



IN THE INDUSTRIAL COURT OF KENYA

AT NAIROBI.

(Coram: Charles P. Chemmutut, J.

A.K. Kerich & J.C. Odaga, Members.)

CAUSE NO.122 OF 2000.

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

- v -

ASECO (K) LTD.....Respondents.

Issue in Dispute:-

“Redundancy of Janet Nyaoro (hereinafter called the grievant) on account of Union activities”.

H. Olilo Nyumba, Deputy Secretary General, for the Claimants (hereinafter called the Union).

Leonard Maingi, Advocate, of Kiplagat & Associates, for the Respondents (hereinafter called the Company).

A W A R D.

The Minister for Labour referred this dispute to the Court for consideration and determination on 31st October 2000, in accordance with the powers vested in him by Section 8 of the Trade Disputes Act, Cap.234, Laws of Kenya (which is hereinafter referred to as the Act). The reference, together with the statutory certificates from the Labour Commissioner and the Minister himself under Section 14, subsection (9) (e) and (f) of the Act, were received by the Court on 10th November 2000 and the dispute was listed for mention on 1st December 2000. On this occasion, Messrs. Agapio Muriuki and Leonard Maingi, Advocate, who appeared for the parties respectively, were directed to submit or file their respective written memoranda or statements on or before 5th January and 5th February 2001, and the dispute was fixed for hearing on 25th April 2001. The Union submitted its memorandum on 8th January 2001 to which the Company filed its reply statement on 5th February 2001, and the dispute was heard as aforesaid, i.e. on 25th April 2001.

In his opening submission, Mr. Nyumba submitted that the grievant was employed by Mitchell Cotts Shipping Ltd. in October 1978 as a temporary worker, whose duties included clerical and typing work and was placed in Grade IV. The grievant was engaged on permanent terms of employment in 1979, and in October 1983 she was transferred to the Freight Division as a typist and was placed in Grade III. Mr. Nyumba stated that the grievant, who had already become a shopsteward, was actually transferred to the Freight Division in order to frustrate her for her trade union activities. He averred further that on 16th October 1985, Mrs. M.W. Ngatia and Miss L. Mbai were promoted to higher typing grades, and the latter was deployed to the Freight Division so as to take over the duties which were previously handled by the grievant. Two days later, i.e. on 18th October 1985, the management noted that the grievant's appointment made the Freight Division over-stretch and hoped that she would be “eased out” of her position with the Company as and when circumstances allowed (see Apps. HON.I and 2). It is alleged that in December 1985, the grievant was served with a letter of transfer to Malaba, but the Union challenged the transfer order on the ground that it was meant to frustrate and undermine both the Union itself and its shopsteward (grievant); and for the

next five months after the unsuccessful transfer, the grievant was neither assigned or allocated any duties nor allowed to carry out her trade union activities, but she, however, received or earned her monthly salary. Thus, since the transfer order was illegal and the grievant had remained idle for a long time without solution, the Union issued a strike notice to the Company, and consequent upon the threat of strike the latter deemed it fit or necessary to allocate or assign duties to the grievant. In mid-1986, the grievant was transferred from the Freight Division to the Claims Department and assigned or allocated the duties of typing daily shipping bulletins and tracers, sorting and dispatching invoices and filing port documents.

In 1996, Mitchell Cotts Shipping Ltd. transferred its shipping franchise to the Company, which held 51% shareholding while the former retained 49% thereof. The grievant was transferred as well without loss of benefits, and attached to the Commercial Department of the Company (see Apps. HON. 3 and 4). Consequently, the Company became a member of the Distributive and Allied Trades Association (DATA), with which the Union had signed a valid recognition agreement and had also entered into several collective agreements. However, the Company wrongly implemented the wages clause in respect of the parties' collective agreement which was signed in 1996; and when the grievant queried about the wrongful implementation of the same in her capacity as a shopsteward, the Company did not take it kindly. Nonetheless, she was asked to prepare a list showing the outstanding arrears of all the unionisable employees for the Company and Mitchell Cotts Shipping Ltd., and as a result the Company chose to persuade the employees individually not to pursue the demand of their arrears. But the grievant insisted that any discussion over the issue of wage arrears should be held with the Union. The Chief Accountant of the Company pleaded with the grievant to convince the employees to agree that their wage arrears had been paid. The grievant was adamant, and gave her own example where, on joining the Company, her salary stood at Kshs.14,647.50, whereas if the Company had properly implemented the 15.5% wage increase each year, her salary would have risen by Kshs.2,270.40 to Kshs.16,917.90, or she would have received total arrears of Kshs.15,892.50. But she received Kshs.526.60 only, or a total arrears of Kshs.3,686/= (see App.HON.5).

Incidentally, on 25th October 1996, the Managing Director of Mitchell Cotts Shipping Ltd. had advised the Union that two companies, namely, UNICORN and CMBT, which had expressed their intention of a business merger with the Company, withdrew and the latter continued its business as usual (see App. HON.7). On 1st July 1997, the Company advised the grievant that her services were no longer required on account of reorganization; and in consideration of her valuable contribution during her employment period with the previous company, i.e., Mitchell Cotts (K.) Ltd., she was offered terminal benefits, amounting to net pay of Kshs.176,007/= (see App. HON. 12). But it would appear that the grievant and the Union rejected the same, and on 17th July 1997 the representatives of the parties met and agreed, inter alia, that the question of implementation of the collective agreement, together with payments that have already been made, will be discussed further on 6th August 1997 and that the redundancy of the grievant has been suspended pending the outcome of the discussion and the redundancy letter has been withdrawn (see App.HON.13).

On 3rd November 1997, the Union reported a trade dispute to the Minister for Labour on refusal by the Company to implement wage increase as provided for in DATA collective agreement. The Minister accepted the dispute and appointed Mr. G.R.O. Ambuche of Mombasa Labour Office to act as the Conciliator, but the report has not been released to the parties to-date (see App.HON.6). On 25th February 1998, the Company informed the Union that it wished to "declare four staff members redundant comprising of one unionisable staff and three management staff" on account of "structural changes (re-organization) taking place within our company in order to be better placed to face economic changes and decline of business" (see App. HON.8). The Union rejected it (see App. HON.9).

On 13th March 1998, the grievant was served with a fresh notice of redundancy due to "structural changes" in the Company and offered payment of an improved package of terminal benefits, amounting to net pay of Kshs.450,990/= (see App.HON.14(a)). The Union rejected it and requested the Company to rescind its decision (see App. HON.10). After a failure of bilateral negotiations between the parties, the Union reported a formal trade dispute to the Minister for Labour on 1st July 1998. The Minister accepted the dispute and appointed Mr. F.L. Okello of Mombasa Labour Office to act as the Investigator, but his appointment was withdrawn and Mr. D.O. Osoro of the same office was appointed in his place (see Apps. HON. 15 and 16). In his lengthy report which was released to the parties on 9th September 1999, the Minister found that the grievant's "redundancy had something to do with her trade Union activities and was not done in good faith". However, he recommended "that Mrs. Nyaoro should accept her redundancy benefits which should be worked out in accordance with the parties' CBA. In addition she should be paid six months' salary as compensation for wrongful termination under the guise of redundancy".

Finally, the Minister appealed to the parties to accept the recommendation as a basis of settlement of the dispute. The Company accepted the recommendation, but the Union rejected it. Hence this dispute for consideration and determination.

Mr. Nyumba cited instances of alleged frustration and victimization of the grievant for her trade union activities, e.g.??g???.? her medical charges or bills were treated as loan to be deducted from her salary, working extra hours without pay, denial of medical facilities, refusal to grant her sick leave after an accident, attempted transfer to a far away station, premature withdrawal of her retirement benefits from an insurance company in order to deny her accrued interest thereon, e?t?c?. (see Apps. HON.18 to 22). He, therefore, urged the Court to find that the grievant, who had an unblemished or clean record, suffered wrongful redundancy on account of her trade union activities, and in the circumstances prayed that she be reinstated to her job without loss of benefits, and also be awarded maximum compensation for suffering a big financial loss.

In reply, the learned counsel for the Company, Mr. Maingi, submitted that the grievant was employed by the Company on or

about 27th January 1997, and all that the representative of the Union alluded to and transpired before the said date was of no relevance to the issue in this dispute. He strongly denied that the Company was not committed to the implementation of the collective agreement between the Union and DATA and that the Company's Chief Accountant had asked the grievant to convince the employees that their arrears had been paid. He stated that the said collective agreement, which was signed on 13th May 1997, and in which the unionisable employees received 15.5% wage increase, was effective from December 1996 and by February 1997 all the unionisable employees had received their wage increases. But for those unionisable employees whose wages fell below the increment of 15.5%, their wages were adjusted and the differences were tabulated, and all arrears were paid by the Company in accordance with the terms and conditions provided for in the collective agreement between the Union and DATA. Mr. Maingi pointed out that the Company is a stranger to the alleged negotiations between Mitchell Cotts Shipping Ltd. UNICORN and CMBT who, after all, are not parties to this dispute, and also that the Company is not bound by the agreement of the meeting which took place between Mitchell Cotts Shipping Ltd., and the Union on 17th July 1997. He averred that the issue in this dispute concerns redundancy of the grievant, and the question of medical bills, overtime hours of work and leave days, which have been raised by the Union in their submission have no relevance. In any case, all the medical bills which were properly incurred by the grievant while in employment were paid for by the Company, and all her dues were correctly calculated, otherwise the Company has no obligation to cater for the medical needs of ex-employees. As regards the differences in calculation of the terminal benefits of the grievant, the learned counsel submitted that the latter amount included her benefits under the Staff Retirement Benefits Scheme (see Apps. HON.12 and 14(a)). He asserted that the allegations that the terminal benefits were irregularly withdrawn from the said scheme were baseless because the Company could not have paid the grievant her terminal benefits without first withdrawing the money therefrom.

Mr. Maingi submitted further that from its inception in February 1997, the Company has suffered economic decline due to poor business performance, both in the country and in Uganda. In the circumstances, computerization of all work stations, especially in the typing pool, was introduced to improve efficiency. This measure or action led to the abolition of the typing pool and the typists and other members of staff, including the grievant, were declared redundant between March 1997 and March 1998, and more staff have since been declared redundant. The Company strictly complied with, or adhered to, the laid down legal procedures in declaring the employees redundant, without considering the trade union activities, particularly those of the grievant, contrary to the allegations made by the Union.

For the foregoing reasons, the learned counsel prayed that the demand by the Union be rejected.

Admittedly, the grievant was employed by Mitchell Cotts Shipping Ltd. in October 1978, and her duties included typing work. She was employed by the Company on or about 27th January 1997 on similar terms and conditions which governed her employment with Mitchell Cotts Shipping Ltd., and without loss of benefits. This was when the latter sold its shipping franchise to the former. On 1st July 1997, the grievant was advised by the Company that her services were no longer required on account of re-organisation and her terminal benefits, amounting to net pay of Kshs.176,007/= were calculated or computed and offered to her (see App. HON.12). But on 17th July 1997, her redundancy was suspended. On 13th March 1998, the grievant was served with a fresh notice of redundancy due to "structural changes" in the Company, and she was offered an improved package of terminal benefits, including her entitlements under the Staff Retirement Benefits Scheme, amounting to net pay of Kshs.450,990/= (see App.HON.14(a)).

Mr. Nyumba argued that the grievant, who was allegedly a shopsteward of the Union, was "frustrated and undermined" by the Company on account of her trade union activities. The learned counsel for the Company, Mr. Maingi, vehemently denied the charges or allegations, and, on the contrary, contended that the grievant was declared redundant on the ground of reorganization and poor business performance. It is important to note that between October 1978 and January 1997, the grievant was an employee of Mitchell Cotts Shipping Ltd., and from January 1997 to March 1998 she was an employee of the Company, though on the same terms and conditions of services, which is a separate legal entity. Therefore, any frustration which the grievant might have suffered prior to January 1997 on account of trade union activities is irrelevant in this case. There is no evidence on the record to show that the grievant was frustrated on account of her trade union activities during her short period of employment with the Company, and the annexures concerning medical treatment, work schedule, transfer, denial of sick leave, etc. do not prove that she was frustrated and declared redundant on account of trade union activities. The Union has not specifically alleged any act by the grievant which might have antagonized the management of the Company, but there is only a general allegation of frustration or victimization of the grievant for trade union activities. In the circumstances, mere allegation that the grievant had been victimized because of her trade union activities is not sufficient and sustainable.

The word "redundancy" is, inter alia, defined under Section 2 of the Act as:-

"the loss of employment, occupation, job or career by involuntary means through no fault of an employee involving termination of employment at the initiative of the employer where the services of an employee are superfluous.....".

It is clear from the notice of termination of her services that the grievant was declared redundant on account of

“reorganization” or “structural changes” of the Company due to poor business performance and for better management or to increase productivity. She was not alone – other employees were, and have since been, declared redundant too. The right of an employer to undertake *bona fide* re-organisation of, or to introduce structural changes to, his business, and in consequence to discharge an employee or employees on the ground of redundancy for good reason is an inherent right. It is, therefore, for the employer to say, pursuant to the amendment of the Trade Disputes Act, Cap.234, and the Employment Act, Cap.226, under the Finance Act 1994, how that could be done best; and in the absence of bad faith, or *mala fide*, the right of the employer should not be interfered with by the Court. In this case, the Company computerised its work stations to improve efficiency and closed the typing pool, and did away with the services of the employees, including the grievant, who became surplus. In my opinion, there was, therefore, no case of frustration or victimization of the grievant on account of trade union activities.

In the result, the demand by the Union for reinstatement of the grievant is rejected. The grievant is, however, entitled to all her terminal benefits under App. HON. 14(a), i.e. Kshs.450,990/=, and any other benefits which the Company may deem fit to grant in accordance with the provisions of the collective agreement between the parties in force at the material time when she was declared redundant.

Both members of the Court concur with this decision.

DATED and delivered at Nairobi this 15th day of April 2002.

Charles P. Chemmutut,

JUDGE.