



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 166 OF 2020**

*(Before Hon. Lady Justice Maureen Onyango)*

**KENYA PETROLEUM OIL WORKERS UNION.....CLAIMANT**

**VERSUS**

**KENYA PIPELINE COMPANY LIMITED.....RESPONDENT**

**JUDGMENT**

1. The Claimant is a lawfully registered Trade Union under Section 19 of Labour Relations Act No. 14 of 2007 Laws of Kenya for purposes of representing and articulation the Unionsable interests and rights of the Respondent's employees.
2. The Respondent is a duly registered Limited Liability Company incorporated in Kenya as per the Laws of Kenya.
3. The parties have a recognition agreement signed in 1984 and have negotiated several collective bargaining agreements since then.
4. The Recognition Agreement between the Claimant and the Respondent under Clause 2(b) provides that parties shall negotiate on any claims for alteration to terms of service which may affect all employees or any group of employees of the Respondent.

**Claimant's case**

5. It is the Claimant's case that the Respondent is in the process of changing the current staff grading structure, Human Resource Policies and Manual, Career Guidelines, Organization Structure and the Staff Establishment without consulting the Claimant.
6. The Claimant as a result wrote a letter to the Respondent requesting for a consultative meeting over the new grading structure.
7. Through the same letter, the Claimant also requested the Respondent to provide them with the various documents that were relevant to the restructuring of the grading system prior to the consultative meeting.
8. A meeting was held between the Claimant and Respondent on 6<sup>th</sup> November, 2019 to discuss the restructuring of the job grading as proposed by the State Corporation Advisory Committee (SCAC).
9. It is the Claimant's case that during the meeting, as captured under Minute 1: Restructuring by SCAC, the parties **ONLY** discussed the **condensing of the job groups** whereby instead of the 16 grades, the revised structure provided for 12 grades. Since the condensed job grades would have some effect on the current unionisable Job Groups covered in the 1<sup>st</sup> July, 2017 – 30<sup>th</sup> June 2021 Collective Bargaining Agreement, the parties were to prepare and sign an addendum to the Collective Bargaining Agreement on the specific change.
10. An addendum to the 1<sup>st</sup> July, 2017- 30<sup>th</sup> June, 2021 Collective Bargaining Agreement was signed by the parties on 6<sup>th</sup> February, 2020 giving effect to the how Respondent's job grades. The Respondent informed the Claimant that the unionisable staff memberships would not be affected in any way and the revisions of the job groups was not to automatically translate to a change of remuneration. The parties further agreed to conduct a joint sensitization of the reviewed grading structure so as to ensure buy-in from all the stakeholders.
11. It is the Claimant's averment that Despite the agreement by parties to do consultation before any implementation the Respondent issued a memo to its staff dated 26<sup>th</sup> November, 2019 under the subject: Board Approval to adopt State Corporation Advisory Committee Approved

Human Resource Instruments for Implementation that outline what the Human Resource Instrument entailed. The above internal memo introduced new aspects that were not discussed during the Consultative meeting between the Respondent Management and the Claimant.

12. The memo highlighted the various changes arising from the State Corporation Advisory Committee Human Resource Instruments. The changes were to be effected on: **Organization Structure, Staff Grading Structure, Career Guidelines, Human Resource Policies & Procedures Manual and Establishment.**

13. It is the Claimant's case that it was not consulted on the changes introduced in the Memo except the staff grading structure. That through a letter dated 4<sup>th</sup> December, 2019 the Claimant protested the adoption and implementation of the State Corporation Advisory Committee Human Resource Instruments.

14. It is the Claimant's case that at a meeting held on 17<sup>th</sup> December, 2019 between the Claimant, the Respondent and the SCAC it was agreed to temporarily halt the implementation of the changes until 30<sup>th</sup> January, 2020 to allow for further consultation and sensitization before implementation.

15. That in total disregard of the agreement, the Respondent through an internal notice dated 15<sup>th</sup> January, 2020 advertised vacant positions in Operations Department KPC Grades 4-11 based on the establishment which was yet to be agreed upon.

16. The Claimant on 30<sup>th</sup> January, 2020 requested for the extension of the status quo that provided for temporarily halting of the New Human Resource Instruments proposed for implementation up to 30<sup>th</sup> January, 2020 since the conditions agreed on had not been met.

17. The Respondent however ignored the Claimant and conducted interviews for the advertised posts.

18. The Claimant raised fundamental concerns from their unionisable members with the Respondent through a letter dated 29<sup>th</sup> February, 2020 during sensitization process. As a result of the concerns raised during the sensitization, the Claimant wrote a memo to all its unionisable members at Kenya Pipeline Company Limited instructing them among other things not to append their signatures and/or any form of assent on to letters that were being circulated by the Respondent.

19. While the Claimant was still in the process of conducting sensitization, the Respondent proceeded to issue individual letters of the alleged changes while inviting other unionisable members for interviews.

20. It is the Claimant's position that the restructuring is being done in bad faith with the aim of denying the Respondent's employees the right to form, join or participate in the activities and programmes of the trade Union. That despite being graded as managerial employees, the role performed/assigned to the employees as per the restructured grading system does not entail any managerial functions that is: supervise, appraise and enforce discipline.

21. In the Memorandum of Claim dated 3<sup>rd</sup> April, 2020 the Claimant seeks the following remedies: -

*a) Determination that the Respondent actions infringe on the Claimant's Constitutional Right to Fair Labour Practices.*

*b) Permanent Order restraining the Respondent from unprocedurally and irregularly restructuring the Claimant members grading system without the prior notification, consultation and approval of the Claimant.*

*c) Order compelling the Respondent to consult the Claimant before implementing the State Corporation Advisory Committee Human Resource Instruments.*

*d) Order that the approved State Corporation Advisory Committee Human Resource Instruments shall not affect the current Collective Bargaining Agreement (2017-2021) and any other subsequent Collective Bargaining Agreement to the detriment of the Union members.*

*e) A declaratory order that ALL the employees of the Respondent save for the Managing Director have a right to join the membership of the Claimant.*

*f) An Order as to cost of the application".*

22. Together with the claim, the Claimant filed an application seeking the following orders:-

*(1) THAT this Application be certified as urgent and heard ex-parte in the first instance.*

*(2) THAT the service of this Application upon the Respondent herein be dispensed with at the first instance.*

*(3) THAT pending hearing and determination of this suit, the Honourable Court be pleased to issue an order restraining the Respondent whether by themselves or their representatives, servants, agents, and/or assigns from restructuring its staff grading structure, Human Resource policies and Manual Career guidelines, Organization structure and the Staff establishment.*

*(4) THAT pending hearing and determination of this suit, the Honourable Court be pleased to issue an order that the State*

*Corporation Advisory Committee Human Resource Instruments shall not affect the current Collective Bargaining Agreement (2017-2021) between the Respondent and the Claimant.*

*(5) THAT pending the hearing and determination of this suit a mandatory order of do issue compelling the Respondent whether by themselves or their representatives, servants, agents, and/or assigns to stop the process of implementing the State Corporation Advisory Committee Human Resource Instruments.*

*(6) THAT the Honourable Court be pleased to issue an order compelling the Respondent to produce/ provide the Claimant with the documents in the Notice to Produce attached herein.*

*(7) THAT this Honourable Court be pleased to grant such other or further orders as it may deem fit to grant.*

*(8) THAT costs of this Application and suit be met by the Respondent.*

23. The application was heard ex parte on 15<sup>th</sup> April, 2020 and the following orders granted:-

*(i) "THAT pending hearing and determination of this suit, an order is hereby issued restraining the Respondent whether by themselves or their representatives, servants, agents, and/or assigns from restructuring its staff grading structure, Human Resource policies and Manual, Career guidelines, Organization Structure and the Staff establishment.*

*(ii) THAT hearing on 14<sup>th</sup> May 2020".*

24. The Respondent filed a response to the claim dated 26<sup>th</sup> June 2021 in which it denies the averments in the Claim.

25. In the response the Respondent states that the Human Resource Policy Guidelines was a government driven process by the SCAC whose aim was to re-align all human resource instruments in the public service hence no consultation process was required initially in formulating the guidelines. The Respondent states that upon receipt of the confirmed SCAC Human Resource Instruments from the Ministry of Petroleum and Mining, the Respondent consulted with the Claimant on terms of the SCAC Human Resource instruments to ensure fairness of the implementation process.

26. The Respondent states that the internal memo impugned by the Claimant was released based on a meeting that was held on 5<sup>th</sup> November, 2019, a day before the meeting with the Claimant was held. It was therefore not possible for the issues discussed in the meeting on 6<sup>th</sup> November, 2019 to be included in the said memo. It is the Respondent's position that it agreed to temporarily halt the implementation to allow for further consultation, retreat and sensitization before adoption. That by letter dated 16<sup>th</sup> January, 2020 the Claimant informed the Respondent that it was not opposed to filling of vacancies in Operations Departments which was overdue.

27. The Respondent avers that after consultations were held between Operations and Maintenance, Infrastructure, Strategy, Human Resource and Administration Divisions, the concerns raised were reviewed and it was established that the ongoing recruitment process was fair.

28. The Respondent states that a soft copy of the Human Resource Instruments was shared with the General Secretary of the Claimant. A soft copy of the instruments was also uploaded on the ISO document which is easily accessed by all employees of the Respondent.

29. The Respondent prays that the claim be dismissed with costs.

30. The suit was disposed of by way of written submissions.

### **Analysis and Determination**

31. In its submissions, the Claimant set out the following issues for determination: -

- i. Whether the Respondent consulted the Claimant before varying and adopting the Human Resource Instruments;
- ii. Whether the revised Human Resource Instruments changes the terms and conditions of service for unionisable staff;
- iii. Whether the injunctive orders sought herein by the Claimant/Applicant can issue.

32. The Respondent adopted the issues for determination as raised by the Claimant.

33. The Court will adopt the issues as raised by the parties.

#### **(i) Whether the Respondent consulted the Claimant before varying and adopting the Human Resource Instruments**

34. It is common ground that the Respondent and the Claimant have a recognition agreement and have negotiated several collective bargaining agreements, the last one covering the period 2017 – 2021.

35. It is further common ground that the Respondent, being a state corporation, is subject to supervision by the state Corporations Advisory

Committee (SCAC) as provided under the State Corporations Act. It is further common ground that by letter dated 15<sup>th</sup> May 2017, SCAC directed all State Corporations to submit for its approval the following Human Resource Instruments by 31<sup>st</sup> August, 2017: -

i) *The Organization Structure*

ii) *Staff Grading and Establishment*

iii) *Career Guidelines*

iv) *Human Resource Policy and Procedures Manual*

36. The Respondent complied and by letter dated 24<sup>th</sup> June, 2019, SCAC wrote to the Respondent communicating its approval for implementation of the said Human Resource Instruments which were thereafter submitted to the Respondent's board for approval before implementation. The board approved the instruments at its special meeting held on 5<sup>th</sup> November, 2019.

37. By memo dated 26<sup>th</sup> November, 2019 the Respondent communicated to its staff the approval of the instruments by the Board and outlined in the memo the changes that had been approved. The memo informed staff of the intention to carry out sensitization on the changes to enable all staff and related stakeholders to be aligned to the changes.

38. The memo further informed staff of the intention to fill vacant positions in the approved establishment through internal advertisements. The Memo specifically states that its purpose was to "appraise staff on the latest developments on the copy awaited SCAC reviewed documents together with related developments on the same." It urged staff to be patient and apply themselves diligently as the organization went through the realignment phase.

39. By letter dated 4<sup>th</sup> December, 2019 the Claimant protested over the adoption and implementation of SCAC Human Resource Instruments on grounds that the Claimant was not consulted as agreed at a meeting held on 6<sup>th</sup> November 2019. The Claimant demanded a consultative meeting not later than 16<sup>th</sup> December 2019.

40. The Respondent yielded and a meeting was held on 17<sup>th</sup> December 2019. Of relevance are minute 1 and 3 of the meeting which are reproduced below: -

*"Min. 1: The GS' reiterated that whereas they were not opposed to the changes proposed in the HR instruments, the Union was concerned that they would affect the existing Recognition Agreement (RA) as well as the Collective Bargaining Agreement (CBA) currently in force between parties.*

*Following the concern, the parties agreed that an addendum shall be prepared proposing the amendments in the RA and CBA that would be affected by the changes arising from the implementation of HR instruments on or before 30<sup>th</sup> January, 2020.*

### **Min. 3: Review of Tariffs**

*Although the issue of tariffs was discussed in the meeting held on 6<sup>th</sup> November, 2019, it arose again where the Union sought to know the progress the Company had made following the appeal it had lodged with EPRA.*

*In his response the Ag. MD reiterated his earlier remarks that RPC appealed the decision to EPRA citing areas of dissatisfaction and oversights in the model used to determine the new tariffs. He added that EPRA was expected to give a feedback by 13<sup>th</sup> December, 2019 to the Company but as at the date of the meeting no communication had been received on the same".*

41. On 15<sup>th</sup> January, 2020 the Respondent internally advertised for vacant posts in Operations Department: KPC Grade 4-11 based on approved establishment. The Claimant swiftly protested the advertisement by its letter dated 16<sup>th</sup> January 2020 which is reproduced below: -

### **"RE: PROTEST OVER IMPLEMENTATION OF RESTRUCTURED HR INSTRUMENTS:**

*The above subject matter refers: -*

*It was a common consensus reduced into minutes of our last consultative meeting on 17<sup>th</sup> December, 2019 that the New HR Instruments proposed for implementation be halted temporarily up to 30<sup>th</sup> January, 2020 to allow for further consultations, Retreat and sensitization before adoption; however, we are currently informed that you have gone ahead and rolled out vacancy advertisement base on the said suspended structure via List E; Ref: HR/AD/5/1 dated 15<sup>th</sup> January, 2020.*

*We are not opposed to filling vacancies in operations department which is long overdue neither do we have a problem with internal employment, however the purpose for declaring status quo in the HR structure was to allow parties discuss, conceptualize incorporate the proposed change into the current CBA 2017-2021.*

*As it is now, we read a lot of malice in your communication which is unprocedurally enticing and influencing our members to decamp Union to higher grade currently falling in Managerial Cadres but should ordinarily be Unionisable.*

*We demand that you immediately suspend and or withdraw the said circular advert to allow for urgent incorporation of the effects of SCAC's proposed structure into our existing CBA failure to which we shall seek Court's intervention to safeguard the interest of Trade Unionism in the sector. Our members are also hereby advised to remain cautious in their actions lest they get misled out of the Union unknowingly,*

*Please remain notified”.*

42. By letter dated 13<sup>th</sup> February, 2020 the Respondent communicated the programme for sensitization to the Claimant which was to take place from 17<sup>th</sup> February, to 6<sup>th</sup> March, 2020.

43. By letter dated 6<sup>th</sup> March, 2020 the Respondent suspended the internal recruitment exercise in Operations Department.

44. The consultative meeting between the Respondent and the Claimant was held from 17<sup>th</sup> to 19<sup>th</sup> February, 2020.

45. It is the averment of the Claimant that the restructuring of the grading system is intended to remove through the grading system, several employees out of the union grades to grades considered managerial in text which are in content not managerial.

46. From the foregoing, it is evident that the Respondent did agree to the Claimant's demand for consultative meetings and indeed the consultations were held on 17<sup>th</sup> December, 2019 and again between 17<sup>th</sup> and 19<sup>th</sup> February, 2020. This was after an earlier consultative meeting held on 6<sup>th</sup> November, 2019.

47. It is further evident that following protests by the Claimant, the Respondent suspended the internal recruitments in the Operations Department by Memo dated 6<sup>th</sup> March, 2021. I thus find no merit in the allegation of the Claimant that it was not consulted before varying and adoption of the Human Resource Instruments.

**(ii) Whether the revised Human Resource Instruments change the terms and conditions of service for the unionisable staff**

48. In the memo dated 26<sup>th</sup> November, 2019, the Respondent explained the contents of the Organization structure, the staff grading structure, the staff establishment by offices and roles, the career guidelines and the Human Resources Policies and Procedures Manual. Specifically, it set out the changes in the Human Resource Policies and Procedures Manual as follows-

*“The provisions of the Company's HR's Manual have been reviewed to ensure they are **“properly aligned to the guidelines issued by the Public Service Commission in May 2018”**. Key among the immediate changes arising out of the revised policy are:*

*(i) Review of **Commuter Allowance** to be in tandem with government rates as revised from time to time which shall range from Kshs.12,500 to Kshs.24,000.*

*(ii) Revised Employee/employer pension contribution from the current **6% (employee), 12%(employer)** to a revised **7.5% (employee), 15% (employer)***

*(iii) Revision of **Leave allowance** from the current respective rates per grade to a total of **30% of one's basic salary subject to: - An employee having to take a minimum of 15 days** of his annual leave entitlement either at once or cumulatively to qualify or to be eligible for the leave allowance and that;*

*All employees will be eligible for leave allowance only once a year and for ease of administration, the allowance will be paid through the payroll. NB; Those who get paid but do not subsequently proceed on leave shall have the allowance recovered from them.*

*(iv) **Shift Allowance for eligible Management Staff cadre** has been revised from the current **17% to 25% of basic salary***

*(v) Temporary Terms of employment will going forward apply to cases where the Company employs an employee for not more than three (3) months. in such a case, the Temporary employee will be entitled to earn a taxable basic salary, house allowance, Commuter allowances at the prevailing approved rates. Such employee serving on temporary terms shall be entitled to 1.75 days a month leave within the period of engagement. and shall not be entitled to other benefits, neither shall they be entitled to service gratuity. All other cases of an employment contract beyond three months e.g. One (1) year as has been the case before will be entitled to benefits at approved rates including medical and service gratuity at the end of their respective contracts.”*

49. At the consultative meeting between the Parties held on 17<sup>th</sup> December, 2019, the Parties agreed and signed an addendum to the CBA as follows: -

**“ADDENDUM TO JULY 1, 2017 – JUNE 30, 2021 CBA**

*Following a meeting held between Kenya Pipeline Company Limited (KPC) and Kenya Petroleum Oil Workers Union (KPOWU) on 17<sup>th</sup> December, 2019 to be briefed on the revised KPC State Corporation Advisory Committee (SCAC) approved Human Resource*

Instruments, the parties do hereby agree;

1) To amend Clause 6 of the CBA on the "Level of Representation" to read KPC Grade 9 to 12

2) That the new salary structure Appendix 1 covering KPC Grade 9 to 12 shall be as hereunder;

**1<sup>st</sup> July 2019**

<b>KPC Old Grade (JG)</b>	<b>New KPC Grade</b>	<b>Minimum Salary</b>	<b>Maximum Salary</b>
10	9	103,699.00	200,575.00
11	10	83,487.00	175,082.00
12	11	57,075.00	164,884.00
13			
14A	12	37,925.00	94,094.00
14B			

**1<sup>st</sup> July, 2019**

<b>KPC Old Grade (JG)</b>	<b>New KPC Grade</b>	<b>Minimum Salary</b>	<b>Maximum Salary</b>
10	9	109,921.00	212,609.00
11	10	88,496.00	185,587.00
12	11	60,500.00	174,777.00
13			
14A	12	40,200.00	99,739.00
14B			

3) That this Addendum will be deemed to be part of the Collective Bargaining Agreement (CBA) July, 2017 to June, 2021 previously signed on 13<sup>th</sup> December, 2018".

50. From the foregoing it is evident that, other than the terms set out in the addendum to the CBA as set out above, there were no staff removed from the grades held by unionisable staff. It is further evident that the changes in the Human Resource instruments did not affect any of the terms of unionisable staff negatively. The changes set out above on commuter allowance, pension contributions, leave allowance, shift allowance and temporary terms of employment did not negatively affect the unionisable staff. Indeed, the Claimant has not pointed out any change in any of the Human Resource Instruments that negatively impacted on its members, or on the terms of the CBA or on its level of Union membership.

51. From the foregoing, it is my finding that the claim herein has no merit. The same is accordingly dismissed with an order that each party bears its costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 21<sup>ST</sup> DAY OF JANUARY 2022**

**MAUREEN ONYANGO**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered

through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**MAUREEN ONYANGO**

**JUDGE**