



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO E649 OF 2020

KENYA UNIVERSITIES STAFF UNION.....CLAIMANT

VERSUS

UNIVERSITY OF NAIROBI.....RESPONDENT

AND

SALARIES AND REMUNERATION COMMISSION.....INTERESTED PARTY

JUDGMENT

Introduction

1. In its Memorandum of Claim dated 13th October 2020 and filed in court on 15th October 2020, the Claimant states the issues in dispute as:
 - a) Unlawful withdrawal of allowances payable to the Claimant's members in the following departments: College of Health Sciences (extraneous allowance, health risk allowance, nurses uniform allowance); School of Biological Sciences-Chiromo (risk allowance) and College of Agricultural and Veterinary Sciences (risk allowance);
 - b) Refusal to pay the Claimant's members allowances in the following departments: College of Health Sciences (extraneous allowance, health risk allowance, nurses uniform allowance); School of Biological Sciences-Chiromo (risk allowance) and College of Agricultural and Veterinary Sciences (risk allowance);
 - c) Discrimination against the Claimant's members in payment of allowances in the following departments: College of Health Sciences (extraneous allowance, health risk allowance, nurses uniform allowance); School of Biological Sciences-Chiromo (risk allowance) and College of Agricultural and Veterinary Sciences (risk allowance);
 - d) Unlawful withholding of allowances due to the Claimant's members.

The Claimant's Case

2. The Claimant states that it signed a Collective Bargaining Agreement (CBA) with the Respondent in the month of February 2016. The Claimant adds that Clause 16.2 (a-v) of the said CBA provided for various allowances to be paid, including the allowances claimed herein. The Claimant claims that the said allowances were paid effective 1st July 2015 until June 2020, when the employer removed them, without any justifiable cause.
3. The Claimant states that the CBA signed in the month of February 2016, is still applicable, pursuant to Clause 28 of the CBA.
4. The Claimant avers that by its circular dated 14th September 2015 (SRC/028/09/2015), the Interested Party directed that the subject allowances be paid.
5. The Claimant seeks the following remedies:
 - a) A declaration that the Respondent has illegally and irregularly removed the said allowances from the Claimant's members' payslips in the following departments: College of Health Sciences (extraneous allowance, health risk allowance, nurses uniform

allowance); School of Biological Sciences-Chiromo (risk allowance) and College of Agricultural and Veterinary Sciences (risk allowance);

b) An order directing the Respondent to reinstate and pay to the Claimant's members from the following departments their allowances: College of Health Sciences (extraneous allowance, health risk allowance, nurses uniform allowance); School of Biological Sciences-Chiromo (risk allowance) and College of Agricultural and Veterinary Sciences (risk allowance);

c) A declaration that the action of the Respondent is in violation of the legitimate expectation of the Claimant's members under Article 47(1) of the Constitution of Kenya, Articles 14, 22 and 28 of the African Charter on Human and People's Rights and Article 3 of the Universal Declaration of Human Rights;

d) Costs and interest at court rates.

The Respondent's Case

6. The Respondent's response is contained in a Statement of Defence filed in court on 29th September 2021.

7. The Respondent states that it has a Recognition Agreement with the Claimant and a CBA running from 1st July 2015.

8. The Respondent points out that Clause 16.2 of the CBA deals with allowances, including risk allowance, house allowance, extraneous allowance, hardship allowance, responsibility allowance, overtime, leave and subsistence allowance.

9. The Respondent states that extraneous duty allowance, health risk allowance, nurses uniform allowance and risk allowance are governed by the CBA for 2013-2017 and are payable to health personnel/staff with clinical duties/assignment in a hospital/health facility, but excludes staff with administrative duties/responsibilities.

10. The Respondent further states that in the course of conducting integrity and accountability check of its payroll, disparities were unearthed and noted in the payment of various allowances to staff at the College of Health Sciences, School of Biological Sciences- Chiromo and College of Agriculture and Veterinary Sciences.

11. The Respondent asserts that while correcting the identified payroll disparities, its management engaged and consulted with all stakeholders on the issue of clarification of payment of allowances, with the term '*clinical duties/assignment*' being the main guiding factor in the processing and payment of the allowances.

12. The Respondent avers that in response to inquiry by stakeholders on the issue of processing and payment of allowances, its management clarified that the application of clinical services/duties and allowances are matters of individual staff terms of service, the relevant CBA and guidance by the Salaries and Remuneration Commission (SRC), the Interested Party herein.

13. The Respondent observes that according to the Claimant's members' terms and conditions of service, May 2006 as read together with the KUSU CBA for 2013-2017, '*clinical service/duty*' is defined as service offered by staff duly deployed and assigned clinical duties and who are in direct contact with patients in a registered health facility/hospital.

14. The Respondent states that it has continued to pay clinical allowances to qualified staff, whose terms and conditions of service provide for the allowances and who are assigned clinical duties in a duly registered health facility.

15. The Respondent maintains that the conciliation process on this dispute has not been concluded, as the appointed conciliator has not issued a certificate of disagreement to demonstrate that the parties have exhausted the dispute resolution mechanism, before moving to court.

16. The Respondent adds that in its representations before the Labour Office, it made it clear that the Claimant's members are expressly excluded from payment of the allowances because they are not medical practitioners or dentists, are not in direct contact with patients, they do not perform clinical duties/services in a duly registered health facility/hospital and the SRC has expressly excluded them from payment of clinical allowances.

17. The Respondent further maintains that it is not a gazetted public hospital and that all its constituent colleges offer theoretical information and cannot therefore qualify for the benefits, as alleged by the Claimant Union, except as provided under the relevant terms of service and advisory by the SRC.

18. The Respondent submits that an error in payment of allowances does not guarantee a right and therefore concludes that the Claimant's claim lacks merit and ought to be dismissed.

19. The Respondent further submits that the Claimant's members are administrative staff, who are expressly excluded by the SRC Circular SRC/028/09/2015 Ref. No. SRC/TS/CGOVI/3/61 Vol. 111 (136) dated 14th September 2015. The Respondent avers that non-payment of the allowances does not amount to discrimination or unilateral withholding of allowances.

20. The Respondent asks the Court to direct that the allowances paid in error together with interest, be recovered from the relevant Claimant's members.

Determination

21. The matter proceeded by way of written submissions. The Claimant submits that the withdrawal of the subject allowances, which it terms as an unjustified and unfair administrative action, was effected without affording the Claimant an opportunity to be heard. The Claimant relies on Article 47 of the Constitution, which provides as follows:

47. (1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

22. The Claimant further relies on the decision in *JMK v MWM & another [2015] eKLR* where the Court of Appeal stated the following:

“The courts of this land have been consistent on the importance of observing the rules of natural justice and in particular hearing a person who is likely to be adversely affected by a decision before the decision is made.”

23. There is evidence on record that the issue in dispute, being the withdrawal of certain allowances, from some of the Claimant’s members, was the subject of discussions at the shop floor and at the conciliation stage. From this evidence, it emerges that the withdrawal was informed by the position taken by the Respondent that the affected employees were not performing clinical duties and were therefore not entitled to the subject allowances.

24. The Claimant did not contradict the position taken by the Respondent that the withdrawn allowances were not merited in the first place. The Respondent’s assertion in this regard was therefore unassailed. In its decision in *Nicholas Muturi Okemwa & 8 others v Judicial Service Commission [2016] eKLR* this Court held that where benefits have been paid in error, no right can be said to have accrued in favour of the recipient(s) of the payments.

25. Having failed to disprove the assertion made by the Respondent that the subject allowances were paid in error, the Claimant failed to establish a basis for its claim. As held in *Saunders v Edwards [1987] WLR 1116* a court of law cannot confirm actions taken illegally.

26. Moreover, the Claimant did not provide any particulars of the affected employees and its prayers were therefore made at large.

27. That said, the only conclusion to make is that the Claimant has failed to prove its claim against the Respondent, which claim therefore fails and is dismissed.

28. Each party will bear their own costs.

29. Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 28TH DAY OF APRIL 2022

LINNET NDOLO

JUDGE

Appearance:

Mr. Jaoko for the Claimant

Mr. Masese for the Respondent

No appearance for the Interested Party