



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NUMBER 155 OF 2020

BETWEEN

KENYA ENGINEERING WORKERS UNION.....CLAIMANT

VERSUS

EAST AFRICAN FOUNDRY WORKS LIMITED.....RESPONDENT

Rika J

Court Assistant: Emmanuel Kiprono.

Patrick Makale, Industrial Relations Officer for the Claimant.

Kimathi Wanjohi Muli Advocates for the Respondent.

JUDGMENT

1. The dispute herein relates to Respondent's inability or refusal to sign a Collective Bargaining which has already been fully negotiated, and every subject agreed.
2. The inability or refusal prompted the Claimant Union to report the existence of a trade dispute to the relevant Cabinet Secretary, under Section 62 of the Labour Relations Act.
3. Conciliation did not yield settlement, and the Claimant instituted this Claim, through a Statement filed on 13th March 2020, seeking the following orders: -
 - a. The Court finds the Respondent's refusal to sign duly negotiated and signed agreement to be an act of bad faith, and the Respondent is ordered to sign the CBA within the shortest time possible.
 - b. Any other suitable relief.
 - c. Costs.
4. The Respondent filed a Statement of Response and Counterclaim, on 3rd March 2021. It acknowledges that Parties registered a CBA executed on 22nd November 2016, but denies conclusion of any other CBA. The CBA of 2016 was for 2 years, ending 31st July 2018, to remain in force until amended by the Parties by consent. The Respondent has not refused to negotiate. It informed the Claimant it would not be in a position to grant the Claimant its proposals due to hard economic times. It is conceded that the matter went for conciliation and remained unsettled. It is also stated by the Respondent that Parties held a meeting on 4th September 2019, and agreed on all terms of the CBA, except clause 36, on the duration and effective date.
5. The Counterclaim appears to be a rehash of the Statement of Response. It however introduces fresh reasons and demands concerning

Respondent's inability to execute the CBA. It is said that the electioneering period of 2017 and the Covid-19 pandemic have affected Respondent's financial position, to be able to meet the proposals in the CBA. It is further stated that there was a Tripartite Committee, comprising the Ministry of Labour, COTU and FKE, which came up with a Memorandum of Understanding, recommending suspension of implementation of concluded CBAs whose effective dates fell within the COVID-19 period. If the effective date is found to be 1st August 2018, the Respondent would suffer financial loss and inability to meet obligations under the CBA.

6. The Respondent therefore prays for the following orders: -

- a. Claim is dismissed with costs to the Respondent.
- b. A declaration that the effective date shall be the date mutually agreed by the Parties.
- c. The Claimant is stopped from rewriting the CBA.
- d. Effective date of the amended CBA is suspended up to January 2022 in accordance with the Tripartite Memorandum of Understanding.

7. It was agreed by the Parties that the dispute is considered and determined on the strength of these Pleadings, and Submissions which have subsequently been placed on the record, and which again are a replica of the Pleadings.

The Court Finds: -

8. Parties negotiated and concluded a CBA in 2016. It was to remain on force until 31st July 2018, or until amended with the consent of the Parties.

9. There is evidence by way of minutes of negotiation meetings held between the Parties, that indeed the Parties negotiated the CBA to cover the period 2018-2020.

10. There was agreement on all CBA subjects as conceded by the Respondent, in a meeting held on 4th September 2019, the only dispute being on the effective date.

11. The matter went through conciliation without yielding settlement.

12. The Respondent seeks orders postponing the effective date to January 2022, arguing that there is a Tripartite Memorandum of Understanding, suspending implementation of CBAs for the period of Covid-19 pandemic.

13. The Respondent has not elucidated the legal effect of the Tripartite Memorandum of Understanding. What is its place in the Labour Relations Act? Does it have a binding force on the Parties herein? Is the Claimant an affiliate of COTU? These matters were not addressed by the Respondent in its attempt at avoiding the CBA of 2018-2020.

14. Whatever the legal perspective, the CBA subject matter relates to the period before Covid-19, and before the Tripartite Memorandum. The effective date proposed by the Respondent, January 2022, would ensure that contemplated CBA of 2020-2022, is not feasible. It would cumulatively result in loss to the Members of the Claimant in their wage progression.

15. In the meeting held on 4th September 2019, before Covid-19 and the Tripartite Memorandum of Understanding, the Respondent proposed effective date as 1st August 2019. This alteration, from 1st August 2018 to 1st August 2019, is sufficient to assuage the concerns raised by the Respondent.

16. The Court does not think it is helpful to the Parties, to keep moving the effective date.

17. All factors taken into account, the Court would adopt the date proposed by Respondent, 1st August 2019, as the effective date, with a duration of 2 years.

18. The Counterclaim is declined.

19. No order on the costs.

IN SUM IT IS ORDERED: -

- a. ***Parties shall sign the CBA, as agreed in their meeting of 4th September 2019.***
- b. ***The effective date shall be 1st August 2019, to run for a period of 2 years, and thereafter to remain in force until amended with the consent of the Parties.***
- c. ***The CBA to be executed within 21 days of delivery of this Judgment.***

d. No order on the costs.

Dated, signed and released to the Parties at Nairobi, under the Ministry of Health and Judiciary Covid-19 Guidelines, this 11th day of June 2021.

James Rika

Judge