



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 2458 OF 2017

(Before Hon. Lady Justice Maureen Onyango)

KENYA SHOE LEATHER WORKERS UNION.....CLAIMANT

VERSUS

FAST TRACK MANAGEMENT CONSULTANTS LIMITED.....RESPONDENT

JUDGMENT

The Claimant herein is a duly registered trade union within the provisions of the Labour Relations Act, 2007 whose mandate is to represent the interests of employees working in the leather industry within the Republic of Kenya.

The Respondent is a limited liability company having been incorporated as such in the year 2003. It provides human resource services on outsourcing basis to various organizations within the Republic of Kenya.

The Parties hereto have a valid Recognition Agreement and a Collective Bargaining Agreement that regulates terms and conditions of service for all unionisable employees of the Respondent.

On 15th December 2017, the Claimant filed a Statement of Claim dated on even date in which it is alleged that there had been negotiations of their third Collective Bargaining Agreement covering the period between 1st January 2017 to 31st December 2018 and parties had failed to agree on three issues being Annual leave, Leave Travelling Allowance and Wage increments which it now seeks to be determined by this Court.

In its Claim the Claimant urged this Court to make an order in its favour in terms of the three disputed issues of the CBA as its demands are realistic and based on the consumer price indices. The Claimant further urged this Court to grant it any other relief that may be deemed fit to grant.

The Respondent in its Memorandum of Defence dated 25th June, 2018 and filed in Court on 26th June, 2018, acknowledges the existence of a dispute on the negotiations of the Collective Bargaining Agreement for the year 2017/2018.

The Respondent urged this Court to dismiss the proposals raised by the Claimant union and instead to adopt their position as regards the three issues in contention.

It is undisputed that both parties have a mutual relationship through a valid Recognition Agreement. It is also not in dispute that the Minister accepted the Claimant's report of the existence of a trade dispute under Section 62(1) of the Labour Relations Act, 2007 and endeavoured to effect settlement through conciliation after which a conciliator was appointed on 14th July, 2017. The parties do not dispute that on 19th September, 2017, the conciliator convened an inter partes meeting wherein the parties were similarly unable to agree on the issues and proceeded to sign the agreement to disagree thus paving way for the instant Claim now pending before this Court.

Claimant's Case

It is the Claimant's case that on 13th February, 2017 it made proposals for a Collective Bargaining Agreement for the Respondent's consideration. Subsequently the parties met for negotiations on three occasions, twice in the month of March and once in the month of April, 2017 and concluded all the issues of the CBA except the three issues in dispute.

The Claimant further contends that it was forced to report the existence of a trade dispute to the Minister and subsequently a conciliator was

appointed. The Conciliator scheduled a meeting with all parties but the meeting did not yield any fruits and the parties on 3rd October, 2017 signed an agreement to disagree and the matter subsequently filed before this Court.

Respondent's Case

It is the Respondent's case that the Claimant's proposal on increasing annual leave from 21 days to 24 working days in order to allegedly coincide with the closure of the factory is unsubstantiated and the Respondent does not wish to unduly increase labour costs at the risk of losing the contract. The Respondent urged this Court to retain the annual paid leave at 21 working days.

On leave travelling allowance, the Respondent proposes that the same be increased from Kshs.2,150/- to Kshs.2,200/- as most of the work force operates from their homes which means they incur minimal transportation costs travelling to and from their rural homes when they proceed on annual leave.

On the issue of wage increments the Respondent contended that it shall be difficult to maintain the level proposed by the claimant given the hard economic environment which makes the Claimant union's proposal of 17% for 2 years unsustainable. It is the Respondent's position that there should be no wage increments on the current employee's wages.

Submissions by the Parties

The Claimant in its written submissions dated 5th November 2019 and filed on 7th November 2019, associates itself with the report of the Central Planning and Monitoring Unit and prays that this Court proceeds to adopt the same.

The Claimant union further submitted that during negotiation of the said CBA and even at the subsequent conciliation meetings the Respondent never disclosed its financial status to the union to allow it negotiate from an informed perspective. That from the report by CPMU the Respondent's financial performance is good and therefore it can accommodate the adjustments in wage increment as sought.

The Claimant urged this Court to allow its proposal on leave travelling allowance as the amount sought of Kshs.2,500/- per year is realistic.

As regards annual leave the Claimant submitted that the same be increased to the proposed 24 working days for the main reason that Bata Shoe Company (K) Limited where the workers are deployed closes for maintenance during the entire month of August every year and the work force breaks and resumes at the same time.

In conclusion the Claimant requested for the enhancement of all the three issues in contention.

Respondent's Submissions

The Respondent in its written submissions dated 11th December, 2019 and filed on 13th December 2019 submits that the recognition is vitiated for lack of capacity of the Claimant since at the time of filing this dispute in December 2017 the Claimant union had about 70 members working with the Respondent. It is further contended that the number has since dropped to 24 out of 700 employees and therefore fails to meet the threshold as provided under Section 54 of the Labour Relations Act, 2007.

The Respondent further submitted that the report of the Central Planning and Monitoring Unit of the Ministry of Labour as submitted contained errors such as the exact number of staff represented by the Claimant Union. It submitted that since it is outsourcing staff services, wages are paid directly by the Client and all that the Respondent gets is a commission on the same. That the Respondent's financial position was also not correctly captured thereby giving a wrong finding and recommendation.

On the three contentious issues the Respondent submitted that there is no basis to increase annual leave days to 28 days as Section 28 of the Employment, Act, 2007 provides for 21 working days. The Respondent urged this Court to be guided by the said section of the Employment Act.

On leave travel allowance the Respondent submitted that the same be enhanced by 2.3% as the amount would not have a huge impact on the labour costs in the outsourcing contract.

Finally, on wage increment the Respondent submitted that there can be no increase of wages due to the harsh economic situation that the country is facing at the moment.

In conclusion the Respondent urged this Court to adopt their position in regards to the CBA negotiations.

Analysis and Determination

The Employment and Labour Relations Court Act, provides that when this court is considering an economic dispute, it is to take into account, among other considerations, the economic report prepared by the CPMU Department of the Ministry of Labour and the Wages Guidelines issued by the Minister for Finance. In the report filed by CPMU herein, it has considered the respondent's labour costs trends, wage bill trends and financial position between 2013 and 2016 which is the relevant period for purposes of review of the CBA under reference.

The CPMU also considered the major compensable factors according to the Wages Guidelines being rise in the cost of living due to inflation and productivity. The CPMU report states that the respondent faced hard economic items during the period 2016/2017 due to election

violence. The report observes as follows with regard to the rise in the cost of living and productivity.

“G: MAJOR COMPENSABLE FACTORS

The following form the major compensable factors: -

1. Rise in the Cost of Living:-

1.1 This factor endeavours to restore the purchasing power of basic consumer goods and services which has been eroded by inflation over the lifespan of an out - going CBA.

The expiring CBA is for the period 1st January 2015 to 31st

December, 2016 and this forms the relevant period for compensation in respect of the rise in the cost of living. The Claimant’s members lie in the New Other Provinces Combined except Nairobi Income Group. Thus using these indices, Table 1 below shows the percentage rise in the cost of living indices.

Table 4:- Rise in the cost of living indices (January, 2015 to December, 2016)

New Other Provinces Combined Income Group	Consumer Price Index (CPI)
January, 2015	155.67
December 2016	178.91
Percentage Rise	14.92

Source: Computation by CPMU on the basis of data supplied by the Kenya National Bureau of Statistics (KNBS)

1.2. The percentage rise in the cost of living indices stood at approximately 15% during the two year period.

2. Improved Labour Productivity

2.1 Further compensation would arise from greater labour productivity of workers as stipulated in the Wages Guideline No. 2 which requires that workers get a share of wealth they have helped the Respondent create during the period of compensation. Knowledge and measurements of compensation parameters is important.

2.2 The Respondent’s economic performance during the outgoing CBA was not bad whereby a net profit of Ksh.3.1 Millions and Ksh.2.0 Millions was made in 2015 and 2016 respectively, making an accumulated Net profit of Ksh.5.1 millions for the two years.”

The report further makes the following observations –

“I. OBSERVATIONS

The CPMU wishes to make the following observations

1. The Respondent in the year 2016 had a total of 78 employees, which included 8 Management staff and 70 unionisable with a wage bill of Ksh.9,834,991 for unionisable and Ksh.6,205,117 for management making a total of Ksh.16,040,108

2. The respondent’s financial performance over the period under review has been healthy. It has been making profits throughout the review period, the 2016 net profit being Ksh.1,942,239.

3. The wage demand and CPI entitlements would result to additional wage bill of Ksh.1,743,006.24 and Ksh.1,730,570.45 respectively. This will be on wages alone without putting into consideration other clauses with financial implication in dispute.

4. The workers’ purchasing power has been eroded by 15% (as per the CPI in H 1.3) compared to the union’s wage increment demand of 17%.

5. The Bata shoe Company where the employees of the claimant work are given a compulsory leave of 24 working days during which the factory closes for maintenance purpose.

6. The proposed CBA technically expired on 31st December, 2017 as it was to run from January 2016 to December 2017.”

In its submissions, the claimant agreed with the proposals of the CPMU. The respondent however observed that certain observations and findings in the report do not capture the correct position. The respondent submitted that being an outsourcing company, it has about 700 employees at Bata Shoe Company who are the subject of this dispute, as well as employees recruited for other companies other than Bata Shoe Company. It further clarified that the salaries of the employees are paid directly by the outsourcing company and it only gets commissions. That on the specific contract for Bata Shoe Company it has been performing poorly. That in 2013 it made a marginal profit of Kshs.1,784 while in 2014 it made a loss. In 2015 it made a profit of Kshs.168,195 and in 2016 a loss of Kshs.125,383. That it also made a loss in 2017.

The respondent further submitted that the employees have been compensated through the General Wages increase of 18% in 2017 and 5% in 2018, a total of 23% which is higher than the demand of the union of 17% (8.5% each year).

The respondent further pointed out that its commission has been reducing from 10% in 2016 to 8.5% in 2014 and that currently it is at 6%. That should the wage increase be unsustainable there is risk of job losses of all its employees as its contract would become too expensive for the contracting firm, Bata Shoe Company.

The respondent thus proposed that the clause on annual leave days be retained at 21 days against a demand of 24 days, leave travelling allowance be increased from the current Kshs.2,150 to Kshs.2,200, an increase of Kshs.50 against the claimant's demand of Kshs.2,500. It proposes no increase in wages.

Having considered the submissions of the parties, the CPMU report and the compensable factors in the wages guidelines having further considered the nature of business of the respondent and its financial position, I make the following awards –

1. General wage increase

I award 5% increase above statutory minimum wages.

2. Annual leave

The current 21 days to be maintained.

3. Leave travelling allowance

I award the sum of Kshs.2,350.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 23RD DAY OF APRIL 2020

MAUREEN ONYANGO

JUDGE

ORDER

In view of the declaration of measures restricting court of 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