IN THE COURT OF APPEAL

AT NAIROBI

CORAM: G.B.M. KARIUKI, SICHALE & KANTAI, JJ.A.

CIVIL APPEAL NO. 14 OF 2016

BETWEEN

EAST AFRICA PORTLAND CEMENT CO. LTD ..... APPELLANT

AND

KENYA CHEMICAL & ALLIED WORKERS UNION .....RESPONDENT

(An appeal from the judgment and decree of the Employment and Labour Relations Court of Kenya (Wasilwa, J) dated and delivered on 6th day of July, 2014

in

ELR Cause No.2119 of 2014)

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JUDGMENT OF THE COURT

This is an appeal from the judgment of Employment and Labour Relations Court (Wasilwa, J) dated 6th July, 2015 in which the learned judge found that the respondent breached the terms of the Collective Bargaining Agreement by partially implementing it only in favour of workers on permanent engagement and excluding casual workers. The contention of the appellant is that the learned judge erred in that decision.

The appellant, East African Portland Cement Co. Ltd is a limited liability company whose core business (which carried on in Athi-River, in Machakos County) is production of cement under the Brand name of Blue Triangle. It is common ground that way back in 1961, the appellant established industrial relations with the **respondent** trade union, Kenya Commercial and Allied Workers Union, and signed a **Recognition Agreement** which appears to have served both parties well over the years. By dint of the recognition agreement, the respondent became the sole negotiating body representing workers employed by the appellant with the exception of supervisory staff.

The recognition agreement, was entered into with the object of regulating the relations between the appellant and the respondent inter alia in the interest of mutual understanding and co-operation and with a view to ensuring speedy and impartial settlement of disputes and grievances as well as securing by both parties of greater appreciation of reasons underlying decisions taken in the negotiating committee.

In the recognition agreement, the appellant undertook not to victimize any employee on account of his or

her membership in the respondent union but otherwise reserved its right to engage, promote, demote, and terminate the services of any worker in accordance with the terms of his or her contract and whether he or she be a union member or otherwise.

The appellant and the respondent entered into a **Collective Bargaining Agreement** (**CBA**) dated 19th December 2014, for the period 2012 to 2015 which was accepted by the Employment and Labour Relations Court in accordance with **The Labour Relations Act No.14 of 2007**. It was entered in the Register of Collective Bargaining Agreements maintained by the said court under entry RCA 24/2014. Under Clause No.1 of the CBA, the terms and conditions of service (set out in the CBA) are required to be observed by the appellant for those employees who are "members" within the definition of the Recognition Agreement.

On 6th December 2010, in Cause No.76 of 2008, Employment and Labour Relations Court, following a Memorandum of Claim presented by the respondent union decreed that all fixed term contracts issued by the appellant directly or otherwise relating to unionisable employees contrary to the recognition agreement and the CBA in force were varied and deemed to be issued by the appellant under the CBA governing the parties and all unionisable employees under such contracts were converted immediately to permanent employees and henceforth enjoyed the terms and conditions of employment contained in the CBA. The court directed that letters of appointment be issued forthwith to those employees in the form contained in the CBA with the date of appointment and conversion being 6th December 2010 when the award was rendered.

On 26th November 2014, the respondent union filed a Memorandum of Claim in the Employment and Labour Relations Court alleging that the appellant implemented the current CBA from February 2014 selectively in that *"the appellant did not effect new rates of pay as agreed in the CBA on monthly basic wages to some of its employees"* whom they classified as on contact though employed to work in unionisable jobs as contained in the CBA and are also members of the respondent union who pay union dues on monthly basis through check off system facilitated by the appellant in accordance with the provisions of Section 48 of the **Labour Relations Act No.14 of 2017**. Recommendation by a Concilliator appointed by the Minister following

the reporting by the appellant of a trade dispute to the Cabinet Secretary for Labour pursuant to Section 61 (2) of the **Labour Relations Act 2007** did not result in implementation by the appellant as the later alleged unsustainability. The view taken by the Concilliator was that the wage increments awarded by the CBA to the staff on fixed term contracts *"could be staggered in sustainable installments taking into account the wage increment awarded to the group of employees as from 1st January 2013 outside the Collective Bargaining machinery."*

It was on account of the appellant's failure to implement the Concilliator's recommendation that the respondent union moved to the Employment and Labour Relations Court in Cause No.2119 of 2014 to urge it to order, inter alia, that the appellant company was in violation of clauses 1, 5 (iv) and 11 of the Recognition Agreement as well as clause 2 – **(**classification of jobs and wages structure of the existing CBA**)** by subjecting unionisable employees to inferior pay, terms and conditions of employment under fixed term contracts. The respondent union sought in the Memorandum of Claim immediate withdrawal of the inferior pay, terms and conditions of employment and the expurging of the same. The respondent also sought an order for immediate conversion into permanent and regular terms under the registered CBA with effect from the date one was first employed of all unionisable employees under fixed terms contracts who are members of the respondent union.

In the determination of the Cause No.2119 of 2014, the Employment and Labour Relations Court held that the appellant was in breach of the terms of the CBA by partially implementing it only in favour of workers in permanent engagement. For this reason, the Employment and Labour Relations Court found merit in the respondent's case and ordered the appellant to implement the CBA as negotiated and for the purpose of reaching an amicable settlement beneficial to all parties, directed it to negotiate the implementation process *"where there are problems of implementation on account of unsustainability."* This is the decision that the appellant company has appealed against to this court.

In its Memorandum of Appeal dated 22nd January 2015, the appellant proffered eleven grounds of appeal. In summary, the appellant contends in the said grounds that the learned judge erred in law and fact by holding that the appellant breached the terms and conditions of the CBA by implementing it (the CBA) in favour of the permanent employees only when both the appellant and the respondent had agreed on implementation for both; that the learned judge erred in failing to have regard to the fact that since 1961, until the suit was filed by the respondent, the fixed term contract employees were not covered by the CBA; that the learned judge should have recognized the separate agreement for payment of wages of employees on fixed term contracts and casual staff executed in 2009; that the respondent had not made any proposal to incorporate the employees on fixed term contract into the CBA to entitle such employees to benefit from the CBA for the period 2013 to 2015; that as the appellant and the respondent had been negotiating separately for the contract staff outside the CBA from 1961, it was therefore an error on the part of the learned judge to hold that any member of the respondent union was entitled to benefit from the CBA and further that as the appellant and the respondent had negotiated separately for the terms affecting contract staff outside the CBA from the year 1961, the learned judge was in error in holding that the appellant was discriminating against the fixed term contract staff; that the terms and conditions between the appellant and the fixed term employees cannot be sustained by the appellant; and that the learned judge did not adhere to the provisions of Sections 57 and 59 of the Labour Relations Act 2007 and further that he failed to consider the pleadings, evidence and submissions by the appellant.

When the appeal came up for hearing before us on 2nd May 2017, learned counsel **Ms Lorraine Oyombe** appeared for the appellant and learned counsel **Mr. Alfred Nyabena** appeared for the respondent. As both counsel had each filed written submissions, they highlighted the salient features of their submissions.

In highlighting her submissions, **Ms Yombe** emphasized that the issue of separate contracts and casuals did not come up during the negotiations for CBA and until 2011 the contract employees were not covered by the CBA. Counsel contended that the 2009 to 2012 CBA related to non-contract employees. Sections 48(1) of the **Labour Relations Act** was alluded to by counsel with the contention that it does not confer benefits to parties whose terms have not been negotiated. It was counsel's submission that both the 2009 to 2012 CBA and the 2012 to 2015 CBA apply only to "members" and that separate terms for casuals and contract staff were negotiated, a fact which, according to counsel, the Employment and Labour Relations Court failed to consider when it held that all unionisable employees were covered. Counsel contended that the wage bill for casuals and contract staff was unsustainable. It was counsel's submission that the principle of voluntary negotiations embodied in **ILO Convention** 98 ratified by Kenya in 1964 was not was not followed. It was further submitted by counsel for the appellant that the trial court failed to consider the issue of separate terms for casuals and contract staff and condemned the appellant for discrimination in spite of the fact that separate terms ensued from separate negotiations and therefore discrimination did not arise. We observe that Section 5(1) (2) & (3) of **Employment Act** outlaws discrimination in employment. We also observe that **ILO Convention** 100 which was also referred to supports of equal remuneration for men and women for equal work.

On his part, **Mr. Nyabena** opposed the appeal and relied on the respondent's written submissions. The respondent, he said, had a CBA with the appellant and further, that the 2012 – 2015 CBA was negotiated and signed. In counsel's submission, the issue was whether the appellant could go out of the negotiated settlement in the recognition agreement and in the CBA. According to the respondent's counsel, the 2012 to 2015 CBA applied to all employees who were members of the respondent union and it was not open to the appellant to differentiate between casual and contract employees for the simple reason that such differentiation would amount to amending the CBA unilaterally and would be tantamount to discriminating the workers excluded. It was counsel's further submission that the Conciliator's recommendation was not challenged by the appellant and the appellant was engaging in unfair labour practices in breach of Article 41 of the Constitution of Kenya 2010. It was Mr. Nyabena's submission that there was nothing of substance to challenge in the impugned judgment. He urged us to dismiss the appeal.

We have perused the record of appeal and the rival submissions made by counsel for the parties. We are cognizant that in line with rule 29 (1)(a) of the Rules of this Court which requires us to re-appraise the evidence in the record of appeal and the principle in **Selle v. Motor Boat Co. Ltd** [1968] 1 EA 123 we

ought to give the appellant a retrial of the dispute, this being a first appeal, by re-evaluating the evidence and reaching our own conclusions.

The issue for determination in this appeal is whether or not the decision of the Employment and Labour Relations Court was wrong and if so the reasons therefor. The dispute is centered on the issue of casual employees as distinguished from contract employees and the question for determination is whether the appellant was enjoined to implement and effect general wage increases to both casual employees as well as employees classified as being on contract though they are employed to work in unionisable jobs contained in the CBA and are the respondent's members who pay union dues on monthly basis through check off system.

The record of appeal shows that the appellant has employees who are on contract and employees who are not on contract who are referred to as casuals. The former are not part of management. Both categories do the same work. The record of appeal also shows that the contract employees have been members of the respondent (Union) since 2010 as they pay union dues. They have had renewable 2 year contracts.

The respondent negotiated the CBA for the period commencing August 2012 and signed it on December 19th 2013 **(**and it was registered in 2014**)** for the non contract employees. The respondent concedes that as most of the contract staff were recruits prior to the making of the CBA for the period 2012/2015, no remittance of union dues was being affected by the appellant. This prompted the filing by the respondent of Industrial Causer No.1451 of 2011 (between the respondent and the appellant) in which a consent dated 30th November 2011 was recorded to the effect that the appellant would effect deduction of union dues from the employees whose names were contained in a list dated 30th May 2011 submitted by the respondent and annexed to the respondent's memorandum in the said cause. The dispute in the cause was "failure by the appellant to deduct union dues or rather, non-implementation of check-off system in respect of employees who had joined the respondent union in the year 2010. It was contended by the respondent that subsequently the appellant continued to recruit more members who were unionisable employees of the appellant. It was also contended by the respondent that the 2012/2015 CBA covered the respondent's members.

It is clear to us that prior to 30th November 2011, when the contract employees became members of the respondent union, they could not claim to be entitled to benefit from the bargaining agreement resulting in the 2012/2015 CBA. But did the negotiation include the contract employees and if it did not, does the law allow the benefit obtained from the negotiations to accrue to them? First, as at the time of the negotiations resulting in the CBA (for the period 2012 to 2015), the contract employees were in employment of the appellant. Secondly, the contract employees were not paying union dues because the appellant had declined to implement the set-off system; this is what sparked off the institution of industrial cause No.1451 of 2011 aforementioned in which the appellant, by dint of the consent order therein recorded, was enjoined to implement the check-off system. Payment of union dues is a condition for membership in a Union. As the CBA applies to members, it goes without saying that non-members of a Union cannot be beneficiaries of negotiations for wages and conditions of service negotiated for members of a Union. Section 48 of the **Labour Relations Act** deals with the issue of payment of union dues and membership in a trade union and it is implicit that terms negotiated by a Union on behalf its member's benefit all members on whose behalf the Union has negotiated. Can non-members on whose behalf the Union may negotiate legitimately claim benefit from such terms?

In the instant case, it is common ground that payment of Union dues for the contract staff commenced after the consent order in Industrial Cause No.1541 of 2011 was recorded. If therefore the negotiations did not cover the contract staff and the latter were non-members of the respondent Union prior to 2010, can they benefit from the negotiated terms under the 2009-2012 CBA which in monetary terms resulted in wage increase from 2009 to 2010 and an increase of 5.5% for the period 2010 (August) to 2011 (July) and 6% increase for the period 2010 to 2012.

The contract staff and the casual staff perform the same tasks. Ideally, there should be equal pay for equal work regardless of gender. There is no dispute that the contract staff are not in management. By virtue of being on contract, the contract staff are not employed on permanent basis and the effect of this is that they

are not entitled to benefits on retirement to which non contract staff are eligible. The salient feature in the contract staff employment is that although they may work for long following successive renewal of their contacts, they have no security as every two years their contracts would have to be renewed. The law has not been changed as it does not allow keeping of casuals beyond a period of six months, (see the Employment Act).

It is clear to us that upon the contract staff who were not part of management becoming members of the respondent Union on payment of union dues, the negotiations by the parties on wages and terms of employment relating to 2013 to 2015 CBA were in relation to the cadre of staff doing the work done by the casuals which included the work done by the contract staff and it did not therefore matter whether the respondent explicitly stated the full category of workers covered by the negotiations so long as it was understood that the negotiations covered Union members of that particular cadre unless the contract staff were expressly excluded in the CBA. It was understood that the negotiations related to members of the respondent (Union) and that they all performed the same task save that some were continually on renewable two year contracts while the others (casuals) were not. In our view, the practice of paying the casuals wages different from those for contract staff who were not in management when both were Union members and performed the same task and when negotiations under the CBA related to the members of the Union would be frowned at as being contrary to section 5 of the Employment Act which upholds equality of opportunity in employment in order to eliminate discrimination. It matters not that the appellant thought that it was negotiating in respect of casuals only and it would have been discriminatory and therefore void if it was expressly stated in the CBA that the contract staff who were not in management though also union members, were not covered by the negotiations and would not benefit from the negotiations along with the casuals. We are alive to the provisions of Section 57 of the Labour Relations Act which provides that an employer with a recognition agreement is enjoined to enter into a CBA on terms and conditions of service for all unionisable employees covered by the recognition agreement. The section does not allude to "all employees covered by the negotiations"; it specifically refers to "all unionisable employees covered by the recognition agreement." The appellant's argument that there were separate negotiations for non-management workers, some of whom were on contract and others not, does not hold sway and must fail. We so find. The negotiated wages, terms and conditions of service applied to the contract staff as well as the casuals by dint of Section 59(1)(b) of the Labour Relations Act. Section 59(1) states –

A collective agreement bides for the period of the agreement –

> ***(a) the parties to the agreement***
>
> ***(b) all unionisable employees employed by the employer , group of employers or members of the employers' organization party to the agreement; or***
>
> ***(c) the employers who are or become members of an employers' organization party to the agreement, to the extent that the agreement relates to the employees.***

Moreover, by virtue of Section 59(3) of the Labour Relations Act, the terms of the CBA were incorporated into the contract terms of the contract staff as the latter were unionisable members of the respondent union whose subscriptions to the respondent union were effected pursuant to the consent order made in Industrial Cause No.1451 of 2011 between the appellant and the respondent.

In the impugned judgment, the learned judge held that it was discriminatory for the appellant to treat the contract staff and the casuals differently in terms of wages as this abrogated the ILO Convention 100 which advocates equal remuneration for men and women workers for work of equal value. This position was fortified by Article 27 of the Constitution of Kenya 2010 which the learned judge alluded to. We are in agreement with the learned judge's finding. This answers all the grounds of appeal. They fail.

In the result, we find no merit in the appeal and accordingly dismiss it with costs.

Dated and delivered at Nairobi this *6th day of October, 2017*.

G. B. M. KARIUKI SC

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR