REPUBLIC OF KENYA.

IN THE INDUSTRIAL COURT OF KENYA

AT NAIROBI.

(Coram: Charles P. Chemmuttut, J.,

J.M. Kilonzo, & O.A. Wafula Members.)

CAUSE NO. 153 OF 2005.

TAILORS & TEXTILES WORKERS' UNION ..../..Claimants.

v.

KENYA SHIRTS MANUFACTURERS LTD...Respondents.

Issue in Dispute:-

"Refusal by the employer to confirm fifteen casual employees into permanent basis (employment)".

Charles N. Maina, Director of Industrial Relations, for the Claimants (hereinafter called the Union).

A.O. Ambenge, Senior Executive Officer, for the Respondents (hereinafter called the Company).

A W A R D.

The Notification of Dispute, Form 'A', dated 17th October, 2005, together with the statutory certificate from the Labour Commissioner under Section 14(7) and (9)(e) and (f) of the Trade Disputes Act, Cap. 234, Laws of Kenya (which is hereinafter referred to as the Act), were received by the Court on 15th December, 2005. The dispute was then listed for mention on 17th January, 2006, when the parties were directed to submit or file their respective memoranda or statements on or before 31st January and 14th February, 2006, and the case was fixed for hearing on 23rd February, 2006. The Union belatedly submitted their memorandum on 3rd February, 2006, and the Company also belatedly filed their reply statement on 10th May, 2006. The case was heard on 18th May, 2006.

The parties have a valid recognition agreement and have also entered into some collective agreements which govern or regulate the terms and conditions of employment of the unionisable employees (see App. I).

The case of the Union is that, contrary to Clause 10 of the parties' collective agreement, the Company engaged some employees on casual basis for a long time, especially the following:-

1. Tom Okumu.
2. Purity Karimi.
3. Emily Mburi.
4. Catherine Mwanyasi.
5. Juma Hamisi.
6. Wilson Mutetenga.
7. Jackline Momanyi.
8. Salome Kalisa.

The parties met at their own level to resolve the matter but no agreement was reached. (see Apps. 2,3,4 & 5). On 7th September, 2004, the Union reported a formal trade dispute to the Minister for Labour in accordance with Section 4 of the Act. The Minister accepted the dispute; and, under Section 7 of the Act, he appointed Mr. C.N. Mwinami of Mombasa Labour Office to act as the Investigator.

On 25th August, 2005, the Minister released his report to the parties wherein he found and recommended as follows:-

"<u>FINDINGS</u>.

…………… that the parties have a recognition agreement and a valid C.B.A. that regulates their relationship.
That among the initial fifteen (15) grievants only eight (8) are still in employment working in various sections.
… that the grievants had served the company for a period ranging from 2-8 years continuously with clean record. In essence they cannot be termed as casuals as Part I Sec. 2 of the Employment Act defines a casual 'an individual the terms of whose engagement provide for payment at the end of each day and who is not engaged for a longer period than 24 hours at a time'.

The nature of duties performed by the grievants cannot be termed as casual as there was continuity in service. The management assertion that the grievants are causal is therefore untenable as the law is clear on what constitutes casual employment.

<u>RECOMMENDATION.</u>
…………… I recommend that the grievants be confirmed into permenent status from the fourth (4th) month after the date they were engaged in employment".
The Minister finally appealed to the parties to accept the recommendation as a basis of settlement of this dispute. The Union accepted the recommendation, but the Company rejected it. Hence this dispute for consideration and determination (see Apps. 6,7,8 & 9).

Mr. Maina submitted that the employees have served the Company as casuals for a long time, but the Company has deliberately and blatantly contravened and flouted Clause 10 of the parties' collective agreement for the period 1st August, 2002 to 31st July, 2004, which stipulated "that the employer shall employ on permanent terms any casual worker employed continuously for a period of more than three months". He pointed out further that the Company disregarded the provisions of Section 2 of the Employment Act, Cap. 226, Laws of Kenya, on casual employment, and also failed to honour the observation in **Cause No. 4 of 1975**, wherein the Court stated "that if a worker has been offered work regularly as a casual for a period of three months, he should immediately be converted to monthly terms".

Accordingly, Mr. Maina urged the Court to reject the submission by the Company and that the Court may order the Company to retrospectively confirm the grievants into permanent terms of employment with effect from the date when each one of them commenced the fourth month of his/her service with the Company. He prayed further that the Court may also include any of the casuals who might have left the Company after serving the same for four months and over because it was their contractual right to have been treated and paid as permanent employees, and not as casuals, after three months of continuous service.

In his background submission, Mr. Ambenge stated that the Company came into operation in 1953, and has since had a valid recognition agreement and, together with M/S Millbrook and M/S Mohanlal Garments, entered into group collective bargaining agreements with the Union. He pointed out that the Company is run by four old directors, two of whom have since retired and the other two, aged 65 and 68 years respectively, are still working.

Mr. Ambenge submitted that at the time of reporting the dispute, the Company had a workforce of 14 permanent employees and 15 casual workers; and currently it has a workforce of only 14 permanent employees and no casual workers because the workers who are the subject of this dispute have since left employment. In the circumstances, the demand by the Union for confirmation of the casual workers to permanent employment is, therefore, redundant. He stated that at the time when the Company entered into an agreement with the Union on 4th March 2003, to confirm some 15 seasonal casual workers to permanent terms of employment, with effect from 1st September, 2004, it (Company) started experiencing serious economic

hardships due to importation of, and competition from, “Mitumba” business, a fact which is well known by the Union. These goods (Mitumba) are smuggled into the country without payment of either duty or VAT, and this makes them cheap compared to manufactured products-some are even cheaper than the payable duty.

Mr. Ambenge vehemently denied that the said casual workers have worked for the Company for a long time as alleged by the Union. He averred that the nature of the Company’s business only requires engagement of casual workers on seasonal basis when there is extra work, otherwise the Company cannot employ extra hands when there is neither business nor orders. He asserted that the Company is insolvent and on the verge of imminent collapse due to heavy losses and other financial problems; and the two remaining directors have indicated their wish to retire and close down the Company by December, 2006 as they do not intend to engage in manufacturing business any longer. Thus, with effect from June 2006, the Company will lay off 2 employees per month as no funds are available to pay off the total workforce at once, and by December 2006, the entire workforce will be laid off.

Finally, Mr. Ambenge prayed that the demand by the Union be rejected or dismissed as unsustainable on the short or simply ground that the casual workers, who are the subject of this dispute are no longer in employment.

The question of confirmation and the period of probation of employees are matters of internal management and no hard and fast rules can be laid down. There is no rule or practice of general application with regard to confirmations and the employer reserves to himself the right or discretion to determine how, when, in what manner and with what effect and from what date confirmations will be made. There is also no unreasonableness in this, for it is only the employer who can say when an employee is to be considered to have become fit for confirmation and permanent retention according to his requirements, and until then the employee can have no lien to or right of retention in the service. Nor has the employee any right to be confirmed from the date of his original engagement, no matter when he qualifies for confirmation. However, in the normal course and all other conditions being fulfilled, or if there is nothing against the employee or employees concerned, the general rule is that confirmation can and does in most cases relate back to the date of original induction into service.

In this case, the Union listed the names of 8 employees, but did not consider it proper to give the names of 7 other employees, making a total of 15 casual workers, who are alleged to have been kept by the Company on casual work for a long time, contrary to the law and for whom it demands retrospective confirmation. But the Company maintained that the said casual workers are no longer in employment, and it is insolvent and on the verge of imminent collapse, or about to close down due to heavy financial losses. This has not been challenged by the Union; and in the circumstances, there is nothing left for the Court to adjudicate upon.

This being the case, the demand is rejected as baseless and redundant.

On being consulted, the members of the Court concur with this decision.

DATED and delivered at Nairobi this 13th day of July, 2006.

Charles P. Chemmuttut, MBS.,

JUDGE.

J.M. Kilonzo,	O.A. Wafula,
MEMBER.	**MEMBER.**