



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI
CAUSE NO 1344 OF 2012
MAURICE ANTHONY EWING.....CLAIMANT
VS
EQUITY BANK LIMITED.....RESPONDENT

RULING

Introduction

- 1 On 5th July 2013, I delivered an award in favour of the Claimant in the following terms:
 - a) 4 months' salary in compensation for unfair termination.....US\$ 140,000
 - b) Relocation costs.....35,000
 - c) Prorata leave.....16,333
2. I also directed the Respondent to facilitate payment of the Claimant's pension in accordance with existing retirement benefits rules and to issue the Claimant with a Certificate of Service.
3. The Respondent duly satisfied the award on compensatory damages, relocation costs and prorata leave. The parties were however unable to agree on the tabulation of the pension payable.

Points of Departure

4. The issues which the parties have referred to the Court for determination are as follows:
 - a. The pensionable period applicable to the Claimant;
 - b. The quantum of the Claimant's own contribution towards his pension account;
 - c. Whether the Claimant is entitled to the employer's contribution and if so the applicable quantum in this regard.

Pensionable Period

5. The Claimant submitted that the pensionable period applicable to him was 13.5 months made up of 9 ½ months when he was in the Respondent's employment plus 4 months awarded by the Court as compensation for unfair termination of employment.

6. The Respondent on the other hand submitted that the Claimant's pensionable period was only 3 months and 15 days. In support of its position, the Respondent made reference to Clause 7.6 of the Claimant's employment contract which pegged the Claimant's eligibility to participate in the Staff Contributory Pension Scheme on successful completion of the probationary period.

7. According to Clause 4.0 of the contract, the Claimant was on probation for 6 months from 1st November 2011 to 1st May 2012. The Claimant's pensionable period was therefore 3 months and 15 days running from 1st May 2012 up to 15th August 2012 when his employment was terminated.

8. Pension in a contributory scheme is an accrued earning calculated and set aside on a monthly basis to be paid to an employee upon leaving employment. The basis of the contribution is the monthly salary paid to the employee and the level of contribution by the employer and the employee is established by the specific scheme rules. It follows therefore that an employee cannot claim pension which is not earned. Consequently, the Claimant's claim for pension for any period after the termination of his employment is without basis and is dismissed.

9. Similarly, in view of the express terms of the Claimant's contract of employment, he was not entitled to pension during the period he was on probation. If deductions were made from his salary on account of pension during this period, this would amount to erroneous deductions which the Respondent is directed to rectify by making the appropriate refunds.

Quantum of the Claimant's Contribution

10. The parties presented divergent figures on the quantum of the Claimant's contribution towards his pension. The Claimant gave the monthly figure of US \$1,750 being 5% of his monthly salary of US\$ 35,000 and the Respondent gave a global figure of Kshs 544,958.12. The Respondent did not however provide a basis for the monthly figures used to arrive at the global figure and the Court could not establish adherence to the set contributions as per the Claimant's contract of employment. I therefore direct that the Respondent shall recalculate the Claimant's contribution on the basis of his monthly salary of US\$ 35,000.

The Employer's Contribution

11. The Respondent maintained that since the Claimant was in its employment for less than one year, then he is not entitled to the employer's contribution to the pension fund. In taking this position the Respondent relied on Regulation 20 of the Retirement Benefits (Occupational Retirement Benefits Schemes) Regulations, 2000 which provides as follows:

“The scheme rules shall provide that benefits shall fully vest in a member within one year of commencement of pensionable service

Provided that:-

(i) All benefits derived from statutory contributions and contributions

made by a member shall vest immediately in the member...”

12. On his part, the Claimant submitted that the Respondent who unfairly and unlawfully terminated his employment should not be allowed to benefit from its wrongful action. In my view, the one year waiting period provided under Regulation 20 of the Retirement Benefits (Occupational Retirement Benefits Schemes) Regulations, 2000 is intended to encourage employees to offer a reasonable period of service to their employers. This limitation cannot however be used against an employee where employment is terminated by the employer through no fault of the employee. I therefore agree with the Claimant's submission that in light of the finding by the Court that the termination of his employment was unfair, he cannot be barred from

accessing the employer's contribution to the pension fund by virtue of brevity of service. I therefore direct the Respondent to pay to the Claimant its contribution for the pensionable period running from the end of the probationary period to the date of termination of the Claimant's employment. For the avoidance of doubt, the employer's contribution shall be based on the Claimant's monthly salary of US\$ 35,000. The Respondent is further directed to issue the Claimant with a Certificate of Service.

13. Each party will bear their own costs.

Orders accordingly.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 17TH DAY OF DECEMBER 2014

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JUDGE

Appearance:

Mr. Karanja for the Claimant

Mr. Kipkorir for the Respondent