Bakery Confectionery Food Manufacturing & Allied Workers Union (K) v Bigcold Kenya Limited (Cause E180 of 2024) [2024] KEELRC 1809 (KLR) (8 July 2024) (Ruling)

Neutral citation: [2024] KEELRC 1809 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE E180 OF 2024

BOM MANANI, J

JULY 8, 2024

BETWEEN

BAKERY CONFECTIONERY FOOD MANUFACTURING & ALLIED WORKERS UNION (K) .... CLAIMANT

AND

BIGCOLD KENYA LIMITED .... RESPONDENT

RULING

Background

1. By an application dated 6th March 2024, the Claimant moved the court for orders of interim injunction to restrain the Respondent from declaring some of its (the Respondent's) employees who are members of the Claimant redundant. The foundation for the application was *inter alia*, that:-

    a. The Respondent had failed to notify the Claimant of the proposed redundancy.

    b. The Respondent had failed to notify the local labour officer of the proposed redundancy.

    c. The Respondent had failed to notify the Claimant about and invite it for consultations over the proposed redundancy.

2. Based on these averments, the court issued an ex-parte order of injunction on 8th March 2024 restraining the Respondent from finalizing the proposed redundancy. Further, the court directed the application to be served on the Respondent and the matter to be mentioned on 18th March 2024 for directions on the mode of disposal of the application.

3. On 18th March 2024, the Respondent filed an affidavit in response to the aforesaid application. The affidavit contested the truthfulness of the averments made by the Claimant in its affidavit in support of the application.

4. In effect, the Respondent contended that contrary to the position expressed by the Claimant on the various issues highlighted above, it had:-

    a. Served the Claimant with the redundancy notice on 9th February 2024.

    b. Served the local labour officer with a similar notice on 9th February 2024.

    c. Expressed willingness to engage the Claimant's members on the proposed redundancy and had invited them for consultations on the matter in the company of their union representatives, if they so desired.

5. Subsequently, the Respondent filed an application dated 27th May 2024 in which it sought for, inter alia, orders that:-

    a. The application be certified urgent.

    b. The orders of interim injunction which were issued by the court on 8th March 2024 be lifted.

6. The foundation for the latter application was that the Claimant had obtained the impugned orders through concealment of material facts. The Respondent contended that the Claimant had concealed the fact that:-

    a. It (the Claimant) had been issued with a redundancy notice on 9th February 2024.

    b. The local labour office had been served with a similar notice on 9th February 2024.

    c. The Respondent had extended an invitation to the Claimant's members for consultations over the proposed redundancy and that the said members had been informed that they were free to attend the meetings in the company of their trade union officials.

7. In response to the Respondent's application, the Claimant's General Secretary swore an affidavit dated 4th June 2024. Earlier on, the Claimant had filed two other affidavits both dated 21st May 2024 in support of its case.

8. In the replying affidavit, the Claimant conceded that the Respondent had indeed served it with the redundancy notice. However, it now contended that the notice was inadvertently not placed on the file where it stores records between them. As such, it (the notice) was unknowingly not brought to its (the Claimant's) lawyers' attention at the time of issuing instructions to them in the matter.

9. The Claimant contended that notwithstanding the foregoing, the Respondent had committed other procedural errors in processing the impugned redundancy which justified issuance of the contested ex-parte interim injunction. As such, the orders are properly on record.

10. Further, the Claimant stated that it was a stranger to the purported consultations with the Respondent over the proposed redundancy. It contended that it was not invited to the alleged consultative meetings.

11. Quite apart from the dispute on the impugned redundancy, the Claimant has questioned an earlier process by which the Respondent converted contracts of service for some employees from indefinite to short term. The Claimant argues that its members were not consulted prior to the decision to convert their contracts. Further, it contends that the said employees were not given the option of either exiting employment on account of redundancy or taking up the new short term contracts.

12. According to the Claimant, the Respondent ought to have invoked the redundancy procedure to close the existing indefinite term contracts before it could issue the affected employees with the short term contracts. The Claimant contends that since this was not done, the indefinite term contracts for the

affected employees were not terminated and remain in force. As such, it seeks an order to restrain the Respondent from terminating the said indefinite term contracts.

13. On its part, the Respondent contends that the process of conversion of the contested contracts from indefinite to short term was consultative. It avers that the affected employees consented to the arrangement. As such, the transition happened procedurally and lawfully.

14. The Respondent further contends that conversion of the contested contracts was undertaken before the affected employees became members of the Claimant. Therefore, there was no basis for it (the Respondent) to consult the Claimant on the process.

15. The court directed the two applications to be heard together. Further, it directed the applications to be heard by way of written submissions.

Analysis

16. An injunction is an equitable remedy. It is normally issued at the court's discretion.

17. A party who seeks an ex-parte order of interim injunction has the singular duty of making full disclosure of all material facts that are relevant to the request. If he fails to do so, any ex-parte injunctive order which he obtains stands impugned and is susceptible to be set aside (*Unicom Limited v Diamond Trust Bank & another* [2020] eKLR).

18. The basis for the Claimant's application is that it was not served with the notice of the proposed redundancy. Yet, there is evidence that it was indeed served with the notice on 9th February 2024. As a matter of fact, the Claimant's General Secretary eventually conceded this fact through his affidavit dated 4th June 2024.

19. The Claimant has now sought to justify the failure to disclose this fact initially on the grounds that the redundancy notice had inadvertently not been placed on its file. As such, it was not shared with its lawyers at the time of issuing instructions to them.

20. It is apparent from the record that at the time that the Claimant instructed its lawyers in the cause, it was aware of the redundancy notice since it had been served with it. Therefore, even if the notice was not, for whatever reason, on its (the Claimant's) file, it was incumbent on it (the Claimant) to notify the lawyers that it had received the notice but the same had apparently been mislaid.

21. Instead of doing so, the Claimant sought to paint the picture of having not been served with the notice. This was inappropriate.

22. The Claimant also made a positive assertion that the local labour office was not served with the redundancy notice. Yet, there is evidence that the notice was indeed delivered to the said office on 9th February 2024.

23. When it was confronted with evidence of service of the notice on the labour office, the Claimant contended that it was unaware of this fact since the notice to the labour officer was not copied to it. It argued that the labour office ought to have been copied in the notice that was served on it (the Claimant). It contended that since the Respondent had issued a standalone notice to the labour office, it was not possible for it (the Claimant) to have known that the labour office had been served.

24. The law does not suggest that the redundancy notice that is served on an employee or trade union should be the one to be copied to the local labour office. The employer is at liberty to either copy such notice to the labour office or issue it (the labour office) with a separate standalone notice.

25. In the court's view, before the Claimant ventured to assert that the Respondent had not issued the labour office with the redundancy notice, it ought to have verified this fact through inquiries from the labour office. It was inappropriate for it (the Claimant) to assert that the said office had not been served with the notice without first verifying this fact from the relevant labour officer.

26. In the court's view, the Claimant's actions were a deliberate scheme by it to manipulate the court into issuing the impugned injunction. This behaviour must be deprecated.

27. The Claimant also asserted that it was not invited for consultations over the impugned process. Yet, there is evidence that the Respondent invited the affected employees to consultative meetings where they were permitted to attend in the company of their trade union officials. As such, it was open to them (the employees) to seek the assistance of the Claimant during the meetings.

28. Having regard to the foregoing, I am convinced that the Claimant obtained the impugned orders through concealment of material facts. As such, I have little option but to lift the orders.

29. Regarding the application for injunction, the court has considered the preliminary material before it and arrived at the conclusion that it is not merited. Although the Claimant contends that the Respondent did not serve it with notice of the impugned redundancy, the preliminary evidence on record speaks to the contrary.

30. Further, although the Claimant argues that it was not invited to the consultative meetings on the impugned redundancy, the preliminary evidence on record suggests that its members were issued with letters inviting them to these meetings and the letters informed them of their right to involve their trade union officials in the consultations.

31. Thus and in the court's view, there is no prima facie evidence to suggest that the Respondent deliberately sought to exclude the Claimant from the consultative process. As such, I am not satisfied that the Claimant has established a prima facie case that warrants issuance of the orders sought.

32. Should the Claimant succeed in demonstrating that there are flaws in the impugned process, the affected employees are at liberty to either: seek to be reinstated to their respective positions without loss of benefits; or seek compensation for unfair termination of their respective contracts of service. Put differently, the Claimant has not demonstrated that failure to issue the orders sought will occasion its members irreparable harm. As such, I am inclined not to issue the injunctive orders sought at this preliminary stage.

33. As regards the contested conversion of some of the contracts from indefinite to short term, the preliminary evidence on record suggests that the impugned process took place in June 2023. As such, it cannot be stopped at this stage since the disputed events have already occurred. However, it (the process) may be reversed if there is evidence tendered during trial to demonstrate that it was unlawful. As such, this matter must await full trial of the case.

34. As I pen off, I must point out that I have agonized over the Claimant's decision to pursue the two causes of action (one on the legitimacy of conversion of contracts from indefinite to short term and the other on the legitimacy of the impugned redundancy) through one suit. The grievances are obviously distinct and ought to have been the subject of two separate suits. I venture to suggest that the Claimant should consider separating the two causes of action for ease of the trial process.

Determination

35. The upshot is that the application for orders of interim injunction to restrain the Respondent from proceeding with the impugned redundancy process is unmerited and is therefore declined.

36. Conversely, the application to set aside the ex-parte orders of injunction which were issued on 8th March 2024 is allowed.

37. Costs of both applications shall abide the outcome of the case.

DATED, SIGNED AND DELIVERED ON THE 8TH DAY OF JULY, 2024

B. O. M. MANANI

JUDGE

In the presence of:-

.... for the Applicant

.... 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

JUDGE