



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

AT NAIROBI

CAUSE NO. 247 (N) OF 2009

BAKERY CONFECTIONERY, FOOD MANUFACTURING

AND ALLIED WORKERS UNION (KENYA)CLAIMANT

-VERSUS-

THE WRIGLEY CO. (E.A) LIMITEDRESPONDENT

Mr. Muchai for the Claimant.

Mr. Orao Obura for the Respondent.

JUDGMENT

The Memorandum of claim dated 25th May, 2009 was filed on 26th May, 2009.

The issue in dispute in terms of the memorandum is;

“Unlawful, wrongful and premature retirement of Mr. Francis Ogutu (hereinafter “the grievant”).

In violation and breach of the current Collective Bargaining Agreement between the parties (hereinafter “the CBA”).

The matter was brought by the union on behalf of the grievant (hereinafter “the Claimant union”).

The Respondent is **Wrigley Company (East Africa) Limited** a subsidiary of William Wrigley Junior Company U.S.A (hereinafter “the Respondent”).

Claimant’s case

At the material time was in place a CBA concluded between the Claimant Union and the Respondent on behalf of the Grievant and all other members of the Union and unionisable staff at the Respondent’s enterprise. The CBA was for the period 2004 to 2010.

The full text of the CBA is attached to the Memorandum of claim.

Clause 31 of the CBA provides;

“An employee who attains the retirement age of 55 years but 60 years for compulsory retirement, may retire or be retired. On leaving his/her employment, such employee shall be paid retirement benefits on the following basis: -

....”

On 8th March, 2009, the Respondent issued a notice of intended compulsory retirement to the Grievant. The said notice is said to be in breach of clause 31 of the CBA and the Industrial Court Award in Cause NO. 116 of 2004, issued on 17th November, 2005 to the effect;

“The court upholds the demand of the claimant and awards inclusion of a clause in the collective agreement that an employee may voluntarily retire at 55 years but must compulsorily retire at 60 years.”

The Claimant objected to the notice of intended retirement and when the objection was not heeded by the Respondent, on 30th April, 2009, the Claimant reported a trade dispute to the Minister of Labour on behalf of the Grievant.

The claim was accompanied by an interlocutory application seeking for an injunction to stop the retirement process pending the hearing and determination of the suit but this was overtaken by events as the matter took too long to settle and the retirement was hitherto effected by the Respondent.

It is the Claimant's case that the Respondents is duty bound to obey and abide by the provisions of the CBA and the Award of the court in Cause No. 116 of 2004.

The Claimant prays for an order declaring that the Claimant is bound to retire the Grievant at the age of sixty (60) in accordance with the CBA and Court Award and award damages for wrongful and premature compulsory retirement equivalent to the earnings for the remedies of the years up to the attainment of sixty (60) years which is the Grievant's retirement age.

Respondent's case.

The Respondent filed a replying affidavit deponed to by **Emma Saliamo Onyango** in opposition to the interlocutory application and the Memorandum of claim.

The deponent is the People Leaving and Development (PLD) manager of the Respondent.

The Respondent states that clause 31 of the CBA did not define the retirement age for the employees.

That the parties had in the CBA dated 31st March 2003 agreed to refer the issue of the retirement age to the court for interpretation hence the Industrial Cause No. 116 of 2004, in which the court ruled on 17th November, 2005 that it upheld the demand of the Claimant and awarded inclusion of a clause in the CBA that an employee may voluntarily retire at fifty five (55) years but must compulsorily retire at sixty (60) years.

That the ruling of the court was challenged by way of an Interpretation Application through Cause No. 1- 116 of 2004 questioning *inter alia*, the court's jurisdiction to determine a dispute relating to retirement of employees of the Respondent in the light of the provisions of the Retirement Benefits Act, No. 3 of 1999.

That the Industrial Court discussed the Respondent's challenge following which the Respondent filed a High Court Misc. Application No. 720 of 2006 by way of Judicial Review seeking *inter alia*; an order of *certiorari* to quash the Industrial Court Award in Cause No. 116 of 2004 dated 17th November 2005 and the Industrial Court ruling on Interpretation Application in Cause No. 1 - 116 of 2004 dated 12th October, 2006 and an order of stay of any other or further proceedings arising from or connected to the Industrial Court Award in Cause No. 116 of 2004 dated 17th November, 2005.

That on 28th November, 2006, the High Court, issued an order staying any other or further proceedings arising from or connected to Industrial Court Award in Cause No. 116 of 2004 and Ruling in Interpretation Application No. 1 - 116 of 2004. The orders were to last for 120 days. The order is annexed to the Replying Affidavit and marked exhibit "ES0-3".

The order was on 27th March, 2007 extended to remain in force until the determination of the suit. See "ES04".

As at the time the matter in *casu* was filed at the Industrial Court on 26th May, 2009, the Judicial Review Misc. Application No. 720 of 2006 was still pending and the interim orders were still in place.

The issues for determination are as follows;

- 1) *Whether the Respondent could lawfully compulsorily retire the Claimant pursuant to a notice dated Bth March, 2009, whilst there was in place an order of stay in the H.C.Misc. Application No. 720 of 2006.*
- 2) *Whether this suit was properly brought to stop the intended action by the Respondent.*
- 3) *What remedies if any are available to the Claimant.*

For the record, the Respondent filed a supplementary memorandum with leave of court dated 8th July, 2012 and the same was duly responded to by the Claimant on 16th July, 2012.

The parties then agreed to proceed by way of oral submissions and they duly filed list of authorities in support of those submissions.

In the Supplementary Response, the Respondent states that by an agreement dated 8th December, 2010, the parties agreed on an out of court settlement of High Court Misc. Application No. 720 of 2006 which challenged the award in Industrial Court Cause No. 116 of 2004 and in particular the question of retirement age.

The court observes that a meeting was held by the parties on 10th February, 2011 to attempt to resolve the matter amicably pursuant to earlier agreement.

An agreement was reached pursuant to the meeting held on 10th February, 2011 at Federation of Kenya Employers Offices, Nairobi. The relevant parts of the agreement are as follows;

"The parties further deliberated on the issue of the retirement age and agreed that for the CBAs between the years 2003 and 2008, no retirement age clause would be inserted. However, for the CBAs for the years 2009 - 2010, a clause on retirement age would be inserted to read that the voluntary retirement age shall be 55 years and the compulsory retirement age shall be 60 years; provided that no employee retired in 2009 or 2010."

Emphasis mine.

For the avoidance of doubt the parties further agreed;

"The company agreed to double-check this and stated if there was an employee retiring between 2009 and 2010 the company would not be able to agree to insert the compulsory retirement age of 60 years to the 2009/2010 CBA. In such case, the company would only be willing to accept the compulsory retirement age of 60 years to be included in the 2011/2012 CBA."

The court has endeavoured to interpret Clause 7 of this Agreement in the context of the entire agreement between the parties dated 15th March, 2011 and has come to the inevitable conclusion that there was deliberate intention by the Respondent and therefore, the parties consequent to the agreement to exclude the retirement of the grievant by notice of 8th March, 2009 from its purview.

This intention was achieved in the convoluted and contradictory manner in which clause 7 was concluded.

The result is that the court is seized of the issue as to whether or not the Grievant ought or not to have been retired at the age of fifty five (55) years and if such action had not been injected by the High Court at the time it happened.

In his lengthy submissions, Mr. Muchai, representative for the Claimant ably submitted that the negotiations for out of court settlement were done on without prejudice basis and in any event did not settle the issue on retirement clause, as discerned on the face of the agreement itself.

That the negotiations were never spelt out to extent and/ or cover Cause No. 247 (N) of 2009 in any event.

That the issue in dispute must therefore be determined in terms of the evidence and the law before court.

Mr. Muchai therefore urged the court not to take into account the agreement in the determination of this case.

Mr. Obura countered this argument strenuously stating that negotiations on without prejudice basis, remain as such, but where an agreement is reached, the same becomes relevant and material to the settlement of the matter before court.

That the agreement settled High Court Misc. Application No. 720 of 2006 hence the court cannot now ignore the terms of the settlement.

Mr. Muchai disagrees and urges the court to ignore the agreement in determining this matter.

Issue I

From the facts of this case, it is clear that the Respondent purported to retire the Grievant by a notice dated 8th March, 2009 when there was an order for stay of the Industrial Court in Cause No. 116 of 2004 restraining the Respondent from retiring the Grievant at the age of fifty five (55) as intended pending the hearing and determination of the H.C. Misc. Application No. 720 of 2006.

This *status quo* order equally bound the Respondent from proceeding to retire the Grievant during the pendency of the Misc. Application No. 720 of 2006.

This is the legal implication of that status order whether or not it clearly states so in express terms.

This is because the nature of a stay order as granted was interim in nature and the stay was conditional on the hearing and determination of the pending case.

It was unlawful and violation of the *status quo* order for the Respondent to proceed to retire the

Claimant as it did.

This being the case, the Claimant was perfectly entitled to file this claim and an application on Certificate of urgency to injunct the illegality that was about to take place.

The parties have now agreed to insert in the material CBA of 2009 - 2010 a clause providing for compulsory retirement at sixty (60) years and voluntary retirement at fifty five (55) years.

From the facts of the case, the Claimant did not retire voluntarily.

The attempt to compulsorily retire him was injuncted by the court and the Respondent nevertheless went ahead to unlawfully retire him.

The effect of the conduct by the Respondent was not to retire the Grievant but to unlawfully terminate his services in that the termination was not for a valid reason in terms of **Section 45 (2) (a)** of the Employment Act.

The Respondent in the circumstances failed to discharge the onus placed on it by **Section 47 (5)** of the Employment Act to show that the termination of the Claimant was justifiable taking all the circumstances of the case into account.

On the contrary, the Claimant has discharged its onus on a preponderance of evidence that indeed a wrongful termination of employment of the Claimant took place.

It is clear it was later agreed by the parties in the filed agreement that the Grievant ought to have been retired at age sixty (60).

The Grievant has specifically prayed that he be awarded damages for wrongful and premature compulsory retirement equivalent to the earnings for the remainder of the years up to the attainment of sixty years which was the lawful retirement age.

The court upon considering the factors enumerated under **Section 49** of the Employment Act, especially, that the Grievant for no fault of his own lost prospective income of five (5) years, was terminated not for misconduct but due to the Respondent's misapplication of the law, did not contribute to the determination, clearly wished to be reinstated and/ or paid for the unserved term award him maximum compensation for the unlawful and unfair termination in terms of **Section 49 (1) (c)** of the Employment Act which award is twelve (12) months gross salary as at the time of his termination. In addition, the Claimant is awarded general damages amounting to eight (8) months salary to mitigate the loss of income for the five (5) years he was entitled to work prior to retirement. This is because it would not be reasonable to make an order for the reinstatement of the Claimant, it being about four (4) years from the date of premature termination. The Award takes into account that the Claimant was bound to mitigate his losses by engaging himself in gainful activities upon being retired prematurely.

The award be computed by the Claimant within thirty (30) days from the date of this judgment and be presented to the Respondent for approval within fourteen (14) days from date of service. The quantification be filed in court thereafter for consideration and approval.

The respondent to pay costs of the suit to the Claimant.

Dated and delivered at Nairobi this 10th day of December, 2013.

MATHEWS N. NDUMA

PRINCIPAL JUDGE