



**REPUBLIC OF KENYA**

**IN THE INDUSTRIAL COURT OF KENYA**

**AT NAIROBI.**

**(Before: Charles P. Chemmutut, J.,**

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

**CAUSE NO.8 OF 2002.**

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

**- v -**

**IMPALA GLASS INDUSTRIES LTD.....Respondents.**

**Issue in Dispute:-**

**“Forced early retirement of Mr. Samuel Musyoka, Fredrick Mbuku and Five others (hereinafter called the grievants) and**

**refusal to discuss Voluntary Early Retirement package”.S.D.O. Mutambi, 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 Notification of Dispute, Form ‘A’, dated 31<sup>st</sup> July, 2001, 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 (which is hereinafter referred to as the Act), were received by the Court on 19<sup>th</sup> February, 2002, and the dispute was listed for mention on 7<sup>th</sup> March, 2002. On this occasion Mr. Mutambi appeared for the Union while Mrs. M. Onyango, Executive Officer, F.K.E., appeared for the Company. The matter was, however, listed for another mention on 18<sup>th</sup> April, 2002, when Mr. Mutambi and Mr. J.N. Namasake, Principal Executive Officer, F.K.E., who appeared for the parties respectively, were directed to submit or file their respective written memoranda or statements on or before 9<sup>th</sup> May and 7<sup>th</sup> June, 2002, and the dispute was fixed for hearing on 24<sup>th</sup> July, 2002. Mr. Mutambi belatedly submitted his memorandum on 19<sup>th</sup> June, 2002, but Mr. Namasake did not file his reply statement thereto, although the hearing date was taken by mutual agreement and despite being served with a copy of the memorandum, and no reasons were given for his inability to do so. The case was, therefore, heard *ex parte* as aforesaid, i.e. on 24<sup>th</sup> July, 2002.

At the commencement of the hearing of this dispute, as aforesaid, Mr. Mutambi dropped the dispute, and rightly so, in

respect of the “five others” unnamed grievants, but urged the Court to consider and determine the case regarding the two named grievants and the refusal by the Company to discuss the Voluntary Early Retirement package. This being the case, I dismiss the dispute in respect of the “five others” as dropped.

It will also be well to consider first the last limb of the issue in dispute, viz: “refusal to discuss Voluntary Early Retirement package”. In my ruling on the same issue in *Cause No.34 of 1996: between Kenya Reinsurance Corporation and the same Union*, I observed at pages 4 and 5 *in extenso* as follows:-

‘A Voluntary retirement is the act of the employee, just as dismissal or removal from service is the act of the employer. “Voluntary” means free choice, or something done with free will without any compulsion, obligation or valuable consideration: *A-G -vs- Ellis (1895) 2. Q.B. 466*. The word “voluntary” is constantly used in two different senses: it is used as the antithesis of something done under compulsion; but it is also used commonly among lawyers, and not uncommonly among other people, as denoting the obtaining or giving of something without anything being obtained in return.

In this dispute, the Early Retirement Scheme was voluntary, i.e. the employees were at liberty to voluntarily opt to retire or remain in employment. The Union have been unable to show how “refusal by the Corporation to discuss Early Retirement Scheme with the Union” could be called a “trade dispute”, which means:-

“a dispute or difference between employers and employees, or between employees and employees, or between employers and trade unions, or between trade unions and trade unions, connected with the employment or non-employment, or with the terms of employment, or with the conditions of labour, of any person and includes disputes regarding the dismissal or suspension of employees, the redundancy of employees, allocation of work or recognition agreements; and it also includes an apprehended trade dispute” ‘.

In my humble view, therefore, this part of the dispute is incapable of adjudication and does not constitute a trade dispute. Accordingly, it is rejected as frivolous and vexatious.

Mr. Mutambi submitted that the parties have a valid recognition agreement, and have also concluded several collective agreements. As regards the two grievants, Messrs. Samuel Musyoka and Fredrick Mbuku, he stated that the grievants were initially employed as general labourers on 5<sup>th</sup> August and 5<sup>th</sup> February 1974 respectively, and were unilaterally, arbitrarily and prematurely retired on 2<sup>nd</sup> November, 1999, with effect from 2<sup>nd</sup> January, 2000, contrary to the provisions of Clause 20 of the parties’ collective agreement in force at the material time. At the time of their retirement as aforesaid, they were serving as Machine Attendant, Grade 3, and Frame Binder, Grade I, and earning a salary of Kshs.6,798/= and Kshs,5,512/= per month respectively.

The Union attempted to resolve the matter with the Company at their own level but failed allegedly because of the obstinate attitude of the latter. On 4<sup>th</sup> February, 2000, the Union reported a dispute to the Minister for Labour under Section 4 of the Act. The Minister accepted the dispute and appointed

Mrs. M. Wambua of Nairobi Central Labour Office to act as the Investigator. On the basis of the investigation report which was released to the parties on 4<sup>th</sup> July, 2001, the Minister found *inter alia*, and recommended as follows:-

#### “FINDINGS”

.....that  
(in) mid October the management met with the long serving old members of staff and informed them that they could take up early retirement if they so wished. The duo Musyoka and Mbuku took up the offer and were subsequently paid off in December. In January, the Union wrote to the management seeking to enhance the retirement package but the management was not willing to re-visit the issue.

.....  
.....Clause 20 authorises the parties to retire employees either upon reaching the prescribed retirement age or ill health. The grievants case did not fulfil either of this requirement. Instead the management used a thin veiled threat of non performance to have the grievants accept early retirement.

.....  
..... the grievants to some extent are to blame for their predicament, (by) failing to seek the counsel of their union representatives, and collecting their dues. On the other hand the management should not be allowed to flout the

agreement which they had signed with the union and had an obligation to adhere to. The retirement of these workers is, therefore, found to have been wrongful.

RECOMMENDATION.

.....  
.....I recommend that the grievants be paid the following in addition to their final dues as compensation for wrongful loss of employment.

Samuel Musyoka 2 months salary.

Fredrick Mbuku 4 months salary”.

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 (Union Apps. I to 5).

Mr. Mutambi averred that at the time of their premature retirement as aforesaid, the grievants had neither attained the age of 55 years old nor were they of ill health. He pointed out that the grievants were aged 54 and 50 years respectively at the time of their premature retirement, and the Company should have consulted the Union before retiring them prematurely. In the circumstances, Mr. Mutambi prayed that the grievants be paid Kshs.81,576/= and Kshs.330,610/= respectively, being the terminal dues for the unexpired periods of their employment, made up as follows:-

1<sup>st</sup> grievant: Kshs.6,798/= x 1 year x 12 months = Kshs.81,576/=

2<sup>nd</sup> grievant: Kshs.5,512/= x 5 years x 12 months = Kshs.330,610/=.

He also prayed that the grievants be awarded full compensation of 12 months’ salary for wrongful loss of employment.

Clause 20 of the parties’ collective agreement under which the grievants were retired prematurely reads as hereunder:-

“ 20. RETIREMENT:

An employee may retire or may be retired by his employer on old age or ill health. The retirement age will be 55 years for males and 50 years for females. On ill health, the doctors certificate will be required to satisfy this. The Company will be at liberty to send such employees to its own Doctor for further confirmation. On retirement an employee will be entitled to:-

- (i) Required Notice.
- (ii) Retirement benefit at the rate of ½ months pay for each completed year of service.
- (iii) Any other remuneration that he/she may be entitled to”.

It is, therefore, clear from the reading of this clause that the age of superannuation in this dispute is either 55 years or 50 years, as the case may be, and in such a case retirement takes place *ipso facto*. But an employee may retire or be retired before the age of superannuation on two grounds only, namely, old age or ill health. Here these two grounds did not apply to the grievants as they were prematurely retired by the Company without consulting the Union or assigning any reasons; and, in their own words, this was “normal retirement” (App.4(b)). In my considered view, the order of retirement passed by the Company against the grievants was a penal termination of employment before the incumbents reached the age fixed for superannuation, i.e. 55<sup>th</sup> year of their ages. Such an order of premature retirement was clearly unjustified, harsh and wrongful.

As stated hereinabove, the Company neither filed their reply statement to the Union's memorandum nor did they give any reasons for their inability to do so, despite the hearing date having been taken by mutual consent. I have, therefore, no reason to disbelieve the case of the Union. Accordingly, I allow the demand prayed for hereinabove by the Union and order the Company to pay the same, i.e. Kshs.81,576/= and Kshs.330,610/= to the grievants respectively, within thirty (30) days from to-day. The grievants are not, however, entitled to any other compensation. I so award.

On consultation, both Members of the Court concur with this decision.

**DATED** and delivered at Nairobi this 15<sup>th</sup> day of October, 2002.

Charles P. Chemmutut,

**JUDGE.**