Bakery Confectionary Food Manufacturing & Allied Workers Union v Weetabix East Africa Limited (Cause E407 of 2023) [2024] KEELRC 1183 (KLR) (7 May 2024) (Judgment)

Neutral citation: [2024] KEELRC 1183 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE E407 OF 2023

BOM MANANI, J

MAY 7, 2024

BETWEEN

BAKERY CONFECTIONARY FOOD MANUFACTURING & ALLIED WORKERS UNION ..... CLAIMANT

AND

WEETABIX EAST AFRICA LIMITED ..... RESPONDENT

JUDGMENT

Background

1. The instant dispute centres around the interpretation of clause 9 of the Collective Bargaining Agreement (CBA) that was entered into by the parties on 22nd October 2021. This clause sets out the hours of work for unionisable employees engaged by the Respondent.

2. The clause provides as follows: -

    a. The standard working week shall consist of fourty five (45) working hours spread over five (5) working days in a week.

    b. Any employee who works in excess of fourty five (45) hours in a week shall be paid overtime for all the excess hours worked.

3. The Claimant understands the clause to mean that its members who are in the Respondent's employment are to work for a total of fourty five (45) hours in a five (5) days' week. This means that they should work for an average of nine (9) hours every working day to make fourty five (45) hours in five (5) working days. Thus, if a unionizable employee is required to work beyond nine (9) hours in any given work day, the time worked beyond the nine (9) hours constitutes overtime for which the employee should be remunerated in terms of clause eleven (11) of the CBA.

4. On the other hand, the Respondent understands the clause to require it to subject its unionizable employees to a total of fourty five (45) hours of work in a week. If the employees work for a period that is in excess of fourty five (45) hours in a week, then the excess time worked during the week is what constitutes overtime for which the said employees are to be remunerated in terms of clause eleven (11) of the CBA. However, it is noteworthy that the Respondent avoids the debate on what constitutes a week for purposes of the CBA.

5. Arising from the varied interpretations of the clause, the Respondent has required the Claimant's members to work on daily shifts comprising of twelve (12) hours. However, in order not to overshoot the fourty five (45) hour cap in any given week by a wide margin, the Respondent has reduced the number of work days for the affected employees from five (5) to four (4).

6. According to the Respondent, so long as the workers cap their work hours to fourty five (45) in whatever number of days in a week, they are not entitled to overtime. However, should they exceed this cap, then they can draw overtime pay for the extra hours earned in the week.

7. For the Claimant, overtime computation is to be worked on a daily rather than weekly basis. Thus, if an employee exceeds nine (9) work hours in a day, he should be paid overtime for the excess time that is worked during that specific day.

8. The dispute was referred to conciliation. As the record shows, the Conciliator arrived at the conclusion that clause nine (9) of the CBA does not specify how the fourty five (45) work hours should be spread in a week. As such and in the Conciliator's view, the Respondent was entitled to spread the work hours in the manner that it has done. The Conciliator relied on section 27 of the *Employment Act* to aver that the Respondent has the sole discretion to determine how to distribute the fourty five (45) work hours in a week.

Analysis

9. I have considered the contrasting arguments on the matter. In order to correctly interpret clause nine (9) of the CBA, one must read sub-clauses a) and b) of the clause together. Otherwise, reading one sub-clause in isolation of the other would yield absurd results.

10. Starting with clause 9 (a) of the CBA, it is clear that it fixes the normal work hours in a week for unionizable employees to fourty five (45). The sub-clause goes further to state that these hours are to be spread over five (5) working days in the week.

11. From the foregoing, it is apparent that the CBA between the parties contemplates a working week to constitute of five (5) working days. Thus, the Respondent is required to spread the fourty five (45) hours of work over five (5) working days and not less. Therefore, the Respondent's unilateral decision to reduce the number of working days in a week from five (5) to four (4) was a violation of the CBA.

12. It is true that section 27 of the *Employment Act* entitles the Respondent as the employer to fix the hours of work in a day. However, this must be done in strict compliance with the CBA between the parties which contemplates a five (5) days' work week. Thus, whichever way the Respondent distributes the fourty five (45) work hours, this must be spread across the five (5) working days and not less.

13. Article 41 of *the Constitution* of Kenya 2010 entitles an employee to the right to fair labour practice. This requires, inter alia, that the employee is subjected to terms of employment that are not only fair but predictable.

14. The employee is entitled to predict with a reasonable degree of certainty when he will be entitled to overtime pay. And hence the need to fix the normal hours of work for each day in consultation with

him. Thus, the Respondent cannot invoke the discretion that is donated to it under section 27 of the *Employment Act* to manipulate the work hours as it deems fit. The parties must agree beforehand on the hours that the employee will work on any given day in order for the employee to be certain when he is entitled to claim overtime pay.

15. It is in the above context that clause nine (9) of the CBA of 22nd October 2021 must be understood. To ensure predictability of the work hours for every day for a five (5) days' work week, the hours must be equitably spread across the five days. Should the Respondent desire to treat the work hours for any particular day differentially, it must provide justification for this decision.

16. Indeed, this position is supported by the fact that in most employment relations, employees are subjected to a standard amount of work hours in any given day. Informatively, clause number two (2) of ''the Hours of Work (Industry) Convention, 1919" echoes this narrative by recommending that a standard working day should comprise of eight (8) hours. Although Kenya is yet to ratify this Convention, it provides a good illustration of the general thinking that the number of hours worked in a day must be standardized as opposed to being left to the whims of the employer as suggested by the Respondent.

17. Significantly, the Convention underscores the fact that the accepted international best practice is that employees are subjected to working day that does not exceed eight (8) hours. This is informed by the fact that the employees ought to have sufficient time for rest after a day's work.

18. Having regard to the foregoing, I am convinced that the intention of clause 9 (b) of the impugned CBA was to equitably spread the fourty five (45) work hours for unionizable employees across the five (5) working days that are decreed by clause 9 (a) thereof. As such, it was inequitable for the Respondent to unilaterally redistribute this time over four (4) working days in utter disregard for the five (5) days' work week that is provided for in clause 9 (a) of the CBA.

19. The Respondent has no right to reduce the work days provided in clause 9 (a) of the CBA to less than five (5) in order to increase the work hours for unionizable employees to beyond nine (9) in any given work day. To do so is to manipulate the clause to the disadvantage of the affected employees.

20. Having regard to the foregoing, I agree with the Claimant that the Respondent's conduct in this respect is in breach of the express sanction of clause 9 (a) of the CBA between the parties. This provision's intention was to secure time for the Respondent's employees to get sufficient rest after a day's work. As such, if the Respondent requires the services of these employees beyond the normal nine (9) hours in a day during the five (5) days' work week, it must be ready to pay such employees overtime pay for the excess amount of time that the employees are engaged during the day. The Respondent cannot circumvent this provision by reducing the affected employees' work days to less than five (5) in a week and increasing their daily work hours to more than nine (9) in order to avoid the obligation to pay the correct amount of overtime dues.

21. I do not agree with the Conciliator's finding that clause 9 of the CBA does not specify how the number of work hours are to be distributed across the work week. Clause 9 (a) of the CBA specifies the number of work days in a week to be five (5). Thus, the fourty five (45) hours decreed in clause 9 (b) are supposed to be equitably spread out over these five days. Absent justification for uneven distribution of the work hours over the five (5) days, the standard practice is to evenly spread out the hours over the period in question in order to secure the right of employees to get sufficient rest at the close of each work day.

22. I note that as a result of the attempts by the Respondent to manipulate the impugned clause, it has directed its unionizable employees to work on a twelve (12) hour work shift. At the same time, it has reduced these employees' work week from five (5) to four (4) days. As a consequence, whilst the

employees put in long hours of work in a day for the four days, the total number of overtime hours worked is minimized by declaring an extra rest day. In this way, the Respondent is able to rely on clause 9 (b) of the CBA in total disregard of clause 9 (a) thereof to compute overtime based on the weekly as opposed to the daily hours worked to the disadvantage of unionizable employees.

23. In my view, this amounts to an unfair labour practice. Through it, the Respondent seeks to extract the most from the affected employees' efforts in return for the least pay.

24. That said, although the Claimant's counsel has suggested in his submissions that the unionizable employees were not remunerated during the extra rest day, no evidence was tendered to support this contention. Further, this issue is not pleaded in the Statement of Claimant. As such, I have no materials before me on the basis of which I can conclude that the unionzable employees were not paid their daily wages to cover the extra rest day that they were granted.

25. Absent evidence that the unionazable employees did not draw a salary during their extra rest day, it is presumed that they received remuneration for this day in line with the accepted labour practices. As such, I reach the conclusion that they enjoyed this day with full pay. For this reason, I am hesitant to make any orders in respect of payment for overtime for the period that has gone by.

26. However and going forward, the Respondent ought to adjust its shift schedule to fit into ''a nine (9) hours a day work-five (5) days a week'' programme. Henceforth, any unionizable employee who will be required to work in excess of nine (9) hours in a given work day shall be deemed to have accrued overtime for which he will be entitled to overtime pay.

27. If the Respondent does not adjust its shift schedule in order to spread the work hours to five (5) days in a week, it shall be deemed to have waived the right to have its unionizable employees to work for five (5) days a week. However, this shall not affect the right of such employees to earn overtime pay for any work that is done in excess of nine (9) work hours in a day. In effect, the Respondent shall compute overtime pay on a daily rather than week basis.

28. As I conclude, it is important to mention that this decision is anchored on the subsisting CBA between the parties. As such, the parties are bound by it (the decision) during the life of the CBA in question. Once they negotiate a new CBA to replace the one dated 22nd October 2021, they shall be bound by the terms of the new CBA.

Determination

29. Having regard to the evidence on record, I arrive at the following conclusion and issue the attendant orders:-

    a. A declaration is hereby issued that the work shift arrangement and overall computation of overtime dues of unionisable employees employed by the Respondent violates clause 9 of the Collective Bargain Agreement between the parties.

    b. A declaration is hereby issued that by virtue of clause 9 of the Collective Bargain Agreement aforesaid, overtime earned by a unionizable employee is to be calculated based on overtime hours earned by the employee on a normal working day as opposed to a working week. For the avoidance of doubt and based on clause 9 of the Collective Bargaining Agreement, the normal work week for unionized employees constitutes five (5) working days with each day having a maximum of nine (9) normal working hours.

c. Because the Respondent granted the affected employees an extra rest day presumably with full pay, the court shall not issue any orders in respect of the claim for overtime pay for the period falling before the date of this decision.

d. However and going forward, the Respondent ought to adjust its shift schedule to fit into a five (5) days and nine (9) hours a day work programme.

e. Henceforth, any unionizable employee who will be required to work in excess of nine (9) hours in a given work day during the currency of the Collective Bargaining Agreement dated 22nd October 2021 will be deemed to have accrued overtime for the extra hours worked in the day for which he will be entitled to overtime pay.

f. If the Respondent does not adjust its shift schedule in order to distribute the fourty five (45) work hours across five (5) days in a week as directed, it shall be deemed to have waived the right to have its unionizable employees to work for five (5) days a week during the currency of the Collective Bargaining Agreement dated 22nd October 2021.

g. However, this shall not affect the right of such employees to earn overtime pay for work that is done outside of the nine (9) work hours in a day. In effect, the Respondent shall compute overtime pay on a daily rather than week basis.

h. Costs of the case are granted to the Claimant.

DATED, SIGNED AND DELIVERED ON THE 7TH DAY OF MAY, 2024

B. O. M. MANANI

JUDGE

In the presence of:

..... for the Claimant

..... for the Respondent

Order

In light of the directions issued on 12th July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

B. O. M MANANI