IN THE INDUSTRIAL COURT OF KENYA

AT NAIROBI.

(Coram: Charles P. Chemmuttut, J.,

A.K. Kerich & J.M. Kilonzo, Members.)

CAUSE NO.38 OF 2001.

KENYA UNION OF COMMERCIAL, FOOD & ALLIED WORKERS.....Claimants.

- v -

KENYA BREWERIES LTD.....Respondents.

Issue in Dispute:-

"Refusal to reinstate Mr. Solomon K. Too."

W.D. Wambua, Assistant Secretary General, for the Claimants (hereinafter called the Union).

No appearance for the Respondents (hereinafter called the Company).

A W A R D.

The undated Notification of Dispute, Form 'A', together with the statutory certificates from the Labour Commissioner and the Minister for Labour under Section 14, subsections (7) and (9)(e) and (f) of the Trade Disputes Act, Cap.234, Laws of Kenya, were received by the Court on 10th April 2001, and the dispute was listed for mention on 20th April 2001. On this occasion, Messrs. K.A. Luvega and L.W. Kariuki, who appeared for the parties respectively, were directed to submit or file their respective written memoranda or statements on or before 21st May and 21st June 2001, and the dispute was fixed for hearing on 17th July 2001. The parties did not submit their memoranda or statements as directed, but the dispute was, however, brought forward for another mention on 13th July 2001, when Mr. K.A. Luvega again appeared for the Union but there was no appearance for the Company. In spite of the absence of the Company's representative on the said date, the parties were ordered to submit or file their memoranda or statements on or before 15th August and 14th September 2001, and the dispute was rescheduled for hearing on 27th November 2001. The Union belatedly submitted its memorandum on 20th November 2001, and in the circumstances the Company was unable to file its reply statement as directed. The case was, therefore, listed for yet another mention on 18th December 2001, when, by mutual agreement of Messrs. S.D.O. Mutambi and R.M. Muthanga, who appeared for the parties respectively, the dispute was fixed for hearing on 17th April 2002, and the Company was ordered to file its reply statement on or before 18th January 2002. The Company intentionally or deliberately neglected or failed to file its statement as directed and no reasons have been given for its neglect or failure. The matter was, therefore, heard *ex-parte* on 17th April 2002.

According to the Union, the grievant was employed by the Company on 20th November 1992 as a "Process Minder" at a salary of Kshs.3,200/= per month, and a monthly house allowance of Kshs.560/=. In November 1995, he was retired on medical grounds pursuant to the recommendation of the Company doctor, a Dr. Gondi. At the time of his retirement as aforestated, the

grievant was earning a monthly salary of Kshs.8,755.40 and a house allowance of Kshs.1,874/= per month.

The grievant appealed against the order of the doctor to retire him on medical grounds in view of the fact that he had no history of eye problem. He was re-examined and it was recommended that his sight had improved and that he could be considered for re-instatement. The Company declined or refused to re-instate him; and in the circumstances, the grievant appealed further for a medical board to examine him. The Medical Board, comprising of Drs. K.P. Letting, Acting Medical Officer of Health, M.S. Aluora, Surgeon, and D.K. Rotich, Medical Officer, was convened at Kapsabet District Hospital on 9th October 1998; and after examining the grievant, they assessed his permanent partial disability at 30%. The Medical Board also found, *inter alia*, as follows:-

"- Age - 37 years.
- Blood pressure - normal.
- Mental state assessment - normal.
- Eye examination - V.R.2/60 near vision - normal.
- both correa clear to light.
- finish copy - pale disc".

Therefore, the Medical Board diagnosed thus:-

"Poor vision due to bilateral optic atrophy obvious recovery noted. This person is from a medical point of view has poor vision. He has signs of recovery after surgery. There was no point of retiring him on medical grounds. He stands a chance of reinstatement and subsequent re-deployment. Not a hereditary case. Problem due to nature of work at K.B.L. There is no history of eye disorder in the family".

On 2nd November 1998, the Director of Medical Services concurred with the opinion or conclusion of the Medical Board.

On the basis of the said report, the grievant again approached the Company for reinstatement but all in vain. The Union contended that the Company erred in ignoring the recommendation of the Medical Board; and, therefore, prayed that the grievant be reinstated to his job; or in the alternative, he be paid his terminal benefits and maximum compensation, i.e. 12 months' salary, for loss of employment.

According to the findings of the Medical Board, the grievant had suffered 30% permanent partial disability, but quite obviously this could not prevent him from working. The Company conveniently and deliberately ignored the recommendation of the Medical Board that the grievant may be reinstated to his job. It ought to have accepted the expert opinion of the qualified doctors and reinstate the grievant to his job without reservation. I entirely agree with the opinion reached by the Medical Board which examined the grievant, and in my considered view this case must succeed.

In the result, and considering the inordinate lapse of over 6 years since the grievant was unlawfully retired, I find that it would suffice the ends of justice if the Company is ordered to pay the grievant terminal benefits and compensation rather than reinstatement. Accordingly, I award and order that the grievant be paid all his terminal benefits pursuant to the terms and conditions of his engagement, or the parties' collective agreement in force at the material time. In addition he be paid full compensation, equivalent to 12 months' salary, for loss of employment.

In coming to this decision, I have consulted with and taken into consideration the advice of both Members of the Court.

Before I part with this case, I wish to caution or warn disputing parties in general that this Court will not entertain or act on applications for adjournment through correspondence, particularly when the matter has been fixed for hearing by mutual agreement or consent.

DATED and delivered at Nairobi this 22nd day of April, 2002.

Charles P. Chemmuttut,

JUDGE.