



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI

CAUSE NO. 227 OF 2020

KENYA PRIVATE UNIVERSITIES WORKERS UNION.....CLAIMANT

VERSUS

AFRICA NAZARENE UNIVERSITY.....RESPONDENT

RULING

1. For determination is a motion dated 8 June 2020 by the Kenya Private Universities Workers Union (the Union) against Africa Nazarene University (Respondent) seeking orders

(i) ...

(ii) **THAT** pending the hearing and determination of this application, this Honourable Court do grant an order of temporary injunction restraining the Respondent from effecting any wage/salary reduction in respect of unionisable employees.

(iii) **THAT** pending the hearing of the Claim filed herewith, this Honourable Court do grant an order of temporary injunction restraining the Respondent from effecting any house allowance reduction in respect of its unionisable employees.

(iv) **THAT** the Honourable Court do grant an order of mandatory injunction compelling the Respondent to refund to its unionisable employees all amounts already deducted from their salaries/wages.

(v) **THAT** the Honourable Court do grant any other order it deems fit to address the cause of justice.

(vi) Costs of the suit to the applicant.

2. When the application was placed before the Court on 9 June 2020, it directed that it be served upon the Respondent.

3. On 26 June 2020, the Court issued directions as a result of which the Respondent filed a replying affidavit on 16 July 2020 (should have been filed by 10 July 2020) and the Union filed a further affidavit on 5 August 2020 (should have been filed together with submissions before 17 July 2020). None of the parties had filed submissions by the time of preparing this Ruling.

4. The Court has considered the motion and affidavits.

Background

5. It is not in dispute that the Union and the Respondent have a recognition agreement and that on 15 May 2020, the Respondent issued a Circular to all staff/employees informing them that due to the COVID19 pandemic and suspension of learning, all staff would be sent on unpaid leave with effect from 15 June 2020 pending further instructions on 31 August 2020.

6. The Circular also advised the staff that during the leave, they would be paid the equivalent of 30% of their housing allowance.

7. It is also not in dispute that when the Union became aware of the decision, it sought for a meeting with the Respondent and on 19 May 2020, the Respondent proposed for a virtual meeting on 20 May 2020.

8. The meeting was held but the Respondent maintained that due to the prevailing circumstances, it would not reverse the decision on unpaid leave and 30% house allowance.

9. The stance prompted the Union to move to Court.

Wage/Salary deductions or denial

10. Section 10(5) of the Employment Act, 2007 obligates an employer to consult with the employee (or with the trade union where the workers have organised) before altering or changing certain employment particulars.

11. Such particulars include remuneration, form and duration of contract and entitlement to annual leave.

12. The records on file suggest that the Respondent held some form of consultations with the employees and not the Union, despite the parties having a recognition agreement.

13. The need for consultation and/or social dialogue and more so during the COVID19 has been recognised by the International Labour Organisation.

14. In our jurisdiction, the Memorandum of Understanding between the Tripartite Social Partners – the Ministry of Labour and Social Protection, Central Organisation of Trade Unions and the Federation of Kenya Employers signed on 30 April 2020 underscored the need for social dialogue.

15. Considering that the Union and the Respondent had a recognition agreement, the Respondent needed to consult with the Union before making the decision to send the unionisable staff on unpaid leave and reducing the house allowance.

16. The failure to consult the Union before making the decision was in breach of the law on change of employment particulars.

House allowance reduction

17. Section 31 of the Employment Act, 2007 at the first instance obligates an employer to provide at his own expense reasonable housing accommodation for each employee or in default to pay such sufficient sum to cover rent.

18. The statutory right of every worker in this country to housing accommodation and/or in lieu thereof a house allowance implicates and underlines the Constitutional norm of dignity.

19. The worker's entitlement to housing has also been recognised by the International Labour Organisation in Recommendation 115, Workers' Housing Recommendation.

20. The statutory right, in the view of the Court has many characteristics which include affordability, habitability, location and accessibility because of the use of the term *reasonable housing accommodation* and *sufficient sum as rent*.

21. Such a provision, in the view of the Court, constitutes a fundamental (basic) condition under the law and which the employer may not unilaterally alter to the disadvantage of the employee during the subsistence of the employment relationship unlike the other particulars or terms envisaged under section 10(1) as read with section 10(5) of the Employment Act, 2007.

22. To draw an analogy, the Court would state that the workers right to housing accommodation and/or in lieu house allowance is *non-derogable* while the employment lasts.

23. Taking cognisance of clause 3(f) of the Memorandum of Understanding between the tripartite partners which provide that Mutually agreed terms and conditions of employment entered into during the pandemic period must be in writing and may be filed with the Labour Commissioner through the nearest labour office and, being alert to the economic challenges placed upon educational institutions which rely mainly on fees from students, in lieu of granting the orders sought by the Union, and in further consideration of the need to preserve jobs rather than an application of the technicality of the law which may have adverse consequences on both the employer and employees and further considering the fundamental nature of the requirement for an employer to provide reasonable housing accommodation, the Court directs

(a) That the Union and Respondent forthwith engage in negotiations with a view to agreeing on an equilibrium which would preserve jobs and not also lead to the financial ruin of the Respondent and such agreement be deposited with the office of the Commissioner of Labour within 30 days.

(b) The Respondent to continue paying full house allowance at pre-COVID19 rates (including a refund of arrears) to all unionisable employees.

24. Due to the ongoing social partnership between the parties, the Court orders each party to bear its costs.

Delivered through Microsoft teams, dated and signed in Nairobi on this 7th day of August 2020.

Radido Stephen

Judge

Appearances

For Union

Mr. Owiti, General Secretary

For Respondent

Ms. Kanyiri, Federation of Kenya Employers

Court Assistant

Judy Maina