IS THERE A TIME LIMIT FOR CLAIMING ACCRUED ANNUAL LEAVE?

G4s Security Services (K) Ltd v Ongori [2025] KECA 1950 (KLR)

Background

1. The Respondent was employed by G4S Security Services (K) Limited (the "Appellant") as a security guard in 1998. His employment was subsequently confirmed on a permanent basis with effect from 1st September 2002.

2. In 2017, the Respondent developed a medical condition and underwent surgery in August 2017. He was granted medical leave, which was extended from time to time until 10th October 2017, and was required to attend weekly medical check-ups.

3. During the same period, the Appellant's contracts with various clients in the Mombasa region came to an end. The Respondent was consequently transferred to Nairobi and was required to report to his new station on 11th October 2017.

4. The Respondent did not report to Nairobi as required. He stated that, after collecting his transfer letter from the Appellant's office, he was attacked by unknown persons and was required to seek further medical treatment. The Appellant subsequently commenced disciplinary proceedings against him for absence from duty and failure to comply with instructions and summarily terminated his employment on 8th November 2017.

5. The Respondent challenged the termination before the Employment and Labour Relations Court ("ELRC") and sought various reliefs, including payment for accrued annual leave.

6. The ELRC found that the termination was unfair and awarded him, among other reliefs, payment in lieu of annual leave for 18 years. The Appellant appealed against the award for accrued leave, contending that the claim for accrued leave was time-barred under section 90 of the Employment Act.

Court of Appeal's Determination

7. The Court of Appeal identified two issues for determination: Whether the Respondent's claim for accrued annual leave constituted a continuing injury under section 90 of the Employment Act, 2007 (the "Employment Act"); and the appropriate salary to be used in computing the accrued leave.

8. On the first issue, the Appellant argued that the Respondent's claim for accrued leave prior to 2015 was time-barred under section 90 of the Employment Act. Its position was that leave accrued annually and that each year in which leave was not taken gave rise to a

separate cause of action, rather than a continuing injury. On the other hand, the Respondent argued that the failure to grant him his accrued leave entitlement constituted a continuing injury which cyrstallised upon his unlawful termination.

9. Section 90 of the Employment Act provides that:

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."

10. It is clear from section 90 of the Employment Act that a claim arising from a continuing injury must be instituted within twelve months after the injury ceases.

11. The Court found it necessary to determine what constitutes a "continuing injury". In this regard, the Court observed that there was limited jurisprudence on the doctrine of continuing injury in the context of employment claims, particularly from the Court of Appeal, and that there were differing and conflicting decisions on the issue before the Employment and Labour Relations Court.

12. For instance, in ***Ol Pejeta Ranching Limited v David Wanjau Muhoro (2017) KECA 329 (KLR),*** the issue before the Court was whether the continued discrimination of employees on account of race and the payment of different salaries, resulting in a violation of the right to equal pay for equal work, constituted a continuing injury under section 90 of the Employment Act. The Court held that the argument that the discrimination claim was time-barred was an afterthought, as limitation had not been raised as a defence or canvassed before the trial court and could not be raised for the first time on appeal. The Court further held that, as the claim concerned a violation of constitutional rights, it could not be said to be statute-barred. On the other hand, in ***Mary Kitsao Ngowa and G4S Security Services (K) Limited vs. Joseph Kamau & others (2018) KECA 827 (KLR),*** the Court held that *'"unpaid terminal benefits', which includes salary underpayments, unpaid house allowance, annual leave and/or overtime, do not constitute continuing injury as contemplated under Section 90 of the Act, and especially after the employment relationship had been severed."*

13. The Court then considered the Appellant's argument that each year in which the Respondent was not granted the accrued leave entitlement amounted to a separate wrongful act, giving rise to a separate cause of action for that year. According to the Court, a distinction must be made between a completed wrongful act, which gives rise to a one-off cause of action even where its injurious effects continue, and a continuing wrong, which persists for as long as the wrongful act endures.

14. In ***M. Siddiq (D) Thr Lrs v Mahant Suresh Das & Ors (2020) 1 SCC 1,*** the Supreme Court of India considered the principle of a continuing wrong in the context of limitation. The Court explained that a distinction must be made between the source of a legal injury and the effect of that injury. In particular, it observed that:

A continuing wrong arises where there is an obligation imposed by law, agreement or otherwise to continue to act or to desist from acting in a particular manner. The breach of such an obligation extends beyond a single completed act or omission. The breach is of a continuing nature, giving rise to a legal injury which assumes the nature of a *continuing wrong …What makes a wrong, a wrong of a continuing nature is the breach of a duty which has not ceased but which continues to subsist. The breach of such a duty creates a continuing wrong and hence a defence to a plea of limitation.*

15. In ***The German School Society & another v Ohany & another,*** which arose from two consolidated appeals, the main complaint concerned the underpayment of salary during the employee's period of employment. In determining whether the claim was time-barred, the Court considered several decisions from the Indian courts on the principle of a continuing wrong and held that:

> *"Normally, a belated service-related claim will be rejected on the ground of delay and laches or limitation. One of the exceptions to the said rule is cases relating to a continuing wrong. Where a service-related claim is based on a continuing wrong, relief can be granted even if there is a long delay in seeking remedy, with reference to the date on which the continuing wrong commenced, if such continuing wrong creates a continuing source of injury. Borrowing from the excerpts reproduced above and considering that the respondent continued to work under the same circumstances, we find and hold that the breach complained of was of a continuing nature, capable of giving rise to a legal injury which assumes the nature of a continuing wrong. It follows that the appellant's argument that the claims were time barred fails. On the contrary, the said claims fall within the ambit of a continuing wrongs contemplated under section 90."*

16. From the foregoing authorities, the Court concluded that the essence of a continuing injury is that the events giving rise to the injury persist over time, making it unreasonable to expect a claimant to institute proceedings at an early stage while the wrongful conduct is continuing. Conversely, where the injury can be broken down into independent and distinct wrongful acts, each act gives rise to a separate cause of action when it occurs.

17. The Court then considered whether the Respondent's claim for accrued unpaid leave fell within the meaning of a continuing injury. In doing so, the Court examined the statutory provisions governing an employee's entitlement to annual leave as follows:

i) Section 28(1)(a) of the Employment Act, which provides that:

> *"An employee shall be entitled –*
> *(a) after every twelve consecutive months of service with his employer to not less than twenty-one working days of leave with full pay." The Court observed that the use of the word "shall" makes the entitlement to annual leave mandatory and described it as being "akin to a non-derogable right".*

ii) section 10(3)(a)(i) of the Employment Act, which requires the terms of employment to provide for an employee's annual leave entitlement, including sufficient information to enable any accrued leave payable upon termination to be precisely calculated.

iii) section 74 of the Employment Act, which requires an employer to maintain records of an employee's annual leave entitlement, the leave days taken and the leave days due.

18. Consequently, the Court stated that the right to annual leave is a statutory entitlement granted to employees. The Court further stated that an employee is entitled to full pay during the period of annual leave, as if the employee were on duty.

19. Applying the above principles, the Court held that:

i) the Respondent's contract of employment dated 4th September 2002 did not contain a provision on his entitlement to annual leave, as required under the Employment Act. The Court reiterated that the entitlement to annual leave is "sacrosanct" and, by virtue of its statutory basis, the failure to grant an employee the right to annual leave for each year of service constitutes a continuing wrong or injury.

ii) in line with the decision in The German School Society & another v Ohany & another (supra), the Respondent's claim was a service-related claim arising from a continuing wrong. Relief could therefore be sought despite the delay in seeking a remedy, as the state of affairs giving rise to the injury had continued. The Appellant's failure to grant the Respondent annual leave with full pay, as required by law, therefore constituted a continuing wrong;

iii) the termination of the Respondent's employment did not extinguish his entitlement to payment for the accrued leave. Rather, the continuing injury ceased upon the termination of his employment on 8 November 2017. As section 90 of the Employment Act allows a claim arising from a continuing injury to be instituted within twelve months after the injury ceases, the Respondent's claim, which was filed on 20 June 2018, was brought within the prescribed period. The Court therefore rejected the Appellant's argument that the claim for accrued leave prior to 2015 was time-barred; and

iv) in any event, the Appellant had not pleaded limitation under section 90 of the Employment Act as a defence before the ELRC. The Court held that raising the issue for the first time on appeal was procedurally improper.

20. On the appropriate salary to be used in computing the accrued leave, the Court held that an employee is entitled to the basic salary that would have been payable had the employee been at work. Since the failure to grant the Respondent annual leave constituted a continuing injury which persisted until the termination of his employment, and it was not conceivable that he would institute a claim for each year in which leave was denied, the appropriate remuneration for computing the accrued leave was his basic salary at the time of exit.

Consequently, the Court upheld the ELRC's award of accrued annual leave for 18 years, on the basis that the claim constituted a continuing injury and had been instituted within the limitation period prescribed under section 90 of the Employment Act. The Court also upheld the computation of the accrued leave based on the Respondent's basic salary at the time of termination. The appeal was therefore dismissed with costs.

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