



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 623 of 2010

BANKING, INSURANCE AND FINANCE UNION (K) CLAIMANT/APPLICANT

VERSUS

BARCLAYS BANK OF KENYA LTDRESPONDENT

RULING

The Claimant is Banking, Insurance and Finance Union of Kenya. The Respondent is Barclays Bank of Kenya Limited. The Claimant filed the Memorandum of Claim on 4th June, 2010 for wrongful termination of employment and non-payment of early retirement Benefits Scheme to their member, one Julius Njoroge Kamau (grievant).

The claimant prays for an award and orders that the grievant be paid his voluntary early retirement scheme benefits of Ksh.1,848,990.50.

The grievant was employed by the respondent with effect from 15th January, 1988 and the contract of employment was communicated by the letter dated 29th December, 1987. The grievant worked for the Respondent until 14th August, 2000 when he was addressed a letter as follows:

“14th August, 2000

Mr. Julius Njoroge Kamau

c/o Nyahururu Outlet

Nyahururu

Dear Mr. Kamau

TERMINATION LETTER

Reference is made to the case of irregular withdrawal of Kshs.42,002/= from savings account in the name of Phylis Wamuyu Mwangi.

After the investigations and having considered what you have stated in that respect, we are satisfied that you paid out the said funds to someone who was not the account holder. At the point of payment, you had sufficient information which you withheld from the bank but which could have been useful in frustrating the fraud.

In view of this, the bank is not prepared to have you continue in its service and with effect from today's date, your services are terminated in accordance with the provisions of Clause A5 (d) of the Collective Agreement covering Section Heads, Clerical, Technical and Subordinate staff, by the payment of one month's salary in lieu of notice.

Please acknowledge receipt of this letter by signing the attached copies and returning them to this office.

***Yours sincerely,
SIGNED
E.W. WAMBUGU***

On 18th May, 1999, the grievant had written to the Respondent applying for early retirement under a voluntary scheme for early retirement offered by the Respondent. The main issue in dispute in this case is whether the Grievant was wrongfully terminated and whether he is entitled to payment of dues under the early retirement scheme.

However, the Respondent has raised a preliminary objection on the ground that the cause of action is time barred. The Respondent filed the memorandum in reply on 17th August, 2010. The preliminary objection is stated in paragraph 6 of the Reply. The Respondent has pleaded that the dispute is time barred for the following reasons:

(a) The grievant's claim as stated in the memorandum of claim was filed at the Industrial Court on 4th June 2010, being ten years after the cause of action arose contrary to Section 90 of the Employment Act, 2007.

(b) The claim violates the provisions of the Employment Act, 2007 which provides,

“Notwithstanding the provisions of Section 4(1) of the Limitation of Actions Act, no civil action or proceedings based or arising out of this Act or a contract of service in general shall lie or be instituted unless it is commenced within three years next after the act, neglect or default complained or in the case of continuing injury or damage within 12 months next after the cessation thereof.”

(c) Further, the Claimant Union failed to comply with mandatory requirement of Section 4(4) of the Trade Disputes Act, Cap 234 (now repealed) of the Laws of Kenya. The Act provided that,

“S. 4 (4). Any trade dispute involving the dismissal of an employee or the termination of any contract of employment shall be reported to the Minister within twenty eight days of the dismissal or termination of employment.”

(d) The dispute involving the grievant was reported to the Minister on 30th April, 2008, eight years after termination of employment.

Accordingly, the Respondent prays that the dispute filed by the claimant be dismissed with costs for reasons raised in the preliminary.

The claimant filed on 8th September, 2010 the Memorandum of Reply to the preliminary objection. The claimant raises the following reasons to oppose the preliminary objection:

(a) The termination was by the letter dated 14th August, 2000.

(b) Counsel represented the grievant in the matter at the initial stages but the Respondent subsequently retained the Counsel and therefore Counsel could not continue acting for the grievant.

(c) The claimant took up the matter and raised the dispute with the Respondent by the letter dated 25th

April, 2005.

- (d) The parties met on 15th June 2005 and the Respondent by the letter dated 21st July 2005 upheld their decision to terminate the grievant.
- (e) A formal Trade dispute was reported to the Minister of Labour and Human Resource Development on 25th August, 2005 as per Section 4 of the Trade Disputes Act, Cap. 234 (now repealed).
- (f) The Minister addressed the parties by the letter dated 3rd October, 2005 conveying that having consulted the tripartite Committee under Section 5(1) of the Act, the report of the dispute had been accepted and the parties were invited to submit their respective memoranda within seven days to the appointed investigator, one H. Opiyo of Labour Headquarters.
- (g) The Respondent failed to submit its memorandum as directed by the Ministry's letter of 3rd October, 2005 despite a reminder from the Ministry signed by the Investigator as per the letter dated 30th March 2008 addressed to both parties. According to the letter of 30th April, 2008, parties were invited to the investigation meeting at the Ministry on 27th May, 2008 at 9.30 a.m.
- (h) The Minister's findings and recommendations are dated 9th December 2009. The court notes that the Minister's decision states the submissions by both parties. The court further notes that nowhere in the Minister's report did the Respondent submit that the case was time barred because the dispute had been reported long after the 28 days prescribed under Section 4(4) of the Trade Disputes Act, Cap. 234.
- (i) The respondent by a letter dated 8th February 2010 declined to implement the recommendations of the Minister's report.

The Respondent wrote as follows,

“18th February 2010

M.O. Bunde

Ministry of Labour

Social Security House

P.O. Box 40326

Nairobi – Kenya

Dear Madam

RE: ML/LR/52/5/2005 – Trade Dispute

We are in receipt of your letter dated 9th February 2010 regarding the termination of Julius N. Kamau.

We have reviewed the case and regret to advise we are not willing to vary our original decision regarding the termination.

Yours faithfully,

Azu Ongola

Employee Relations/Wellness Manager

c.c. The Secretary General

Banking Insurance Finance Union (K)

The Labour Relations Act, 2007 came into operation on 26th October, 2007. Parties attended the investigation meeting at the Ministry on 27th May 2008; long after the repeal of the Trade Disputes Act on 26th October, 2007. Secondly, at the investigation meeting, it was never submitted for the Respondent that the Minister lacked jurisdiction because the investigation was time barred under the Trade Disputes Act under whose provisions the report had been made.

Accordingly, the court finds that having not submitted on the issue of time barring before the Ministerial dispute investigation meeting on 27th May, 2008, the Respondent waived its right to raise the issue of time barring and is thereby *estopped* from raising it before this court. Further, the court finds that on 27th May, 2008, the Trade Disputes Act had already been repealed under Section 84 of the Labour Relations Act, 2007. Thus, it is the provisions of the Labour Relations Act, 2007 that should guide this court in disputes brought to the court after the commencement of the Labour Relations Act, 2007 and as provided in paragraph 2 (4) (b) of the relevant schedules to the Act. This cause having been filed after commencement of the Act, the provisions of the Act, shall apply.

The relevant provision of the Act is Section 73. The Section provides that if a trade dispute is not resolved after conciliation, a party to the dispute may refer it to the Industrial Court in accordance with the rules of the court.

The matter that arises is whether Section 73 of the Labour Institutions Act, 2007 is chained by Section 90 of the Employment Act, 2007. Section 90 of the Employment Act provides,

“90. Notwithstanding the provisions of Section 4(1) of the Limitation of Actions Act, no civil action or proceedings based or arising out of this Act or a contract of service in general shall lie or be instituted unless it is commenced within three years next after the act, neglect or default complained or in the case of continuing injury or damage within twelve months next after the cessation thereof.”

The court takes the opinion that a trade dispute that is not resolved after conciliation as envisaged under Sub Section 73 (1) of the Labour Relations Act, 2007 is a proceeding based on a contract of service in general so that it must be instituted within three years from the date of the end of the conciliation proceedings or date a party to such proceedings declares none compliance with the recommendation of the Conciliation proceedings, whichever is last. The court finds that in event of conciliation, the cause of action cannot be said to have accrued before conclusion of the conciliation proceedings, and before a party to the proceedings declares none compliance. Where no such declaration is forthcoming, the course of action will invariably accrue on the date the conciliatory proceedings concluded.

In the instant case, the court finds that the course of action accrued on 8th March, 2010 when the claimant received the Respondent’s letter dated 18th February, 2010 declaring that it would not vary its original decision regarding the grievant’s termination.

In view of the provisions of Section 90 of the Employment Act, 2007, the Claimant was entitled to file the case three years from 18th February, 2010 being any time before 19th February, 2013.

The Memorandum of Claim was filed on 4th June, 2010, long before 19th February, 2013. The court finds that the claim is therefore not time barred.

In making the finding, the court is guided that **PART VIII** of the Labour Relations Act, 2007 provides for elaborate conciliation mechanism. Subsection 62(3) provides that a trade dispute concerning the dismissal or termination be reported to the Minister within

- (a) Ninety days of the dismissal; or
- (b) Any longer period that the Minister, for good cause, permits.

The provision is such that the Minister can admit a dispute concerning dismissal or termination, if good cause is established, long after three years from the date of the dismissal or termination. In such cases and where the conciliation does not resolve the dispute, it cannot be that such a cause when filed in this court would be found to be time barred in view of Section 90 of the Employment Act, 2007. The court opines that in such cases, the cause of action must be founded upon the date of conclusion of the conciliation so that as long as the conciliation proceedings have not concluded, time does not begin to run for purposes of Section 90 of the Employment Act. If an otherwise opinion were to be taken, the court would thereby fail to promote and facilitate alternative dispute resolution in employment and labour relations disputes as envisaged under Section 15 of the Industrial Court Act, 2011.

Accordingly, the preliminary objection is dismissed with costs. This being a 2010 cause and spanning back to a termination on 14th August, 2000, parties shall take a hearing date at the registry on priority basis.

Signed, dated and delivered this 22nd day of October, 2012 in the presence of Counsel for both parties.

BYRAM ONGAYA
JUDGE