



Kenya Union of Commercial, Food and Allied Workers v National Social Security Fund (Cause 968 of 2017) [2022] KEELRC 52 (KLR) (11 May 2022) (Judgment)

Neutral citation: [2022] KEELRC 52 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 968 OF 2017
MA ONYANGO, J
MAY 11, 2022**

BETWEEN

**KENYA UNION OF COMMERCIAL, FOOD AND ALLIED
WORKERS CLAIMANT**

AND

NATIONAL SOCIAL SECURITY FUND RESPONDENT

JUDGMENT

1. The Claimant herein is a trade union registered under the [Labour Relations Act](#) to represent employees in the sectors set out in its constitution.
2. The Respondent is a government agency, established under the National Social Security Fund (NSSF) Act No. 45 of 2013 offering social protection to all workers.
3. The Claimant and the Respondent have a valid recognition agreement pursuant to which parties have negotiated, signed and registered several collective bargaining agreements (CBAs) in this Court. The CBA relevant to this dispute is for the period 2013 to 2015
4. The claim herein is filed by the Claimant on behalf of its member Mr. Dismas Nyamweya Osano, the grievant herein, an employee of the Respondent.
5. The issue in dispute herein is the refusal by the Respondent to pay transfer allowance to Mr. Dismas N. Osano contrary to Clause 7.4 of the parties collective bargaining agreement.
6. The grievant was transferred from Head Office to Kitengela Branch on August 21, 2014. The transfer letter informed the grievant that his terms and conditions of service remained as “currently stated”.
7. The grievant was released from Head office to report to Kitengela Branch on September 5, 2014.



8. It is the averment of the Claimant that upon transfer the grievant had expectation of immediate payment of transfer allowance as provided in Clause 7.4 of the CBA which provides: -
 - (a) All unionisable employees on transfer will be paid transfer allowances for a period not exceeding 30 days at the rate of four thousand seven hundred (Kshs.4,700) per day.
 - (b) An employee will be paid transfer allowance as per his/her grade at full rate for himself/herself and spouse and half rate for he/her children under the age of 22 years. Transportation will be provided by the fund as per prevailing AA rates House allowance is not payable during this period. The employees allowance will be paid on departure while the allowance due to his/her stated dependents will be claimed upon arrival at the new station.
 - (c) For a normal transfer employees will be given two weeks' notice. Emergency transfers would be handled on a case by case basis.
 - (d) Transport shall be paid as per the prevailing AA rates.
 - (e) The two parties did not agree on this sub clause. Consequently, the earlier sub clause (c) of the outgoing CBA 2011/2013 remains in force.
9. The Claimant avers that when the grievant sought payment of transfer allowance under Clause 7.4 of the CBA, the Respondent declined to pay even after receiving the Claimant's letter dated 23rd October 2014 prompting it to report a dispute over the issue to the Minister for Labour.
10. After hearing the parties, the Conciliator prepared a report in which it was recommended that the Claimant be paid. The Claimant accepted the recommendations of the Conciliator while the Respondent did not, hence the filing of the claim herein.
11. In the memorandum of claim dated April 28, 2017, the Claimant prays for the following reliefs: -
 - (a) The contents of the Respondents letter dated 4th November, 2014 are inconsistent with Section 7.4 of the parties registered Collective Bargaining Agreement 2013/2015 and therefore null and void.
 - (b) The transfer allowance claim by the grievant is in line with his contract of service and therefore the Respondent is directed to pay the allowance with immediate effect.
 - (c) The Respondents action to unjustly deny the grievant transfer allowance amounted to unfair labour practice consequently order for interest of 14% on the principal amount from the date of transfer.
 - (d) Costs be to the Claimant.
12. The suit was disposed of by way of pleadings, documents and written submissions in accordance with Rule 21 of the *Employment and Labour Relations Court (Procedure) Rules*, 2016.
13. In the written submissions of the Claimant, it is contended that at the time of transfer of the grievant, the CBA in force was that for the period 2013 – 2015 which provided for transfer allowance of Kshs.4,700/= per day for 30 days. That the Respondent is bound by the CBA. That Sections 59 and 60 of the *Labour Relations Act* provide for validity of a CBA. That Section 5 of the *Employment Act* prohibits discrimination.
14. The Claimant relies on Article 41 of the CBA, ILO Convention No. 98 on the right to collective bargaining.



15. For the Respondent it is submitted that the CBA for the period 2013 to 2015 was signed 23rd March 2015 while the grievant was transferred on 21st August 2014 before the CBA came into force. That the CBA could therefore not have given rights to the grievant before its registration.
16. It is the Respondent's averment that this issue was first raised by the grievant in his letter dated September 19, 2014 and in the response dated November 4, 2014, the Respondent clarified to the grievant that the applicable CBA was not distance specific while the Human Resource Manual specified the applicable rates.
17. The Respondent submits that at all material times relevant to this claim, its Human Resource Policy clearly stipulated circumstances under which transfer allowance would be payable to an employee on transfer. That the Human Resource Policy clearly stated the rate of such transfer allowance.
18. The Respondent submits that the Claimant did not contest the existence of the Respondent's Human Resource Manual which gave the specific guidelines in respect of the transfers. It submits that the Human Resource Manual was reviewed by the Board and communicated to all staff (including the grievant) on the April 14, 2014. That this was not controverted by the grievant.
19. It is further the submission of the Respondent that the Human Resource Manual stipulated at the relevant parts that employees would be obliged to serve in any station within Kenya as exigencies of the job would require. With specificity, it was stipulated;
 - i. At Clause 1.2 on application, that the manual would apply to all employees of the Fund. Where the policies and regulations were in conflict with the CBA in force, the CBA would prevail.
 - ii. There is no conflict between the CBA and the Human Resource Manual. One gives a general provision, the other gives specific provision as to application of the general provision.
 - iii. At Clause 7.2 of the HR Manual, the stipulation is specific that the transfer allowance shall be paid only where the distance between the two stations are more than 50 kilometers.
 - iv. The Claimant did not demonstrate that the distance between the Respondent's Head Office and its Kitengela Branch was more than 50 kilometers.

Analysis and Determination

20. The facts of this suit are not in dispute. It is common ground that the grievant was transferred from Nairobi to Kitengela by letter dated August 21, 2014 and reported to the new station on 8th September 2014. He had earlier by letter dated 1st September 2014, applied for processing of his transfer allowance in accordance with Clause 7.4 of the CBA which provides for transfer allowance as has already been reproduced at paragraph 8 herein above.
21. Further, the Human Resource Policy of the Respondent provides for transfer allowance as follows –

“ 3.1.2

Transfer Allowance

Where an employee on Management cadre is transferred from

one station to another, he will be eligible for payment of a transfer allowance amounting to one month's consolidated salary immediately he is released to the new station provided the new station is not less than fifty (50) kilometres from the old station. Unionizable staff will be paid as per the CBA.”



22. Paragraph 1.2 of the Human Resource Manual provides as follows –

1.2

Application

- i. Policies and regulations shall apply to all employees of the Fund.
- ii. Where these Policies and Regulations conflict with the Collective Bargaining Agreement (CBA) in force, the latter shall prevail.

23. It is the Respondent’s position that at the time the grievant was transferred on 21st August 2014, the CBA for 2013/2015 had not been registered and by virtue of Section 59 of the Labour Relations Court Act. Section 59(5) specifically provides that a CBA shall not come into force and shall not be enforceable until it has been registered by the Court.

24. It is further the Respondent’s position that at the time the grievant was transferred the transfer allowance clause was as provided in the amendment to the Human Resource Manual as communicated by the Respondent to staff by circular or letter dated 14th April 2014.

25. The opening paragraphs of the letter/circular reference No. SF/EST/1/146 Vol.1/28 and the closing paragraphs are as reproduced below –

“SF/EST/1/146 VOL.1/28 14 April 2014

All Staff

Human Resource Manual

Please refer to the Human Resource Manual that was approved by Board of Trustees and circulated to all staff in January 2012 via GroupWise.

You are hereby notified that some Clauses of the manual have been reviewed as a way of clarifying or improving on the issue in those Clauses.

The Clauses in question are as follows:

(A) Chapter iii: Compensation Benefits Advances

i. Transfer Allowance

Transfer Allowance will only be paid for a distance of 50 kilometres between the old and new station. This will apply to payment of local Per Diem Allowance as well

ii. Staff Loans

The Clause has been reviewed to include purchase of Ipads/Tablets as well as Laptops. Staff will apply in the usual manner subject to approval by the officer’s line Manager.

...

A signed copy of the Human Resource Manual has been posted on the intranet for your consumption. Management will also ensure there are copies of the same in all Departments, Regional and Branch offices as well as the Library. The Human Resource Team will conduct a sensitization on the Manual to all staff in the first quarter of the Financial Year, 2014/2015.

Please endeavour to familiarise yourself with the provisions of the Manual.

Signed



Richard K. Langat Ceo/managing Trustee”

26. The Claimant argues that the parties are bound by the CBA and any unilateral changes in the terms and conditions of employment that negatively affect its members is unfair labour practice. That the CBA, although signed on March 23, 2015, was effective from July 1, 2013 and all employees were paid arrears arising from the CBA amendments from the effective date being 1st July 2013.
27. It is further the Claimant’s argument that the Respondent did not make any proposals for change of the Clause on transfer allowance to include the changes made to the Human Resource Manual during negotiations of the CBA which was signed on March 23, 2015 after the alleged unilateral changes by the Respondent had been effected.
28. I would agree with the Claimant for several reasons. The first is that the alleged changes to the Human Resource Manual were communicated to staff when the relevant CBA was under negotiation. The Respondent has not explained why it was changing a clause in the CBA through the Board yet the CBA was under negotiation.
29. The Respondent has further not explained why it did not propose the clause for amendment during negotiation of the CBA to take into consideration the said changes made in the Human Resource Manual.
30. Thirdly, the circular letter by the Respondent does not state the date on which the changes were to take place, whether immediately or on a particular date in the future. The circular is silent on its effective date.
31. Further, the Human Resource Manual is explicit that where there is a conflict between the Human Resource Manual and the CBA, the latter will take precedence. Thus, in interpreting a clause that would deny and employee a CBA benefit, the clause must be interpreted in a manner that favours the employee.
32. Finally, the Respondent has not denied the averments of the grievant in his letter dated 19th September 2014 in which he states that during negotiations, the Managing Trustee agreed with the union that Kitengela was in a different county from Nairobi and that transfer allowance was payable for a transfer from Nairobi to Kitengela.
33. It is for these reasons that I find that the grievant is entitled to transfer allowance in accordance with clause 7.4 of the CBA and direct that the same be paid to him as provided in the relevant CBA.
34. The Respondent shall pay costs to the Claimant to cover reasonable costs for disbursements and other necessary expenses which I award the Claimant at Kshs.50,000/-, the Claimant being a trade union and having prosecuted the case by itself.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 11TH DAY OF MAY 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 15th March 2020 and subsequent directions of 21st 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

