



**REPUBLIC OF KENYA**

**High Court at Mombasa**

**Cause 156 of 2012**

**(Originally Nairobi Cause No. 2034 of 2011)**

**KENYA CHEMICAL & ALLIED WORKERS UNION.....CLAIMANT**

**v**

**BAMBURI CEMENT LTD.....RESPONDENT**

**JUDGMENT**

1. Kenya Chemical & Allied Workers Union (the Union) filed a Memorandum of Claim on 16 December 2011 against Bamburi Cement Ltd (the Respondent) and the issues in dispute were stated as

1. *End of year Christmas bonus/13<sup>th</sup> month salary*
2. *School fees/education and contribution to company employees*
3. *On call allowance*

2. The Respondent filed its Defence on 6 February 2012.

3. On 27 February 2013 the Cause came up for hearing and Mr. Oyatsi suggested that the parties could file and then highlight their respective written submissions. Mr. Ogutu for the Union indicated he would rely on his pleadings and submissions. Because the Respondent had only filed a defence I granted Mr. Oyatsi 14 days within which to file the Respondent's submissions and any documents the Respondent would seek to be rely on.

4. On 12 March 2013 the Union filed what it referred to as Claimant Summary while the Respondents Submissions in Reply were filed on 18 March 2013. The submissions were highlighted on 22 March 2013.

5. On 22 March 2013 during the highlighting of submissions, Mr. Ogutu informed me that the Union had withdrawn the claim of *on call allowance* and therefore there are only two issues for determination.

6. Rule 21 of the Industrial Court (Procedure) Rules 2010 empower the Court, with the agreement of the parties to make a determination of a case before it on the basis of pleadings, affidavits, documents filed and submissions. I do therefore proceed to determine the 2 issues in dispute on the basis of the pleadings, affidavits, documents and submissions filed and highlighted by the parties.

7. For the record I note that the issues in dispute were subject to conciliation under the Labour Relations

Act but the parties disagreed and a Certificate of Disagreement was signed on 27 October 2011.

***End of year Christmas bonus/13<sup>th</sup> month salary/bonus***

8. The first issue relate to the payment of a 13<sup>th</sup> month salary or Christmas bonus. It is generally referred to as the 13<sup>th</sup> cheque in employment practice parlance.

9. It was the case of the Union that the Respondent had on 2 July 2003 conceded that the Respondent would be paying a 13<sup>th</sup> month salary. The Union relied on the minutes of a meeting held on 1<sup>st</sup> and 2<sup>nd</sup> July 2003 for this submission. My reading of the minutes of the meetings held on 1 July 2003 and 2 July 2003 and signed on 12 August 2003 however do not indicate that the issue of the 13<sup>th</sup> month salary was in the agenda but was mentioned in passing at page 6 where it is stated

The management in their rejoinder said, people should not look at profit in isolation. The management said when cement sales have been declining and the economy was not doing well, the Management has continued to give salary increases at an average of 8% - 10% p.a. culminating with a bonus at the end of 2002. It has been a practice of the employer to give Bamburi employees 13 salaries every year i.e. every December employees get 2 salaries. Whatever the profit, the workers have been taken care of. It is now hoped that, the economy will improve.

10. The Union submitted that based on the minutes the Respondent had been paying a 13 month salary but stopped in 2009. Select pay slips were exhibited to the Memorandum of Claim to support this contention at *Appendix 7*. The pay slips show that between 2002 and 2009 the Respondent used to pay a 13<sup>th</sup> month salary.

11. It was the further case of the Union that the Respondent was in breach of an Agreement on Corporate Social Responsibility and International Industrial Relations between LaFarge, IFBWW, ICEM & WFBW on promotion and protection of workers' rights and that this amounted to discrimination. It was stated Lafarge is the majority shareholder in the Respondent. The agreement was annexed to the Memorandum of Claim as *Appendix 12*.

12. It was also pleaded and submitted that the Respondent's management staff still enjoyed the 13<sup>th</sup> month salary though it had been collapsed and a portion of it included into each month's salary. It was also submitted that the Respondent had been performing financially well throughout and therefore there was no reason to decline to pay the 13<sup>th</sup> month salary.

13. The Union annexed to its Memorandum of Claim as *Appendix 13*, a bulletin published by the Respondent and I will refer to it briefly in my evaluation.

14. The Respondent's response on this 13<sup>th</sup> month salary issue was that the Respondent introduced a *performance based bonus* payment scheme in 2003 to motivate staff who had excelled in their performance and that the Union's members rejected a *performance bonus* and further that the 13<sup>th</sup> month salary was introduced to address chronic problem of financial burden placed upon management staff after Christmas festivities.

15. But the crucial part of the response of the Respondent was in two respects, one, that the 13<sup>th</sup> month salary was not part of the voluntarily negotiated Collective Bargaining Agreement entered into by the parties. It was not based on any contract in existence between the parties as prescribed under the Labour Relations Act and two, that the claim did not have any statutory basis. It was further urged that any practice to pay a 13<sup>th</sup> month salary or bonus was *purely discretionary* to improve productivity and dependent on the financial performance of the Respondent.

16. It was also submitted that the Respondent has its own life independent of its shareholders and therefore any policy by Lafarge which was just one of the shareholders could not hold.

17. The Respondent also placed reliance on a decision of the Industrial Court, *Nairobi Cause No. 827 of 2012, Kenya Plantation & Agricultural Workers Union v Lafarge Eco Systems*. I wish to note at this juncture that save for this authority there was little or no mention or discussion of authorities.

18. Regarding the discrimination argument, the Respondent submitted that the law provides for two categories of workers, unionisable and non-unionisable and that the entitlements of unionisable employees are negotiated and captured in a Collective Bargaining Agreement and that as between the unionisable employees, they were not treated differently.

### ***Evaluation of the 13<sup>th</sup> month salary/bonus***

19. Broadly the issue for determination is whether there is a legally enforceable right to a 13<sup>th</sup> month salary and narrowly whether there can be an implied term in an employment contract to pay a 13<sup>th</sup> month salary where there is no express written provision. An implied term properly so called is a term that is introduced into the employment contract as a matter of course through operation of law, either the common law, industry usage or custom, or statute subject to the parties autonomy to vary it by agreement.

20. Ordinarily and I don't need to cite any authority for this, within human resource management and employment relationship, bonuses are paid by employers to recognise and reward employee contributions, improve morale and increase productivity taking into consideration market conditions, economic performance, salary disparities and comprehension.

21. These bonuses can be categorized first, as *Christmas bonus or 13<sup>th</sup> month salary/cheque* and is normally gratuitous payment in recognition of a job well done or for going the extra mile, second, a *performance bonus* normally paid for good performance and usually calculated as a percentage of an employee's basic salary or lastly, a *production bonus* based not on performance but rather on production as measured against targets. The bonus in contention here falls under the first category.

22. The Union's claim for a 13<sup>th</sup> month salary/bonus is not anchored in any law. Mr. Oyatsi was therefore correct to submit that it has no statutory basis. A statutory right is imposed by statute in order to give effect to social policies underpinning the legislation such as right to safe working environment or to compensate for injuries at the work place. In deed my attention was not drawn to any statute which would create a right or entitlement to claim a 13<sup>th</sup> month salary/bonus and I therefore do hold that the union has not established any statutory right to a 13<sup>th</sup> month salary/bonus.

23. Mr. Oyatsi also submitted that the Union could not found a cause of action based on contract because any terms and conditions of employment as between a union and an employer are codified in a Collective Bargaining Agreement. These contractual rights depend upon the actual or imputed consent of the parties. The Union did not refer to any specific Collective Bargaining Agreement or part thereof that it could rely on to found a claim.

24. My discussion hereafter, therefore will consider whether the Union has made out a case for the incorporation of an implied term to pay the 13<sup>th</sup> month salary. The Unions submissions were anchored primarily on practice and policy considerations.

25. The argument of the Union was that the 13<sup>th</sup> month salary bonus was part of what it had proposed as part of the Collective Bargaining Agreement and that the Respondent had agreed to the proposal during negotiations but later on refused to sign a written agreement in that respect.

26. If the parties had reached agreement and incorporated this particular issue as part of the Collective Bargaining Agreement, nothing would stop this Court or any other Court from requiring a recalcitrant party from implementing or enforcing such a clause of an agreement. In the instant case, it was not an express term of the Collective Bargaining Agreement that a 13<sup>th</sup> month salary/bonus would be paid.

27. It was pleaded and submitted that the Respondent had developed a practice of paying a 13<sup>th</sup> month salary and that it is only around 2009 that the Respondent had refused to pay the 13<sup>th</sup> month salary/bonus. In fact, it was the case of the Union that it was the policy of Lafarge, the majority shareholder in the Respondent to pay the 13th month salary/bonus and to treat all its workers and its subsidiaries workers equally.

28. The Union also relied on the minutes of the meetings held on 1 July 2003 and 2 July 2003.

29. In *Devenald v Rosser & Sons* (1906) 2KB 728 the legal principle that a custom (practice) could play a role in supplying incidents to the contract of employment which had not been expressly agreed was acknowledged. In that case it was held that *a custom to be good, must be reasonable, certain and notorious*.

30. In a case which was decided shortly thereafter, *George v Davies* (1911) 2 KB 445, it was held that the notoriety had to be proved in evidence although where widespread judicial notice of it could be taken while in *Powell v Braun* (1954) 1 All ER 484, the Court of Appeal held that an agreement to award an employee a bonus did not become unenforceable because the amount was not set or could vary from time to time.

31. In *Dunlop Tyres Ltd v Blows* (2001) EWCA Civ 1032, the Court of Appeal in an appeal from the Employment Appeal Tribunal reasoned that

where there is a clearly established practice which continues before and after a contract is made, the evidence of what happened before becomes relevant in determining whether any change in the position has been made. If there is (as I believe there was here) real ambiguity as to the meaning of the contract, the absence of any change of practice would be a clear indication that the parties by their conduct which as part of the background circumstances against which the contract should be interpreted, intended no change in the contractual terms.

32. In *Henry v London General Transport Services Ltd* (2002) IRLR 472 one of the issues for consideration was the role of custom and practice in relation to incorporation of terms into individual employee applicants' contracts of employment. The Court of Appeal held *the burden of proof of a custom or practice was on a balance of probabilities and that clear evidence of the custom or practice is required*.

33. I have to admit that the cases I have made reference to are not binding upon me at all. I make reference to them only in respect of general principles which have been laid or acknowledged therein and also with the general realization that causes of action cannot be decided merely on general legal principles. There must be evidence.

34. In my considered view if an employer has consistently and persistently paid a 13<sup>th</sup> month cheque/bonus and such practice or custom is reasonable, certain and notorious, it becomes an implied term of the employment contract which can be legally enforced provided that sufficient and clear evidence is placed before the Court.

35. The question that I have to discuss therefore is whether the Respondent's practice/custom of paying the 13<sup>th</sup> month salary/bonus had become such a practice or custom that the Union or its members could expect it to be an implied term of contract between them.

36. Rule 4(e) of The Industrial Court (Procedure) Rules, 2010 envisages a situation where a party may rely upon a policy, industrial relations issue or management practice to prove a claim. I make reference to the rules fully alive to the fact that these are merely procedural rules which don't create any substantive rights upon any person or litigant. In a sense, therefore in my view, a policy, industrial relations issue or management practice by an employer may be used by an employee to assert a substantive right but not create a right.

37. The rules of procedure so to speak do not create any duty upon an employer nor confer upon an employee a relative right. But I have to ask myself whether the Union has made a case that the payment of the 13<sup>th</sup> month salary had become such a persistent practice or custom over the years that the employees had developed a strong legitimate expectation that the Respondent would continue to pay the same.

38. I have gone through the agreement on Corporate Social Responsibility and the closest it comes to covering the issue of 13<sup>th</sup> month salary is when it talks of workers being paid wages and benefits for a standard working week at least at the level set by national legislation or as agreed in a Collective Bargaining Agreement. There is no statutory provision for payment of a 13<sup>th</sup> month salary/bonus. The Union equally did not establish that there was an express provision in the Collective Bargaining Agreement.

39. The Zenith bulletin, also relied upon by the Union was Issue No. 1 of 2011 only addresses a performance bonus scheme. The Union's claim is for the year 2009/2010 and I did not understand it to be laying claim to a performance bonus scheme. Any claim by the Union for the performance bonus scheme referred to in the bulletin is not part of the claim before me.

40. The Union exhibited a letter dated 24 March 2010 and marked as *Appendix 10* to illustrate that the Respondent was paying a bonus to a certain category of employees of a 13<sup>th</sup> month salary. But this bonus was based on individual, departmental and company performance and it was not across the board bonus payment made to all employees.

41. In this case the Union has failed to discharge both the burden of proof and standard of proof. The Union did not produce evidence to show that the practice was consistent and persistent or that it was reasonable, certain and notorious. The documentation relied on was not adequate. The history and foundation of the payment of the 13<sup>th</sup> month cheque/salary needed to be laid.

42. The documents relied on required to be tested through cross examination. A background should have been laid to the contents of the minutes. What was referred to in the minutes were merely comments by the Respondent. In my view the Union has not made out a clear case. If the Union had made a clear case then in my mind it would have been unfair for the Respondent to unilaterally decide not to pay or stop the payment of the 13<sup>th</sup> month cheque/salary before giving the Union or the employees a chance to make representations.

43. Before leaving the bonus issue I need to note that I don't understand why an issue which started off as a proposal by the Union for inclusion in the Collective Bargaining Agreement was brought as a crystallized right rather than as an issue where the parties had failed to reach agreement.

### **School fees/education contribution by the Respondent**

44. The Union's case in this regard was that the Respondent had an education policy in which only management /non-unionisable employees or staff had an education allowance of up to 80% of full fees.

45. This according to the Union was discriminatory in that the profits realized by the Respondent was the effort of both management staff and unionisable employees and that in any case the management staff were better remunerated and therefore capable of meeting their childrens education expenses.

46. The Union relied on the Agreement on Corporate Social Responsibility signed between Lafarge and certain International Trade Unions, the Constitution and ILO Convention No. 87 and 98.

47. The Respondent's response to the question of education allowance mirrored what it submitted in response to the 13<sup>th</sup> month salary that the claim had no basis either in statute or contract.

### **Evaluation**

48. The critical issue for determination here is whether it is a prohibited discrimination for an employer to pay certain benefits/privileges to a category of employees and not others.

49. The issue before me is not a wage discrimination case of similarly situated employees or one based on gender. It is not about equal pay for equal work. It is not about the right to fair remuneration as provided for in Article 41(2)(a) of the Constitution. It is an issue concerning *benefits* and if I may say so *privileges*. These benefits or privileges serve to attract, retain and motivate qualified and competent staff

50. Benefits or privileges may either, be legally required such as housing allowance or social security or discretionary, such as private pension plans or employee welfare programmes.

51. The Constitution has put in place elaborate provisions on protection of human rights. One of the protections is the right to be treated equally. This right to equality connotes right to be treated without distinction based on the set criteria of *sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth*. These are protected grounds.

52. There are various statutes in Kenya which have set out the rights and entitlements of employers and employees. The primary one is the Employment Act, 2007 which expressly states that its purpose is to declare and define the fundamental rights of employees and provide basic conditions of employment.

53. Part IV and V of the Employment Act have set out in detail the rights of employees and the basic terms of service. My extensive reading of the two parts and the Act in general lead to only one conclusion, that, employer contribution towards education expenses of its employees and/or their dependents is not one of the fundamental rights or part of the terms of the statutory basic conditions of employment.

54. Because the issue was packaged as one of discrimination, it is necessary for me to consider the provisions of section 5 of the Employment Act which makes provision for discrimination in employment.

55. Section 5(2) of the Act requires employers to promote equal opportunity in employment and to work towards elimination of discrimination in employment policies and practices. Section 5(3)(a) on the other hand outlaws discrimination on certain listed grounds. I would refer to these as the statutorily protected grounds. It was not alleged or argued that the discrimination was in respect of the listed statutory protected grounds and therefore I would not say any more in regard to section 5(3)(a).

56. Section 5(3)(b) of the Act outlaws discrimination in respect of recruitment, training, promotion, *terms and conditions of employment* among others. To my mind, an education allowance is a benefit. It is a privilege. It is not a fundamental right or entitlement of an employee nor a term of basic condition of employment.

57. What I need to observe is that section 5(3)(b) of the Employment Act has not listed remuneration as one of the grounds in respect of which discrimination is outlawed but section 5(5) has placed an obligation to pay all employees equal remuneration for work of equal value. Remuneration is defined so broadly in section 2 of the Act as *the total value of all payment as in money or in kind, made or owing to an employee arising from the employment of that employee* that one can logically argue that an education allowance though a benefit or privilege is remuneration for the purposes of the Act.

58. I would therefore have stretched this issue of the education allowance save that section 5(4)(b) of the Act provides that it is not discrimination to *distinguish, exclude or prefer any person on the basis of inherent requirements of the job*.

59. The right to equality of treatment does not affect the general principle that an employer may require work to be performed in exchange for compensation and that such compensation may not be claimed by an employee who does not perform the requisite work. The courts have often recognized the distinction between employment-related benefits such as paternity leave and benefits related to the performance of

work such as payment of a bonus.

60. Although an employer is not legally required to provide certain benefits, such as group insurance or a pension plan, if a benefit is offered to employees by an employer, it must be done without discrimination. While granting different benefits to different groups of employees is not automatically discriminatory, there is a risk that such a practice will be considered discriminatory if the difference in treatment between groups of employees is based on a protected ground.

61. The inherent job requirements, qualifications, skills and competencies expected of the management staff to whom the education allowance is applicable are not the same as those expected of the Unions members.

62. In the present case the practice to pay an education allowance is not one of those which can be said to be discrimination on a protected ground and therefore the Union cannot found a cause of action on discrimination or a legally enforceable right.

63. In respect to the education allowance, the Union has not established that the discrimination was on one of the either constitutionally protected grounds or statutorily outlawed reasons set out in the Employment Act.

64. The Unions claim in this respect must therefore fail.

### **Conclusion and Orders**

65. In the final analysis I do hold that where an employer has persistently and consistently paid a 13<sup>th</sup> month salary, and it is proved that the practice or custom was reasonable, certain and notorious, there arises a legitimate expectation by the employees that such a practice or custom becomes an implied term of the employment contract which can be legally enforced and the employee asserting the term must lay a proper and clear evidential basis for the incorporation of the implied term into the contract. The Union did not discharge the burden of proof placed upon it.

### **Costs**

66. The Respondent had submitted that the Memorandum of Claim should be dismissed with costs.

67. Unlike the Civil Procedure Act which has provided that award of costs is discretionary and costs shall follow the event the Industrial Court Act provides that costs are discretionary and that the Court shall make a costs order which is *just*. The practice of Industrial Courts in other jurisdictions is that the default rule regarding costs is not to make a costs order unless in exceptional circumstances.

68. Bearing in mind the above and the fact that the Union and the Respondent have in place a recognition agreement, have signed several Collective Bargaining Agreements and are social partners who have a continuing/on-going relationship within the framework of industrial relations, I make no order as to costs.

69. The Memorandum of Claim is therefore dismissed but with no order as to costs.

***Dated, delivered and signed in open Court in Mombasa on this 29<sup>th</sup> day of April 2013.***

**Justice Radido Stephen**

**Judge**

**Appearances**

Mr. Were Dibo Ogutu

Instructed by Kenya Chemical & Allied Workers Union for Claimant Union

Mr. D. Oyatsi

Instructed by Shapley Barret & Co Advocates for Respondent