



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**PETITION NO. 74 OF 2020**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS**

**AND FREEDOMS UNDER ARTICLES 1, 3, 10, 25, 27, 41, 47, 50, 258, CHAPTER SIX**

**AND CHAPTER THIRTEEN OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF SECTIONS 5, PART IV & 28 OF THE EMPLOYMENT ACT**

**AND**

**IN THE MATTER OF SECTIONS 5, 57 AND 59 OF THE LABOUR RELATIONS ACT**

**AND**

**IN THE MATTER OF SECTIONS 4 AND 5 OF THE FAIR ADMINISTRATIVE ACTIONS ACT**

**AND**

**IN THE MATTER OF RULE 7 OF THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**(PROCEDURE) RULES, 2016**

**BETWEEN**

**KENYA AVIATION WORKERS UNION.....PETITIONER**

**VERSUS**

**KENYA AIRWAYS PLC.....RESPONDENT**

**RULING**

1. On or around 2 April 2020, Kenya Aviation Workers Union (the Union) and Kenya Airways PLC (Kenya Airways) executed a Memorandum of Agreement whose tenor was to alter certain terms and conditions of employment (pay cuts and unpaid leave). The Agreement was to lapse on 30 April 2020 but was subject to extension through mutual agreement.

2. On 5 May 2020, the Chief Human Resources Officer of Kenya Airways issued notices to employees to consent to a temporary reduction of remuneration for May and June 2020.

3. The notice indicated that the pay reductions agreed in the Agreement of 2 April 2020 would remain in place and that employees who would not have given consent by 7 May 2020 would have their reduced salaries withheld until further notice. The notice had other provisions.

4. On 8 May 2020, Kenya Airways notified the employees that the deadline for submission of consent forms had been extended to 11 May

2020.

5. The Union was of the view that the actions by Kenya Airways were in breach of the law and contract and it moved the Court on 12 May 2020 alleging constitutional violations and breach of contract.

6. Filed together with the Petition was a motion under a certificate of urgency seeking orders

1. ...

2. ...

3. THAT pending the hearing and determination of the Petition herein, this Honourable Court do issue an order of stay/injunction to restrain the operation or implementation of the email dated 5<sup>th</sup> May 2020 by the Respondent's – Chief Human Resources Officer to its employees and all consequential emails arising therefrom requiring the involuntary grant of consent for a temporary May – June 2020 salary reduction for the Respondent's unionisable employees and requiring the compulsory taking of annual leave for 2019 and 2020 by 7<sup>th</sup>, 10<sup>th</sup> May 2020 or otherwise without notice, consultation voluntary agreement with the Petitioner contrary to collective bargaining agreement (the CBA) between the Petitioner and Respondent dated 19<sup>th</sup> December 2014, the Employment Act, Law of contract on freedom of contract, Fair Administrative Action and the Constitution.

5. THAT the Petition filed herewith be certified urgent and be heard on priority basis virtual means or otherwise pursuant to electronic case management practice directions 2020 and Practice Directions for the Protection of Judges, Judicial Officers, Judiciary Staff, other Court Users and the General Public from the Risks Associated with the Global Corona Virus Pandemic of March 2020.

6. THAT the Honourable Court be pleased to grant the Petitioners costs of the application herein.

7. On 22 May 2020, the parties informed the Court that they were negotiating. As a result of the negotiations, Kenya Airways gave a written undertaking that it would not implement the email of 5 May 2020.

8. Pursuant to Court orders, the following documents were filed

(i) Replying affidavit by Chief Human Resources Officer of Kenya Airways.

(ii) Further affidavit by Union's Secretary-General.

(iii) Union's submissions.

(iv) Respondent's submissions.

9. The Court has considered the motion, affidavits and submissions including authorities cited.

10. It is not in dispute that COVID19 has caused massive disruptions to businesses, industries, employers and employees and even to governments the world over. Of particular concern in the present case are disruptions to international and domestic aviation. At some point, air travel was banned and Kenya Airways was one of the affected.

11. It is also not in dispute that Kenya Airways had hit turbulence even before COVID19. The information is in the public domain.

12. Further, it is not in dispute that the Union and Kenya Airways entered into a Memorandum of Agreement which served to alter the terms and conditions of unionisable staff and that the Agreement was to lapse on 30 April 2020.

13. Equally not disputed is that on or around 21 April 2020, Kenya Airways wrote to the Union seeking for a meeting to review the Agreement and that a meeting was held on 23 April 2020. Kenya Airways again sought for a review meeting through a letter dated 27 April 2020 and a meeting was held on 28 May 2020 and agreement reached to exchange proposals.

14. Another meeting was held on 5 May 2020 but no agreement was reached forcing Kenya Airways to reach out directly to the unionisable employees.

15. Despite reaching out directly to the employees, the Union and Kenya Airways still exchanged communication and proposals culminating in meetings on 8 May 2020 and 12 May 2020. The parties appear to have disagreed on the question of (unpaid) annual leave.

16. Section 10(5) of the Employment Act, 2007 requires an employer to consult with the employee before certain employment particulars (including remuneration) are varied. Where the employees have organised, the employer should consult the trade union representing the employees.

17. The consultations, in the view of the Court, are part of the constitutional norm of fair labour practices, every worker's right to join and participate in the programmes of a trade union and the right of every trade union to organise. The consultations should be conducted in good faith.

18. 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 underscores the need for social dialogue.

19. Clause 3(f) of the Memorandum of Understanding between the tripartite partners 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.

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

21. While consultations are a constitutional imperative, a statutory requirement and part of the traditions and practices of industrial relations in this country and a *sine qua non* for industrial peace and harmony, the Court cannot discern any legal obligation placed on the social partners to agree.

22. Where an employer alters terms and conditions of service without consultations, the Court will emphatically declare so and assert the rights of the parties.

23. It would, therefore, bode ill for an employer to bypass consultations with a trade union where the employees have decided to organise. Such a course of action, in the view of the Court, would be an assault on the right to organise and collective bargaining for both the individual employee and the trade union.

24. This Court is satisfied that the Union and Kenya Airways held consultations to review the 2 April 2020 Memorandum of Agreement but did not reach a consensus even by the time the Union was moving the Court.

25. However, should the Court in such circumstances order what would amount to *specific or part performance*, especially where operational requirements make it difficult for an employer to sustain its operations and/or survive. The legally prudent course would be to consider whether there was a breach of contract after a hearing on the merits, at the end of which appropriate remedies including damages would be considered.

26. From the foregoing, the orders which commends itself to the Court is direct

(i) That the Union and Kenya Airways forthwith continue engaging in negotiations to agree on an arrangement which would preserve jobs and not also lead to the financial ruin of the Kenya Airways and such agreement be deposited with the office of the Commissioner of Labour within 30 days.

(ii) Liberty granted to parties to apply.

27. Costs to abide the Petition.

**Delivered through Microsoft teams, dated and signed in Nairobi on this 2<sup>nd</sup> day of October 2020.**

**Radido Stephen**

**Judge**

**Appearances**

For Union Mr. Litoro instructed by Litoro & Omwebu Advocates

For Respondent Mr. Ohaga instructed by Triple OKLaw LLP Advocates

Court Assistant Judy Maina