REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 235 OF 2009

KENYA UNION OF DOMESTIC, HOTELS, EDUCATIONAL

INSTITUTIONS, HOSPITALS AND ALLIED WORKERS.....CLAIMANT

V

CATERING & TOURISM DEVELOPMENT LEVY TRUSTEES...RESPONDENT

AND

ATTORNEY GENERAL.....THIRD PARTY

JUDGMENT

1. The delay in the hearing and determination of this Cause lies squarely in the conduct of the parties. They rarely complied with Court directives/timelines issued with a view to concluding the Cause with finality.

2. On 22 July 2009, the Kenya Union of Domestic, Hotels, Educational Institutions, Hospitals & Allied Workers (Union) instituted legal proceedings against Catering and Tourism Development Levy Trustees (Respondent) and the Issues in Dispute were stated as

1) Severance pay

2) Two months' pay in lieu of notice

3) Pro rata leave

4) Pro rata travelling allowance.

3. The Respondent filed a *Reply to the Claim* on 22 October 2009 and on 8 February 2010 it moved the Court to issue Third Party Notice to the Attorney General.

4. The application was allowed and the Attorney General filed a *Third Party Defence* on 1 April 2011.

5. On 13 July 2016, the Union applied for leave to amend the Memorandum of Claim and in a ruling delivered on 12 July 2017, the Union was granted leave to file an *Amended Memorandum of Claim*.

6. The Union filed an *Amended Memorandum of Claim* on 25 July 2018.

7. In the course of time, the Court dealt with several interlocutory applications including consolidation with Cause No. 129 of 2010 (this latter Cause was withdrawn on 25 November 2010).

8. When the Cause came up for hearing on 25 January 2018, the Respondent sought and was granted leave to file and serve an amended Response on or before 2 February 2018.

9. The *Amended Response* was filed on 22 February 2018.

10. The Court further directed the parties to file *Agreed Issues* on or before 28 February 2018 and in default of agreement, the Union was directed to file its proposed Issues before 2 March 2018.

11. When the Cause was mentioned on 2 March 2018 to confirm compliance, the parties had not complied.

12. The Court, at the request of the Respondent directed it to file further documents before 9 March 2018. The Court further directed that *Agreed Issues* be filed before 9 March 2018.

13. On 2 May 2018, the Court adopted the Issues as proposed by the Union because the Respondent had failed to respond to the same. Hearing was fixed for 25 July 2018.

14. The hearing commenced on 25 July 2018 and continued on 17 October 2018 and 13 December 2018. Each party called one witness.

15. The Union filed its submissions on 21 January 2019 while the Respondent filed its submissions on 13 February 2019.

16. The Court has considered the pleadings, evidence and submissions, and will examine each party's case in terms of the Issues as adopted for trial

17. The Court observes that though it gave the parties more than sufficient time to agree/settle Issues for trial, they failed to make any attempt to settle the same and that they have introduced new Issues (such as applicability of Public Authorities Limitation Act and discrimination) in the submissions.

18. The Court will not examine those Issues as they did not form part of the trial).

Whether the Respondent had valid reasons to declare the Grievants redundant

19. The Respondent's case was, and the Union did not dispute as much, that the government initiated and carried out a civil service reform programme during the financial year 2000/2001 and that the programme included public universities and state corporations.

20. The stated objective of the exercise was to improve service delivery and cost efficiency in a bid to support poverty reduction strategy. Parliament was also involved in the programme.

21. The Union through its single witness on the other hand took the position that the *retrenchment* exercise was directed towards employees who had joined the Union and that the retrenched employees were replaced.

22. It was also contended that no reasons for the retrenchment was given to the Union members.

23. To demonstrate that the retrenchment was aimed at employees who had joined the Union, the name of one *Daniel Mageto* was mentioned.

24. The material on record show that *Daniel Mageto* was dismissed on 9 April 1997, and litigation ensued culminating in a judgment in his favour on 30 May 2008.

25. The Court is unable to discern any facts or circumstances upon which it can infer that the Respondent was targeting the grievants herein.

26. It was not disputed by the Union that the reform programme involved various public institutions, and not only employees of the Respondent.

27. There is evidence on record that the Respondent approved the retrenchment package in a meeting held on 1 February 2001.

28. This was after consultative meetings with the Directorate of Personal Management, Treasury and other stakeholders.

29. Although asserting that the retrenchment lacked good faith because the retrenched employees were replaced, the Union did not place before Court any evidence that the retrenched employees were replaced by new employees.

30. On whether the grievants were notified and given reasons, the Court notes that there is sufficient evidence on record that the grievants were notified of early retirement through letters dated 5 March 2001.

31. The letters gave the rationale for the exercise, and the Court finds no merit in the contention that reasons were not given.

32. It might as well be that *Daniel Mageto* was dismissed because of union activities, but the Union in the present case did not produce or lead any evidence to demonstrate that its members were retrenched on account of union activities or that the reasons informing the civil service reform (*retrenchment*) programme contravened any law or contractual agreements.

33. The Court will therefore answer the question in the affirmative, there were valid reasons for the retrenchment programme.

Whether the Respondent followed due process in declaring the Grievants redundant

34. The Union urged in the submissions that the gravamen of its case was the failure by the Respondent to comply with the requirements of section 16A of the Employment Act., cap 226 (repealed) and section 4(5) of the Trade Disputes Act, cap 234 (repealed).

35. However, the Union did not disclose either in the pleadings or during testimony the particular procedures (contractual or statutory) which were not complied with by the Respondent.

36. However, there is material on record to show that the employees were first given the option to indicate whether they would take early retirement from 15 December 2000 to 22 January 2001. 152 employees indicated willingness to take early retirement.

37. There is also material to show that the employees were informed through a Memo dated 3 October 2000 of the impending retrenchment.

38. A follow up Memo was issued on 31 October 2000.

39. Further evidence on record show that the employees were taken through a sensitisation programme on the retrenchment from 12 February 2001 to 15 February 2001 where the whole programme including the selection criteria was explained (Memos dated 8 February 2001 and 23 February 2001).

40. It was only on 5 March 2001 that the grievants were issued with letters notifying them of early retirement/retrenchment.

41. The Union contended that the notification given to the grievants was not legally adequate because the Respondent did not inform and involve it (Union) and the local Labour Officer in the retrenchment exercise.

42. In terms of labour law, the Union could only have been rightly involved/consulted if it had a recognition agreement with the Respondent.

43. The Union did not show that it had a recognition agreement with the Respondent and therefore failure to consult it was not a valid requirement.

44. There was no evidence that the Respondent informed the local Labour Officer of the retrenchment exercise.

45. But it is not lost to the Court that the Labour Officer was a delegatee of the Minister for Labour and ultimately the Executive branch of government.

46. There is evidence that the Executive was involved in the retrenchment exercise and without demonstrating any injustice occasioned to the grievants by failure to directly inform the Labour Officer, the Court is of the view that the failure should not be a basis for a finding of procedural unfairness.

47. The Court will also answer this question in the affirmative.

Whether the Grievants are entitled to the redundancy benefits as outlined in paragraphs B.2 and C of the Amended Memorandum of Claim

48. This issue was not precisely worded to capture the gravamen of the Union's case.

49. The Court says so because the principal reason advanced in support of these heads of claim herein (severance pay at 2.5 months' pay for each completed year of service (or up to retirement age) and 2 months' salary in lieu of notice) is the package promised to civil servants under the Civil Service Reform Programme, Identification for Early Retirement, and accrued leave.

50. The question arising from the pleadings is therefore whether the grievants were *civil servants* to be entitled to the package developed for *civil servants* or put differently whether the Respondent had a distinct retrenchment package.

51. The Union did not produce any approved retrenchment package/policy or document for the *civil servants* who were sent home as part of the civil service reform programme in 2000 – 2001, but were merely content to rely on what appear to be a one page blank *pro forma* referenced *Civil Service Reform Programme Identification for Early Retirement* which enumerated benefits payable under a retrenchment scheme.

52. The source of the document was not disclosed. It was a blank form.

53. Evidence as to whether the benefits indicated thereon were paid out to any class of *civil* or public servants retrenched was not produced. Whether the benefits had been approved by any entity in government was not stated.

54. In the view of the Court, little or no weight ought to be attached to the document without evidence and context.

55. The grievants or employees of the Respondent may have been and still are *public officers* but they were not *civil servants* as they were not employed by and under the direct control of the Public Service Commission of Kenya.

56. The Grievants would therefore, in the opinion of the Court not be entitled to lay claim to the package for the *civil servants*.

57. The Respondent met and approved a retrenchment package on 1 February 2001. The benefits as approved were paid to the grievants.

58. The Union now contends that the benefits should have been computed to take into account the retirement ages of the grievants and not the effective date of retrenchment. Is the Union right?

Severance pay

59. The grievants were paid severance pay at the rate of 1 month salary for each year of service but capped to 10 years of service.

60. The Union however urged that the severance pay should have been at the rate of 2.5 months' salary for each completed year of service, until retirement age.

61. The Respondent's *Terms and Conditions of Service* did not provide for early retirement or retrenchment. It had s provision for normal retirement and pension. The same is therefore of no assistance to the Court on the question of severance pay.

62. The Union had not entered into a *collective bargaining agreement* with the Respondent at the time of retrenchment.

63. In many instances, the *collective bargaining agreement* makes provision for payment of severance pay. That is not the case here.

64. The applicable law at the time the grievants were sent away was the Employment Act, cap. 226 (repealed).

65. Section 16A of the Act provided at section 16A

> 1) A contract of service shall not be terminated on account of redundancy unless the following conditions have been complied with –
>
> *(a)* ……
>
> *(f)* an employee declared redundant shall be entitled to severance pay at the rate of not less than 15 days' pay for each completed year of service as severance pay.

66. In so far as the Respondent capped the severance pay to 10 years of service in respect of employees who had served for more than 10 years, it was in breach of the law.

67. The Court therefore finds merit in this head of claim, but only in respect of the capping of severance pay to 10 years of service.

Salary in lieu of notice

68. On the question of salary in lieu of notice, the Union asserted that the grievants should have been paid at the rate of 2.5 months of basic salary.

69. The Court having come to the opinion that the Respondent had a distinct retrenchment package finds no merit in the head of claim.

State of the pleadings

70. Parties are bound by their pleadings.

71. The Union, in the *Amended Memorandum of Claim* sought 4 reliefs, declaration, severance pay and pay in lieu of notice, costs and interest. Those are the issues the Court have addressed.

72. The Union has succeeded only in respect of 1 substantive head of claim for which it is entitled to relief.

Conclusion and Orders

73. From the foregoing, the Court finds and declares that Respondent was in breach of the law when it capped severance pay to maximum 10 years of service.

74. In this respect, the Court orders that

> (i) the Respondent to compute and file in Court within 15 days the balances of severance pay for the grievants who had over 10 years of service for adoption by the Court.
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> (ii) In default, the Union to compute and file the balances for adoption by the Court.

75. The Union failed to establish to the required standard the merit of the other heads of relief and the same are dismissed.

76. The Union did not have a recognition agreement with the Respondent though it sued in its own name. It is denied costs.

Delivered, dated and signed in Nairobi on this 22nd day of February 2019.

Radido Stephen

Judge

Appearances

For Union Mr. Enonda instructed by Enonda, Makoloo, Makori & Co. Advocates

For Respondent Mr. Ojienda instructed by Ojienda & Co. Advocates

Court Assistant Lindsey