REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

PETITION NO. 65 OF 2017

(Before Hon. Lady Justice Maureen Onyango)

IN THE MATTER OF ARTICLE 22(1) OF THE CONSTITUTION OF KENYA, 2010 IN THE MATTER OF CONTRAVENTION OF RIGHTS AND FUNDAMENTAL FREEDOMS UNDER ARTICLES 10, 41, 47, 232 AND 248 OF THE CONSTITUTION OF KENYA, 2010

UNIVERSITIES ACADEMIC STAFF UNION (UASU).....PETITIONER/APPLICANT

VERSUS

SALARIES AND REMUNERATION COMMISSION.....1ST RESPONDENT

THE HON. ATTORNEY GENERAL.....2ND RESPONDENT

JUDGMENT

The Petitioner herein filed the petition herein on 28th July 2017 against the Salaries and Remuneration Commission (SRC) the 1st Respondent and the Attorney General, the 2nd Respondent. However, on 6th February 2018 the Attorney General was discharged from the Petition by this Court following a Preliminary Objection that the Attorney General has no control over the constitutional activities of the 1st Respondent and that the contested job evaluation was undertaken by the Respondent, the SRC.

The petition was filed under Article 23(3) of the Constitution, Rule 13 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2010 ad Rule 7 of the Employment and Labour Relations Court (Procedure) Rules 2016.

The petition is supported by the Replying Affidavit of Constantine Wasonga, the Secretary General of the Petitioner, and is premised on the grounds that the Respondent conducted a job evaluation for academic staff in Public Universities in Kenya who are unionised members of the Petitioner without involving the Petitioner who is a key stakeholder with an existing Collective Bargaining Agreement that was painfully crafted by the Petitioners and the Employers for their members which would be adversely affected by the job evaluation by the 1st Respondent contrary to the law. That the exclusion of the Petitioner in the job evaluation process infringes on the University Academic Staff rights to Collective Bargaining rights to Collective Bargaining rights guaranteed by the Constitution. That the 1st Respondent failed to involve the Petitioners from the very onset of the job evaluation process to pave way for consultations for development of a relevant tool for assessment of the Petitioner's members jobs contrary to the law.

The Petitioner avers that it is imperative that the 1st Respondent carries out its mandate consultatively by involving all the requisite stakeholders such as the Petitioner since the job evaluation touches directly on the terms and conditions of service of academic staff, that this was contrary to Article 232(1)(d), (e) and (f) of the Constitution which required the involvement of the people in policy making accountability and transparency.

The Petitioner avers that on numerous occasions it sought audience with the 1st Respondent for purposes of being involved in the job evaluation process but its request fell on deaf ears. That the 1st Respondent went ahead and engaged the services of Price water House Coopers to conduct the job evaluation using the Paterson Tool which is a tool that is not suitable to evaluate academic positions, that the Paterson Tool is skewed towards manual and administrative positions and is not suitable for knowledge intensive industry such as the University because the Tool leans more on managerial/administrative positions to the detriment of academic positions.

The Petitioner avers that the core mandate of university academic staff is to teach/train, conduct research, conduct outreach, consultancy and community services under section 3 of the Universities Act. That the Paterson Tool relies in the REMeasure Method which grades jobs solely on the criteria of decision making which is not a function delegated to the members of the University Academic Staff by the Law.

The Petitioner avers that on the 30th June 2017 it was surprised to learn that the 2nd Respondent (the Attorney General) had already generated a Report on job evaluation for university academic staff which recommends lower salary ranges based on the grades they had come up with to the detriment of the Universities Academic Staff. That the Report of the 1st Respondent places junior administrative staff of the University over and above the academic staff yet the core functions of the University is trainings and teachings performed by the members of the Petitioner. That the said Report fails to take into account the qualifications of persons graded as more qualified members of the Petitioner had been graded lower than less qualified administrative staff.

The Petitioner avers that the job evaluation tool adopted by the 1st Respondent is in contradiction to the law which recognises academic qualifications as a consideration in settling the remuneration of an employee. That elevating 'decision making' criteria over and above academic qualifications in setting out remuneration is discriminatory to the members of the Petitioner whose core function is training, teaching and research as opposed to administration.

The Petitioner avers that the 1st Respondent has secretly forwarded the said Report to the management of public universities to the total exclusion of the Petitioner. That the 1st Respondent Job Evaluation Report infringes on the University Academic Staff rights to collective bargaining rights guaranteed by the constitution of Kenya at Article 41(5) since it proposes pay grades which are in total and complete contradiction with the Collective Bargaining Agreement entered as between the Petitioner and the Universities. That unless the court intervenes the Respondents will proceed with the intended final job evaluation report that will occasion injustice to the University Academic Staff incomes as agreed in the existing Collective Bargaining Agreement without affording the Petitioner an opportunity to be heard by the Court.

The Petitioner avers that its exclusion in the job evaluation process infringes the University Academic Staff rights to Collective Bargaining rights guaranteed under Article 41(5) of the Constitution. It further avers that it is imperative that the 1st Respondent carries out its mandate consultatively by involving the requisite stakeholders as required under Article 232 (1)(d), (e) and (f) of the Constitution. That under Article 248 of the Constitution the Respondent is bound to secure the requirement of observance by all State organs of democratic values and principles and promote constitutionalism. That contrary to this provision the Respondent relied on a job evaluation tool which proposes pay grades that are in complete contradiction with the Collective Bargaining agreement. That in addition, its members will be condemned to earn a salary that does not match their qualifications.

The Petitioner therefore seeks the following reliefs:

a. A Declaration that the 1st Respondent's Job Evaluation Report dated 30th June 2017 is unconstitutional, null and void in relation to Article 10,41,47,232 and 248 of the Constitution and the Salaries and Remuneration Act No. 10 of 2011, the Universities Act No. 42 of 2012 and the Employment Act 2007.

b. A Declaration that the Respondents have infringed on the Petitioner's Constitutional rights under Articles 10, 41, 47, 232 and 248 of the Constitution.

c. A permanent injunction be issued against the 1st Respondent whether by themselves, their servants and or agents or whomsoever is acting on their behalf from implementing the final Job Evaluation Report for Academic Staff in all Public Universities in Kenya without the inclusion of the Petitioner's input.

d. Any other or further order this court may deem fi to grant in the circumstances.

e. Interest at Court rates on (c) above from the date of the filing suit until settlement in full.

f. Costs of this suit.

Respondent's Replying Affidavit

The Respondent in response to the petition filed a Replying Affidavit sworn by ANNE R. GITAU, the Respondent's Commission Secretary on 7th February 2018. She avers that the Respondent launched the nationwide job evaluation process for the entire public sector and that the purpose of the exercise was to determine the true worth of Public Service Jobs which include Public Universities, Research and Tertiary Institutions.

She avers that the benefits of the job evaluation include the establishment of a proper basis for recruitment and selection of incoming staff, ensuring proper succession in the public sector as well as mapping out training needs of an institution. In addition, the lack of a harmonised framework brought forth huge disparities in remuneration across various sectors guided by institutions ability to pay. According to the Respondent the pay inequalities for similar jobs led to discontent, low morale and inefficiency in the public service and that the wage bill was unsustainable.

She avers that the basic premise of the Paterson Philosophy was that all the jobs, irrespective of level can be compared in terms of number and weight of decisions made by the incumbent. She avers that the philosophy was used successfully in the evaluation of the entire public service because it is based on decision making and level of responsibility which all jobs entail. According to the Respondent the tool used to evaluate the Petitioner's members was REMeasure which is the PwC tool on job evaluation which as ascertained by the Commission, met the threshold of the Compensable factors. It was compatible with the Paterson philosophy and it connected with internationally recognised Job Evaluation methodology tools thus it was reliable and consistent.

It is the Respondent's case that the job evaluation exercise for the Petitioner's members was launched in February 2017 and the Petitioners

were invited to the exercise as they sent their representatives. However, on 14th March 2017, the Petitioner wrote to the Respondent expressing concerns over the tool used. That the concerns were forwarded to the Consultant by the Respondent on the same day. Further, the concerns were addressed and on 9th and 16th May 2017 a meeting was held between the Petitioner and the Respondent to discuss the same.

She avers that the Respondent took cognisance of the concerns raised by the Petitioner and introduced the "*Sapiential Factor"* which is influence based on knowledge and when applied in academic jobs it has the same weighting as financial impact. She states that it was objective and that in carrying out the job evaluation the Respondent released a quality report on the Petitioner's members jobs. She avers that the job evaluation cannot adversely affect an existing Collective Bargaining Agreement and that the Petitioner's input was incorporated.

She avers that the Petitioner has not met the threshold for grant of conservatory order.

Petitioner's Submissions

The Petitioner submitted that since the Respondent's actions adversely affect the Petitioner's members, the Petitioner is clothed with the requisite locus standi to bring this Petition as the authority granted by the Constitution of Kenya under Article 22(1) and (2).

The Petitioner submitted that the mandate of university academic staff is to teach/train, conduct research, conduct outreach, consultancy and community services as provided under section 3 of the University Act and as such decision making is no a function delegated to the members of the University Academic Staff by the law.

It is the Petitioner's submission that the Paterson tool is skewed towards manual and administrative positions and is not suitable for a knowledge intensive industry such as the universities as it leans more on managerial /administrative positions to the detriment of academic positions. The Petitioner submitted that it is important for the Respondent to carry out its mandate consultatively by involving all requisite stakeholders as the Petitioner.

The Petitioner relied on the decision in ***Doctors for Life International v Speaker of the National Assembly and Others (CCT12/05) [2006] ZACC 11:20006 (12) BCLR 1399 (CC)*** (17 August 2006) where Sachs J stated that

> "The principle of consultation and involvement has become a distinctive part of our national ethos. It is this ethos that informed a well-defined normative constitutional structure in terms of which the present matter falls to be decided."

The Petitioner submitted that the Respondent never invited the Petitioner to a sensitization meeting but rather addressed its invitation letters to Deputy Vice Chancellors in charge of Academics, Deputy Vice Chancellors in charge of Finance and Heads of Human Resource Departments of various public universities. That the Respondent was never in communication with the Petitioner until 14th March 2017 when the Petitioner approached the Respondent with a complaint on the tool used for job evaluation.

The Petitioner argued that the Respondent did not involve the Petitioner and or its members but rather made their attendance a requirement when they wrote to the Vice Chancellor of Public Universities asking them to nominate members to participate in the training. The Petitioner argues that this does not constitute a consultation or inclusivity since the Petitioner's members were bound to attend the job analysis.

The Petitioner relied on the decision in ***Kenya Airways Limited v Allied Workers Union Kenya & 3 others [2014] eKLR*** and ***Kenya Union of Domestic Hotels Educational Institutions and Hospital Workers (KUDHEIHA) v Aga Khan Hospital Nairobi [2015] eKLR***. In that case Mbaru J. observed that:

> "As righty noted by the Court of Appeal … consultations should not be a charade. I will add, consultations should not be a means to justify an end or an end in itself. It should entail a process towards achieving a goal. Consultations should be held so as to achieve industrial peace and ensure fair labour relations."

Respondent's Submissions

The Respondent submitted that the Petitioner does not have any constitutional basis to justify the petition herein. The Respondent argued that job evaluation forms part of the advice which is binding pursuant to Article 259 (11) of the Constitution and that the Respondent has the Constitutional right to undertake job evaluation under Article 230 of the Constitution. The Respondent submitted that this Court cannot usurp the Respondent's right to conduct job evaluation unless the Petitioner has proved illegality or procedural impropriety. The Respondent cited the decision in ***Gibb Africa Ltd v KRA [2017] eKLR*** in finding that:

> "It is settled law that public bodies no matter how well intentioned may only do what the law empowers them to do"

The Respondent submitted that it was merely upholding its constitutional mandate. That the job evaluation has not in any way violated the Petitioner's constitutional rights relying on the decision in ***Mumo Matemu v Trusted Society of Human Rights Alliance and 5 Others [2013].***

The Respondent submitted that the Petitioner has not proved that the Respondent departed from the procedural rules and failed to observe the rules of natural justice. It argued that it conducted the exercise with the said employees through their employers and the engagement with the employees obviated the need for the Respondent to engage with the Petitioner, that the Petitioner has not proved illegality, unreasonableness or procedural unfairness as stated in the case of ***Geoffrey Oduor Sijeny v Kenyatta University [2018] eKLR.***

The Respondent submitted that the Petitioner has not demonstrated how the job evaluation has infringed Article 10 or Article 41 of the Constitution. It is the Respondent's submission that the job evaluation was to create standardization so that public officers get equal pay for work of equal value. That under section 107 of the Evidence Act the Petitioner has not proved that the Job Evaluation Report violated its rights.

The Respondent submitted that the Court can only determine illegality and procedural impropriety but not decide for a public body with the necessary expertise and constitutional mandate which system/tool should be used in job evaluation.

Determination

The issues for determination are whether the Respondent violated the Petitioner's rights and if the petitioner is entitled to the prayers sought.

The common ground in this matter is that the Petitioner advanced its concerns to the Respondent on the use of the Paterson tool by itself or through its various University Chapters. Prior to raising these concerns, the Respondent in its letter dated 25th January 2017 invited the Vice Chancellors of Universities to a stakeholder's sensitization meeting to appraise them on the Job Evaluation exercise.

Further in seeking to address the concerns raised by the Petitioner on the job evaluation exercise a meeting was convened on 16th May 2017 by the Respondent at which the Petitioner was represented by 6 persons who included Prof. Muga K'olale, Dr. Janepha Kumba, Dr. Constantine Wesonga, Dr. George Rukaria, Dr. Meshack Obonyo and Prof. H. M. Bwisa. Min 2. / UASU .2. /2017 states that the SRC provided its Response to the Report of the Universities Academic Staff Union that the tool is designed to cater for all jobs including universities. The resolution of the meeting was that:

i. UASU was to share their concerns with SRC in writing for consideration.

ii. PwC was to address UASU on how the JE (job evaluation) factors were weighted and applied.

iii. All JE issues raised were to be addressed within 10 days.

iv. UASU was to continue engaging the Commission.

The outcome of this meeting was that the Petitioner was to further give their concerns in writing and that the concerns would be addressed by PwC.

The Petitioner's main concern appears to be that the Respondent did not from the very onset involve the Petitioner in the job evaluation process and that on 30th June 2017 it was surprised to learn that the Attorney General (who was the 2nd Respondent) had generated a Report on job evaluation which recommended lower salary.

The Respondent on its part avers that the Petitioner's input was incorporated and the tool used, the REMeasure was revised to cater for academic jobs, that the revisions included incorporation of the "*Sapiential Factor*" to differentiate academic jobs. The Respondent argued that the job evaluation cannot adversely affect an existing CBA. That the Respondent rightfully undertook its role in conducting the job evaluation since the objective of the job evaluation encompasses the functions and powers set out under both Article 230 (4) of the Constitution and Section 13 of the Salaries and Remuneration Commission Act.

The role of the Respondent in determining remuneration of public officers was dealt with in the case of ***Teachers Service Commission (TSC) v Kenya Union of Teachers (KNUT) & 3 Others [2015] eKLR*.** In advising on remuneration of public officers the Respondent is required to consider the prevailing factors provided under Regulation 12 of the Salaries and Remuneration Commission (Remuneration and Benefits of State and Public Officers) Regulations, 2013.

From the pleadings and submissions of the parties, it is evident that the respondent did involve the petitioner as a union in the job evaluation exercise. It is further evident that the petitioner raised its elaborate concerns early in its letter dated 16th March 2017. The respondent forwarded the concerns to the consultants PWC for consideration. Several meetings were held by the parties thereafter. Thus even though the petitioner was not involved from the outset, it was allowed to raise its concerns which were sent to the consultants for consideration well before the report was prepared.

The dictionary meaning of consultation is "

> "**The process by which the public's input on matter affecting them is sought. Its main goals are in improving efficiency, transparency and public involvement in large scale projects or laws and policies**."

Consultation does not mean that all the proposals or demands of the people who are to be consulted must be adopted wholesale or at all. It requires that the input of the people consulted is taken into account before the final decision is reached. In the present case the petitioner's concerns were that the "*Paterson Tool*" used in the job evaluation was not suitable to evaluate academic positions a it was skewed towards manual and administrative positions. The respondent states that it took cognisance of these concerns and introduced the "S*apient Factor*" to ensure academic jobs were compensated accordingly.

Following the addition of this factor the petitioner's members were graded as follows –

Professor	EX
Director Postgraduate Studies	E1
Associate Professor	E1
Dean of Faculty	E1
Director Undergraduate Studies and Field Attachment	E1
Chair of Department	D5
Senior Lecturer	D4
Lecturer	D2
Assistant Lecturer	D1
Graduate Assistant	C2

The respondent further states that the ranking was generated from information in job descriptions validated and signed off by the petitioners' institutions, that it 15released a quality report and met all the objections raised.

It is further the respondent's position that it has instituted internal mechanisms to address any dissatisfaction from institutions including sessions of engagement in the form of meeting and an appeals process.

In its written submissions the petitioner only referred to violation of Article 232(1)(d), (e) and (f) which are (d) involvement of the people in the process 15of policy making (e) accountability for administrative acts and (f) transparency and provisions to the public of timely, accurate information.

As submitted by the respondent, the petitioner did not 16demonstrate violation of Articles 1016, 41 or 248 of the Constitution. Neither did it demonstrate that it was not consulted.

From the foregoing I find that the petitioner has not demonstrated that it is entitled to the reliefs sought in its petition. The same therefore fails and is accordingly dismissed.

There shall be nor orders for costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 20TH DAY OF MAY 2019

MAUREEN ONYANGO

JUDGE