



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 389 OF 2018

BAKERY CONFECTIONERY FOOD

MANUFACTURING & ALLIED

WORKERS UNION.....CLAIMANT

VERSUS

UNITED MILLERS LIMITED.....RESPONDENT

JUDGMENT

1. The Bakery Confectionery Manufacturing & Allied Workers Union (the Union) sued United Millers Ltd (the Respondent) on 20 December 2018 and the Issue in Dispute was stated as:

Unfair refusal by the Company to issue appointment letters to 297 employees.

2. The remedies sought by the Union were:

(i) A declaration that the two hundred and ninety seven (297) Grievants herein are entitled to issuance of appointment letters in line with the provisions of clause 4 as read with clause 31 and Appendix B of the existing collective agreement between the Claimant and the Respondent from the date of their respective engagements with the Respondent upon completion of their probation period.

(ii) A declaration that the Respondent's refusal to issue the said Grievants with appointment letters set out in Appendix B of the existing collective agreement signed between the Claimant and the Respondent as provided is illegal, null and void and in violation of the collective agreement.

(iii) A declaration and finding that the Respondent's engagement of the 297 Grievants outside the terms and conditions of service set out in the collective agreement is in contravention of the existing collective agreement.

(iv) An order directing the Respondent herein to forthwith issue the 297 Grievants whose names and details are attached to the schedule to the Memorandum of Claim appointment letters in accordance with Appendix B of the existing collective agreement within a period of 30 days from the date of judgment.

(v) An order of injunction to issue restraining the Respondent herein from victimising any of the 297 Grievants whose names are attached to the Memorandum of Claim or from unlawfully terminating their services, unlawfully rendering them redundant or interfering with their employment in any way.

(vi) Any other relief which this Honourable Court may deem fit to award.

(vii) Costs of the suit.

3. The Respondent filed a Memorandum of Response on 26 July 2019 and on 9 March 2020, the parties proposed and the Court directed that the Cause be determined on the basis of the pleadings and submissions to be filed.

4. The Union filed its submissions on 26 January 2021 wherein it identified the Issues for adjudication as:

(i) Whether the 297 Grievants are entitled to issuance of appointment letters in accordance with the collective agreement and if so whether the refusal by the Respondent to issue appointment letters to the 297 Grievants is unlawful, null and void?

(ii) Whether the Respondent has the liberty to issue its own appointment letters other than the standard letter of appointment set out in appendix B of the Collective Agreement?

(iii) What remedies are available to the Claimant?

(iv) Who is to bear the costs of these proceedings?

5. The Respondent filed its submissions on 14 April 2021 but did not explicitly set out the Issues for determination but appeared to suggest the dispute was on the format of the appointment letter(s).

6. The Court has considered the record and the submissions.

7. The Union and the Respondent entered into a recognition agreement on or around 4 September 2006 after which the parties negotiated and signed several collective agreements.

8. The last such agreement produced in Court covered the period 1 January 2017 to 31 December 2018.

9. Part of the agreement was Appendix B which set out the form of appointment letters to be issued to the employees.

10. On 21 December 2016, the Union wrote to the Respondent decrying the fact that the Respondent had violated section 37 of the Employment Act, 2007 and clause 41 of the collective agreement. The thrust of the Union's concern was that the Respondent had refused or declined to issue appointment letters converting the status of employees to *regular employment* or *permanent employment*.

11. The dispute was taken through conciliation and the parties reached agreement on 28 August 2017 in the following terms:

(i) That the two hundred and ninety seven (297) employees currently serving on piece-rate/contractual basis be issued with appointment letters effective from the date one was first employed by the company. The exercise to be carried out gradually but not later than 12 months from the date of this agreement.

(ii) That parties to this agreement do meet quarterly to assess the progress on implementation. The meetings shall be held at the County Labour Offices, Kisumu.

(iii) The Union to sensitise and appraise her members on the implementation of this Agreement.

(iv) The Union to explain to her members the impact, implications and consequences of conversions from piece rate to monthly contracts.

12. The Respondent did not issue the letters as set out in Appendix B or as agreed in the conciliation agreement.

13. It attempted to issue appointment letters in a different format.

14. The dispute between the parties appears to the Court to be the legal impact or significance of the appointment letter at Appendix B in relation to employees who are on piece-rate contracts and those on casual employment basis.

15. Or to put it differently, does the appointment letter at Appendix B serve to convert piece-rate contracts and casual employment contracts into term contracts or *permanent* contracts?

16. Sections 9, 10 and 37 of the Employment Act, 2007 contemplate various types of contracts which can generally be categorised as contracts of indefinite duration (usually given the euphemism permanent), contracts of definite duration (fixed-term contracts), piece-rate contracts and daily contracts (casual contracts).

17. The parties in this particular case are concerned by piece-rate contracts and casual contracts. The Court will examine them apiece.

Piece-rate contracts

18. In terms of section 9(1) of the Employment Act, 2007, if a piece-rate contract continues for more than 3-months, then it must be reduced into writing.

19. However, a close reading of the section and section 10 of the Employment Act, 2007 does not reveal any intention to turn such a contract into a contract of indefinite duration (permanent contract). It is still left to party autonomy to agree on the duration of the contract.

20. The Court has looked at the letter of appointment at Appendix B. It provides:

Letter of Appointment

Following your recent appointment and interview, this letter serves to confirm your appointment as an employee of this company.

Position/Designation

You will be employed as and your work station will be

Date of Commencement

You will be required to commence employment with effect from

Salary on Appointment

Your starting salary will be paid Ksh ... salary (figures and in words) plus a housing allowance of Kshs Per month which will be paid in arrears at the end of each month.

Abridged Job description

Attached to this letter of appointment is your job description which please read and acquaint yourself with.

All other terms and conditions of service are as contained in the Collective Bargaining Agreement existing between the company and the Bakery, Confectionery, Food Manufacturing and Allied Workers Union (Kenya).

This letter is sent to you in duplicate and we shall be glad if you will sign the duplicate and return to us, signifying that you accept the appointment.

21. The Court is unable to discern in the said letter at Appendix B any express intention to convert the contractual terms of employees on piece-rate terms into permanent contracts. If there was such an intention, recourse must be taken elsewhere.

22. The Court has also looked at the prototype letter issued by the Respondent. At the significant part, it provides:

Commencement Date

Your recognised commencement date is

You will be employed on a permanent basis and your contract will expire as per the set retirement date.

23. It appears that the prototype appointment letter had the intention of converting the employees on piece-rate contracts into permanent employees.

24. In the view of the Court the prototype contracts have a more superior terms to the one envisaged in Appendix B.

25. The Union rejected the same and because the form of contract at Appendix B was the result of party autonomy, the Respondent should issue appointment letters in the format set out in the Appendix to employees who were on piece-rate contracts.

Casual employees

26. A *casual employee* is one who is paid at the end of the day at which point in time the contract expires.

27. However, by dint of section 37 of the Employment Act, 2007, if a casual employee has worked on daily casual contracts continuously for working days amounting in the aggregate to the equivalent not less than one month, then the contract is deemed as converted into term contract.

28. The conversion will also occur where the casual employee performs work which could not be completed within a number of working days amounting in the aggregate to the equivalent of 3-months.

29. If the Respondent had such type of employees who had served continuous working days of not less than two months or whose nature of work could not be completed within working days equivalent to two months, they were entitled to written contracts of employment in terms of section 37(3) of the Employment Act, 2007.

30. Just as in the case of piece-rate employees, the Court cannot see any intention in the appointment letter in Appendix B to convert the contracts of the casual employees into *permanent contracts* as opposed the term-contracts within the context of section 37 of the Act, 2007.

31. In respect to these employees, the Court again opines that the prototype contract prepared by the Respondent would have been superior.

32. Since the parties agreed to the format and basic content of appointment letters to be issued to the qualifying employees in the collective agreement and the agreement has not been set aside or varied, the Court's duty is to uphold the contract.

Victimisation

33. The Union did not lay an evidential foundation to the head of the claim on victimisation of its members.

Conclusion and Orders

34. From the foregoing, the Court orders:

(i) A declaration be and is hereby issued that the two hundred and ninety seven (297) Grievants herein are entitled to issuance of appointment letters in line with the provisions of clause 4 as read with clause 31 and appendix B of the existing collective agreement between the Claimant and the Respondent from the date of their respective engagements with the Respondent upon completion of their probation period.

(ii) An order directing the Respondent herein to forthwith issue the 297 Grievants whose names and details are attached to the schedule to the Memorandum of Claim appointment letters in accordance with Appendix B of the existing collective agreement within a period of 30 days from the date of judgment.

35. The parties are in an on-going social partnership. Each party to bear its own costs.

Delivered through Microsoft teams, dated and signed in Kisumu on this 12th day of May 2021.

Radido Stephen, MCI Arb

Judge

Appearances

For Union	Daniel Amalemba, Advocate
For Respondent	Federation of Kenya Employers
Court Assistant	Chrispo Aura