

REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT
NAIROBI
CAUSE NO. E631 OF 2024

KENYA ENGINEERING WORKERS UNION
.....CLAIMANT

- VERSUS-

HEAVY ENGINEERING LIMITED.....
RESPONDENT

JUDGMENT

Introduction

1. The Claimant lodged this suit through a Memorandum of Claim dated 7th August, 2024, wherein it seeks the following remedies:-
 - i. That the Court deem fit and find the stoppage of facilitation of the transport to her unionisable employees by the Respondent to be unfair, unlawful, and in bad faith, and declare the same null and void.
 - ii. That the Court do issue an Order against the Respondent to re-effect facilitation of transport to all her unionisable employees with immediate effect.
 - iii. That the Court do hereby issue an Order against the Respondent to pay the transport arrears from January 2023 as tabulated, and that the same shall continue to

accumulate during the litigation till the determination of this suit.

iv. That the costs of this suit be provided for.

2. The Respondent filed a Memorandum of Response to the Claim, denying the Claimant's Claim.

3. Parties were directed to canvass the claim by way of affidavits evidence, and written submissions, were received from both parties.

The Claimant's Case

4. The Claimant's case is that the Respondent is a member of the Engineering and Allied Industries Employers Association and has a Recognition Agreement with the Claimant, under which several Collective Bargaining Agreements have been negotiated.

5. It avers that since 1979, the Respondent voluntarily provided transport facilitation to employees, which was formalized in a written agreement dated 22nd March 1996 between management and workers' representatives.

6. The Claimant maintains that over time, it became an established practice to pay transport allowances at varying rates depending on the distance traveled by employees, up until the time the benefit was discontinued.

7. The Claimant states that the Respondent issued them a notice in November 2022, which it opposed and requested

that it be withdrawn, but due to the Respondent's firm stance, the Claimant reported a trade dispute to the Ministry of Labour under Section 62 of the Labour Relations Act, 2007.

8. The Claimant states that the dispute was registered and a conciliator, named Ms. Christine Chepkosgei, was appointed. It avers that, despite joint meetings, no resolution was reached, resulting in the issuance of a Certificate of Unresolved Dispute.
9. The Claimant avers that the conciliator recommended that the Respondent reinstate the transport facilitation benefit and pay arrears from January 2024.
10. The Claimant contends that the Respondent's actions were in breach of Article 47 of the Constitution by violating the right to fair administrative action. The Respondent is further said to have violated the principles of natural justice by unilaterally withdrawing an established practice without putting in place adequate measures to address its impact.
11. The Claimant prays that the Court allow its Claim and grant the orders sought.

The Respondent's Case

12. The Respondent states that it voluntarily introduced transport facilitation in 1996 to improve working conditions, following discussions with employees' representatives, and

has consistently complied with that agreement over the years.

13. It is its position that due to harsh economic conditions and sustained operational losses, the Respondent found the transport allowance financially unsustainable, and formally notified the Claimant Union of these challenges and further proceeded to issue a two-month notice in November 2022, withdrawing the allowance effective 1st January 2023.
14. The Respondent maintains that its financial position did not improve, as reflected in its audited accounts (2021-2023), and that it repeatedly communicated these constraints to the Union. The Respondent states that while it acknowledges the conciliator's report, it rejects the recommendations on the basis that it lacks the financial capacity to reinstate or pay the transport allowance.
15. The Respondent asserts that it made deliberate efforts to engage the Claimant Union on the issue of transport allowances, but the discussions were unsuccessful, leading the Union to report a trade dispute under Section 62 of the Labour Relations Act.
16. The Respondent states that a conciliator was subsequently appointed, and parties were invited to present their submissions. It avers that, eventually, a Certificate of Unresolved Dispute was issued following the parties' failure to reach an agreement, along with recommendations.

17. The Respondent states that it wholly disagrees with the conciliator's recommendations and denies any constitutional violation.
18. It maintains that it has consistently promoted favourable working conditions, including providing transport allowance from 1996 until 2023, when financial constraints necessitated its withdrawal.
19. The Respondent asserts that the decision was made in good faith, was duly communicated to the Claimant Union, and was driven solely by economic challenges. Further, the Respondent argues that the transport allowance is contingent on financial sustainability and may be withdrawn when funds are insufficient, with the possibility of reintroduction when conditions improve.
20. It emphasizes that the withdrawal was unavoidable due to harsh economic conditions and was undertaken to safeguard business operations and preserve employees' job security, while continuing to honour existing Collective Bargaining Agreements.
21. The Respondent finally prays that the Claimant's claim be dismissed with costs.

The Claimant's Submissions

22. It is the Claimant's submission that consistent payment of transport allowance created a legitimate expectation, which crystallized into a legal right, and as such, the employer

cannot unilaterally or arbitrarily alter it, given its impact on employees' livelihoods and family life.

23. The Claimant submits further that there was no proper consultation at the shop floor level where the original agreement was reached, and the alleged notice was merely informative rather than consultative, and was not served upon the Claimant.
24. The Claimant submits that termination without consultation is impermissible, as the agreement was mutually reached and lacked a termination clause, thus requiring prior consultation before any variation or withdrawal.
25. The Claimant also challenged the Respondent's financial justification, noting the selective filing of audited accounts and procedural irregularities in filing documents without leave of court.
26. The Claimant submits that the prayers sought herein should be granted, emphasizing the adverse socio-economic impact of the abrupt withdrawal on employees, including disruption of family life and education.

The Respondent's Submissions

27. The Respondent submits that the Claimant did not dispute that it had, on several occasions, informed the Union of its financial difficulties and inability to sustain payment of transport allowances. It further submits that the withdrawal of the allowance was a necessary cost-cutting measure

aimed at ensuring the business's sustainability and preventing potential redundancies.

28. In support of this position, the Respondent relies on ***Moses Kamau & 6 others v Signature Holdings (E.A.) Ltd (2020)***, for the holding that: -

"Considering the above and the fact that the Claimants are still employees of the Respondent, and further that there are remedies for breach of contract apart from an order for part or specific performance, and further considering that the orders sought may lead to redundancies, a far more perilous action, the Court is of the view that it would not be prudent to give any of the orders sought in the motion."

29. The Respondent states that although a trade dispute was reported and subjected to the statutory conciliation process, the parties failed to reach an agreement. It criticizes the Labour Officer's recommendations as impractical, arguing that they failed to consider the Respondent's financial position and threatened the sustainability of the business.

30. The Respondent further contends that it is not in breach of Article 47 of the Constitution, asserting that the Claimant has not demonstrated how any violation of the right to fair administrative action occurred.

31. The Respondent urges the Court to disregard the conciliator's recommendations, emphasizing that they are

not binding under Rule 8(1)(b) of the Employment and Labour Relations Court (Procedure) Rules, 2024, and should not be adopted as they do not meet the test of business sustainability.

32. The Respondent reiterates that it has consistently upheld favourable working conditions, including providing transport allowance from 1996 until 2023, when financial constraints necessitated its withdrawal. It maintains that the withdrawal was made in good faith, properly communicated to the Claimant Union, and driven solely by economic challenges. The Respondent emphasizes that such benefits are dependent on financial capacity and may be withdrawn when unsustainable, with the possibility of reintroduction in the future.
33. In response to the Claimant's argument regarding failure to file certain audited accounts and alleged procedural irregularities, the Respondent dismisses the issue as an afterthought, noting that the Court had already confirmed compliance with filing directions and set the matter down for hearing.
34. The Respondent submits that although transport allowance had become an established practice and employee benefit, it complied with Section 10 of the Employment Act, 2007 by undertaking consultation before its withdrawal, albeit without reaching an agreement. Relying on *Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others* (2014), the Respondent submits that consultation requires genuine

engagement and consideration of employees' views, but does not grant employees or unions veto power over an employer's decision.

35. This position is reinforced by ***Solomon Chemjor & 7 others v Commission for University Education & 3 others (2017)***, where the Court held that consultation does not equate to approval.
36. The Respondent maintains that the withdrawal was not arbitrary, noting that a consultative meeting was held on 27th October 2022, followed by the issuance of a two-month notice on 1st November 2022, which was not disputed.
37. It further contends that even where a benefit has crystallized into a contractual term, it may still be withdrawn if justified by a valid business case, particularly to avert greater consequences such as redundancies.
38. The Respondent prays that the claim be dismissed.

Analysis and Determination

39. From the pleadings and the parties' submissions, the Court distills the following issues for determination:-
- i. Whether the transport allowance constituted a contractual right.
 - ii. Whether the withdrawal of the allowance was procedurally lawful and fair.
 - iii. Whether the Respondent violated Article 47 of the Constitution.

iv. Whether the Claimant is entitled to the reliefs sought.

Whether the transport allowance constituted a contractual right

40. Parties are in agreement that the Respondent provided transport allowance to its workers from 1996 to 2023. It is also not disputed that the practice crystallized into a formal written agreement dated 22nd March 1996 between the Respondent's management and its workers' representatives.
41. It has variously been held that long standing and consistent benefits crystallize into contractual terms through practice and the doctrine of legitimate expectation. In ***Kenya Chemical & Allied Workers Union v Bamburi Cement Ltd (2013)***, the Court held that a benefit consistently enjoyed over time becomes part of the employee's terms and conditions of service.
42. Similarly, in ***Postal Corporation of Kenya v Andrew K. Tanui (2019)***, the Court emphasized that employment terms may arise not only from written contracts but also from conduct and established practice.
43. In light of the foregoing, there is no doubt in my mind that the transport allowance, having been paid consistently for over two decades and being anchored in an agreement between parties, firstly, crystallized into a contractual benefit and secondly, the Claimant's member gained legitimate expectation for its continued payment.

Whether the withdrawal was procedurally lawful and fair.

44. On whether the withdrawal is fair and lawful, the first question is whether the Respondent had valid grounds to withdraw the benefit, and secondly, whether the withdrawal process was fair.
45. The Respondent has produced its audited reports from 2020 to 2023 to prove that it was/is under financial distress. Courts have recognized that employers may vary employment terms where justified by genuine operational or financial reasons, provided that due process is followed.
46. In ***Moses Kamau & 6 others v Signature Holdings (E.A.) Ltd (2020)***, the Court declined to grant orders that would jeopardize business sustainability and potentially lead to redundancies.
47. In the premise, I find and hold that the Respondent has established a valid and legitimate business reason for reviewing the Claimant members' employment benefits.
48. On the withdrawal procedure, even where there is justification to withdraw a benefit, the law requires meaningful consultation before altering employment terms. Section 10 (5) of the Employment Act mandates consultation before changing employment terms.
49. In ***Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others (2014)***, the Court of Appeal held

that consultation must be real involving engagement, and views from the affected employees must be considered. The Court further emphasized that consultations must occur before decisions are finalized so as to give employees or their unions a genuine opportunity to influence the outcome.

50. Where changes are imposed without consultations, the court may treat the situation as a fundamental breach of the employment contract.

51. Further in ***Solomon Chemjor & 7 others v Commission for University Education & 3 others (2017)***, the court clarified that consultation does not require agreement, but must be genuine.

52. The evidence before the court is that a meeting was held on 27th October 2022, and subsequent thereto, a notice was issued on 1st November 2022 of the withdrawal of the transport allowance effective 1st January, 2023.

53. The Claimant, on its part, disputes the adequacy and nature of the consultations. The evidence before court however shows that notification and engagements happened before the transport benefit was withdrawn. The Respondent has also sufficiently proved financial distress justifying the withdrawal.

54. In the premise, I find and hold that the Respondent complied with consultation requirements, hence the withdrawal was fair and lawful.

Whether Article 47 was violated

55. Article 47 of the Constitution guarantees fair administrative action that is lawful, reasonable, and procedurally fair. While employment decisions may, from time to time, attract Article 47 scrutiny, courts have held that not every contractual variation amounts to a constitutional violation unless procedural unfairness or arbitrariness is clearly demonstrated.

56. There is no doubt that the Respondent issued notice of the intended withdrawal of the transport benefit. It is also not denied that engagements were held in relation to the intended withdrawal, and reasons for the withdrawal were communicated to the Claimant union.

57. The Claimant has, in my view, not sufficiently demonstrated a constitutional violation under Article 47.

Whether the Claimant is entitled to the reliefs sought

58. Having found the withdrawal of the transport allowance lawful, the reliefs sought are not available to the Claimant.

59. The Claimant's Claim is, therefore, devoid of merit and is hereby dismissed in its entirety.

60. Parties shall bear their own costs of the suit.

61. It is ordered.

SIGNED, DATED, AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS 7TH DAY OF MAY, 2026.

**C. N. BAARI
JUDGE**

Appearance:

Mr. Makale present for the Claimant

Ms. Obiayo h/b for Mr. Ouma for the Respondent

Ms. Esther S- C/A

ORIGINAL