



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU

CAUSE NO.207 OF 2018

KENYA PLANTATION AND AGRICULTURAL WORKERS UNION.....CLAIMANT

VERSUS

BENDOR ESTATE LIMITED.....RESPONDENT

JUDGEMENT

The issues in dispute - failure to deduct and remit union dues, unlawful and wrongful variation of employment and victimisation of employees on account of unionisation.

Claim

The claimant is a registered trade union under the Labour Relations Act, 2007 and the respondent as company engaged in cultivating crops for local and international markets.

On 12th July, 2017 the claimant recruited members and employees of the respondent all being 58 who signed Form S authorising a deduction of trade union dues. the respondent was served with these forms as required under the Labour Relations Act (the Act) to effect a deduction and remittance of trade union dues but failed to attend and only paid the dues for 4 months being September to December 2017 and has refused and neglected to pay for the other period since. This has subjected the claimant to hardship and is depriving it of the necessary resources with which members receive service particular the 58 members who indicated their willingness to join the claimant union.

The claim is also that the respondent has since changed the employee's mode of employment from monthly salary to daily wages despite some employees working for the respondent for over 13 years. The employees have been denied their right to NSSF and NHIF contributions. The employees who had elected to join the claimant union had achieved the requirement threshold for the recognition of the claimant by the respondent.

The claimant is seeking for orders that the failure to deduct and remit trade union dues from the claimant members is unlawful; a declaration that the actions of the respondent are unfair labour practices; an order compelling the respondent to commence deduction and remittance of trade union dues from the members who have joined the claimant; an order directing the respondent to pay the arrears of trade union dues from the time they were served with notice of membership and until payment in full; the respondent to conclude the recognition agreement with the claimant; an order compelling the respondent to pay monthly salary and remit NSSF and NHIF contributions; payment of interests on the withheld trade union dues and costs herein.

David Wanyonyi the Branch Secretary Thika branch testified that he recruited 58 employees in the service of the respondent and who comprise a simple majority and the claimant is due for recognition by the respondent. the recruited employees as members of the claimant signed the check off forms and such were served upon the respondent who commenced trade union dues deductions for 4 months from September, to December, 2017 and then stopped without notice or giving reasons. The respondent also refused to sign the recognition agreement submitted by the claimant and the orders sought should issue to protect the claimant and its members.

Defence

The defence is that on 12th July, 2017 the claimant conducted a recruitment exercise where 58 members from the employees of the respondent signed membership forms authorising the deduction and remittance of trade union dues for the period of employment. The respondent deducted and made remittances of trade union dues to the claimant of the months of September to December, 2017 as per the legal requirements.

The defence is also that the respondent has not refused to deduct and remit trade union dues as alleged as the contracts of the 58 employees and members of the claimant expired on 31st January, 2018 and such contracts were to be renewed on 1st February, 2018 but due to financial constraints and scaling down operations this was not possible. The employees were engaged as casual labourers entitled to daily wage and

were fully informed of this position at a meeting held at the respondent's farm on 31st January, 2018.

The employees re-engaged as casual employee and paid a daily wage were at liberty to directly pay their trade union dues.

George Maina Gichuru the Legal Officer for the respondent testified that in March, 2018 remittance of trade union dues by the respondent to the claimant stopped as the contract of employment for the employees and members of the claimant had since terminated. The existing contracts of employment had not been renewed and the issue of recognition of the claimant does not arise as the employees who were members had employment terminated. Most contracts for the employees expired on 31st January, 2018 and were not renewed due to financial constraints and scaling down operations.

The respondent had one year contracts with the employees and following operations scaling down these were not renewed. About 90 employees who had fixed term contracts were not renewed. The farm manager held a meeting with all the employees. The contracts issued had a clause that renewal would be subject to availability of work.

At the close of the hearing both parties filed written submissions

Determination

The issues which emerge for determination are summarised as follows;

Whether there is unfair labour practice in failure to deduct and remit trade union dues;

Whether there is unfair variation of employment contracts; and

Whether the respondent should be compelled to recognise the claimant.

From the pleadings and the evidence of the parties, the claimant recruited 58 employees of the respondent and served the relevant forms to notify the respondent of this fact so as to effect trade union dues deduction and remittance as required under the provisions of section 48 of the Labour Relations Act, 2007 (the Act). The deductions and remittances of trade union dues were done for 4 months being September, to December, 2017 and this stopped.

The defence is that the respondent was served with membership forms with regard to 58 employees who joined the claimant union and commenced trade union dues deduction and remittances to the claimant. The employees were on one year contracts which ended on 31st January, 2018 and were not renewed due to scaling down of operations and financial constraints. The employees who were retained as casuals were at liberty to pay their trade union dues directly to the claimant.

Section 48(4) of the Act requires an employer who is served with Form S to commence trade union dues deductions and remit to the trade union;

(3) An employer in respect of whom the Minister has issued an order under subsection (2) shall commence deducting the trade union dues from an employee's wages within thirty days of the trade union serving a notice in Form S set out in the Third Schedule signed by the employees in respect of whom the employer is required to make a deduction.

Upon cessation of membership, employment or for whatever reasons leading to stoppage of trade union dues deduction, the employer has a duty in law to inform the trade union of the same. Without such notification, the employer is required to continue the deduction and remittance of trade union dues.

In this case, the claimant stated that upon the commencement of trade union dues deduction and remittances, this stopped in December, 2017. The respondent in defence asserted that the trade union dues were remitted until 31st January, 2018 as the term contracts with the claimant members expired and were not renewed and those retained were taken on casual terms and were at liberty to pay union dues directly to the claimant.

This evidence by the respondent on the turn of events as at 31st January, 2018 was not adequately interrogated by the claimant. It was left as presented. Whether there was a redundancy which justified the non-renewal of the fixed term contract and the need to retain the re-engaged employees on casual employment so as to pay the trade union dues directly was not gone into with regard to the rationale, extent and justification.

The evidence of the respondent therefore taken as presented gave a justified reasons as to how employment of the 58 members of the claimant out of the 90 employees alleged to have been laid off had their contract expire and not renewed. The extent and scale of the employees who were re-employed on casual terms was not questioned and therefore no explanation was given by the respondent.

As submitted by the respondent, fixed term contract legitimately end on their terms as held in **Eunice Mwikali Munyao versus Elys Chemical Industries Limited [2017] eKLR**. with the 58 employees and members of the claimant being on fixed term contracts ending as of 31st January, 2018 and the contract having not been renewed due to operational reasons which were not challenged, employment and by extension the need to deduct and remit trade union dues to the claimant was dealt.

Failure to issue notice to the claimant when the employees and members affected by the end of contracts and non-renewal of contracts took

effect was also not addressed. The evidence by the respondent that trade union dues were paid up and until 31st January, 2018 as against the claim that union dues were paid until December, 2017 well covered the respondent.

The end of the employment contracts was lawful. the payment of the due trade union dues up and until the end of the contracts is commensurate with the legal requirements of section 48 of the Act. the respondent cannot be said to have engaged in unfair labour relations on the basis that there was a justified reason for the nonrenewal of term contract due to operations reasons and the owing trade union dues were paid up and until end of employment with the 58 members of the claimant.

With end of employment and stoppage of trade union dues deductions, where the claimant states that they had recruited 58 employees and the respondent has due to operations reasons terminated contracts with 90 employees, the threshold required for recognition need to be addressed afresh.

The evidence submitted by the claimant was from the branch secretary Thika and no employee (s) affected by the operations leading to and ending employment was called. To claim unfair labour practices requires the call for evidence in this regard as held in **Elizabeth Washeke & 62 others versus Airtel Networks Limited & another [2013] eKLR.**

This being the case the orders sought for the respondent to revert into paying the employees on monthly basis and to remit the NSSF and NHIF contributions has not been given face and therefore lacks a basis. Without recognition being achieved, as noted above, the claimant must go back and achieve numbers and move the court as appropriate for recognition.

Accordingly, the claims made are found without merit and shall not issue in this instance. The threshold for recognition is not achieved. Each party shall bear own cost.

Delivered at Nakuru this 25th day of April, 2019.

M. MBARU

JUDGE

In the presence of: