IN THE HIGH COURT OF SINDH AT KARACHI

Suit No. 194 of 2012

Plaintiff	:	Syed Anwar Ali and 19 others, through Mr. Salman Mirza, Advocate.
Defendant No.1	:	Federation of Pakistan, Nemo.
Defendant No.2	:	Karachi Electric Supply Company, through Ms. Zara Villani, Advocate.
Date of hearing	:	23.01.2019

JUDGMENT

YOUSUF ALI SAYEED, J. - The Plaintiffs are former employees of the Defendant No.2, whose professed grievance is in relation to amendments made to the service rules of the Defendant No.2, whereby they have been divested of benefits that were said to have accrued to and vested in them as an incidence of their employment. Such grievances are twofold – (a) that a post-retirement medical cover for employees and their spouses for a period of 10 years as well as dependent children for a period of 5 years after retirement as had been provided under clause 7.5 (c) of the KESC Officers Service Rules 2002 (the "**2002 Rules**") has been curtailed in their cases by the Defendant No.2 on the ground that such entitlement no longer exists under the prevailing KESC Officer Policy 2010 (the "**2010 Policy**"), and (b) that a commitment to provide free electricity for a period of 5 years from the date of retirement, as is said to arise in terms of an inter-department memo dated 19.04.2003 (the "**2003 Memo**"), has also not been honoured.

2. The preceding facts, as discernible from the pleadings, are as follows:

(a) The Plaintiffs were all apparently in longstanding regular service with the Defendant No.2 until their retirement upon reaching the age of superannuation on different dates between April 2010 and November 2011, having entered into employment at a time when the Karachi Electric Supply Corporation (the "**KESC**") existed as a concern in the public-sector;

(b) That KESC maintained an Officers Policy that was contained in various office orders and circulars that governed the terms and conditions of service of its officers;

(c) In 2002, the various office orders and circulars constituting the Officers Policy issued by KESC from time to time were collated for purpose of convenience in the form of the 2002 Rules, under clause 7.5 (c) of which full medical facilities were to be provided to employees and their spouses for a period of 10 years, as well as dependent children for a period of 5 years, after retirement;

(d) Subsequently, the KESC management was requested by the KESC Officers Association, which included the Plaintiffs, to provide retired officers with free electricity benefits for a period of 5 years after retirement as was already being provided to non-officers. The KESC after deliberation with the employees was pleased to agree to the request and allowed the same vide the 2003 Memo; and

(e) However, when the Plaintiffs' applied for the aforesaid benefits after retirement, they were informed that the retirement policy that had earlier been in place in terms of the 2002 Rules had since been replaced by the 2010 Policy, under which the medical benefits available earlier in terms of Clause 7.5 (c) had been were no longer provided for, hence could not be extended to them. Moreover, they were also refused free electricity as envisaged under the 2003 Memo.

3. Accordingly, for purpose of enforcement of their entitlement under the aforementioned heads, the Plaintiffs have filed Suit seeking final relief in the following terms:

"A. Declare that the plaintiffs are entitled to the medical and electricity benefits in terms of the KESC Officers Service Rules 2002 and inter departmental memo dated 19.04.2003 and that the KESC Officers Policy 2010 is unlawful and of no legal effect insofar as it purports to amend any of the KESC Officers Service Rules 2002 to the detriment of the plaintiffs.

B. Direct the Defendant No.2 to provide the plaintiffs with free electricity benefits for a period of 5 years from the date of initiating the same.

C. Direct the Defendant No.2 to provide, free of cost, full medical benefits to the plaintiffs and their spouses for a period of 10 years and for a period of 5 years to their dependent children from the date of initiating the same.

D. Grant damages against the Defendant No.2 in the sum of Rs.1,500,000/- to each of the plaintiffs.

E. Costs of the suit.

F. Any other additional/alternate remedy as this Honourable Court may deem fit and appropriate."

4. During the course of the Suit, on 05.11.2013 a suggestion was apparently made that evidence was not required in the matter, and on 05.03.2014 it was observed with reference to that earlier Order in reiteration of this point that the Suit could be disposed of without evidence being recorded, and on this note the following issues were settled:

> "1. Whether suit is maintainable by the retired employee of the KESC in the present form?
>
> 2. Whether through the KESC Officers Policy 2010, certain benefits to the Plaintiff under the previous policy, can be withdrawn by the Defendant?

5. Some controversy apparently then ensued with reference to the Order of 05.11.2013, in as much as in terms thereof it had also been recorded that the 2010 Policy would remain suspended till further Orders. On such account an Application seeking review was filed, being CMA No.12564/13, which remains pending despite the subsequent Order made on 11.11.2015, whereby it stood clarified that the suspension was only to the extent of the Plaintiffs, it being further recorded that the mere pendency of such application ought not to be an impediment to final adjudication of the main case. Even otherwise, notwithstanding the suspension, neither specie of benefit claimed under the Suit was extended to the Plaintiffs, as has been confirmed vide a Joint Statement presented in Court on 20.11.2018 under the signature of counsel for the Plaintiffs and Defendant No.2, confirming such aspect as well as signifying tacit acceptance of the roadmap for adjudication reflected in the aforementioned Orders of 05.11.2013, 05.03.2014 and 11.11.2015. Needless to say, under such circumstances, the claim to damages could not be advanced further and, as such, no arguments were advanced on that score.

6. Whilst a question of maintainability was raised in terms of the Written Statement, turning on the assertion that in its capacity as a private entity the Defendant No.2 was free to frame its policies and service rules and that the Plaintiffs were aware of and had acquiesced in the 2010 Policy, the Written Statement does not expound on this aspect and no further submissions were made on behalf of the Defendant No.2 to advance the proposition of acquiescence with reference to any material on record that would indicate the same, nor was any argument made that served to press the issue of maintainability, either from such standpoint or otherwise.

7. On the contrary, the Plaintiffs had specifically pleaded that the 2010 Policy had not been disseminated and had come as a surprise to them. It was their case that it was only when they applied for the aforesaid benefits after retirement that they were informed that the 2002 Rules had been amended in terms of the 2010 Policy, and the benefits were withheld on such pretext. It was submitted that the 2010 Policy was said to have been issued on 15.04.2010, and in support of the contention that there had been an attempt on the part of the Defendant No.2 to suppress the same at the outset. Attention was invited to a Circular of that very date, which reads as follows:

> "Human Resources Management
> DATED: 15th April, 2010
>
> **KESC OFFICERS SERVICE POLICY 2010**
>
> In pursuance of the organizational circular dated 15th April, 2010 issued through the Administrator in respect of the above subject, individual copies of KESC Officers Service Policy 2010 are being sent to the respective Departmental Heads. The same is to be kept in the custody of the Departmental Heads or persons specifically nominated as custodians on their behalf but now below the level of DGM. The policy will under no circumstances be photocopied, hand noted, scanned, photographed, distributed etc.

Any employee who seeks any information/clarification on any policy shall fill in and submit the attached form to the concerned Departmental Head specifying the query. The designated department will clarify the same or shall let him/her consult the policy document in the presence of the Departmental Head or Custodian without providing any copy of the policy to the employee. All such request forms shall be retained by the concerned department and sent to the Human Resources Management Group at the end of the month to be inserted in the personal file of the individual as a ready reckoner.

Please note that the copies of KESC Officers Services Policy 2010 being sent bear serial numbers unique to every department and are in original form. In case of any loss, theft or being copied, the concerned Departmental Head of his/her custodian shall be held responsible."

8. It was submitted that the Circular showed that the Defendant No.2 had actively sought to curb access to and control circulation of the 2010 Policy, and had not pleaded that there was any consultation prior thereto or general dissemination upon issuance thereof, nor placed any material on record to demonstrate the same.

9. Having considered the matter, it is evident that the Plaintiffs have brought the Suit seeking certain retirement benefits that were apparently due and payable under the 2002 Rules, which according to them continues to govern their employment, and under the circumstances, as aforementioned, no apparent question of acquiescence arises so as to affect the maintainability of the claim, which would fall to be considered and determined on its merit. As such, Issue Number 1 as to maintainability of the Suit is decided in the affirmative.

10. Addressing the subject of the Plaintiff's professed entitlement, learned counsel for the Plaintiffs submitted that the terms and conditions of employment and the benefits available to the Plaintiffs – as set out in 2002 Rules were an essential part of their employment contract and could not be varied to their detriment without their consent.

11. It was contended that whenever such terms, conditions and benefits were revised, it was always with the consensus of concerned officers and their representative association. It was averred that both specie of retirement benefits that were the subject of the Suit were a material part of the Plaintiffs' employment contract and one of the main incentives/inducement for the Plaintiffs' to continue in service, and the Plaintiffs were entitled to receive the same in accordance with the 2002 Rules and 2003 Memo.

12. In this context, it is pertinent to note that Clause 7.5 of the 2002 Rules as well as the content of the 2003 Memo provided as follows:

The 2002 Rules

"7.5 RETIREMENT BENEFITS

Retired officers shall be entitling to the following benefits as permissible under the relevant rules:

a. Gratuity.

b. Total amount of the Contributory Provident Fund at his/her credit including Corporation's contribution.

c. Medical treatment for self and wife for 10 years and 5 years for dependents. The facility shall however cease if the wife re-marries or divorce.

d. Vehicle allocated to the entitled officer under transport policy shall be sold to him/her on book value on his/her retirement from service or in case of death to the legal heirs of the deceased. However the Board of Directors has suspended this policy till the Financial health of the Corporation is improved.

e. Official telephone will be transferred against his/her name on payment of security deposit."

The 2003 Memo

"Subject: Free Electricity Benefit to KESC Officers after Retirement / Death.

I am directed to inform you that KESC Boards Directors at its meeting held on 29th March, 2003, with a view to eliminate disparity among the employees of the Corporation viz. Officers & Non Officers and considering nominal financial implications, approved that free electricity benefit be also allowed to KESC Officers for a period of =05= years after retirement / death as admissible to non officers.

The Board also decided to extend the above benefits to the officers retired during last five years for the balance period as detailed below: -

- Officers retired 04 years ago will get free electricity benefits for next 01 year.
- Officers retired 03 years ago will get free electricity benefits for next 02 years.
- Officers retired 02 years ago will get free electricity benefits for next 03 year.
- Officers retired 01 years ago will get free electricity benefits for next 04 year.

Exact period will be computed on case to case basis.

This is for your information and further necessary action under intimation to the undersigned.

Sd/.
(OSWALD PEARL)
CORPORATE SECRETARY"

13. It was submitted that the procedure for availing the aforementioned post-retirement benefits under the 2002 Rules was that the KESC would issue post-retirement medical cards to the retiring officer and spouse/eligible dependents, which would allow them to avail free medical treatment/medicine at such hospitals, laboratories and pharmacies as were enrolled on the Defendant No.2's panel. As far as the free electricity benefits to retired officers in terms of the 2003 Memo were concerned, the Defendant No.2 would make an appropriate deduction from the electricity bill, however the officer would remain liable to pay the applicable duties/taxes, etc.

14. Attention was then drawn to Clause 7.5, as revised/substituted in the 2010 Policy, which reads as follows:

> "7.5 RETIREMENT BENEFITS
>
> Retired officers shall be entitled to the following benefits as permissible under the relevant rules/policy:
>
> a. Gratuity.
>
> b. Total amount of the Contributory Provident Fund at his/her credit including Company's contribution.
>
> c. Medical treatment for self and wife / husband for 10 years and 5 years for dependents to officers who have already retired before the date of coming into force of this policy and as may be laid down from time to time by the management."

15. It was submitted that neither the Plaintiffs nor the KESC Officers Association had any notice of an amendment or modification of their retirement benefits nor were they ever consulted in regard to the 2010 Policy. It was submitted that far from consulting and seeking the approval of the affected officers in relation to the framing of a revised policy, the Defendant No.2 did not disseminate the 2010 Policy but rather kept it

suppressed, and it was only when the Plaintiffs finally managed-through their own efforts- to obtain a copy thereof that they discovered that the same had ostensibly been issued on 15.04.2010 with Clause 7.5 (c) being amended so as to omit the medical benefits available in the earlier 2002 Rules. Moreover, the Defendant No.2 has refused to honour the 2003 Memo providing free electricity for five years to retired employees.

16. Attention was invited to the Circular dated 15.04.2010, as reproduced herein above, which directed the selected recipients to keep the 2010 Policy a secret and forbade the copying thereof, directing that an employee could have access to it only if he submitted a specific request for information or clarification. It was submitted that if the changes sought to be introduced had been lawful and regular, then the exercise ought to have taken place in an open and transparent manner with proper intimation to the employees, who were the affected party. Per learned counsel, the swift and secretive manner in which the 2010 Policy was introduced reflected bad faith on the part of the Defendant No.2 and was demonstrative of a breach of the implied term of trust and confidence underpinning the 2002 Rules.

17. It was argued by learned counsel for the Plaintiffs that the invocation of Clause 7.5(c) of the 2010 Policy as a pretext to deny the Plaintiff's their benefits was unlawful as the same had no legal/contractual effect as it completely upset and contradicted the 2002 Rules and the Plaintiff's service as well as the subject of such benefits continued to be governed thereunder. It was submitted that the Plaintiffs had served with the Defendant No.2 on the understanding that they would be entitled to certain post-retirement benefits, and the

endeavour of the Defendant No.2 to deny them the same on such plea in their last year of service was mala fide, and such a step could not be taken unilaterally. It was submitted that the 2010 Policy had been framed without consent and could not be extended to the Plaintiffs in derogation of the existing rights that had accrued to them under contract, and such endeavour amounted to a breach on the part of the Defendant No.2. It was pointed out that the interplay between the 2002 Rules and 2010 Policy vis-à-vis the provision for unilateral had previously been the subject of adjudication before a learned single Bench of this Court in the case reported as Muhammad Shahnawaz and others v. Karachi Electric Supply Company 2011 PLC (C.S) 1579 in the context of the termination of certain other employees by the Defendant No.2 in exercise of a provision of the 2010 Policy that marked a departure from earlier safeguards under the 2002 Rules, and reliance was placed on the observations made in an Order which had been passed in that proceeding whilst granting injunctive relief on Applications pressed by such employees seeking suspension of the termination notices that had been issued to them.

18. Reliance was also placed on the Judgment in the cases reported as (i) Scally v Southern Health and Social Services Board [1992] 1 AC 294 to demonstrate that an employers had a contractual duty, implied into the employment contract, to properly inform employees of their rights, (ii) Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd [1987] EWCA Civ 6 to show that in cases of onerous clauses the rule of common law is that reasonable notice of such clause(s) must be given to a contracting party in order that they be effective, (iii) United Bank v Akhtar [1989] IRLR 507, to show that an express variation clause must not be exercised in a way that undermines the implied term of

mutual trust and confidence, (iv) Wandsworth London Borough Council V D'Silva and another 1998 IRLR 193, to show that a court would be reluctant to apply a power of unilateral variation to produce an unreasonable result and in construing such a clause would seek to avoid such a result, and (v) *Solectron Scotland v Roper* [2004] IRLR 4, to show that the fact that an employee continues to work knowing that the employer is asserting that that is the term for compensation on redundancies, does not mean that the employee can be taken to have accepted that variation in the contract.

19. Conversely, it was submitted by learned counsel for the Defendant No.2 that following the privatization of the KESC, 2002 Rules were subsequently replaced by the 2010 Policy, which then regulated the affairs between the Defendant No.2 and its employees. It was submitted that the 2010 Policy had been validly framed and introduced by the Defendant No.2 and was fully effective, applicable and binding in relation to all matters and persons covered by it, and was neither contrary to law or public policy.

20. It was argued that the introduction of a new/revised policy was provided for in terms Clause 1.2 of the 2002 Rules, which conferred the power and discretion to the Defendant No.2 to unilaterally undertake such an exercise, and attention was invited to Clause 1.2 of the 2010 Policy which reflected that the same had been introduced in supersession of the 2002 Rules in exercise of that provision. In this regard, it is pertinent to mention that Rule 1.2 of the 2002 Rules stated as follows:

> "1.2 The Board of Directors may add/amend or repeal any of these rules."

21. It was submitted that the 2010 Policy had been considered in High Court Appeals No.57 of 2012, 127/2011, 128/2011, 129/2011, 137/2011, but its provisions had not been found violate law or public policy, and the learned Division Bench vide its common Judgment dated 08.08.2012 had in fact been pleased to set aside the Judgment in Shahnawaz's Case (Supra) granting injunctive relief to the former employees of Defendant No.2 as against their termination, which had been relied upon by counsel for the Plaintiffs.

22. Learned counsel for he Defendant No.2 also sought to rely on the judgment of the Honorable Supreme Court in the case reported as Abdul Wahab and others v HBL and others 2013 SCMR 1383, contending that that the matter was on a similar footing to that at hand as it concerned changes brought about by HBL to its Staff Service Rules 1981 following its denationalization so as to provide for early retirement and dismissal from service, which were held to non-justiciable, being founded upon commercial, business administrative wisdom, prudence and judgment of a private enterprise for the better interest of the institution, which may involve and be based upon financial constraints and considerations. Reliance was also placed on the Judgment of the Honourable Supreme Court in the case reported as United Bank Limited through President v. Shahmim Ahmed Khan and 41 others PLD 1999 Supreme Court 990, contending that in that case the Apex Court while analyzing the legality of a downsizing policy introduced had also held "that the Bank was entitled to downsize the number of staff in view of the economic stress; that the Bank was entitled to reorganize its business in Order to run it more efficiently and if, in the process, some of the members of the staff had become redundant, Bank was entitled to terminate their services".

23. In rebuttal, it was pointed out by learned counsel for the Plaintiffs that the cases cited on behalf of the Defendant No.2 dealt with the subject of termination in the context of a 'master and servant' relationship whereas the Plaintiffs claim was that of enforcement of rights as per a contract under which substantial performance had already taken place on their part. With reference to Abdul Wahab's case (Supra) it was pointed out that the same essentially turned on an issue of maintainability under the Constitutional jurisdiction and where the termination of the bank's employees had been undertaken under the existing rules when the conditions for doing so were met rather than under the garb of a unilateral variation that had never been notified. As regards that case as well as that of Shahmim Ahmed Khan (Supra) it was also pointed out that the arguments run on behalf of the banks had also turned on economic considerations, and in the matter of UBL the bank had displayed its bona fides by having a survey carried out by an independent contractor, giving rise to a proposal for retrenchment, of which the employees were informed. It was pointed out that the instant case relates to unilateral variation of a contract without notice to the detriment of the Plaintiffs, and economic considerations or factors have not even been pleaded or otherwise argued. It was submitted that under the circumstances underpinning the matter at hand, the amendment was unreasonable as the Plaintiffs were all bordering on retirement and had completed the overwhelming majority of their service whilst tendering performance under their respective employment contracts in anticipation of such retirement benefits. It was averred that if the Plaintiffs had known of the 2010 Policy in advance, they could well have opted to voluntarily retire even a day prior to the date that the same was put into effect, but since they were not even subsequently notified let alone forewarned, they could not avail exercise such an option.

24. Having considered the arguments advanced at the bar in light of the material on record, it merits consideration that the general rule is that a contract of employment, like any other contract, cannot lawfully be varied without the consent of both parties. Normally, therefore, an employer who seeks to effect a change in an employee's contract of employment must obtain that employee's consent. A unilateral variation clause may serve as an exception, which may permit one party – usually the employer – to vary the terms of the contract without consent, however, the principles that can be distilled from decided cases on the subject of the scope and application of such clauses is that the wording thereof must be clear and unambiguous, and the more unreasonable the result yielded by the variation, the more necessary it is that the intent in that regard be made abundantly clear. In this regard, in *Security and Facilities Division v Hayes* [2001] IRLR 81, CA, Peter Gibson LJ held that

> 'Had the parties intended a provision allowing the unilateral variation of the rate of allowances, in my judgment the contractual terms would have had to provide unambiguously for that.'

25. In *Wandsworth London Borough Council v D'Silva* [1998] IRLR 193, paragraph 31, the Court of Appeal observed that:

> 'The general position is that contracts of employment can only be varied by agreement. However, in the employment field an employer or for that matter an employee can reserve the ability to change a particular aspect of the contract unilaterally by notifying the other party as part of the contract that this is the situation. However, clear language is required to reserve to one party an unusual power of this sort.'

26. In *Wickman Machine Tools Sales v LG Schuler* [1974] AC 235, Lord Reid held that:

> 'The fact that a particular construction leads to a very unreasonable result must be a relevant consideration. The more unreasonable the result, the more unlikely it is that the parties can have intended it, and if they do intend it the more necessary it is that they should make their intention abundantly clear.'

27. In United Bank v Akhtar [1989] IRLR 507, Mr Akhtar was requested to move in accordance with a mobility clause. but was given very little notice and the bank chose not to exercise its discretion to assist him with relocation expenses. The Employment Appellate Tribunal held that this amounted to a fundamental breach of terms implied into the employment contract, one of which was that the employer would not act in a manner that violated or undermined mutual trust and confidence.

28. As pointed out, the interplay between the 2002 Rules and 2010 Policy had already been the subject of adjudication at an interlocutory stage before a learned single Bench of this Court in Shahnawaz's Case (Supra), and whilst the grant of injunctive relief against termination of the employees that had come forward to assail the same vide those cases may have been reversed on appeal by a learned Division Bench, the analysis and assessment of the learned single Judge in relation to Clause 1.2 of the 2002 Rules remains significant and merits consideration. In this regard, the relevant excerpts/paragraphs from that the judgment in that case are as follows:

> "23. Since the matter must now be considered in the realm of contract law, it will be in order to preface the analysis with a recapitulation of certain well established legal principles. The first, and most obvious, point is the ascertainment of the contract,

itself. By this, I do not mean the permissible methods of providing the contract, which lie properly in the realm of evidence. Rather, I refer to the more basic question of what are the terms and conditions that comprise the contract itself. These are not normally in dispute. However, it is well established that if there is such a dispute, it is a mixed question of law and fact and is in the end, a question to be decided by the Court itself. Secondly, if the terms of a contract have been ascertained or are not in dispute, then the interpretation thereof (i.e. a determination of their true legal meaning) is also a question of law to be decided by the Court. Thirdly, it is also well established that a contract cannot normally be unilaterally varied or altered by one of the parties thereto (although, as will be seen shortly, it is the precise application of this principle that is in dispute in the present case). Finally, the provisions of the contract are to be construed and interpreted objectively. This is absolutely fundamental. Thus in Sirius International Insurance Co V FAI General Insurance Ltd [2004] UKHL 54[2005] 1 ALL ER 191, it was observed as follows;

> "The aim of the inquiry is not to probe the real intentions of the parties but to ascertain the contextual meaning of the relevant contractual language. The inquiry is objective; the question is what a reasonable person, circumstanced as the actual parties were, would have understood the parties to have meant by the use of specific language. The answer to that question is to be gathered from the text under consideration and its relevant contextual scene." (para 18, per Lord Steyn).

This is of course, not the enunciation of any new principle, but rather than restatement, in modern terms, of a principle that forms part of the bedrock contract law.

24. The first question that must be determined in the present case is as to what were the applicable terms and conditions of the contract between the parties. This question arises because KESC asserts that the terms are contained in the 2010 Policy (as noted above), whereas the plaintiffs' case is that the terms were, and continue to remain, contained in the 2002 Rules (as noted above). Now, there is no dispute that prior to the coming into force of the 2010 Policy (which took effect from around 15.04.2010), the relevant contractual terms were to be found in the 2002 Rules. What learned counsel for KESC contended was that the 2002 Rules themselves permitted their alteration, substitution and even complete replacement, and it was in the exercise of this power that the 2010 Police was given effect, and thus became part of the plaintiffs' contracts of employment. It is the correctness of this submission that must now be considered.

25. The locus of the contractual power asserted by KESC is to be found, according to learned counsel, in clauses 1.2 and 1.3 of the 2002 Rules, which have been reproduced above. Clause 1.2 confers a contractual power on the Board of Directors of KESC to "add", "amend" or to "repeal" the 2002 Rules or any particular rule thereof. How is this power to be construed? The point can be put more generally; if two parties enter into a contract, whereby one is conferred with a power or discretion thereunder, how must such power be exercised? The (English) Court of Appeal gave the following answer in Abu Dhabi National Tanker Co v Product Star Shipping Ltd (The "Product Star") (No.2) [1993] 1 Lloyds Rep 397'

> "The essential question always is whether the relevant power has been abused. Where A and B contract with one another to confer a discretion on A, that does not render B subject to A's uninhibited whim. In my judgment, the authorities show that not only must the discretion be exercised honestly and in good faith, but, having regard to the provisions of the contract by which it must be conferred, it must not be exercised arbitrarily, capriciously, or unreasonably. That entails a proper consideration of the matter after making any necessary enquiries. To these principles, little is added by the concept of fairness, it does no more than describe the result achieved by their application." (pg 404; emphasis .....LJ., with whom the rest of the Court agreed).

Thus, the contractual power conferred on KESC by clause 1.2 is not untrammeled, nor can this power be exercised in such manner as KESC deems fit in its absolute, i.e. subjective, discretion. It is pertinent to note that clause 1.2 itself does not contain any such language. Learned counsel for KESC sought to rely on clause 1.3 in support of a broad, almost untrammeled, interpretation of clause 1.2 but in my view, clause 1.3 does not have the meaning being ascribed to it. Firstly, clause 1.3 itself amounts to the conferment of a contractual power on KESC, and is therefore subject to the same limitations as noted above. Secondly, it is restricted to an "interpretation" of the rules in case of any "controversy/ambiguity". This obviously means, and can only mean, a resolution of a dispute regarding the proper interpretation of the rules as they stand. Clause 1.2 on the other hand, does not apply to the rules as they stand, it confers a power on KESC to alter or amend the rules, which is a different thing altogether. Finally even if the KESC Board were to exercise its powers under clause 1.3 in relation to any particular rule as it stood, the Board's determination would still remain subject to the ultimate jurisdiction of the court to authoritatively determine the true legal meaning of the provision. This is so since, as noted above, the determination of the legal meaning a contractual term is a question of law, and such questions

ultimately must fall within the domain of a court of law. Parties cannot, by their own unilateral act, purport to deny or curtail this judicial power. Clause 1.3 therefore, has no application to the issues at hand.

26. What then, is the extent and scope of the contractual power conferred by clause 1.2?. How would a reasonable person, considering the provision objectively in a relevant contractual and contextual framework, consider the clause as applying? On one possible interpretation, the power conferred thereby should be strictly limited to what is expressly stated therein, i.e. to "addition", "amendment" and "repeal"---but not substitution of the rules in their entirety, since repeal does not necessarily mean, include or require substitution. However, I accept that such a strict and literalist approach would not be appropriate. A repeal of the essential terms and conditions of employment of an ongoing service contract, and certainly in relation to an organization like KESC, can only be in the context of replacing the "repealed" provisions with others. Now, each of the plaintiffs has his own contract of employment with KESC. Thus, legally speaking, the 2002 Rules were part of literally hundreds of separate contracts, i.e., those between KESC and each of the concerned employees. Strictly speaking therefore, any change in, or of, the 2002 Rules would alter hundreds of different contracts. It is noted above, normally a party cannot unilaterally alter the contractual terms. Without a provision like clause 1.2 KESC may well have found itself in the position of having to renegotiate hundreds of different contracts every time it wished to alter any of the terms and conditions of service. Therefore, the purpose behind clause 1.2 is clear. Since the 2002 Rules were to apply in all employees. ----formed part of their respective contracts with KESC and any change in the 2002 Rules would simultaneously affect hundreds of different contracts in precisely the same manner, clause 1.2 was inserted to obviate the inconvenience that would be caused if KESC had to separately rewrite those contracts to achieve the same purpose. (I have used the term "hundreds", although the member of employees affected may well be much larger.

27. Once the purpose behind clause 1.2 has been understood and established, a determination of its scope becomes much easier. Now, any alteration in, or of, the 2002 Rules may affect the employees either favorably or adversely. If the former, the employees could not reasonably be regarded as having any objection. Thus, the scope of clause 1.2 would be regarded by a reasonable person, considering the situation objectively, as extending to any change or alteration in the 2002 Rules that would be favorable to the employees. What however, of changes that may be adverse to the employees? Here, the situation must be regarded as being more nuanced. For example, some alterations may adversely affect all employees, while others may affect only some of the

employees. Furthermore, the degree of the adverse affect may also be relevant; some changes may be adverse, but only marginally, while others may have a more substantial impact on the employees. Fortunately, these subtleties need not detain me in the present case. There is no doubt that in the present case, all the plaintiffs have been adversely affected by the substitution of the 2002 Rules with the 2010 Policy, and this effect has been substantial (to say the least). In my view, no reasonable person, considering the situation objectively, would regard clause 1.2 as empowering KESC to alter or replace the 2002 Rules in a manner that is substantially adverse to the employees. At the risk of some repetition, it must be stated again that any change in, or of, the 2002 Rules amount to a contractual alteration, i.e. a variation of the employment contract between KESC and each of its affected employees. As noted above, it is an established principle of contract law that a party to a contract cannot unilaterally alter it. A power such as that conferred by clause 1.2 can be regarded as an exception to this rule. Like all such exceptions, it ought, in my view, to be strictly and narrowly construed. No reasonable person would conclude that an employee would empower the employer to unilaterally alter the terms and conditions of his service in a manner that is substantially adverse to him. This would be especially true of the termination clause. Would a reasonable person, considering the contract objectively, construe it as meaning that a rational employee would confer a unilateral power on his employer to alter the termination clause of the contract in a manner that is substantially adverse to the employee? This question can, in my view, admit to only one answer, and that is in the negative. Only the clearest possible language could, if at all, achieve such a result. A contractual power of this nature should also be construed contra proferentem, i.e. any ambiguity or doubt in the scope of the power should be construed against the employer and in favor of the employee.

28. There can however, be certain situations where an employer has purported to exercise a power of the nature as conferred by clause 1.2 to alter the contract of employment in a manner substantially adverse to the employee, and the latter may be unable to obtain redress. The most obvious such situation would be where the employer is able to plead estoppel. There could also be acquiescence, or even laches. However, each case would turn on its own facts, and the employer would have to specifically plead and establish any such defence. In the present case, no such considerations can arise. The 2010 Policy came into effect from 15.04.2010. The power of termination was exercised on 19.04.2010. The present suits were filed in May and July 2010. Thus, the plaintiffs have challenged the termination of their services from the beginning and have never accepted the purported change in the termination clause.

> 29. In my view, therefore, insofar as the termination clause of the plaintiffs' contracts of employment is concerned, it continues to be governed by the relevant provision of the 2002 Rules and not the 2010 Policy. This is so because the altered position under the 2010 Policy in this regard is quite obviously substantially adverse to the plaintiffs. Clause 1.2 of the 2002 Rules did not, and could not, empower KESC to make such a change in the employment contracts. These contracts must therefore be construed and applied in terms that the termination clause continues to remain as contained in the 2002 Rules. It is therefore necessary to consider that termination clause in some detail.
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> 30. Before proceeding further, it would be appropriate to pause briefly to clarify certain points, which may otherwise cause confusion. It may be noted that I have not declared clause 1.2 of the 2002 Rules to be invalid, nor have I invalidated the 2010 Policy as such. Thus, for example, the latter will apply to contracts of employment entered into after 15.04.2010, as part of the terms and conditions of employment of freshly inducted employees. I have not even held that the 2010 Policy will not apply at all to the plaintiffs. As presently relevant, a contract of employment may be regarded as comprising several separable elements (e.g, the salary payable, promotion, transfers, leave entitlement, gratuity and provident matters, medical facilities, etc). It may well be the case that in respect of some, or perhaps even most, of these elements, the exercise of contractual power by the KESC Board in terms of clause 1.2 was lawful (in the manner as explained above), and therefore, the plaintiffs' contracts of employment now, in respect of these elements, comprise the terms as set forth in the 2010 Policy. However, whether this is so or not is not the matter before me. I am only concerned with the termination clause and that, for the reasons already stated, must in law be regarded as still being that as set forth in the 2002 Rules and not the 2010 Policy."

29. In the context of the matter at hand, it falls be determined in light of the principles discussed in the aforementioned cases whether Clause 1.2 of the 2002 Rules could have been invoked by the Defendant No.2 to contend that a change had been brought about to Clause 7.5 in the shape of the substituted provision under the 2010 Policy so as to materially curtail/impair the earlier right/entitlement conferred upon the Plaintiffs, notwithstanding their long-standing service and impending retirements.

30. As observed, such a determination necessarily entails consideration of the language of Clause 1.2 so as to assess whether the same is so clear and explicit that a reasonable person would construe such clause so as to confer a power to the Defendant No.2 broad enough to unilaterally alter and substitute Clause 7.5 of the 2002 Rules with the provision as exists in the 2010 Policy and divest the Plaintiffs of part of the retirement benefits in anticipation of which they had been serving, and can Clause 1.2 be construed to mean that an employee would confer a unilateral power on his employer to alter the retirement benefits in a manner materially adverse to him? Needless to say, only the clearest possible language could, if at all, achieve such a result, as a contractual power of this nature would, as noted, be construed contra proferentem, with any ambiguity or doubt as to scope of the power should be construed against the employer and in favor of the employee, especially when it is considered that contracts of such nature are imbued with an implied term that the employer would not act in a manner that would violate or undermine mutual trust and confidence.

31. In the instant case, no consultation is apparent in respect of the formulation of the 2010 Policy or has even been pleaded and the m890-aterial on record also suggests that employees were not notified of its issuance, hence the Plaintiff's continuation in employment thereafter, even if unqualified, cannot be deemed to be acceptance of the revised terms and cannot operate so as to divest them of rights that had substantially accrued in their favour by virtue of their long-standing service.

32. The term of mutual trust and confidence is also implied into employment contracts and imposes constraints on the manner in which a unilateral variation can be employed, and the wording of clause 1.2 of the 2002 Rules does not serve to expressly confer the right to vary the terms of the contract 'without any restriction, express or implied'. As such, on ordinary contractual principles, it would appear that such a clause would not confer unbridled power on the Defendant No.2. As such, the term and variation made in purported exercise thereof would be unenforceable if the employer had acted so unreasonably or arbitrarily as to end up in breach of the implied term of mutual trust and confidence. For instance, by introducing a change to the retirement benefits of employees on the cusp of retirement without any prior consultation, notice or warning, as appears to have been done in the instant case. Furthermore, it also merits consideration that the 2010 Policy even otherwise does not have any apparent bearing on the subject of the entitlement to free electricity for a period of 5 years from the date of retirement, which was a matter apparently dealt with independently in terms of the 2003 Memo, and the written statement of the Defendant No.2 is itself silent as to any action taken to cancel or withdraw the 2003 Memo or even to ascribe a reason for the denial of such benefit to the Plaintiffs.

33. Under such circumstances, Issue Number 2 as to whether the benefit of post-retirement medical cover provided for under the 2002 Rules and the commitment to free electricity in in terms of the 2003 Rules can be unilaterally withdrawn by the Defendant No.2 through issuance of the 2010 Rules is answered in the negative, and such entitlements are determined as subsisting in favour of the Plaintiffs.

34. In view of the aforementioned findings, the Suit is hereby decreed in favour of the Plaintiffs as against the Defendant No.2 to the extent and in terms of Prayers A, B, C and E.

JUDGE

Karachi
Dated _____