REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1619 OF 2017

(Before Hon. Lady Justice Maureen Onyango)

BANKING, INSURANCE AND FINANCE UNION (K).....CLAIMANT

VERSUS

KCB BANK (K) LIMITED.....RESPONDENT

AND

DISHON OCHIENG ACHIRO AND 70 OTHERS.....INTERESTED PARTY

JUDGMENT

The claimant herein is a trade union registered under the Labour Relations Act to represent workers in the banking sector. The respondent is a commercial bank registered under the Banking Act. The respondent's unionisable employees are members of the claimant.

The Interested Parties are also employees of the respondent and members of the claimant.

The respondent is a member of Kenya Bankers Association, an association registered under the Labour Relations Act as an employers' association with the mandate to represent its member banks in negotiating terms and conditions of employment for their employees.

The Kenya Bankers Association has a recognition agreement with the claimant herein signed on 4th October 2000. The Association has negotiated several collective bargaining agreements with the claimant union on behalf of its member banks, among them the respondent.

The recognition agreement provides that the agreement was entered into in free and voluntary association for the purposes of –

i) Regulating the relations between the claimant and the Association in the interests of mutual understanding and cooperation.

ii) To ensure to speedy and impartial settlement of real or alleged disputes or grievances.

iii) To secure a more detailed appreciation of members of both sides for the reasons underlying decisions taken by the negotiating bodies.

The recognition agreement establishes a joint consultative committee constituting representatives of both the claimant and the Association. The recognition agreement further sets out matters for negotiation under appendix A and matters that are not subject to negotiation under Appendix B. It further sets out a grievance handling procedure and a joint negotiating council.

Appendix 'A' sets out the issues for negotiation as follows –

1. Rates of pay and Overtime

2. Length of Leave (excluding sick leave) and attendant conditions.

3. Hours of Work

4. Duration of individual Contracts

5. Principles of Redundancy

6. Uniforms and Protective clothing

7. Conditions in Premises

8. Medical Schemes

Appendix 'B' states that –

"The following items that are not subject to negotiation–

1. *Social and Sports Activities*

2. *Management Methods*

3. *Sickness Benefits*

4. *Pension and Provident Funds/Gratuities"*

Claimant's Case

The claimant filed this claim alleging that the respondent irregularly introduced the Balanced Score Card (BSC) (Performance Management) for assessment of performance of its staff, as it is neither in the list of negotiable terms under Appendix 'A' or non-negotiable terms under Appendix 'B' of the Recognition Agreement. The claimant avers that the introduction of the Balanced Score Card appraisals has been opposed on several occasions by the workers through the respondent's Central Staff Committee and the claimant, due to its lop-sidedness and lack of objectivity. The claimant avers that several unionisable employees have been denied loans, merits, annual increments, bonuses, promotions and other employment benefits due to unsatisfactory performance assessment.

The claimant referred to a letter dated 2nd May 2017 in which the respondent's Central Staff Committee raised complaints about the Balanced Score Card (BSC) as follows –

"That the employer (KCB Limited) has been using the Balanced Score

Card as a tool to measure performance on non-management members of staff.

That the Employer has imposed a scorecard that is not aligned to staff's Job description in most cases where targets are prescribed by the Employer with instructions not to make any alteration which makes it not an individual BSC hence subjective.

That whereas the balanced scorecard (BSC) is a tool that allows KCB to follow and understand not only how their staff are performing, in most cases it is not aligned to the core duties of the employees hence throughout a performance cycle most employees struggle to be at a met spite of their best efforts, as the targets which are not realistic are set by the Employer. If one had a disagreement with their line Manager, he/she is assured to be rated as a not met. If a fraud occurred in your department or unit you are all punished collectively whether you were involved or not.

That following individual self-assessment, the same assessment is subjected to a management moderation panel that is nothing but a forum of negatively manipulating performance metrics. This lack of sincerity in any of the BSC appraisal and implementation phases would almost inevitably lead to failure.

That at the end of the year even though the staff who have not met are given a window to appeal, it is evident that the appeal process is flawed because of the following reasons;

a. The appeals still goes to the same line Manager who had rated an employee not met which negates the general principles of appeal.

b.The appellant is not privy to the comments of the line Manager which form a basis for the determination of the appeal

c. The aggrieved employees are not granted the privilege of appeal which comprises of only management team which in most cases leads to a predetermined outcome. This denies the same employees the right of representation

d. KCB is yet to build a culture that focuses on sharing, discussing and resolving poor performance issues in an open and constructive way.

That the same BSC is not captured anywhere in employees letters of employment nor in the CBA and yet those employees who are

subjected to the tool and pushed to not met are issued disciplinary letters and also denied the benefits and privileges spelt out in the letter of engagement. This amounts to total discrimination and violation of the CBA, laid down procedures and Labour Laws."

The members of the Central Staff Committee urged the claimant to intervene urgently in order "*to close this form of apathy as it has negatively impacted on employees' rights and should not be allowed to continue in the present age.*"

The Claimant further avers that the respondent invited unionisable employees for disciplinary hearings, with a view to reprimand, issue warnings and ultimately terminate such employees from the Bank's employment.

The Claimant contends that the Respondent has gone against the laid down procedures in the parties Recognition Agreement and has moved to introduce other offences like unsatisfactory performance which may lead to dismissal of unionisable employees without the involvement of the Claimant union.

The Claimant further contends that given the existence of the recognition Agreement and the CBA both of which stipulate the manner in which a new clause is to be introduced in the CBA, the Respondent erred by introducing the BSC appraisals without following the agreed process in Clause 19 of the Recognition Agreement.

The claimant further contends that Section 41 of the Employment Act does not envisage that unsatisfactory performance is the same as poor performance but rather refers to termination on grounds of misconduct, poor performance or physical incapability. The poor performance referred to under Section 41 is not synonymous to unsatisfactory performance or under performance. That the allegation of poor performance must be proven by any employer as required by section 45 of the Act before any disciplinary hearing is convened.

It is further the claimant's contention that although Performance Management was introduced in good faith to act as an impetus to encourage competition amongst employees and enhance productivity, the respondent has turned the whole process into a punishment tool so as to exit employees from employment unfairly and without incurring any cost.

The claimant further avers that the respondent introduced targets without consultation and imposed them on employees and that some of the targets are not based on employee's job descriptions. It is the claimant's averment that the main reason for introduction of BSC performance management is for the respondent's senior managers to award themselves huge bonuses and not for the intended purpose of enhancing productivity in the bank.

The Claimant seeks the following remedies:

1. That the Court do order the respondent to stop the staff performance Management reviews, the Balanced Score Card appraisals and to order that the practice should be introduced for discussions and possible adoption as a clause in the CBA by the Joint Negotiating Council (JNC) as required by Article 19 of the parties Recognition Agreement.

2. That the court do order the respondent to revoke and expunge all the disciplinary letters from the employees employment records i.e. warning letters which were irregularly and illegally issued to the unionisable employees as a result of the unprocedural and unlawful balanced score card appraisal and performance management reviews.

3. That the court do order the respondent to strictly abide by the provisions of the recognition agreement, the collective bargaining agreement and the law on matters which may affect unionisable employees of the bank in order to create fairness and best practice in the bank.

4. That the Court do award costs in favour of the Claimant.

Respondent's Case

The Respondent filed its Memorandum of Response dated 21st September 2017 and filed on 27th September 2017. It contends that the BSC is a tool of appraisal adopted by the Respondent and falls under Appendix "B" of the Recognition Agreement as a management method which is not subject to negotiation as per clause 19 of the Recognition Agreement.

The Respondent further avers that the performance appraisal for its staff has been in continuous use since it was introduced in the year 2004. Further that on 7th June 2005 it issued to its staff a performance management framework that acknowledged the Balance Score Card (BSC) as a tool that was to be used to measure performance as well as enable the Respondent reward performance.

The Respondent avers that after the BSC was introduced, training was undertaken at the Respondent's Leadership Centre in Karen for Management Staff where some staff were trained to be trainers. Subsequently, the trainers within the Bank commenced training of other staff including unionisable staff over a period of time from around August 2006.

That following the training in 2006, all members of staff started using the BSC as a tool for performance appraisal and the same has been in use to date without any disputes being raised by the claimant.

The Respondent contends that the introduction of BSC led to introduction of bonuses to the staff who have benefitted therefrom over the years.

The Respondent avers that the Claimant in filing the instant cause bypassed internal mechanisms that provide that in the event of any

grievances the affected party ought to seek the Bank's internal grievance procedure as per Clause 18 of the Recognition Agreement.

The Respondent urged the Court to dismiss the claim with costs.

Interested Parties' Case

The Interested Parties filed a statement of response to the statement of claim in which they state that Clause 19 of the Recognition Agreement between the claimant and the Kenya Bankers Association makes provision for the Joint Negotiating Council (JNC) and that it is a demonstration of good faith for parties to adhere to the said clause.

The Interested Parties state that the BSC is a tool used in Performance Management and thus subject of management methods provided for under Appendix 'B' of the Recognition Agreement.

It is the contention of the Interested Parties that an employee is entitled to raise any specific complaints about the appraisal process in accordance with the respondent's internal procedure as well as all other mechanisms provided in law. It is the averment of the Interested Parties that the complaints on performance appraisal should be addressed as specific individual grievances.

The Interested Parties aver that the target setting process entails the following –

i. An employee is independently tasked to state their yearly performance targets based on their responsibility as provided in the job description and aligned to the strategic objectives of the Respondent and the same becomes their Balanced Score Card Plan;

ii. Quarterly review of the targets is undertaken to allow review of targets;

iii. Appraisal process commences by a self-assessment then line manager's assessment which is subjected to moderating panel for review and confirmation then finally an appraisal meeting with the line manager.

iv. The checks on the process include an Appeal process that is open to an aggrieved employee and disciplinary sanctions against line managers who unfairly assess an employee;

v. The employees who have met their targets are rewarded through bonus payment, promotions and trainings as per the Respondent's Bonus Policy and those that may have performed poorly are put on a Performance Improvement Plan to help them achieve their respective targets.

vi. The areas for improvement identified during performance appraisal are discussed with an employee during appraisal meeting, performance gaps are noted and support required to improve performance is also stated by the employee in a designed form which is discussed between a member and the line manager on a monthly basis and appraised quarterly.

vii. The process is conducted in the manner provided for in the Respondent policy documents and guidelines such as the Guidelines on setting target, Performance Management Policy, A guide to performance appraisal and Staff Performance Bonus Policy.

The Interested Parties pray for orders as follows –

1. An order that the Interested Parties be at liberty to raise any general concerns arising from the performance management and the balance score card tool through the Joint Consultative Committee in consultation with the Respondent's Management.

2. A declaration that the Claimant be at liberty invoke lawful processes and procedure with a view to seeking amendment of the Recognition Agreement in terms of items under Appendix A and B;

3. That the specific grievances arising from the performance appraisal and use of the balance score card tool in terms of the Claimant's annexure Appendix 3, be addressed through the set internal procedure with the option to recourse to court with respect to specific contentions.

At the time of filing of this claim, the claimant also filed a notice of motion and obtained orders stopping performance appraisals that were in progress.

On 6th September 2018, parties entered into a partial consent as follows –

1. The respondents are free to conclude appraisals for 2017 and carry out appraisals of 2018.

2. The respondents are free to release bonuses for 2017 to unionisable staff including loans and related benefits.

3. The claimant will be at liberty to raise objections to any appraisal that is contested.

4. Parties to agree on mode of intervention by the claimant union.

This cause was by consent of parties disposed of by way of written submissions. The claimant and Interested Parties filed written submissions.

The parties thereafter made oral submissions.

Claimant's Submissions

It is submitted on behalf of the Claimant that specificity requires that the targets on BSC is aligned to the job description of the employees. The Claimant submitted that the Respondent has and continues to rate staff on the basis of targets which are not specific or are otherwise outside their job description leading to employees' poor score of 1 & 2.

The Claimant further submitted that the BSC is unfair as it imposes certain targets which cannot be measured as the targets are collective rather than individual and are beyond the control of individual employees.

The Claimant avers that it is the norm that the Respondent ought to measure its employees based on achievable targets and that such targets can only be achievable if they are realistic. The Claimant further submitted that it challenges the BSC given that some of the targets as contained therein are not realistic and are therefore unachievable within the required time.

The Claimant relied on the authority of ***Alex Wanaina Mbugua Versus Kenya Airways Limited Cause No. 430 of 2016*** where the Court stated that:

> *"Incapacity relating to poor performance is prevalent where an employee has persistently failed to meet certain performance standards despite the employer offering training, guidance, assistance and evaluation. In such a case the employee would potentially lack the skills, knowledge or competencies to meet the employer's standards."*

The Claimant further submitted that the BSC is not conducted in a fair manner, as the targets are set by the board of the Respondent, passed down to the HR for implementation and then cascaded down to the unionised employees without any consideration to factors such as the business environment, economic recession/ state of the economy and many other fact that may need consideration. The Claimant further relied on the case of ***Banking Insurance & Finance Union Versus Barclays Bank of Kenya Limited & Another Cause No. 95 of 2014***.

It is submitted by the Claimant that letters of offer have clear job descriptions. It is therefore unfair that the Respondent Bank proceeds to assign at will and without consultation new roles that staff are not trained on and then proceed to rate them on such roles. Further that a score card based on such parameters is unfair and must not be allowed. The Claimant relied on the authority of ***Alex Wanaina Mbugua Versus Kenya Airways Limited Cause No. 430 of 2016*** where it was stated that:

> *"Where the employee cannot meet standards of quality and quantity when those standards have never been communicated to him/her, and likewise, the employee cannot perform if no training has been given. If the required standards have never been communicated to the employee, and you have never taken steps to ensure proper training, a case of poor performance must fail."*

It is submitted that the Respondent has victimised and discriminated employees using the BSC which is contrary to the intention for its inception. It is further submitted that most of the members of the Claimant union have been employed by the Respondent for long and to claim a sudden drop in their performance to warrant warnings and possible terminations amounts to mischief. The Claimant relied on the cases of ***Alex Wanaina Mbugua Versus Kenya Airways Limited Cause No. 430 of 2016*** and ***Abdi Halake Garamboda Versus Fidelity Services Limited (2015) eKLR***.

The Claimant further submitted that an employer cannot rely solely on poor performance to issue warning letters that may lead to possible termination as illustrated in the case of ***Banking Insurance & Finance Union Versus Barclays Bank of Kenya Limited & Another Cause No. 95 of 2014*** where the Court held that:

> *"An employer can therefore not rely on the grounds of poor performance to terminate an employee. The rationale is that, such an employee was hired and found fit for the job, any deterioration in performance must be interrogated and effort made to address it. It cannot be simply cited that the Claimant suddenly became of poor performance when all quarterly performance appraisals were in the positive. The Respondent has the duty to demonstrate that from the October 2015 evaluation, the Claimant's good performance deteriorated so fast that it led to the alleged loss of $29.7 billion."*

The Claimant avers that the Respondent's punitive application of the BSC amounts to unfair labour practice.

Further, that the BSC has been used by the Respondent to settle scores with employees contrary to the intention for its inception.

The Claimant urged the Court to allow its claim as pleaded in the Amended Memorandum of Claim and to find that the BSC is unfair and unprocedural and in the circumstances render void all warning letters issued to the unionised employees on account of the unfair BSCs.

Respondent's Submissions.

The Respondent submitted that the 1st prayer in the Memorandum of Claim has been defeated by an admission made by the Claimant's Counsel that they are not opposed to the BSC.

It is further submitted that the Claimant has not proved their case either by direct evidence, through oral evidence and/or by way of Affidavits sworn by employees of the Respondent Bank. The only evidence on record is affidavits sworn by employees of the union.

It is submitted on behalf of the Respondent that the Claimant cannot raise new issues in submissions that were never pleaded as parties are bound by their own pleadings.

It is further submitted that the Respondent is not obligated to negotiate with the Claimant union while formulating the BSC and that the said tool had been in use for about 14 years with no issues raised. Further, that in the event of poor performance the Respondent has put in place Performance Improvement Plan that runs for 2 years with a view to assist the employee in improving performance.

The Respondent submits that prayer 2 of the Claimant's claim must fail as the recognition agreement provides for a Joint Negotiating Council whose mandate is to negotiate, that the claimant has not raised this issue through the said committee thereby making the instant dispute premature.

Further that prayer 2 should fail as the Claimant has failed to prove by way of affidavit that the warning letters issued were irregular or illegal.

It is submitted that prayer 3 of the Memorandum of Claim has not been proved as no evidence has been placed before the Court. It was further submitted that there is no evidence that employees were assessed on jobs they were not trained to do.

The Respondent urged the Court to dismiss claim with costs to the Respondent.

Interested Parties' Submissions

The Interested Parties identify themselves with the submissions of the Respondent in so far as it aligns to the evidence of the Interested Parties. It is submitted on behalf of the Interested Parties that the BSC appraisal system is one of the methods of conducting performance management review hence this is a matter that falls under management method. It is further submitted that Article 16 and 17 of the Recognition Agreement set out management methods as matters that are not subject to negotiation as listed under Appendix B of the Recognition Agreement.

The Interested Parties further submitted that employees of the Respondent have participated in the performance management review through the Balanced Score Card method since the year 2005 when the same was introduced as stated in the Respondent's statement of Response.

The Interested Parties submitted that the employees of the Respondent were fully involved in the rollout and implementation of the BSC as evidenced by periodic communication.

The Interested Parties further submit that the case of ***Alex Wanaina Mbugua Versus Kenya Airways Cause Number 430 of 2016*** relied upon by the claimant can be distinguished from the instant case as the claim was based on unfair termination and was seeking reinstatement unlike the instant matter that is primarily grounded on the issue of whether or not the BSC is a matter for negotiation under the CBA.

The Interested Parties further submitted that the Respondent is permitted by law to take disciplinary action against its unionisable employees based on unsatisfactory performance appraisal outcome as provided under Section 41 of the Employment Act.

It is the Interested Parties' submission that the Claimant union has a duty of fair representation of its members relying on the case of ***Kenya National Union of Nurses Versus Chief Officer Public Service Management, County Government of Uasin Gishu & 3 others (2017) eKLR*** and ***FAWU Versus Ngcobo (2013) ZACC 36***.

It is further submitted that the Claimant's actions in the instant claim have been partisan without regard to the interest of the Interested Parties who are members of the union of equal rights.

The Interested Parties submitted that the Claimant has failed to prove its claim as pleaded in the Amended Memorandum of Cliam in a manner to warrant the granting of the reliefs sought. The Court was urged to dismiss the Claim in its entirety.

Determination

There are several issues for determination in this case. The first is whether the Balance Score Card and employee appraisal is negotiable or a non-negotiable issue. The second issue is whether the respondent has used the balance score card to unfairly victimise employees. Further, whether the targets in the balance score card are set without consultation and are unachievable and lastly, whether the claimant is entitled to the prayers sought.

1. Whether Balance Score Card is negotiable or non-negotiable

The claimant's case is that the balance score card is neither in Appendix 'A' (negotiable) or in Appendix 'B' (non-negotiable). It is the claimant's position that the respondent erred in introducing the same without following agreed procedure under Clause 19 of the recognition agreement.

Both the respondent and the Interested Parties submit that the Balance Score Card appraisal is a management method not subject to negotiation under Appendix 'B' of the Recognition Agreement.

This is not the first time that this issue has come up for determination by this court. In the case of ***Banking Insurance and Finance Union (Kenya) –V- Barclays Bank of Kenya Limited and Another (2016)*** which has been cited by all the parties herein, the same issue arose for the court's determination and this is what the court stated –

> *"The issue in dispute is that the Respondent has violated the Collective Bargaining and Agreement by procedurally and unlawfully intending to terminate the services of unionisable employees who have been issued with final warning letters. The remedy sought to counter the alleged violation is that the Claimant should be fully involved in the development of the Performance Development Plans, Performance Improvement Plan and the capability hearing and that the warning letters issued to unionisable employees pursuant to the Performance Development Plans be declared null and void including the 2008 employment contracts.*
>
> *Going back to the Recognition Agreement at clauses 16 and 17, the list of negotiable items agreed upon between the parties herein is that termination of employment is a matter negotiable and involves the Claimant. Performance Development Plans and Performance Improvement Plan as well as the capability hearings/meetings are internal and management prerogatives of the employer/Respondent.*
>
> *The new and revised contracts have been in force since 2008 and the employees have signed them. The employees have used the Performance Development Plans, Performance Improvement Plan and gone through the motions of capability hearings alleged to have been introduced in the new contracts of 2008. It is now over 3 years since such contracts came into force. As noted above, the introduction of the management methods into the business of the Respondent is appropriate for the business and there exists legal safeguards in section 41 and 43 of the Employment Act to address any issues arising with regard to the tools being used to apply a sanction such as warnings or termination of employment. I find no violation of section 10 as read in its whole and in its application herein."*

I have perused the recognition agreement and CBA and there is no definition of "*management methods*".

However Appendix 'B' is specific that –

> *"All subjects not listed under Appendix "A" and in particular*
>
> *1. Social and Sports Activities*
>
> *2. Management Methods*
>
> *3. Sickness Benefits*
>
> *4. Pension and Provident Funds/Gratuities."*

My understanding of Appendix "B" is that any item not under Appendix "A" falls under Appendix "B" and is not a matter for negotiation.

I therefore agree with Judge Mbaru in the above case that performance development plans and performance improvement plans as well as the capability hearings/meetings are internal and management prerogatives.

As the claimant pointed out in its submissions at page 22, Balance Score Card (BSC) was introduced by the respondent way back in 2006. Lamenting about it as an illegal introduction after more than 10 years is too late. Had the claimant been serious about opposing the same, the issue would have been raised immediately after its introduction. Having failed to do so there can only be an assumption that the claimant acquiesced to the same and is now estopped from raising any issue about its introduction.

2. Whether the BSC has been misused

The second issue raised by the claimant is that the BSC has been used as a tool to settle scores with employees, contrary to the intent at its inception. This is a matter that requires proof by way of evidence. The claimant has not submitted any records of a member who was either terminated or in any other way disciplined for any reason other than failure to meet targets. All that the claimant did was to attach several letters of warning for failure to meet targets and some letters placing employees on performance improvement programs. None of the employees whose warning letters are attached at Appendix 5 of the claimant's bundle were called to give evidence nor did any of them swear an affidavit. There is no evidence that they complained about the process of setting of the targets against which they were assessed or that the targets are unachievable, or irrelevant to their job descriptions as alleged by the claimants.

The Interested Parties have on the contrary set out the process of target setting at paragraph 14 of their Statement of Response. According to the Interested Parties, the process starts with the employee setting targets aligned to their job description. The target setting is followed by a self-assessment which is discussed with the line manager and finally subjected to a moderation panel.

Clause 19 of the Recognition Agreement establishes a joint negotiating council. Clause 19(f) thereof provides that –

> ***"In addition to claims on subjects set out in Appendix "A" the joint negotiating council shall consider such unresolved grievances as may be referred to it in accordance with clause 18 of this agreement."***

It is my view that what the claimant has raised are grievances of some of its members who feel their specific assessments may not have been

objective. These are issues that the claimant should have raised with the Joint Negotiating Council (JNC) under Clause 19(f).

The wholesome condemnation of the BSC merely because a few of its members have complained about it is not a reasonable and responsible option for solving the issue, and is a violation of the process for management of such issues as elaborately set out in the Recognition Agreement

Clause 19 further provides at 19(d), that all items submitted by either party for discussion and negotiation must be supported by an explanatory memorandum in respect of each item, which memorandum must be submitted at the same time that the meeting is requested for."

It is my view that the issues raised by the claimant over the letters issued to its members who were assed as underperformers would easily have been raised with the JNC and as submitted by both the respondent and the Interested Parties, were bought to court prematurely.

Section 62 of the Labour Relations Act further provides for compulsory conciliation of all disputes between employers and trade unions. The dispute is only supposed to be filed in court after a conciliator has certified that conciliation process has failed. The only circumstances when a trade dispute may be filed directly in court is under the circumstances set out in Section 74 of the Labour Relations Act as follows –

> **74. Urgent referrals to Industrial Court**
>
> **A trade union may refer a dispute to the Industrial Court as a matter of urgency if the dispute concerns—**
>
> **(a) the recognition of a trade union in accordance with section 62; or**
>
> **(b) a redundancy where—**
>
> **(i) the trade union has already referred the dispute for conciliation under section 62(4); or**
>
> **(ii) the employer has retrenched employees without giving notice; or**
>
> **(c) employers and employees engaged in an essential service.**

I therefore agree with the respondent and Interested Parties that this dispute was brought to this court prematurely before exhausting the process under the parties own dispute resolution machinery as set out in the Recognition Agreement and the process set out under the Labour Relations Act on pre-court dispute resolution process.

Is the claimant entitled to the prayers sought?

The first prayer by the claimant is that the court stops the staff performance management reviews, BSC appraisals and orders that the issue be discussed by the JNC under Clause 19 of the parties' recognition agreement.

As I have pointed out, this is a process that should have been undertaken before the claimant filed suit as part of the pre-court procedure. The claimant does not need this court's order to refer any dispute to the JNC.

Further the issue whether or not to stop the staff performance management reviews was resolved by the consent order recorded in court on 6th September 2018 pursuant to which the respondent concluded the 2017 appraisals and commenced appraisals for 2018. It is therefore spent and no further orders are necessary in respect thereto.

The second prayer by the claimant is to revoke or expunge all the disciplinary letters from employees' employment records that were issued pursuant to what the claimant termed "*unprocedural and unlawful balanced score card appraisal and performance management reviews*". In the first place, the claimant has not proved that the Balanced Score Card and performance management reviews were unprocedural and unlawful. Secondly, the names of the employees concerned, and the letters sought to be revoked and expunged were not set out by the claimant. This is a matter that should specifically have been pleaded in the claim setting out the names of the concerned employees and the dates of the impugned letters. This has not been done.

Thus I find that this prayer has not been proved with the result that it fails and is accordingly dismissed.

The 3rd and final prayer by the claimant is that the court orders the respondent to strictly abide by the provisions of the recognition agreement. The claimant has not proved that there was noncompliance or failure by the respondent to abide by the provisions of the Recognition Agreement. Further, the prayer is ambiguous. It does not set out the specific provisions of the Recognition Agreement that the respondent failed to comply with and the nature of noncompliance. There is therefore no basis upon which the court would make such orders. The prayer must likewise fail.

Before I conclude, I must also comment on the prayers by the Interested Parties who are members of the claimant and are therefore entitled to representation by the claimant. They prayed for the following orders –

> 1. An order that the Interested Parties be at liberty to raise any general concerns arising from the performance management and the balance score card tool through the Joint Consultative Committee in consultation with the Respondent's Management.

2. A declaration that the Claimant be at liberty invoke lawful processes and procedure with a view to seeking amendment of the Recognition Agreement in terms of items under Appendix A and B;

3. That the specific grievances arising from the performance appraisal and use of the balance score card tool in terms of the Claimant's annexure Appendix 3, be addressed through the set internal procedure with the option to recourse to court with respect to specific contentions.

Basically they have prayed that the issues raised by the claimant in this dispute should be raised through the Joint Negotiating Council while those raised by the members of the claimant should be addressed through the internal procedure with recourse to court in respect of specific contentions that are not resolved at that level.

These have already been addressed generally in the judgment and do not require further interventions.

Conclusion

The court notes that the unonisable employees of the respondent who are also members of the claimant are entitled to representation and also to have any grievances raised by them over the performance appraisal reviews to be addressed. The fact that the specific prayers sought by the claimant herein have not been granted does not mean that those grievances should be wished away or ignored. There is need for the respondent to address every complaint that has been raised by any unionisable employee. These should be addressed through the internal machinery set by the respondent and if not resolved, be escalated as necessary.

Whenever any issue of performance escalates to a disciplinary matter, the claimant has a right to be involved in the manner provided under Section 41 of the Employment Act and in the Recognition Agreement.

Orders

Having found that the claimant has not proved any of the prayers sought, the claim herein fails and is accordingly dismissed with no orders as to costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 29TH DAY OF JANUARY 2019

MAUREEN ONYANGO

JUDGE