Bakery, Confectionery, Food Manufacturing & Allied Workers Union v Mill Bakers Limited; Real Careers Limited (Interested Party) (Cause 1193 of 2018) [2022] KEELRC 1422 (KLR) (27 May 2022) (Judgment)

Neutral citation: [2022] KEELRC 1422 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE 1193 OF 2018

J RIKA, J

MAY 27, 2022

BETWEEN

BAKERY, CONFECTIONERY, FOOD MANUFACTURING & ALLIED WORKERS UNION ..... CLAIMANT

AND

MILL BAKERS LIMITED ..... RESPONDENT

AND

REAL CAREERS LIMITED ..... INTERESTED PARTY

JUDGMENT

1. The Claimant Union filed its Statement of Claim on 13th July 2018.

2. It avers that the Respondent is a registered company, resident in the industry represented by the Claimant, and that the Claimant and the Respondent executed a Recognition Agreement [RA], way back on 11th April 2007. The RA was executed pursuant to an Award made in Industrial Court Cause No. 29 of 2006 between the Claimant and the Respondent.

3. The Interested Party is a registered company, engaged by the Respondent to supply labour.

4. After executing the RA, the Respondent dithered in executing a Collective Bargaining Agreement [CBA]. Another trade dispute over the CBA was reported to the Ministry. Conciliation was fruitless. This resulted in further litigation to compel compliance, in Industrial Court Cause No. 113 of 2008. It was ordered that the Parties negotiate and conclude CBA, which was done, the latest CBA covering the period 1st May 2011 to 30th April 2013.

5. The RA grants the Claimant, the exclusive bargaining agency rights, prohibiting the Respondent from engaging with 3rd Parties, in discussing and negotiating on the subjects specified under clause 2 of the RA.

6. The CBA contemplates that all Unionisable Employees of the Respondent, are to be engaged only in accordance with the CBA.

7. The Minister for Labour issued Gazette Notice 1514 on 25th January 2011, requiring the Respondent to deduct and remit agency fees to the Claimant, in accordance with Section 49 [1] of the *Labour Relations Act*.

8. The Respondent did not do so, compelling the Claimant to report the existence of a yet another trade dispute to the Minister. The Minister appointed a Conciliator who convened a conciliation meeting between the Parties.

9. The Respondent stood its ground, explaining that it had outsourced its entire workforce through the Interested Party, and would therefore not deduct and remit agency fees. The Conciliator returned a finding in favour of the Claimant, but the Respondent still would not budge.

10. At the end of the existing CBA, the Claimant proposed to amend certain clauses, heralding a new CBA. The Respondent declined to negotiate, resulting in another report of a dispute, made to the Minister. The Respondent adamantly declined to participate in the new conciliation process, resulting in the Conciliator issuing a Certificate of Unresolved Dispute under Section 69 [a] of the *Labour Relations Act*, 2007, which opened the way for presentation of the Claim before this Court.

11. The Claimant contends that the Respondent had since gone on a wild spree of suppressing trade union activities at its workplace by: maliciously replacing Claimant's members with new Employees, brought in through the Interested Party; placing the Claimant's members on 1-year fixed term contracts; bypassing all the terms and conditions of service in the CBA; and harassing Claimant's members through undeserved letters to show cause why, they should not be dismissed.

12. The outsourced Employees are deployed in unionisable positions and core functions. The Claimant submits that the arrangement between the Respondent and the Interested Party, is in contravention of the ILO Private Employment Agencies Convention 181 of 1997. The arrangement is aimed at ousting of the CBA from the enterprise, which amounts to an unfair labour practice.

13. The Claimant prays for Judgment as follows: -

    a. The Respondent is compelled to deduct and remit agency fees to the Claimant, in respect of Employees who have resigned from the Claimant, and who continue to enjoy the terms and conditions contained in the CBA negotiated between the Claimant and the Respondent.

    b. The Respondent is compelled to negotiate fresh CBA within timeframes to be given by the Court.

    c. In event the Respondent does not negotiate and conclude such CBA, the Court adopts the proposals submitted to it and to the Respondent, as the current CBA.

    d. Declaration that engagement of Employees in respect of jobs whose designation, description, content, substance and process fall under the RA and CBA, violates the RA and the CBA.

    e. Declaration that such engagement amounts to unfair labour practice and in violation of Article 41 of *the Constitution*.

f. A permanent injunction restraining the Respondent from outsourcing its core functions.

g. The Outsourcing Agreement between the Respondent and the Interested Party is struck down, and all outsourced Employees discharging core functions are deemed as direct Employees of the Respondent.

h. Costs be provided for.

14. The Respondent and the Interested Party filed a joint Statement of Response, on 22nd May 2019. It denies having executed a Recognition Agreement with the Claimant. It is the position of the Respondent that the issue of agency fees was settled about 8 years ago, and is presented again in this dispute in afterthought. It is conceded that the Respondent contracted the Interested Party to provide labour, and the Respondent is therefore not in a position to continue deducting and remitting agency fees.

15. The Respondent does not have any Unionisable Employees in its payroll, to enable it negotiate any CBA with the Claimant.

16. The Respondent states that it dismissed its Employees properly and procured the services of the Interested Party. None of these Employees have moved to Court to claim for unfair termination.

17. The Interested Party states that it has not been approached by the Claimant to negotiate any CBA with the Claimant. It concedes that all its Employees are unionisable. It has no objection whatsoever, in the Claimant approaching it to negotiate a CBA.

18. The Respondent holds that it has the right to issue Employees fixed-term contracts, so long as they are made within the terms and conditions stipulated in the CBA. No Employee has been harassed or victimized. The Respondent and the Interested Party plead that the Claimant has not demonstrated which law they have infringed in their transactions. They have the right to enter into outsourcing arrangement. The right to fair labour practices has not been infringed.

19. The Respondent pleads further that it is not a must that agency fees are collected and remitted to the Claimant by the Respondent; they can be collected and remitted by the Interested Party.

20. The Respondent advised the Claimant as much, but the Claimant has declined to engage the Interested Party.

21. The Interested Party avers that it is in full control of its Employees working at the Respondent's business, and it does not offer inferior terms to these Employees, comparative to the CBA concluded between the Respondent and the Claimant. The Employees sought employment with the Interested Party because their contracts with the Respondent had expired. They were free to enter into fresh contracts with a fresh Employer.

22. The Respondent states that the Claim is ill-advised, time-barred and extortionist. It is meant to arm-twist the Respondent to collect and remit trade union agency fees which is legally beyond its mandate. The Respondent and the Interested Party pray for dismissal of the Claim with costs.

23. Parties agreed before the Court to have the dispute considered and determined Under Rule 21 of the Court's [Procedure] Rules, 2016. The dispute was last mentioned in Court on 11th February 2022, when Parties confirmed filing and exchange of their Final Arguments.

24. The issues are, whether the Respondent or the Interested Party should collect and remit agency fees to the Claimant; whether the rights and obligations created between the Claimant and the Respondent

under their RA and CBA have become extinguished following the entry of the Interested Party at the workplace; and whether the Court should grant the prayers sought.

The Court Finds: -

25. The Claimant was granted Recognition by the Respondent, following a protracted conciliation and litigation process.

26. The Claimant has been compelled to report a multiplicity of trade disputes to the Ministry of Labour, even after Parties executed the RA.

27. The record shows that the Respondent declined, even after RA was executed, to negotiate CBA, resulting in unnecessary further report of a trade dispute, conciliation and litigation.

28. Ultimately, the Respondent engaged the Interested Party, outsourcing its labour, and disregarding the existing RA and CBA, which bind the Claimant and the Respondent, with respect to all Employees working for the Respondent, in unionisable positions.

29. At the centre of all the conciliation and litigation between the Claimant and the Respondent, is the concept of trade union busting.

30. Some businesses which have not fully embraced trade unionism, employ all manner of tactics, to ensure trade union activities are kept at bay in the workplace, and that the structures of collective bargaining are stymied.

31. Martin Jay Levitt, a reformed Union Buster, in his book, Confessions of a Union Buster, New York Crown Publishers, 1993, gives some insights to the dirty tricks employed by Union Busters, dirty tricks which elevated him to the top of his profession. He describes how Union Busters wear down Trade Unions, and are contemptuous of Workers who try to organize. They are masters of corporate skulduggery; whose best ware is to intimidate Workers against unionization. Levitt describes trade union busting, as '' a field populated by bullies and built on deceit. A campaign against a Union, is an assault on individuals and a war on truth. As such, it is a war without honour. The only way to bust a Union is to lie distort, manipulate, threaten and always, always attack.''

32. The Claimant and the Respondent were involved in a prolonged dispute way back in 2006, in Industrial Court Cause No. 29 of 2006 on recognition. The Court ordered the Respondent to grant the Claimant Union recognition and to sign the RA within a month of the Award.

33. In the present dispute, the Respondent still submits that it does not have a RA with the Claimant, and that the Claimant is put to strict proof thereof.

34. There is in place a RA executed pursuant to the Award of the Court.

35. But even after the RA was executed, the Respondent declined to negotiate and conclude a CBA, prompting the Claimant to once again seek the intervention of the Ministry of Labour, and eventually the Court, in Industrial Court Cause No. 113 of 2008. The Claimant sought to have the Respondent compelled to negotiate and conclude a CBA.

36. In this second litigation, it was the position of the Respondent that the Claimant did not have sufficient members at the Respondent's business. This argument was advanced notwithstanding the Award in the previous Cause, and the fact that there was now a RA in place.

37. The Court ordered the Respondent to negotiate and conclude a CBA with the Claimant. Several CBAs were subsequently negotiated and concluded.

38. After the Respondent was compelled to collectively bargain, it engaged an outsourcing firm, the Interested Party herein. It placed its labour under the outsourcing firm, clearly with the objective of circumventing the regulatory burdens imposed by the Court-inspired RA and CBA.

39. The Respondent has continued to wear down the Claimant, and the Respondent's Unionisable Employees, in a triangular relationship. It has totally rendered the Claimant irrelevant at the workplace, and completely trashed existing and legally recognized collective bargaining structures.

40. There is evidence of other trade union busting tactics adopted by the Respondent, besides its engagement with an outsourcing firm.

41. There are notices to show cause on record, issued in unclear circumstances, after Employees had been given short notices to work on Easter Monday. The Employees complained also, about being sent on extended leave. Without consulting the Claimant, Unionisable Employees were placed on fixed term contracts by the Respondent. The Claimant complained repeatedly that it was not consulted by the Respondent, on matters touching on Unionisable Employees, and that such consultations should have taken place at the shop floor level. These are all indicators of trade union busting, tactics applied by Employers, in wearing down Trade Unions, and preventing the free exercise of trade union activities in workplaces.

42. Even as the Respondent is entering into outsourcing agreement with a 3rd Party, it ought to keep in its mind Gazette Notice Number 1514 of 25th January 2011, which imposes the obligation on the Respondent, to deduct and remit agency fees to the Claimant, in accordance with Section 49[1] of the *Labour Relations Act*. It ought to keep in mind its obligations under the RA and CBA.

43. The Court does not think that those obligations were extinguished by the entry into the workplace, of a 3rd Party who is merely managing the Respondent's labour force. The business has not changed hands. The Respondent remains its owner, and in control of the factors of production. In the view of the Court, the obligations created by Gazette Notice Number 1514 of 25th January 2011; the RA; and the applicable CBA, must be read into contracts concluded between the Interested Party and any of the Unionisable Employee at the Respondent's workplace. The obligations of the Respondent created by the law, such as appertains to deduction and remitting of agency fees, must continue to be discharged by the Interested Party. Existing contractual/statutory employment obligations are not voided, by the entry into the workplace, of a new business owner or manager. The Interested Party is not a new business owner, but a 3rd Party, who has been entrusted the role of managing the Respondent's labour requirements. It is bound by the existing CBA, so long as that CBA applies to Unionisable Employees, old and new, working for the Respondent's business. Section 49 [1] of the *Labour Relations Act* is directed at any Employer bound by the CBA. Since the Interested Party has assumed responsibility over the Respondent's unionisable labour force, it must continue to discharge the statutory obligations it found in place, between the Claimant and the Respondent, with respect to that labour force. The Respondent has a responsibility in ensuring that its statutory obligations, continue to be met.

44. The Respondent implicitly acknowledges the role to be assumed by the Interested Party, arguing that it is the Claimant, who has failed to engage the Interested Party. The Interested Party itself, argues it does not have objection to negotiate CBA with the Claimant Union. The Respondent does not however advise how the Claimant is to engage the Interested Party in collective bargaining, while there is no RA between the Claimant and the Interested Party. Is the Claimant to pursue recognition with the Interested Party, returning to where it was in 2006, when it initiated proceedings for recognition by the Respondent, in Industrial Court Cause No. 29 of 2006? Is the Claimant going to enter into RAs with every 3rd Party brought into the equation by the Respondent? Considering the concession made

by the Interested Party on its readiness and willingness to collectively bargain with the Claimant, a mechanism must be found within the existing collective bargaining structures, to facilitate the Parties, instead of taking them back to 2006.

45. Social partners should be wary of workplace policies that have the effect of subverting the right to freedom of association, the right to form, join or participate in the activities and programmes of a trade union, as enshrined in Articles 36 and 41 of *the Constitution*. Parties must not fall into vicious circles of litigation, where past issues re-emerge 15 years later, clogging the wheels of justice and slowing down economic productivity.

46. The series of disputes presented in this Court and to the Ministry of Labour, involving the protagonists, suggest there could be a sustained and wasteful policy of trade union busting, in place at the Respondent's business.

47. The legal obligations existing between the protagonist must not be defeated through the business structure the Respondent has espoused. Decisions of the Court upon which RA and subsequent CBAs are founded, must continue to have meaning and effect.

48. The Respondent explains that it has always been aggrieved by the Award made by retired Hon. Justice Charles P. Chemmuttut, on 15th May 2007, which ordered that the Respondent grants recognition to the Claimant. It still argues, in its Submissions, 15 years after the Award, that the Claimant did not have a simple majority of Unionisable Employees at the Respondent. This is irrational, because that Award has never been challenged on appeal, review or in any way varied of set aside. It was acted upon. This refusal or inability on the part of the Respondent, to accept that it has a RA with the Claimant, and has concluded CBAs subsequently, is the reason the Respondent has found it necessary to adopt a sustained policy of trade union busting.

49. The Respondent applied to the National Labour Board for de-recognition of the Claimant, on 23rd July 2012. It was argued by the Respondent that the Industrial Court had coerced Respondent's Employees to belong to the Claimant. It was further submitted by the Respondent that the Claimant Union did not have a single member, working for the Respondent. The Respondent went on to pray the National Labour Board that '' Recognition Agreement be generally stood over pending the outcome of this application, without any loss of benefits to either party on determination.'' What sort a prayer is this? The *Labour Relations Act* does not have a provision allowing RAs to be stood over generally. The Respondent has not disclosed to the Court whether its application was allowed. Until it supplies such information to the Court, the RA must continue to bind the Parties.

50. Ultimately the Court is satisfied that there is more than sufficient historical insights and evidence, to allow the Claim.

It is ordered: -

a. The Respondent shall ensure agency fees in respect of unionisable Employees who are not members of the Claimant, and who continue to enjoy the terms and conditions contained in the prevailing CBA, are deducted and remitted to the Claimant, either by the Respondent or Interested Party.

b. The Claimant, the Respondent and the Interested Party, shall forthwith negotiate and conclude a fresh CBA, within 90 days of this Judgment, anchored on the existing RA, CBA and Outsourcing Agreement, subject to such modifications of these Agreements, as the Parties shall deem necessary.

c. In default the Court shall adopt the CBA drafted and presented to the Court by the Claimant, subject to such modifications as shall be deemed necessary.

d. It is declared that engagement of Employees in unionisable positions, in respect of jobs whose designation, content, substance and process fall within the realm of the existing RA and CBA, in respect of the core functions of the Respondent, violates the RA and the prevailing CBA.

e. The trade union busting activities of the Respondent enumerated above, are declared to be in violation of Articles 36 and 41 of *the Constitution* of Kenya, more particularly the rights to freedom of association and fair labour practices.

f. The Respondent is permanently restrained from engaging Unionisable Employees in its core functions through outsourcing.

g. It is ordered that the Respondent and the Interested Party shall jointly engage the Claimant for the full implementation of this Judgment, within 90 days, failing which the Claimant is at liberty to reapply for prayer [h] in the Statement of Claim, relating to the Outsourcing Agreement between the Respondent and the Interested Party.

h. Costs to the Claimant, to be paid by the Respondent.

DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY, AT NAIROBI, UNDER THE MINISTRY OF HEALTH AND JUDICIARY COVID-19 GUIDELINES, THIS 27TH DAY OF MAY 2022.

JAMES RIKA

JUDGE