REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 806 of 2011

AGNES WACHU WAMAE & 104 OTHERS.................. CLAIMANTS

VERSUS

BARCLAYS BANK OF KENYA................................. RESPONDENT

R U L I N G

The Claimants herein, 104 in number, were employees of the respondent who as a result of staff rationalization program that was being undertaken by the respondent, declared redundant.

On 1st of July, 2011 when the matter came up before Hon. Justice (rtd) Kosgey, Counsel for the parties entered into a consent to the effect that the issue of liability on the part of the respondent be determined first and that parties were to file submissions on the issue of liability.

The genesis of the matter is that on Christmas eve in the year 2010, the respondent's Managing Director issued an end of year message to the respondent's staff in which he commended them for their good work but at the same time informed them of the intention to restructure the respondent's operations in order to improve the efficiency of the organization. He assured the staff that the details of the process would be communicated by the end of January, 2011. He further assured the staff that the respondent's offer on the terms of exit exceeded the minimum legal requirements. The restructuring process targeted approximately 200 management level employees and was clarified not to be an early retirement scheme.

In their memorandum of claim filed in Court on 20th May, 2011, the claimant's aver that upon termination on account of redundancy they consulted with the Human Resource Department regarding the terms of their exit package and were verbally advised on the same. It is their contention that it was only until 19th January, 2011 that exit package letters were made available to them. The letters indicated the lump sum amount payable without a detailed computation on how the amount awarded was arrived at.

The claimant's argue that whereas in good faith and honestly believing the respondent had computed their exit packages properly and in accordance with the Employment Act, they accepted the payments that were offered to them by the respondent. According to them, it turned out that the exit package was based on one and a half month's pay for each year of completed service capped at 16 years which was equivalent to 24 months pay.

This computation has become the main bone of contention in this suit in that the claimants aver that the Employment Act provides for a minimum number of days to be paid and any payment more than the minimum period is lawful and within the provisions of the Employment Act however there is no corresponding discretion to cap the number of years of service to a particular period. That is to say, according to the claimants, the Act does not permit an employer who pays more than the minimum

required by law to arbitrarily determine and put a limit to number of years payable.

In further support of their argument, the claimants averred that the act of the respondent capping their exit package to 16 years amounted to discrimination since in previous similar cases the respondent has calculated the exit packages based on years of completed service.

The claimants further complained that the respondent in total contravention of the promises and agreements made prior to leaving the service of the respondent that their outstanding loans will be settled with their exit packages as at 31st January, 2011, reneged on the agreement in that it deliberately delayed to make payments to the claimants after 31st January, 2011 so much that the respondent continued levying interest charges on the claimants' outstanding loans up to February and early March, 2012.

Regarding leave, the claimants' contended that they had earned their full 2011 leave by virtue of being in employment in the year 2011 yet the respondent failed to pay them their full leave and only paid a pro rated portion of it.

Concerning selection of who was to be retrenched, that claimants' contended that the respondent ignored the provisions of section 40(1)(a) of the Employment Act which requires an employer while terminating a contract of service on account of redundancy to have regard to the seniority in time and to skill, ability and reliability of each employee of the particular class of employees affected by the redundancy. According to the claimants, no criteria was used and that the exercise was carried out arbitrarily and smacked of witch hunt and extraneous factors. The claimants further argue that the exercise was discriminatory in that their exit terms were different from previous early leavers' schemes.

In conclusion and as a consequence of the forgoing, the claimants aver that the release letters signed by them were as a result of fraudulent misrepresentation and concealment of material facts and further that the respondent exerted undue economic duress and pressure to make them sign the release letters. It is the claimants position therefor that the letters though purported to discharge the respondent from any future claim concerning their declaration of redundancy upon receipt of their exit package, the same is not binding on them for reasons advanced hereinabove.

In refuting the arguments by the claimants, the respondent has averred that the rate that was used by the respondent in computing the claimants' exit package was one and a half times the pay of each claimant which was way above the statutory minimum. The respondent therefore was surprised that the issue was not that the claimants were entitled to fifteen days pay for each year of completed service without a capping of sixteen years but that they were entitled to forty five days for each year of completed service without any capping at all. A position that the respondent contends is untenable. It is the respondent's argument that the claimants' demand is not what the law provides. The respondent contends that the claimants are asking the Court to find that although the respondent paid more than what the statute provides, it is nevertheless in breach of the statute. It is thus their submission that the Court should not be asked to find that the respondent is in breach unless it has not paid the claimants what they are entitled to under the statute. According to the respondent, all the Court needs to consider is whether the sum that was paid to each claimant was more or less than 15 days for each year of service and where it was more, there can be no basis for bringing the claim.

Regarding the complaint by the claimants that the respondent failed to disclose the details of the computation of the exit package, the respondent contends that there is no obligation in the Employment Act that an employer terminating the services of an employee on account of redundancy must disclose the details of computation of exit packages or severance payments. What the Act does is to provide the minimum rate which severance payment will be calculated.

On the issue of discrimination, the respondent contends that the claimants' contracts were terminated on account of redundancy in contradistinction to the early leavers' scheme. According to the respondent, whilst redundancy was involuntary, the early leavers' scheme was a voluntary process in which interested and eligible staff would apply for consideration. The application of similar terms to fundamentally different scenarios is therefor untenable.

Regarding the issue of leave for the year 2011, the respondent relies on section 28 (1) of the Employment Act which provides that an employee shall be entitled after every twelve consecutive months of service with his employer to not less than twenty one working days of leave with full pay. In this respect the respondent submits that the claimants were terminated on 31st January, 2011 which was barely one month of service in the new year hence were not entitled to leave. The respondent further argued that the exit terms offered to the claimants stipulated that the accrued leave days would be paid where leave days had been carried forward.

Concerning the accusation that the respondent deliberately delayed the settling of the claimants' loans, the respondent argues that only 10 out of the 105 claimants complained of the delay. According to the respondent the affected staff members were required to complete a leavers checklist to be returned to the respondent subsequent to which their terminal benefits would be paid including the settlement of outstanding loans. The respondent therefore submits that the those claimants who claim refund of the interest allegedly levied on their outstanding loans delayed in completing the leavers checklist as a result of which there was delay in settling the outstanding loans. In the alternative the respondent contends that the settling of outstanding loans for employees declared redundant was not among the conditions that the respondent was required to comply with under section 40(1) of the Employment Act hence the claimants cannot purport to enforce a remedy beyond the scope of the Act.

Regarding the claim of fraudulent misrepresentation and concealment of material facts, the respondent while denying any such fraud or concealment, submits that upon the discovery of the alleged fraudulent misrepresentation and concealment, the claimants had the option to elect to affirm or rescind the release letters. In this particular case, the respondent submitted, the claimants elected to affirm the release letters since none of them returned a single cent which was paid to them under the terms of the release letter. According the respondents therefore, the claimants cannot benefit from the monies that were paid to them and yet claim that the agreements pursuant to which they received the monies are illegal, null and void.

In order to reach a determination on the question of liability, the Court will only seek to address two fundamental questions; namely: Was the respondent in offering to pay the claimants more than minimum compensation prescribed under section 40(1)(a) of the Employment Act entitled to put a ceiling on the number of years such compensation could be made? Second, the claimants having been paid their exit package and executed the release letter, do they have a right to sue the respondent? The issue of accrued leave days as well as allegations of discrimination are secondary and are determinable at the full trial if any, once the two fundamental questions are addressed.

Section 40 of the Employment Act provides for the procedure to be observed in declaring employees redundant. There seem to be no complaint regarding this procedure save for subsection 40(1)(g) which provides:

"...an employer shall not terminate a contract of service on account of redundancy unless the employer complies with the following conditions:-

(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."

The respondent paid the claimants their severance pay at the rate of one and a half month's pay but capped it to sixteen years. It is this capping that has drawn a lot of contention with the claimant arguing that whereas the respondent was free to offer a better package than the minimum prescribed by the Act, it had no right to cap the period. That is to say the respondent was under duty in law to pay the improved compensation for each year of completed service without placing any ceiling at all. The respondent on the other hand contended that having offered the claimants a compensation over and above the minimum provided for under the Act, it had the right to cap the period for which such compensation should be made.

The preamble to the Employment Act states:

“An Act of Parliament to repeal the Employment Act, 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 (emphasis added)

Section 3(6) further provided that: “...subject to the provisions of this Act, the terms and conditions of employment set out in this Act shall constitute minimum terms and conditions of employment of an employee and any agreement to relinquish vary or amend the terms herein set shall be null and void”.

From the reading of the preamble and section 3(6) it is plainly clear that the Act prescribes minimum terms and conditions of service below which parties cannot contract. The respondent offered the claimants one and a half months salary which is almost three times the statutory minimum of fifteen days. The question however is: does the payment of one and a half times the statutory minimum subject to a ceiling amount to a variation or a relinquishing of the minimum terms prescribed by the Act? The answer to this question is factual and mathematical in the sense that one needs to determine if the enhanced minimum payment subject to a ceiling is less or more than the statutory minimum. If the answer to this question be affirmative, the claimants would be unjustified in making the claim for payment of the enhanced amount for each year of completed service.

The respondent's Counsel in their submissions have very ably addressed this mathematical question. Counsel has submitted that the use of 45 days (one and a half months) with a limit of sixteen years would yield a scenario that would have required a claimant to work for 48 years in order to be entitled to the exit package claimed by the respondent. This submission has not been mathematically rebutted by the claimant's Counsel. All he says is that once the respondent offered to make a payment over and above the statutory minimum, its hands became tied and it could not put a ceiling on the number of years to be paid even if the consolidated sum was over and above what would otherwise have been paid if the statutory minimum was applied for the entire period of service.

The claimants are 105 in number, therefore it would not be practical in this ruling, to mathematically calculate each of their entitlement under the statutory minimum for comparison with the offer made and paid to the claimants. The Court will therefore use the basic earnings of the first claimant to establish this fact and the result will be replicated for the rest.

According to the first claimant, she joined the respondent's employ in January, 1987 and as at the time of her being declared redundant, she had served the respondent or 23 years 6 months. Her pay as at the time of exit was Kshs. 174,638/- per month. If therefore the respondent decided to pay no more than statutory minimum, her pay would have worked out thus:

$$\left(\frac{174,638}{2} \times 23 \right) = 2,008,337$$

The respondent offered and paid the claimant Kshs. 4,191,312/- which Kshs. 2,182,075/- over and above the statutory minimum. If this be the scenario for the rest of the claimants, then to this extent the respondent cannot be said to have breached the law in capping the payment to the claimants to 16 years of service.

The respondent is a business entity and has corporate responsibility not to engage in unfair labour practices. Whereas the respondent was trying to mitigate the claimants' job loss, such endavour must be guided by financial prudence. It is the Court's view that the exit package offered to the claimants was not only over and above the statutory minimum, but also sensitive to the fact that the claimants needed to be reasonably cushioned from the vagaries of unemployment. In the circumstances the claimants argument that once the respondent offered to pay one and a half times the compensation provided by statute it had no right to cap such compensation to a given number of years of service, is not only flawed but unreasonable. As stated earlier in this ruling, the Employment Act at section 3(6) states that the provisions of the Act constitute the bare minimum below which parties cannot contract out, vary or modify. To argue that once an employer offers a favourable term in one aspect it cannot set the extent to

which such favourable term should apply, is oppressive and would discourage any employer from making any offer that would have the effect of cushioning employees facing redundancy from the rough world of unemployment. The claimants' contention therefor for reasons advanced above, is hereby disallowed.

The second question that the Court seeks to address is: the claimants having been paid their exit package and executed the release letter, do they have a right to sue the respondent?

In this respect, Counsel for the claimants Mr. Koceyo has submitted that the fact that the claimants had just been laid off and therefore with no source of income was significant. It was his contention that his clients were required to sign the release letter before being paid. According to Counsel, it could be inferred from these acts that there was undue influence and duress.

Counsel further submitted that the release letter was signed without any disclosure having been made as to the calculation and the mode adopted in coming to the figure payable. According to him, this was a deliberate act of concealment which makes the release illegal, null and void. Further, he submits that to the extent that the release purported to oust the jurisdiction of the court, it was against public policy. According to him the jurisdiction of the court on matters of law cannot be ousted by any form of contract.

On the ouster of jurisdiction Counsel relied on the dictum of Lord Denning in the case of **Lee v. Showmen's Guild of Great Britain [1952] 1 All ER 1175** where the Judge said among others that *"... the jurisdiction of the committee of the Showmen's Guild is contained in a written set of rules to which all the members subscribe. These set of rules contain the contract between the members and is just as subject to the jurisdiction of these courts as any other contract."*

On the question of undue influence and equality of bargaining power, counsel submitted that the court will intervene and set aside a contract which a party enters into without independent advice or a contract the terms of which are very unfair or accepts payment which is grossly inadequate where his bargaining power is grievously impaired by reason of his own needs or desires or ignorance coupled with undue influence or pressures brought to bear on him. In this regard Counsel cited the dictum of Lord Denning in the case of **Lloyds Bank vs. Bundy [1974] 3 All ER 757** where the late law Lord stated that *"where an agreement, hard and inequitable in itself has been exacted under circumstances of pressure on the part of the person who exacts it, this Court will set it aside*

In response to the claimant's submission in this regard, counsel for the respondent submits that the release letters accorded a benefit and advantage to the claimants and not the respondent as they offered payment far above the statutory minimum. And further that the claimants have failed to prove that a relation of confidence existed between them and the respondent which is a fundamental requirement for asserting undue influence. According to counsel, the release letters cannot be impugned on the basis alone that the same were entered into between parties with unequal bargaining power. It was incumbent upon the claimants to establish that there was unconscionable conduct and use of coercive power arising out of the inequality of their circumstances such as through extortion or taking undue advantage.

In support of this submission, Counsel has relied on the case of **Alec Lobb (Garages) Ltd & Others v. Total Oil (G.B) Ltd [1984] EWCA** where Lord Dillon commenting on Lord Denning's judgment in Lloyds Bank vs. Bundy stated that:

> *"...Nothing leads me to suppose that the course of the development of the law over the last 100 years has been such that the emphasis on unconscionable conduct or unconscientious use of power has gone and relief will now be granted in equity in a case such as present if there has been unequal bargaining power, even if the stronger party has not used his strength unconscionably... the Court's would only interfere in exceptional cases where as a matter of common fairness it was not right that the strong should be allowed to push the weak to the wall..."*

Traditionally, Courts guard their jurisdiction jealously but recognise that it may be precluded or restricted by either legislative mandate or certain special contexts. The Court has to look into the ouster clause in order to ensure that justice is not defeated. In practice over time the Courts have interpreted these ouster

provisions narrowly so that although there may be no recourse to Court on facts, the decision would where it concerns a public body, be subject to judicial review. In other words, the decision may be final on facts but it is not regarded as final in law. The decision may still be questioned on grounds of excess of jurisdiction or abuse of power or breach of rules of natural justice or error of law.

With regard to contracts as was the case here, a contract validly formed may nevertheless be avoided as a result of a number of vitiating factors most of which involve some form of unfair or unconscionable dealing by one of the parties.

The claimants have contended that they were misled into signing of the release letters in the belief that the exit package was to be 45 days salary for each completed year of service and not subject to any capping at all. In this respect, the Court has already found that the exit package offered and paid to the claimants was over and above the statutory minimum even if the " fifteen days pay for each completed year of service" formula were to be applied. The Court therefore is of the view that there was neither unfairness nor anything unconscionable on the part of the respondent in making the the release letters a condition precedent to paying the claimants their exit package. In any event the claimants had the opportunity to seek expert advice on the tenor and effect of the release letters prior to executing them.

As aptly observed by Lord Denning in the case of Lloyds Bank vs. Bundy relied on by both Counsel, this Court is of the view that nothing leads it grant a relief in favour of the claimants on the basis of unfairness or unconscionable bargaining power especially in the circumstances where the exit package offered by the respondent was far above the statutory minimum and no sufficient evidence has been shown that the the stronger party (the respondent) has used its strength unconscionably.

Freedom of contract is a fundamental principle and the Courts would only interfere in exceptional cases where as a matter of common fairness it is not right that the strong should be allowed to push the weak to the wall. The claimants have failed to sufficiently demonstrate that the the exit package was unfair and that pressure was brought to bear upon them in executing the release letters to the extent that they were not even able seek second opinion.

In conclusion, the issue of liability that was submitted by the parties' Counsel for determination by the Court in limine, is hereby found not to lie against the respondent with regard to payment of any additional severance pay over and above what the respondent paid to each of the claimants as exit package. Second, the release letters were neither tainted with unfairness nor unconscionable bargaining power hence cannot be impugned by the Court.

The issue of accrued and unpaid leave as well as discrimination are matters of evidence and are determinable after receiving evidence at the trial. The Court is therefore not in a position to make a finding thereon at this stage. It is so ordered.

Dated at Nyeri this 24th day of April 2013.

Abuodha J. N.
Judge

Delivered at Nairobi this 3rd day of May 2013.

Delivered in open Court in the presence of …............................. for the Claimant and …....................................... for the Respondent.

Nderi Nduma
Judge