



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 1389 OF 2018

(Before Hon. Lady Justice Maureen Onyango)

NATIONAL HOSPITAL INSURANCE FUND (NHIF).....CLAIMANT

VERSUS

KENYA UNION OF COMMERCIAL FOOD AND

ALLIED WORKERS (KUCFAW).....RESPONDENT

JUDGMENT

Introduction

The Claimant herein is a state corporation established under the National Hospital Insurance Fund Act, No. 9 of 1998 Laws of Kenya with mandate to provide accessible, affordable, sustainable and quality social health insurance to all Kenyan residents.

The Respondent is a trade union registered in Kenya under the Labour Relations Act, whose mandate is to represent interest of workers, in the commercial and food manufacturing sector.

The parties hereto have a valid Recognition Agreement and a Collective Bargaining Agreement that regulates terms and conditions of service of all unionisable employees of the Claimant. The last Collective Bargaining Agreement (CBA) between the Claimant and the Respondent lapsed on or about 30th June 2017. The parties were in the process of negotiating a new CBA for the period commencing 1st July, 2017 to 30th June, 2021 as well as job evaluation for its entire staff including unionisable employees when a disagreement arose over the Claimant's decision to engage the Salaries and Remuneration Commission (SRC) to undertake the job evaluation exercise at no cost to the Claimant. The Respondent in opposition to this move issued a strike notice on 17th August 2018 demanding that the Claimant hires a private consultant to undertake the job evaluation exercise.

The Claimant maintains that the demand by the Respondent to hire a private consultant is unattainable as the job evaluation exercise would then be costly in terms of consultation fees and would be time consuming given the lengthy process of procurement of the consulting firm.

The report from SRC recommended an increment on salaries for unionisable staff at 6%. Other than the wages increase, SRC recommended the adoption of the draft CBA as negotiated by the parties.

The Claimant maintains that the report and recommendations prepared by SRC was informed by the outcome of the job evaluation exercise and represents the Claimant's true financial ability to sustain and manage costs of its employees for the 4 years to be covered by the draft CBA.

Upon the Claimant reporting this dispute, the parties met before a conciliator on 4th September 2018 when the Respondent only agreed to suspend the strike for a limited period of 30 days. The Claimant found the notice too short for it to conclude the job evaluation process with SRC or an independent consultant. Conciliation failed and the Respondent issued a firm notice to proceed with the strike as from 5th October 2018 if the CBA was not signed.

The Claimant maintains that the refusal by the Respondent to discuss or engage in conciliation with it over the recommendations by SRC on the issue of the basic salary is in bad faith and unreasonable.

In its Amended Memorandum of Claim, the Claimant seeks the following reliefs:

- a) The Court do issue an order restraining the Respondent from

instigating or calling a strike or from continuing with a strike on the dispute arising from the notice issued under the letter dated 17th August 2018.

- b) The Court do grant such orders as are necessary to direct the parties to engage in further conciliation failing agreement the Claimant be at liberty to pay its employees the benefits in accordance with the recommendations given by Salaries Remuneration Commission (SRC) the registration of the CBA notwithstanding.
- c) The Court do issue a permanent injunction against the Respondent from instigating or calling a strike on any matter arising from negotiating of a CBA covering the period 2017 to 2020.
- d) The Court do order parties to take into account incorporate the recommendations by SRC in the intended CBA.

IN THE ALTERNATIVE

- e) The Court do make a determination on the contentious issue of percentage annual salary increments.
- f) Costs of this suit.

Respondent's Case

It is the Respondent's case that the draft Collective Bargaining Agreement arose from voluntary negotiations between itself and the Claimant herein. It is further contended by the respondent that the said negotiations were concluded and the draft prepared and made ready for the signatures by the parties when the Claimant declined to append their signature.

The Respondent vide its letter dated 23rd January 2019 protested on the role played by SRC in the already concluded negotiations. It further averred that it was not aware of any on-going job evaluation as it was not involved and was not approached on the same.

It further avers that Collective Bargaining Agreement is at the core of any trade union activity and that once such an exercise is concluded parties are to be bound by the agreements as stipulated in the draft CBA. It is further the Respondent's assertion that the only issue that remains outstanding is that under Clause 9(b)(ii).

On the issue of Salary and wages as provided under the proposed Clause 8 (a) and (b) the Respondent maintains that the same was negotiated upon and parties reached an agreement as contained in the draft CBA.

The Respondent sought the following reliefs:

- a) Declare that the draft Collective Bargaining Agreement was the product of voluntary negotiations between the parties undertaken willingly and without coercion.
- b) Declare that the Claimant as constituted under the Act does not fall under the mandate of the Salaries and Remuneration Commission and that their advice to the Claimant dated 21st January, 2019 is not binding and is counterproductive to the principle of Collective Bargaining as envisaged under Article 2 (6) and 41 of the Constitution of Kenya which find strong endorsement in ILO Convention No. 98 on the right to organize and to bargaining collectively.
- c) Order the Claimant to sign the draft collective bargaining agreement for the period 1st July 2017 to 30th June 2021 within seven (7) days of the decision of the Court and present the same for registration as required under the provisions of the Labour Relations Act, 2007.
- d) Order the Claimant to conclude negotiations on Clause 9 (b) (ii) as agreed during the negotiations.
- e) Order the Claimant to pay costs of the suit to the Respondent.

Submissions by the Parties

The Claimant in its written submissions dated 12th November 2019 and filed on 14th November 2019 maintained that its decision to select the Salaries and Remuneration Commission to conduct a job evaluation was for purposes of getting an advisory opinion on the proposed CBA and in particular on the issue of salary increments.

The Claimant further submitted that based on the two reports prepared by the SRC dated 19th November 2018 and 21st January 2019 the recommendation was that the wage increment be 6% for each year opposed to the Respondent's proposal of 8% in 2017 and 2018, 10% and 12% for 2019 and 2020 respectively.

The Claimant contends that the CPMU report is biased as it fails to look into factors necessary to determine the pay and benefits payable to the Claimant's staff. It is further contended that the said report relied on falsehood from the Respondent that the rates had freely been

negotiated and agreed upon by the parties when the true position was that no agreement had been reached.

The Claimant further accuses the maker of the CPMU report for apportioning blame on the SRC for allegedly meddling in CBA negotiations while the fact remains that they (the Claimant) sought an advisory opinion from SRC.

The Claimant urged this Court not to accept or adopt the report from CPMU and instead urged the Court to be guided by the Reports prepared by SRC especially on the issue of salary increments as the increment proposed therein makes financial sense in view of the escalating operating costs, reducing number of members and reducing surplus.

The Claimant urged the Court to allow its Amended Claim in terms of the reliefs sought therein.

Respondent's Submissions

The Respondent submitted that it was wrong for the Claimant to consult the SRC on issues CBA at the tail end of the process. They further submitted that the SRC is not mandated to make any recommendations for the Claimant as the Claimant's employees do not fall in the category of employees covered by the SRC. The Respondent cited the decision in **Petition No. 40 of 2015, National Hospital Insurance Fund v Kenya Union of Commercial Food and Allied Workers**.

The Respondent further submitted that the Claimant is financially stable to pay its employees and union members the increments based on the proposed CBA as had been highlighted in the CPMU report filed as the said report took into consideration the same and was also of the view that the Claimant was in a position to make the

proposed changes in terms of salary increment.

The Respondent further maintained that the advice sought by the Respondent from the SRC was therefore not mandatory and is therefore not legally binding to the parties.

The Respondent urged the Court to dismiss the Amended Claim and allow its reliefs as sought in the response.

Determination

Since the issue underlying the strike notice by the respondent is the conclusion of the CBA, and since the issue of the strike has been overtaken by events, the only issue for determination is the outstanding Clauses of the CBA. The issue as to whether the SRC should carry out the job evaluation exercise is also now water under the bridge, the exercise having been undertaken by SRC and a report in respect thereof released to the respondent.

It is further common ground that SRC recommended that all the clauses in the draft CBA be implemented as agreed with exception of salary increases which it recommended to be increased by 4% for management staff and by 6% for the unionisable staff. The clause as negotiated and agreed as per draft CBA is as follows –

“8. SALARIES AND WAGES

8 (a) General Wage Review

Basic salary for Unionisable employees in the service of the Fund at the commencement of each period will have be reviewed upwards as follows:

with effect from 1st July 2017 - 8% (eight percent)

with effect from 1st July 2018 - 8% (eight percent)

with effect from 1st July 2019 - 10% (ten percent)

with effect from 1st July 2020 - 12% (twelve percent)

8(b) Annual Increment

Annual increments will be awarded across the board for the period from 1st July 2017 up to 30th June 2021 at an average rate of about 5% of basic salary subject to respective salary grade ceiling.

8(c) Incremental Dates

Although incremental date for employee may fall on 1st January, 1st April, 1st July or October, that is in any of the four quarters in a year as the case may be with each quarter running on a three months' cycle starting 1st January. In this regard, incremental dates for newly appointed or promoted officers will continue being determined on quarterly basis, as follows: -

(i) Where the anniversary of the date, which an employee is appointed or promoted falls on any date within the first half of the quarter (i.e. up to and including the 15th day of the mid-month) the incremental date will be the first day of the quarter.

(ii) Where the anniversary of the date on which an employee is appointed or promoted falls on any date within the second half of the quarter, the incremental date will be the first day of the succeeding quarter.”

Section 15(5) and (6) of the Employment and Labour Relations Court Act provides as follows –

(5) In the exercise of its powers under this Act, the Court may be bound by the national wage guidelines on minimum wages and standards of employment, and other terms and conditions of employment that may be issued, from time to time, by the Cabinet Secretary for the time being responsible for finance.

(6) Nothing in this section shall preclude the Court from making reference to the guidelines as may be published from time to time by the Salaries and Remuneration Commission to the extent to which they may be relevant to the dispute.

Section 11 of the Salaries and Remuneration Commission Act provides

as follows –

11. Functions of the Commission

In addition to the powers and functions of the Commission under Article 230 (4), the Commission shall—

- (a) inquire into and advise on the salaries and remuneration to be paid out of public funds;**
- (b) keep under review all matters relating to the salaries and remuneration of public officers;**
- (c) advise the national and county governments on the harmonization, equity and fairness of remuneration for the attraction and retention of requisite skills in the public sector;**
- (d) conduct comparative surveys on the labour markets and trends in remuneration to determine the monetary worth of the jobs of public offices;**
- (e) determine the cycle of salaries and remuneration review upon which Parliament may allocate adequate funds for implementation;**
- (f) make recommendations on matters relating to the salary and remuneration of a particular State or public officer;**
- (g) make recommendations on the review of pensions payable to holders of public offices; and perform such other functions as may be provided for by the Constitution or any other written law.**

Salaries and Remuneration Commission therefore has statutory authority to make recommendations and to advise any public entity on salaries for its staff. There was therefore nothing wrong with the claimant seeking services from SRC which as it has explained, was at no costs and did not require procurement, as compared to seeking similar services from private service providers.

On the issue of wages, I have considered the report from the CPMU as well submissions of the parties on the same. As stated in the CPMU report, the major compensable factors are rise in the cost of living and productivity. I am aware that other factors to be considered are the entitlements under the Wages Guidelines which have not been mentioned in the CPMU report which include change in consumer price indices, reduction in wage differential between similar jobs/grades within the organisation, economic growth rate of Kenya and change in productivity.

The foregoing is however not relevant in the present case where parties had actually already negotiated and agreed on the percentage increase for wages for each year.

In a staff circular dated 4th February 2019, the respondent informed the staff that the CBA had been sent to SRC after Board approval. The letter states as follows –

“INTERNAL MEMO

TO: All Staff

FROM: Chief Executive Officer

REF: HF/HR/22 VOL.VI/30

DATE: 11th February 2019

SUBJECT: COLLECTIVE BARGAINING AGREEMENT (CBA) 2017–2021 AND REVIEW OF STAFF REMUNERATION

The Fund submitted the Collective Bargaining Agreement for Unionisable staff, for the period 2017-2021 and salary review for Management staff to Salaries and Remuneration Commission (SRC) in July 2018 after Board approval. Since then, Management has been in constant dialogue and communication with SRC with regard to the submitted proposals both for the CBA and Management staff. The proposals included both Basic Salary and some specific allowances.

I wish to inform you that the Commission concluded analyzing our submissions and has provided advice on both the CBA and Management staff. The Commission's advice on the allowances were in tandem with our proposals as follows:-

- 1) House allowance increment by Ksh1,000 for Unionisable staff;
- 2) Commuter Allowance increment of Kshs.2,000 for both the Unionisable and Management staff;
- 3) Hardship Allowance to be paid as per the SRC Circular No. 5SRC/ADM7CIR/1/13/VOL, III (126) of 10th December. -- 2014, for both Unionisable and Management Staff.
- 4) Leave Allowance was retained pending finalization of a study of allowances by the Commission.
- 5) Basic salary was to be enhanced by 6% annually for the CBA period for the unionsable staff; and 2% less for Management staff.

Thus, there was, a variance in the advice given by the Commission on the Basic Salary, from the 8% proposed percentage in the CBA. The divergent issues will be presented to the Industrial Court by 25th of February, 2019 for hearing and determination. The award for Management staff will however proceed to Implementation subject to Board notification and concurrence.

We request all Unionisable staff to maintain patience as we await the Industrial Court determination of the Basic Salary.

Be informed accordingly.

SIGNED

NICODEMUS ODONGO”

Advice from SRC is supposed to be obtained before negotiations so that the negotiations are held within the mandate of the recommendations of SRC. In this case the claimant negotiated the CBA and concluded before sending to SRC. The guidelines of SRC are clear, that its mandate be obtained before negotiations and then the CBA be presented to it for approval before registration, presumably to confirm that the negotiations were in conformity with its advice.

The issue of approval of the claimant's CBA was the subject of the court's decision in Petition No. 40 of 2015 between National Hospital Insurance Fund Kenya Union of Comerica Food and Allied Workers as 1st respondent, Salaries and remuneration Commission as 2nd respondent and the Attorney General as the 3rd respondent. The court decided as follows –

In conclusion, the Court allows the following prayers only in the petition.

a. A declaration that the petitioner as constituted under the Act does not fall under the mandate of the

2nd respondent.

b. A declaration that the Salaries and Remuneration Commission Act and Salaries Remuneration Commission regulations 2012 in so far as they purport to confer on 2nd respondent jurisdiction to set or restrict remuneration and benefits for public officers other than state officers are inconsistent with the Constitution hence null and void to that extent.

c. The insistence by the 2nd respondent that its advice to the petitioner is binding is counter to the principle of collective bargaining as envisaged under ILO Convention on the Right to Organize and Collective Bargaining, 1949 (No. 98) and by virtue of article 2 (6) of the Constitution, unconstitutional.

d. A declaration that the Petitioner be at liberty to conclude the Collective Bargaining Agreement reached in July, 2013 with the 1st respondent.

e. There will be no order as to costs.

It is so ordered.”

It is material that the Petition was filed by the claimant herein and one of the issues that the claimant wished to be determined by this court at prayer (c) and (d) of the petition was –

c A determination by this Court on whether the Petitioner falls under the mandate, province and statutory supervision of the 2nd respondent under the Salaries and Remuneration Commission Act, 2011.

d) A declaration that the Petitioner as constituted under the Act does not fall under the mandate of the 2nd Respondent.

No mention has been made of either the claimant or SRC having appealed against the decision in the said judgment leaving the same valid and binding on the claimant, respondent and SRC.

It is for these reasons that I find that the claimant having negotiated and concluded the CBA with the respondent, it cannot renege on the same by seeking advice of SRC after the fact.

It is on this basis that I find the claim herein without merit and order that the CBA be signed and registered as agreed between the claimant and the respondent with wage increase as per draft CBA being 8% with effect from 1st July 2017, 8% with effect from 1st July 2018, 10% with effect from 1st July 2019 and 12% with effect from 1st July 2020.

I note that the wage increases for the claimant's non-unionisable employees was paid as per circular dated 11th February 2019 referred to above.

The parties are directed to immediately sign the CBA and process the same for registration by the court to avoid any further delay in implementation of the same.

There shall be no orders for costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 6TH DAY OF MARCH 2020

MAUREEN ONYANGO

JUDGE