed its Response on 10 July 2013 and on 5 August 2013 it filed a Preliminary Objection to the Cause on the ground that it was time barred by virtue of section 90 of the Employment Act, 2007. The Preliminary Objection was canvassed on 10 June 2014.

Respondent's contentions

3. The Notice of Preliminary objection filed in Court was premised on section 90 of the Employment Act, 2007. However, in submissions the Respondent based its objection on the Limitation of Actions Act.
4. According to Ms. Mango for the Respondent, the Union had pleaded that the Grievant had been terminated on 7 November 2005 and that pursuant to the Limitation of Actions Act, the claim should have been commenced within 6 years. The Claim was however filed on 25 April 2013 outside the prescribed timelines. Ms. Mango further submitted that the Conciliator's report was issued on 27 January 2010.

Union's contentions

5. The Union filed its grounds of objection on 2 April 2014. Though it referred to the same as Notice of Motion, the Court will treat the same as grounds of opposition.
6. According to the Union, section 90 of the Employment Act, 2007 had not been violated and the transitional provisions in the fifth schedule of the Labour Relations Act was implicated and further that determining the preliminary objection would amount to determining the whole suit.
7. In submissions, Mr. Simiyu, an Industrial Relations Officer with the Union stated that the Union was directed in Nairobi Cause No. 120 of 2005, *Kenya Hotels & Allied Workers Union v Southern Palm Beach Resort* to report a trade dispute in relation to the Grievant to the Minister and it did

- report a trade dispute in 2006 and that the delay by the Conciliator to release his report led to the delay to institute the suit.
8. Mr. Simiyu further reiterated that the Cause was protected by virtue of the transitional provisions of the fifth schedule to the Labour Relations Act.
 9. The Union also cited Cause No. 68 of 2012 but did not produce a copy thereof.

Evaluation

10. At the time when the Grievant was terminated, the Employment Act, 2007 had not been enacted. Section 90 thereof has not been given retrospective operation and so is not applicable.
11. Because the Grievant was a member of a union and a trade dispute was reported to the Minister, the applicable statutes were the Trade Disputes Act (repealed) and the Limitation of Actions Act.
12. It is worth noting that the Trade Disputes Act (repealed) did not have similar limitation periods to the ones provided for in the Limitation of Actions Act and section 90 of the Employment Act, 2007. It was a sui generis statute.
13. Section 4(4) of the Trade Disputes Act (repealed) provided that a dispute relating to the termination of an employee should be reported to the Minister within 28 days, though the subsection reserved the Minister's power to accept a report outside the set period.
14. In the instant case, the Minister accepted the report and appointed a Conciliator. The Conciliator issued his report on 27 January 2010 recommending that the Grievant be paid his terminal dues.
15. It is apparent the Respondent did not accept the recommendations. It did not request that the dispute be referred to the Court. It was also open to the Union to request the Minister to refer the dispute to the Court. The Union did not but approached the Court directly.
16. Pursuant to section 8 of the Trade Disputes Act (repealed), one of the parties to a trade dispute remaining unresolved after conciliation could request the Minister to refer the dispute to the Industrial Court. None of the parties moved the Minister. The section did not provide any timelines within which the parties should move the Minister or within which the Minister should refer the dispute to the Industrial Court.
17. And this is the source of the dilemma. The Minister's power to refer a trade dispute to the Industrial Court had withered with the repeal of the Trade Disputes Act by the Labour Relations Act effective 26 October 2007, though the same were saved in the transitional provisions.
18. The Industrial Court established under the Trade Disputes Act (repealed) was a tribunal subject to the supervisory jurisdiction of the High Court. It was not a precedent setting body. The current Industrial Court has constitutional basis in Article 162 of the Constitution and is a Superior Court of record with the same status as the High Court. Parties have direct access to it. Parties did not have direct access to the precursor Court.
19. Section 2(1) (4) of the fifth schedule to the Labour Relations Act provides that trade disputes that arose before the commencement of the Act; referred to the Industrial Court before the commencement of the Act or a summary dismissal that took place before the commencement of the Act would be determined in accordance with the provisions of the Trade Disputes Act (repealed). The parties did not request the Minister to refer the present dispute to the Court as already stated.
20. And because the Trade Disputes Act (repealed) did not provide any time limit within which the parties should move the Minister or within which the Minister should refer a trade dispute to the Court, technically, limitation is not applicable because the Minister has not yet taken a precipitate step required of him by the repealed statute. But the parties and the Minister should always act in such cases within a reasonable time.
21. Article 20(3) (b) of the Constitution requires Courts to adopt an interpretation that most favours the enforcement of a right or fundamental freedom. In this respect, the Court has considered the rights of access to justice and to fair hearing in Articles 48 and 50 of the Constitution, though the cause of action predates the Constitution, 2010.
22. Sending the Union back to request the Minister to refer the dispute to the Court as was required under the Trade Disputes Act (repealed) would be antithetical to the constitutional norm of dispensing substantive justice.
23. In the view of the Court such an action on the part of the Court would amount to the Court giving undue consideration to a procedural technicality. It would be just a pyrrhic legal victory for the

- Respondent. In one way or the other, the dispute would find its way back to Court either as a referral from the Minister or appeal against the Minister's refusal to refer the dispute to the Court. The Cause should be heard on the merits.
24. The statutory framework now is different. Under section 73 of the Labour Relations Act, 2007, parties can refer disputes to the Court directly if the dispute remains unresolved after conciliation. The Union moved to Court about three years after the Conciliator's report. The Respondent did not agree with the recommendation of the Conciliator to pay the Grievant his terminal dues.
25. Had the Grievant opted to institute his claim under the common law or Employment Act, cap 226 (repealed) before the High Court or Magistrate's Courts, the question would have been determined simply on the basis of the Limitation of Actions Act.

Conclusion and Orders

26. The circumstances of the present Cause are peculiar and the Court observes that it is not its intention to set out any general principles applicable across the board in regard to limitation for pre 2007 trade disputes.
27. The Court is of the view that the Cause should be allowed to proceed to hearing on the merits. No injustice or prejudice will be occasioned to the Respondent.
28. The upshot of the foregoing is that the Preliminary Objection is dismissed with no order as to costs.

Delivered, dated and signed in open Court in Mombasa on this 11th day of July 2014.

Radido Stephen

Judge

Appearances

For union Mr. Simiyu, Industrial Relations Officer,
Kenya Hotels & Allied Workers Union

For Respondent Ms.
Mango instructed by Kanyi J & Co. Advocates