



**REPUBLIC OF KENYA**

**Industrial Court of Kenya**

**Cause 1562 of 2011**

**Isabel Wayua Musau.....CLAIMANT**

**v.**

**Copy Cat Limited.....RESPONDENT**

**JUDGMENT**

1. The issue in this Cause at once seems straight forward but the answer may not be that straight forward. Some brief background therefore may be in order. Annual salary increases have become a global trend of current employment/industrial relations. No employer or employee expects the salary to remain static during the pendency of the employment relationship.
2. Employers will be motivated by profitability levels to narrow pay expectations while employees would want to maintain the real value of their emoluments to keep up with inflation.
3. Isabel Wayua Musau (the Claimant) was employed by Copy Cat Ltd (the Respondent) sometime in 1990 as a Personnel Officer. She served the Respondent diligently and rose to the rank of Human Resources Manager before her retirement.

**Claimant's case**

4. It was the Claimant's case that in the course of her contract of service, she received several salary increments except for 2010, when the contract of service came to an end. And that in the course of 2008/2010 a salary harmonisation was carried out after which several of her colleagues got a salary raise but not her.
5. She testified that the Respondent had a practice of granting to its employees annual salary increases. Towards this end, the Claimant annexed to her Statement of Claim letters showing that Esther Odhiambo got a salary increment in 2008 and 2010; Ms. Cecilia Wanjiru Kamau in 2008 and 2010; Samuel Maina in 2008 and Charles Wanjie in 2009 and 2010 among other employees. The annexures were marked as Appendix *IWM 3* to the Statement of Claim.
6. Further in 2010 the Respondents employees were given an annual increment/incentive award but she was discriminated against and omitted from the review.

7. The Claimant also annexed a letter dated 28 September 2009 and marked as Appendix IWM 3 which informed her that she would be eligible for a Group Incentive Award bonus of 20% of basic annual salary effective January 2010. The Claimant was redesignated as Human Resources Manager. I will revert to the implications of this particular letter later on in the judgment.

8. According to the Claimant, sometime in 2010, the Respondent informed her that she was due for retirement though she was not the oldest member of staff. She therefore pleaded that she had been forced to retire on 31 December 2010 and that this was malicious and discriminatory.

9. As a consequence the Claimant seeks a declaration that she was discriminated against, an order awarding her 100% increment for period January to December 2010, compensation for forced and wrongful retirement and terminal benefits all totalling nearly Kshs 6,600,000/-.

10. The Claimant gave sworn testimony and filed her submissions on 22 November 2012.

### **Respondent's case**

11. The Respondent did not dispute that the Claimant worked for it diligently and honestly for 20 years but it denied that it had promised the Claimant or any of its employees a salary increment towards the end of 2009 and submitted that any annual salary increments were discretionary and awarded on merit and not a matter of right.

12. The grouse of the Claimant was that she was not awarded a salary increase for 2010. When the Respondent's Executive Director, Vishal Patel was put to task on this, his reply was that salary increment was discretionary and based on the performance of an individual employee.

13. Regarding the retirement of the Claimant, the Respondent contended that it was voluntary and made in writing by the Claimant and that the Claimant indicated it had no further claims against the Respondent as of 24 November 2010. Finally it was asserted that the Claimant had been paid all her retirement dues.

14. The Respondent called 2 witnesses and filed its written submissions on 27 November 2012.

15. I have considered the pleadings, testimony and submissions by the parties in arriving at my decision.

### ***Issues for determination***

16. Arising from the pleadings, evidence and submissions, the central issue which emerges for determination is whether the Claimant or any other employee is entitled to a salary review/increment. There are other questions which revolve around the central issue such as whether it is discriminatory to give or award some employees' (annual) salary review/increment and not others and what would be the appropriate remedy (ies) were a court to find discrimination. I will mention and discuss these other issues as may be necessary.

### **Is there a right to salary review/increment?**

17. It is clear in my mind that for an (annual) salary increase or review to be legally enforceable, it must either be based on some statute or be expressed in a contract as an express term or in certain cases as an implied term. Therefore in attempting to answer the issue in contention I will examine the statutory framework as set out in three primary pieces of labour/employment legislation, common law and contractual basis for a salary review/increment.

### ***Statutory framework***

18. One of the primary statutes regarding the employment relationship is the Employment Act, 2007 which was assented to in 2008 and whose long title expresses its purpose as to:

.....declare and define the fundamental rights of employees, to provide basic conditions of employment of employees, to regulate employment of children, and to provide for matters connected with the foregoing;

does not make express or implicit reference to an entitlement or right to annual salary review/increment.

19. The Employment Act only requires that wages should be paid in cash, into a bank account and that an employee is entitled to an itemised pay statement including details of any statutory deductions. The Employment Act, despite stating that its purpose is to declare and define the fundamental rights of employees does not help in unravelling the question for determination herein. Nowhere in its 93 substantive provisions does it explicitly set out what I may refer to as a statutory right to an annual salary raise or increment.

20. The germane sections of the Employment Act where mention is made of salary are section 10(2) where provision is made for a contract to specify the remuneration, scale or rate thereof and method of calculating the remuneration and other benefits and intervals of payment, section 17 on the payment and disposal of wages, section 18 on when wages are due and section 25 on repayment of remuneration wrongfully withheld or deducted. I may also mention that Part V makes provision of the rights and duties in employment and these relate to hours of work, annual leave, maternity leave, sick leave, housing, medical attention just to mention a few.

21. I therefore turn my attention to another piece of primary legislation dealing with terms and conditions of employment and which was assented to in October 2007 and this is the Labour Institutions Act. Part VI of this Act makes provision for the establishment and functions of what are referred to as Wages Council. Section 44 of this Act has mandated the Wages Council to investigate the remuneration and conditions of employment in any sector and make recommendations to the Minister on minimum wage remuneration and conditions of employment. After considering the recommendations of the Wages Council, the Minister is empowered to publish draft wages order and thereafter wages order setting out the minimum rates of remuneration.

22. Section 48 of the Labour Institutions Act further decrees that the minimum rates of remuneration or conditions of employment constitute minimum terms of conditions of employment and may not be varied by agreement.

23. This Court is aware and takes judicial notice of the fact that around May of each year, the Minister for Labour during the Labour Day celebrations had developed a practice of increasing by a certain percentage point the statutory minimum wages for those employees to whom the Wages Orders applied to.

24. It was not suggested either in the pleadings or testimony that the Claimant was an employee to whom a Wages Order was applicable and therefore I do not find much help in the Labour Institutions Act to help me answer the question posed.

25. The third piece of legislation I need to discuss is the Labour Relations Act which was assented to at the same time with the Labour Institutions Act. The relevance of the Labour Relations Act to the question posed arises from the effect which Collective Agreements have on the terms and conditions of service on those on whom it applies. Collective Agreements are written agreements concerning terms and conditions of employment made between a trade union and an employer. Many such agreements invariably make provision for salary reviews/increment after a year or two but based on negotiations between the employer and a trade union representing the interests of that employer's employee.

26. Therefore if a Collective Agreement has provision for salary review/increment an employee would have an entitlement flowing from the agreement. Because it was not suggested that the Claimant based her cause of action on such agreement, I believe I need not say any more on it.

27. I therefore do not find any statutory basis for a legal right to a (annual) salary increment/review or entitlement thereto in the Employment Act, 2007, the Labour Institutions Act, 2007 or the Labour Relations Act, 2007 upon which the Claimant can found a cause of action.

## **Contractual framework**

### **(i) Express contractual term to increase/review remuneration**

28. I now turn my attention to whether there is a contractual basis upon which a party may found a claim for an entitlement to salary review/increment. Contracts are entered into freely and if the parties mutually agree to make provision for salary review or increment the Courts would not hesitate to enforce such agreements. Unless outlawed due to any legal considerations, party autonomy is a fundamental consideration in contract.

29. My extensive research and consultation did not yield any local case law regarding a claim for salary increase/review though I traced quite a number of the cases from other jurisdictions which had entertained these type of claims. I must however caution that these authorities I am going to discuss are not binding upon this Court.

30. One of the cases is *Clark v BET plc & Another* (1997) IRLR 348, where Mr. Clark's service agreement made an express provision that the basic salary '*shall be reviewed annually and be increased by such amount if any as the board shall in its absolute discretion decide*'. Mr. Clark was dismissed without the three years notice he was entitled to under the terms of his service agreement. Mr. Clark sought among other claims, compensation in respect of salary increases during the three year notice period and the High Court held that he was entitled to '*damages for wrongful dismissal on the basis that, in accordance with the terms of his service agreement, his salary would have been increased by 10% per annum during the contractual three-year notice period.*' The reasoning of the High Court was that service agreement amounted to a contractual obligation on the employers to provide and a contractual right in Mr. Clark to receive an annual upward adjustment in salary and that it was only the amount that was in the discretion of the board and in any event the discretion could not be exercised capriciously or in bad faith. What is notable about this decision is that although the High Court accepted that the employer had an absolute discretion to decide by how much the increase should be, it went ahead based on previous increases to assess the salary increase at 10%.

31. The Claimant did not exhibit a copy of her contract of employment with the Respondent but fortunately for her the Respondent did. The Claimant's letter of appointment was dated 31 August 1990 and it indicated that the date of commencement was 3 September 1990. The letter made provision for payment to the Claimant of a salary inclusive of a house allowance and other benefits.

32. However, the letter of appointment is silent on the question of salary review/increment and therefore the Claimant cannot lay any **express** contractual entitlement to an annual salary review/increment.

33. Despite the letter of appointment's silence on the issue of (annual) salary review, the Respondent did exhibit as annexure 'CC 2' a letter dated 14 December 2005 in which the Claimant's salary was reviewed to Kshs 150,000 per month and further promised the Claimant that her salary review would be considered after two years and further that she would be considered for yearly departmental performance bonus.

34. True to its promise in the year 2005, the Respondent reviewed the Claimants salary in 2008 to Kshs 200,000/- per month and decided also to pay her Kshs 10,000/- per month fuel/vehicle maintenance allowance as shown in its annexure marked 'CC 3' in the Reply to the Statement of Claim. The Claimant on her part objected to the increment as too little as exhibited in the Respondents annexure 'CC 5'.

35. The next review for the Claimant would have been in 2010 if the letter of 14 December 2005 were to be considered as having established a custom or management practice of the Respondent. The Claimant established through documents that Esther A. Odhiambo, Ms. Susan Cecilia Kamau, Samuel Maina Chege, Newton Muinde, Charles Wanjie, Robert Thande, James Mwai, Patricia Mwituria, Ms. Falgani Patel all got a reviews in 2010 as exhibited through annexure 'IWM 3' in the Statement of Claim. Some employees also got salary reviews/increases in the year 2009.

36. I need to very briefly discuss whether the Claimant has established that she was discriminated against

and whether she would be entitled to a salary raise by an implied term in her contract of employment or through custom or management practice.

**(ii) Common law and Implied contractual term**

37. It is trite that terms can be implied into the employment relationship either through statute and examples include sections 47 and 48 of the Labour Institutions Act on minimum wages and conditions of employment, section 41 of the Employment Act on notification and hearing before termination of employment and the Employment (Medical Treatment) Rules, 1977 or terms can be implied through the common law for example on whether a management policy has become part of the contract as was held in *Taylor v Secretary of State for Scotland* (2000) IRLR 502 by the House of Lords that '*the policy must be construed in a way which is consistent with their being still part of the contract.*'

38. There appear to be a line of cases which suggest that failure to increase the salary of an employee in circumstances where it can be shown that the employee was treated unfairly in a way which lacks any rational or objective basis may amount to a repudiation of the contract. This is so because it destroys the obligation of trust and confidence between the parties. This appears in the case of *Pepper & Hope Ltd v Daish* (1980) IRLR 13.

39. Although these authorities are not binding upon me I do find that the legal principles expressed therein are sound in law even within our legal system.

40. Although no material in form of a staff policy on salary increment was laid before me by either the Claimant or Respondent, there was evidence that there were salary reviews/raises in 2010 to some employees and that they were informed in writing.

41. Documents to support the contention that there was a management practice or custom to award salary increments have been referred to in paragraph 35 above and I do not need to belabour the point.

42. In my considered view, the Claimant has satisfied me that (annual) salary reviews by the Respondent had taken effect as a custom thus creating a legitimate expectation among the employees of an (annual) salary review. Again in my view the management practices and custom of the Respondent had the effect of hardening into an implied term thus creating an obligation upon it. But of course I must warn myself that the Court must not transfer to itself the control of an employer's labour costs and burden an employers' managerial control.

43. I do take comfort in arriving in the conclusion in the preceding paragraph from the observation by Janet Gaymer in her book, *The Employment Relationship London, Sweet & Maxwell 2001 at page 159* that:

As a general principle, there is no implied term in the contract of employment to the effect that an employee should receive annual salary increases. However, it does appear that there is an implied term to the effect that employers should not treat an employee arbitrarily, capriciously or inequitably where pay is concerned. [footnotes omitted].

44. Another case which is referred to in the cited work is *Lavarack v Woods of Colchester* (1966) EWCA Civ 4 where the claim related to a service agreement which made provision for payment of a bonus and a minimum salary per annum. Mr. Lavarack was terminated with two years remaining to end of his contract. He sued for future bonuses he would have earned and expected salary increases.

45. In this case it was held that an independent implied obligation to offer a pay increase may arise where an employer decided to offer an 'across-the-board' rise but denied one employee a raise without sufficient cause. The jurisprudence which appears to emerge from these cases is that an offer of a salary raise to employees generally or to a group of employees to which an employee belongs leads to an implied entitlement in each individual employee to that raise. The significance of the foregoing will become clearer when I discuss the management practices of the Respondent shortly.

### **(iii) Management practices of the Respondent**

46. Rule 4 of the Industrial Court (Procedure) Rules appear to envisage a situation where a party may wish to rely on a management practice to ground/prove his/her claim. Basically this would be in a case where the party wants to rely on custom, practice or usage of the other party to assert a right or entitlement to a right. Although the Claimant did not make much of a case for implied terms of a contract I want to discuss whether the Claimant's case would be legally sound on the basis of an implied term based on the management practices and customs of the Respondent thus creating a legitimate expectation on the part of the Claimant. Legitimate expectation has been a principle well referred to in public law but the English Courts over a decade ago imported it into the employment relationship. I believe this is because of the implied term of trust and confidence expected of an employer and employee. An example is the case of *French v Barclays Bank plc* (1998) IRLR 646.

47. For the sake of clarity, I need to note that it was established through evidence that the Respondent carried out a staff job grading exercise sometime in 2008/9 as a result of which the Respondent wrote to the Claimant on 28 September 2009 informing her that her job had been identified as being in grade 6 and that since her salary then was within the salary band, there would be no adjustment to her salary. She was also informed that she would be eligible for a *Group Incentive Award Process bonus of 20% of basic annual salary effective January 2010*. The Claimant was redesignated as Human Resources Manager.

48. In my view this letter notifying the Claimant of eligibility to the Group Incentive Award scheme expressed the clear intention by the Respondent to pay the Claimant such sum based on the formula therein stated and an additional remuneration on top of her basic remuneration from the year 2010 and the Claimant is entitled to recover such sum.

49. The Claimant had grounded her claim on the basis of being discriminated against contrary to the provisions of section 5 of the Employment Act and Article 27(7) and 41 of the Constitution. In this regard, she annexed to the Memorandum of Claim letters to the employees whose salaries were increased. It cannot be disputed that they were informed in writing about their increments while the Claimant was not informed in writing that her salary would not be increased.

50. I would have expected that the Respondent would have formally communicated with the Claimant that because of her performance that year, she would not be getting an increment. I find this lack of formal communication to be arbitrary and capricious rather than discrimination.

51. In the case of *Clark v BET plc* referred to above, there is opinion to the effect that this type of employer discretion should not be exercised capriciously or in bad faith and that if an employer acts capriciously or in bad faith then that would amount to breach of contract. This view has also found support in academic/scholarly writings like in the article by David Cabrelli, 'Discretion, Power and the Rationalisation of Implied Terms', *Industrial Law Journal*, Vol. 36, 2007 at 198 where the author argues that, cases such as *Clark v BET plc* and *Mallone v BPB Industries Ltd* suggest that it may be the case that express discretionary powers regarding the award of share options or annual salary increases are subject to the irrationality/perversity implied term and are conditioned by past custom and practice. (footnotes omitted).

### **Conclusion and Appropriate Relief**

52. Considering the foregoing, it is my view that an implied term to increase or review the salary of an employee can be incorporated into a contract of employment where such a practice/custom has been established either through annual salary increments/review or through staff policies or manuals and where an employer acts capriciously or arbitrarily, it is open to the Court to intervene to enforce the practice, custom or management practice.

53. I would have intervened on behalf of the Claimant in the present case and assessed the amount of salary raise she was entitled to in 2010 and multiplied it with 12 months except that the formula used to raise the salaries of the employees referred to in paragraph 35 herein above appeared haphazard and

whimsical hence arbitrary and capricious.

54. The best I can do is to invoke the powers granted to this Court under section 12(3)(vi) and (viii) of the Industrial Court Act and award her damages equivalent to 10% of her total gross yearly salary of Kshs 2,400,000/- and which sum I assess at Kshs 240,000/-.

55. I also do find that the letter of 28 September 2009 did serve expressly to promise to the Claimant a legitimate expectation to an eligibility bonus of  $20\% \times 2$  of her basic annual pay. It is not disputed that the Claimant was earning a basic salary of Kshs 200,000/- per month. Her basic annual salary at the time of retirement thus was Kshs 2,400,000/-. 20% of Kshs 2,400,000/- is Kshs 480,000/- and I thus assess damages for loss of opportunity to earn the incentive bonus at Kshs 480,000/-.

56. I need to make brief reference to the claims for difference in the payment of service pay and withheld fuel allowance. Because of my finding in regard to implication and or significance of the letter of 28 September 2009, it would be illogical to assess this

57. Payment on the basis of what the increased salary of the Claimant would have been in 2010.

58. On the fuel allowance, the payslip of the Claimant for December 2010 shows that a vehicle maintenance allowance of Kshs 10,000/- was factored in. It was stated in oral evidence that this was essentially the same as the fuel allowance. This type of allowance serve to facilitate an employee in the performance of his/her functions and is not remunerative in character and therefore I do decline to make any award in favour of the Claimant.

## **ORDERS**

59. The prayers set out in paragraph 12 of the Statement of Claim are declined and in substitution the Respondent is ordered to pay the Claimant the sum of Kshs 240,000 as damages and Kshs 480,000/- as Group Incentive Award for 2010 all totalling Kshs 720,000/-.

60. Each party to bear its own costs.

Dated and signed in Mombasa on this 15<sup>th</sup> day of March, 2013.

Justice Radido Stephen

**Judge of the Industrial Court**

## **Appearances**

Ms. J A Guserwa instructed by J A Guserwa & Co. Advocates For Claimant

Mr. Kuloba instructed by Kuloba & Wangila Advocates For Respondent