



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NUMBER E147 OF 2021**

**BETWEEN**

**KENYA AIRLINE PILOTS ASSOCIATION.....CLAIMANT**

**VERSUS**

**KENYA AIRWAYS PLC.....RESPONDENT**

**RULING**

1. The Claimant Union filed this Claim, on behalf of its Member, a Pilot named James Kabiru [Grievant].
2. Dispute arose on 12<sup>th</sup> December 2020, when the Grievant, declined upon the instructions of his Flight Manager, to take a second flight.
3. The Grievant told his Manager that he had other personal engagements. The second flight remained without crew.
4. The Grievant felt he was being harassed and intimidated. He invoked the grievance handling procedure under clause 4 of the Parties' Recognition Agreement by writing to the Respondent.
5. He states that instead of the Respondent replying to his letter, it issued him a letter to show cause, why he should not face disciplinary action.
6. The Respondent alleged that, the Grievant failed to comply with his Supervisor's work instructions, contrary to Respondent's Human Resource Manual; and that he left the place of work, during working hours without permission, contrary to the Manual.
7. He replied on 16<sup>th</sup> December 2020. The Respondent was not satisfied with the reply. The Grievant was asked to attend a disciplinary hearing on 8<sup>th</sup> January 2021.
8. He did not submit himself to the disciplinary process, but instead filed this Claim through his Trade Union, and also reported the existence of a trade dispute to the Cabinet Secretary for Labour.
9. The Claimant seeks in the main Claim: declaratory orders that the disciplinary action against the Grievant, is in violation Article 41 and 47 of the Constitution, and Clause 4 of the Recognition Agreement and the CBA between the Parties; permanent injunction restraining the Respondent from continuing with the disciplinary process; and permanent injunction restraining the Respondent from victimizing the Grievant.
10. The Claimant seeks under Certificate of Urgency, protective measures in the interim. These include: an order against harassment of the Grievant by the Respondent; an order restraining the Respondent from interfering with the Grievant's duties as a Pilot; and an order restraining the Respondent from continuing with the disciplinary process.
11. The Application is the subject of today's Ruling.
12. The Respondent opposes the Application, through the Replying Affidavit of its Chief Human Resources Officer Evelyne Munyoki, sworn on 25<sup>th</sup> February 2021.
13. She explains that the Parties have a Recognition Agreement and a CBA. The Grievant is a Pilot employed by the Respondent. The Fleet Agreement, which is a component of the CBA, regulates flight schedules. The Grievant was informed there was a change in the original

roster and would be required, on 12<sup>th</sup> December 2020, to take an additional flight. His original flight was KQ 612. The additional flight was KQ 608. He was advised of this change in advance. On 12<sup>th</sup> December 2020, the Grievant completed his first flight KQ 612. He completely declined to take flight KQ 608.

14. This compelled the Respondent to make amendment to the flight roster. The Grievant was advised to collect his show cause letter on 15<sup>th</sup> December 2020. He collected the letter and replied on 16<sup>th</sup> December 2020. His reply was not satisfactory. He was invited to disciplinary hearing and advised of his procedural rights. Hearing was scheduled for 13<sup>th</sup> January 2021. He asked for deferment to enable him adequately prepare. This was granted. Hearing was rescheduled to 20<sup>th</sup> January 2021. On 18<sup>th</sup> January 2021, the Claimant Union wrote to the Respondent, indicating that disciplinary hearing would not take place, until the grievance lodged by the Grievant following the flight dispute of 12<sup>th</sup> December 2020, was resolved. The Respondent wrote back, clarifying that the grievance was an individual grievance and response to the grievance would be directed at the individual, not the Union.

15. The Respondent suspended disciplinary hearing, pending resolution of the grievance lodged by the Grievant. The Grievant was invited for grievance hearing on 20<sup>th</sup> January 2021.

16. Hearing of the grievance took place on 21<sup>st</sup> January 2021, in the presence of the Grievant and Claimant's representatives. The grievance panel reached findings, to the effect that the Grievant was not harassed.

17. The Claimant Union expressed its dissatisfaction with the grievance panel findings, and presented a collective grievance. The Respondent advised that the Grievant's matter was an individual grievance, and not subject to collective negotiation between the Parties.

18. The Respondent states that the disciplinary process is justified, procedurally fair, and commenced in accordance with the Respondent's Human Resource Manual.

19. On 25<sup>th</sup> February 2021, the Claimant registered a trade dispute. The issue is stated in the report to comprise: *victimization, intimidation and harassment of a KALPA Executive Council Member- First Officer James Gathiru Karuiru and KQs breach of the parties' CBA Fleet Agreement as pertains to Pilot roster changes.*''

20. The Respondent prays the Court to dismiss the Application with costs to the Respondent.

21. The Application was heard on 11<sup>th</sup> March 2021.

22. Counsel for the Parties restated the arguments contained in the respective Affidavits and Pleadings on record. They highlighted the legal principle that Courts do not interfere with disciplinary processes at the workplace, unless it can be shown that the processes are being carried out in clear violation of applicable legal and contractual standards.

**The Court Finds:** -

23. There is no clear legal provision, or clause in the Parties' workplace labour instruments, or in the individual contract of employment, which the Respondent has been shown to have flouted, to warrant the grant of protective measures sought.

24. The Court is of the view that this is a straight- forward case of an Employee who was instructed that there is a change in his work schedule; he was instructed in advance that the change required he flies an additional flight KQ 608, on 12<sup>th</sup> December 2020; and, he declined to take that additional flight for whatever reason.

25. *Prima facie*, this is a case of an Employee declining the lawful command and instructions of the Employer, which is insubordination, an act of gross misconduct, under Section 44 [4] of the Employment Act.

26. Other actions taken by the Employee after this, seem to the Court aimed at avoiding the disciplinary process. The Grievant and the Claimant have invoked grievance procedure; the Respondent accommodated the individual grievance; disciplinary hearing was suspended; the individual grievance was heard and concluded; the Respondent sought to restart the disciplinary hearing; the Claimant redefined the grievance to be a collective grievance, requiring another round of hearing, and suspension of the disciplinary process; the Respondent insisted on proceeding with the disciplinary process; and the Claimant Union approached the Court and the Minister for Labour, seeking to stop the disciplinary hearing.

27. The Court has no reason to intervene by granting protective measures sought. The Grievant's rights have not been violated, neither is there evidence of threat of violation. He will have the opportunity of arguing his case at the disciplinary panel, in the company of the Claimant's Representatives. All the arguments he is putting forward before the Court, explaining why he did not take the additional flight, can be placed before the disciplinary panel. If the panel does not discharge its work in accordance with the Employment Act, the Constitution, Policies and Contract to which the Parties are subject, then in the end the Grievant has the option of approaching the Court for remedies, which include reinstatement and full restitution. It should not be presumed that the disciplinary panel has a closed mind, or is unaware of its legal obligation to hear the Grievant objectively, with only one outcome expected – summary dismissal of the Grievant. The law does not contemplate that Courts are used by Employees who do not wish to submit to disciplinary processes at the workplace, to stall, frustrate, or completely avoid disciplinary action. How will businesses operate, if the E&LRC liberally issues injunctions, interim or permanent, barring the disciplining of Employees suspected of employment offences? The Claimant submits that the process should be completed in 30 days. Why does its Member, not submit to the process to facilitate expeditious disposal?

28. It is observed that the Claimant has also invoked conciliation process under the Labour Relations Act. The Claimant wrote to the

responsible Cabinet Secretary on 25<sup>th</sup> February 2021, reporting the existence of a trade dispute between the Parties, specifically invoking Section 62 of the Labour Relations Act.

29. Once a report is made, and Section 62 above is invoked, the matter falls outside the jurisdiction of the Court. The dispute [defined under Section 2 of the Labour Relations Act, to include a dispute or difference, or an apprehended dispute or difference between Employers and Employees], should be ventilated and exhausted before the Conciliator. All matters arising under the dispute, including interlocutory disputes and differences, should be placed before the Conciliator. The matter can only be presented before the Court if the Conciliator has issued a certificate that the dispute has not been resolved by conciliation under Section 69 of the Labour Relations Act. Referral to this Court would follow under Section 73 of the Act and Rule 5 of the E&LRC [Procedure] Rules, 2016.

30. The Claimant cannot pursue this Claim in Court, simultaneously with the conciliation process. The law does not contemplate parallel court and conciliation proceedings. This Claim is in abuse of both the court and conciliation process.

IT IS ORDERED: -

*a. The Application by the Claimant Union, amended on 22<sup>nd</sup> February 2021, is declined.*

*b. Interim order issued on 11<sup>th</sup> March 2021, requiring the Respondent to keep on hold the disciplinary process, is discharged.*

*c. Further proceedings in this Claim are stayed, pending the outcome of the conciliation process.*

**Dated and signed at Chaka, Nyeri County, under Ministry of Health and Judiciary Covid-19 Guidelines, this 9<sup>th</sup> day of April 2021**

**James Rika**

**Judge**