



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

AT NAIROBI

CAUSE NO. 1760 OF 2011

JOSEPH KIPLANGAT NGENO 1ST CLAIMANT
WILLIAM LOKORIO 2ND CLAIMANT
JOSEPH BETT 3RD CLAIMANT
JOSEPH CHUMO 4TH CLAIMANT
ROBERT KADASIA 5TH CLAIMANT
DAVID ONYANGO 6TH CLAIMANT
WALTER JUMA 7TH CLAIMANT
IBRAHIM LUKHONI 8TH CLAIMANT
JOSEPH KIRUI 9TH CLAIMANT
JECINTA KOECH 10TH CLAIMANT
NANCY BITTOK 11TH CLAIMANT
CAMILITA WABWIRE 12TH CLAIMANT
ANNE CHEPTANUI SUGUT 13TH CLAIMANT
ROSALIND MURAGURI 14TH CLAIMANT

VERSUS

KENYA INVESTMENT AUTHORITY RESPONDENT

Mr. Maingi for Claimants

Mr. Simiyu for Respondent

JUDGMENT

1. The fourteen (14) Claimants were at all material times to the suit employed by the Respondent in various named positions.
2. The Claimants were retrenched from their employment on 8th September 2008, following a statutory restructuring exercise detailed in this suit by both parties.
3. The Claimants allege that they were unlawfully and unfairly targeted for retrenchment and seek the following reliefs from the Court;
 - i. declaration that the early retirement of the Claimants was wrongful and unlawful;
 - ii. order of specific performance for reinstatement of the Claimants to their former positions that they held before retirement;
 - iii. payment of the Claimant's accumulated salaries from 1st of July 2008 at the new salary scale;
 - iv. order that the Claimants be paid for the remainder of the period on their contracts until attainment of their retirement age of 60 years at the new salary scale;
 - v. payment of their pension dues as per the Respondent's Trust Deed;
 - vi. general and exemplary damage for breach of contract;
 - vii. costs of suits and interest.
4. The suit was initially filed at the High Court but was transferred to the Industrial Court and a memorandum of claim dated 27th February 2012 was filed on 28th February 2012.
5. Under paragraph 5 thereof, the particulars of employment of the fourteen (14) Claimants including the positions they held and the monthly salary they were paid is set out from items 5a – h.
6. Each of the Claimant had a contract of employment terms of which were;
 - (i) Permanent and Pensionable tenure until the attainment of 55 years of age (now 60 years as per the circular by the Head of Public Service dated 2011 March 2009 and annexed to the memorandum of claim and marked 'CLS 1').
 - (ii) An option by either party to terminate employment with notice of three months or in case of Respondent, one month's salary advance in lieu of notice.
 - (iii) Summary dismissal but only in the face of gross misconduct by the employee.
7. The contracts are annexed to the memorandum of claim and marked "CLS 2a – z".
8. The notices of early retirement dated 8th September 2008 concluded in same terms for all the 14 Claimants read as follows;

“As you are aware, the organization has undergone a restructuring process necessitated by the creation of Kenya Investment Authority by the Investment Act 2004.

This is to inform you that, pursuant to the resolution of the Keninvest Board of Directors meeting held on 2nd October 2007, the Authority has decided to discontinue your services through early retirement with effect from 30th September, 2008. You will be paid your September salary in full less liabilities owed to the organization. You will be paid three (3) months' salary in lieu of notice.

In addition you will be eligible for the following safety Net Benefits;

Severance pay of two (2) months' salary for each completed year of service;

1. *Golden Handshake of Kshs.120,000/= (one Hundred and Twenty Thousand;*
2. *Transport Allowance of Kshs.40,000/= (twenty thousand).*
3. *Payment of any pending leave days as at 30th September 2008*”

9. It is common cause that the early retirement was effected in the aforesaid manner and the early retirement package were paid to the fourteen (14) Claimants.

10. The fourteen (14) Claimants however were aggrieved by the decision to retire them early and have set out their claim as follows;

- i. the retirement package failed to incorporate the retirement benefits captured in the Respondent’s Trust Deed annexed to the memorandum of claim and marked “CLS 3” and “CLS 4”;
- ii. that the decision to retire them was malicious and fell short of the Respondent’s own staff Rules and Regulations, December 1991 annexed to the memorandum of claim and marked ‘CLS 5’ and ‘CLS 6’.

Particulars of malice

11. The Claimants have set out the following particulars of malice;

- a. retrenchment was not contemplated under the Staff Rules and Regulations aforementioned;
- b. misrepresenting to the Claimants the Government’s position and that of the law on transition of Investment Promotion Centre to Kenya Investment Authority;
- c. failing to give the Claimants an opportunity to be heard before the Board;
- d. failing to solicit the Claimants’ views on the proposed action on their employment;
- e. failing to provide the Claimants with detailed minutes on the resolution by the Board of Directors on the Claimants’ employment; and
- f. failing to reveal to the Claimants the precise mechanism or system employed to determine who was fit to remain in the Respondent’s employment and who was not.

12. The Claimants state that by reason of the Respondents unlawful and unfair action, they have incurred immense financial loss and emotional pain particulars of which include abrupt withdrawal of benefits and loss of earnings; stigmatization when seeking alternative employment and psychological suffering and low self- esteem.

13. Each of the Claimants filed witness statements outlining their personal circumstances which statements were adopted by consent as their evidence in this matter. In addition, three Claimants gave oral testimony outlining the common thread of the Claimants’ case as set out in the statement of claim and the various documentation produced before Court, including Claimants’ supplementary list of documents filed on 6th November 2012.

MEMORANDUM OF RESPONSE

14. The Respondent, Kenya Investment Authority, filed its memorandum of response dated 8th March 2012 on 12th March 2012 together with annexures in support of its case.

15. In addition, the Respondent filed Additional Supplementary list of documents dated 28th January 2014.

16. The Respondent also filed witness statements of the witnesses who testified in support of its case.

17. On 2nd May 2013, Advocates for the parties filed minutes of pre- trial conference held on 29th April 2013. The list of agreed issues was however not filed on 3rd May 2013 as agreed.

Instead parties filed final submissions upon close of their respective cases.

Admissions

18. The Respondent admits that the Claimants were its former employees and that they were all given early retirement on 8th September 2008.

19. The Respondent further admits that the Claimants were paid an early retirement package set out in the respective letters of the Claimants dated 8th September 2008.

Denial

20. The Respondent however denies that the early retirement was unlawful, malicious unprocedural or that it contravened the Claimants' employment contracts or the Investment Promotion Act No. 6 of 2004 and the staff Rules and Regulations.

21. The Respondent adds that the early retirement was necessitated by a restructuring process pursuant to the operationalization of the Investment Act No. 6 of 2004, as well as General Government of Kenya Policy at the time.

22. The Respondent further states that the packages paid to the Claimants exceeded what was due in terms of the contracts of employment and the same was tax exempt as a value addition.

23. In this regard, the Respondent avers that the retirement package is a matter between the Claimants and the Trust and Trustees establishing the pension scheme and is subject to the provisions of the Retirement benefits Act.

24. Respondent therefore denies that the package provided to the Claimants in any way violated the Trust deed establishing the pension scheme.

25. Furthermore, all particulars of malice, financial loss, pain and suffering set out by the Claimants in the memorandum of claim are denied by the Respondent in total.

26. The Respondent states that wide consultation were made between the Respondent and its employees on the issue of early retirement and that relevant bodies of government including the Directorate of Personnel Management and Inspectorate were involved.

27. The Respondent prays that the suit by the Claimants be dismissed for want of merit with costs.

Testimony

28. As earlier alluded to Claimant No. 1 Joseph Kiplangat testified at length in support of the Claimants case and his testimony was supported by that of the 7th Claimant Mr. Walter Juma and 3rd Claimant Joseph Belt.

29. The Respondent on the other hand called Mwalimu Musee Ndolo, the General Manager of the Respondent, Mr. Robert Bwire the Manager Research and Planning for the Respondent, M/S Susan Wairimu Njoba, the Manager in charge of business Development Services for the Respondent and Susan Kikwai the Deputy Governor, Kericho County.

Issues for determination

30. The following issues are for determination in this matter;

- i. whether the early retirement (retrenchment) exercise was for a valid reason;
- ii. if the answer to (i) above is in the affirmative, whether it was done in terms of a lawful and fair procedure;

iii. what remedy, if any is available to the Claimants.

Issue I

31. From the totality of the evidence before Court, the Court has established the following to be factual on a balance of probabilities;

- a. there was a legal basis and prudent justification for the restructuring programme following promulgation of the new Investment Act of 2004 which created Kenya Investment Authority in place of the Investment Promotion Centre (IPC)
- b. a new Strategic Plan had been developed following which a restructuring programme was initiated as part of a Government of Kenya Policy to position the country better in attracting foreign investment.
- c. the old outfit was bloated and there was a mismatch between the current staff compliment and the new structure. Rationalization of functions and staff was necessary and a report to that effect was prepared in advance by the office of the President, Ministry of state for Public Service in October 2006.
- d. the restructuring process received approvals at various levels including by the Board of the Respondent via a resolution of 2nd October 2007.
- e. all employees were invited to apply for at least three (3) positions in the new structure and those who qualified were absorbed and those not taken were offered the retrenchment package that was paid to the Claimants.
- f. all the staff were offered training in advance to prepare for the intended declaration of redundancy. It is important to note that the training applied to all staff prior to the actual selection for retrenchment.
- g. the interviews conducted with a view to choose who to absorb and who to retrench was in the Court's view done by an independent team and was as objective as it could get. It provided an opportunity for the organisation to match the skills and competency of the existing staff to the job descriptions in the new structure.
- h. by a letter dated 29th August 2008, Ambassador Francis K. Muthaura the then Head of Public Service wrote to the permanent Secretary, Ministry of Finance as follows;

'approval is accordingly granted for Kenya Investment Authority to retrench the fourteen (14) staff and provide them a package

The Law

32. As at the time the retrenchment took place, the law governing retrenchment of employees was **Section 40** of the **Employment Act 2007**.

The Section reads;

Section "40(1) *an employer shall not terminate a contract of service on account of redundancy unless the employer complies with the following conditions;*

- a.
- b. *where an employee is not a member of a trade union, the employer notifies the employee personally in writing and the Labour Officer;*
- c. *the employer has, in the selection of employees to be declared redundant had due regard to seniority in time and to the skill, ability and reliability of each employee of the particular class of employees affected by the redundancy;*
- d.
- e. *the employer has where leave is due to an employee who is declared redundant, paid off the leave in cash;*
- f. *the employer has paid an employee declared redundant not less than one month's notice or one month's wage in lieu of notice; and*

g. *the employer has paid to an employee declared redundant severance pay at the rate of not less than fifteen days' pay for each completed year of service.*

33. The requirements under **Section 40(1)(b), (c), (e), (f) and (g)** outlined above go into the fairness of the process of retrenchment and not to the validity of the reason for the declaration of redundancy.

34. The question whether or not there was a valid reason to declare the employee redundant is one of both law and fact.

Section 2 of the **Employment Act** defines redundancy as follows;

“redundancy means the loss of employment, occupation job or career by involuntary means through no fault of an employee, involving termination of employment at the initiative of the employer, where the services of an employee are superfluous and the practices commonly known as abolition of office, job or occupation and loss of employment.”

35. The question the Court must answer is whether the Claimants lost their employment due to;

- i. reduction of staff due to operational /financial reasons; or
- ii. abolition of the existing offices held by the employees; or
- iii. non-compatibility with the job requirement of the newly established offices; or
- iv. not being the best suited, as compared to others already in the employment of the Respondent to occupy the remaining offices and the newly created ones;

36. It is the Court's considered view from the totality of the evidence before Court that under the new structure of the Respondent some of the old offices were retained and new ones were created.

37. The Respondent had a lawful and justifiable reason to restructure the organization to prepare it for the mandate established under the new **Investment Act, 2004**.

Issue II

38. It is common cause that all the employees of the erstwhile Investment Promotion Centre (IPC) were subjected to placement interviews for three different positions to determine which of the employees were to occupy the positions that were retained and the newly created ones in the new structure of the Kenya Investment Authority.

39. The Claimants have failed to satisfy the Court on a balance of probabilities that, that exercise was not objectively done and was not geared towards selecting the best candidates for retention and inevitably those that were to be retrenched for operational reasons including incompatibility due to mismatch of their skills with the job requirements and / or relative weakness as compared to their worthy competitors in the selection exercise.

40. The Court is satisfied that there is no evidence of discrimination of the Claimants by the Respondent and / or exercise of malice in selecting them for retrenchment.

41. The fact of the matter is that, the Respondent had made a lawful decision to reduce its staff and in the circumstance of the case used a fair selection criteria in determining which of the employees were to go home.

42. The Claimants were notified of the intended retrenchment timeously.

They were adequately prepared for the ordeal via training tailored for the purpose.

43. In addition, the Claimants received an early retirement package that exceeded the minimum

requirement under Section 40 (1) of the **Employment Act, 2004**.

44. In the case of **Williams & others Vs. Compair Maxam Limited [1982] ICR 156**, the Court had this to say;

“..... The purpose of having so far as possible, objective, criteria is to ensure that redundancy is not used as a pretext for getting rid of employees who some manager wishes to get rid of for quite other reasons except in cases where the criteria can be applied automatically (e.g. last in, first out), in any selection for redundancy elements of personal judgment are bound to be required thereby involving the risk of judgment being clouded by personal animosity.”

45. The Court is satisfied in this case, that the interviews conducted consisted a reasonable and fair criteria for selecting the candidates for retrenchment and the exercise cannot be said to have specifically targeted any individual unfairly.

46. I adopt the reasoning in the **Industrial Court of Kenya at Nairobi Cause No. 1268 of 2012 Feisal Ahmed versus Nokia International** to the effect that all the requirements under **Section 40** of the **Employment Act, 2007** were satisfied by the Respondent herein and the Claimants have in the circumstances of this case failed to prove particulars of malice, unlawfulness or unfair treatment in the manner the redundancy was effected.

47. Accordingly, the suit by the fourteen (14) Claimants is dismissed.

Costs

48. The Claimants lost their employment for no fault of their own.

They had reason to feel aggrieved even though the Respondent had in fact complied with all the requirements of the law.

For this reason, the Court will not make an order as to costs against the Claimants.

Consequently, all parties will bear their own costs of the suit.

Dated and Delivered at Nairobi this 7th day of November, 2014.

MATHEWS N. NDUMA

PRINCIPAL JUDGE