



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE NO 1884 OF 2014
BAKERY, CONFECTIONERY, FOOD MANUFACTURING
AND ALLIED WORKERS UNION (K).....CLAIMANT
VERSUS
DEEPA INDUSTRIES LIMITED.....RESPONDENT
JUDGMENT

Introduction

1. This claim is brought by Bakery, Confectionery, Food Manufacturing and Allied Workers Union (K) on behalf of the following members (Grievants), formerly employed by the Respondent:

- a) Beatrice Akinyi;
- b) Emily Karimi;
- c) Hellen Mwikali Kyendi; and
- d) Rosemary Murugi.

2. The claim is contained in a Memorandum of Claim dated 22nd October 2014 and filed in court on 24th October 2014. The Respondent filed a Memorandum of Defence on 12th March 2015. By consent of the parties, the matter proceeded by way of written submissions.

The Claimant's Case

3. The Claimant states that the Grievants were employed by the Respondent on diverse dates between 1999 and 2005 as follows:

- a) Beatrice Akinyi was employed as a Bakery Worker at a monthly salary of Kshs. 6,046 inclusive of house allowance, effective 2nd May 2005. At the time of leaving employment, she earned a basic salary of Kshs. 10,360 plus a house allowance of Kshs. 2,073;
- b) Emily Karimi was employed as a Bakery Worker at a monthly salary of Kshs. 4,913 plus a house allowance of Kshs. 737, effective 2nd May 2005. At the time of leaving employment, she earned a basic salary of Kshs. 10,360 plus a house allowance of Kshs. 2,073;

c) Hellen Mwikali Kyendi was employed in the Sorting Department on 30th April 1999. At the time of leaving employment, she earned a basic salary of Kshs. 10,360 plus a house allowance of Kshs. 2,073;

d) Rosemary Murugi was employed as a Bakery Worker at a monthly salary of Kshs. 6,046 inclusive of house allowance, effective on 2nd May 2005. At the time of leaving employment, she earned a basic salary of Kshs. 10,360 plus a house allowance of Kshs. 2,073.

4. By letter dated 5th April 2013, the Respondent notified the Claimant of its intention to terminate the employment of five (5) unionisable employees on account of redundancy, effective 30th April 2014. The names of the affected employees were not disclosed.

5. In response, the Claimant wrote to the Respondent on 16th April 2013, asking for a meeting to be held on 22nd April 2013, to discuss the matter. At this meeting the parties agreed to meet again on 2nd May 2013 but the Respondent did not show up for the latter meeting.

6. The Claimant states that at the meeting of 22nd April 2013, it had been agreed that no redundancies would be effected as long as the parties were engaged in discussions. However, on 30th April 2013, the Respondent locked out the Grievants. On 19th June 2014, the Claimant wrote to the Respondent asking that the Grievants be allowed back to work.

7. Further meetings convened by the Federation of Kenya Employers did not take place and by letters dated 28th and 29th June 2013, the Grievants' employment was terminated. The Claimant contends that the termination was in violation of the law and the Recognition and Collective Agreements.

8. The Claimant reported a trade dispute to the Minister for Labour on 2nd July 2013 and a Conciliator was duly appointed. On 10th March 2014, the Claimant submitted its memorandum on the dispute to the Conciliator. On 16th April 2014 the Conciliator made recommendations upholding the Respondent's decision by which the Claimant was aggrieved, hence this claim.

9. The Claimant maintains that there was no reason for the redundancy. The Claimant adds that the Respondent did not issue a redundancy notice as required by law. Additionally, the Respondent did not consult the Claimant Union on available options towards mitigating the effects of the redundancy as contemplated by the Collective Agreement. The Claimant also faults the selection criteria employed by the Respondent.

10. The Claimant submits that the redundancy herein was a sham, aimed at de-unionizing the Respondent's enterprise, through outsourcing of core functions. According to the Claimant, the redundancy was not informed by genuine economic, technological or structural reasons.

11. The Claimant seeks the following remedies:

a) A declaratory order that the lock out and eventual termination of the Grievants' employment on account of redundancy was unlawful and unfair;

b) An order of injunction restraining the Respondent from refusing, neglecting and/or failing to continue to employ the Grievants;

c) An order restraining the Respondent from employing replacement labour in the same positions held by the Claimant's members;

d) An order restraining the Respondent from hiring on inferior, superior and/or similar terms employees with comparable qualifications as the Claimant's members;

- e) An order directing the Respondent to reinstate the Grievants without loss of seniority and benefits;
- f) In the alternative, an order directing the Respondent to re-engage the Grievants in other suitable positions;
- g) In the alternative, an order directing the Respondent to pay the Grievants their terminal benefits as spelt out in the Collective Agreement;
- h) An award of 12 months' salary to each Grievant in compensation for unlawful termination of employment;
- i) General damages;
- j) Costs.

The Respondent's Case

12. In its Memorandum of Defence dated 11th March 2015 and filed in court on 12th March 2015, the Respondent admits having employed the Grievants on diverse dates as pleaded in the Memorandum of Claim.

13. Regarding the reason for the redundancy, the Respondent states that it carried out a thorough review of its operational requirements and noted the need to overhaul its Production Department, to increase quality and quantity of its products. Towards this end, the Respondent employed new technology via modern automated lines, thus reducing manual intervention resulting to less staff. The Respondent avers that the Grievants did not have the expertise to operate the automated lines, thus necessitating the redundancy.

14. The Respondent further states that the Claimant was informed in good time of intended changes and the resultant redundancies to take effect on 30th April 2013. The Respondent denies engaging casuals directly as alleged by the Claimant, but admits a labour outsourcing arrangement with Benori Group, undertaken on a need basis.

15. On the process of declaring the redundancy, the Respondent states that on 5th April 2013, it informed the Claimant of the outcome of a review of its operational requirements and the affected positions in the Production Department.

16. Upon the Claimant's request, a meeting was held on 22nd April 2013 during which the Claimant was taken through the operational requirements in the Production Department. The Claimant was however reluctant to accept the declaration of redundancy. By a letter of the same day, the Respondent notified the Claimant that the redundancy would take effect on 30th April 2013. In its response dated 29th April 2013, the Claimant asked for another meeting on 2nd May 2013, which meeting did not take place.

17. The Respondent states that it notified the Ministry of Labour of the redundancy by letter dated 22nd May 2013. On 19th June 2013, the Respondent received a letter from the Claimant alleging a lock out of its members, upon which the Respondent instructed the Federation of Kenya Employers to meet with the Claimant.

18. The Respondent wrote a further letter to the Ministry of Labour on 25th June 2013, giving the effective date of the redundancy as 30th June 2013 and enclosing the Grievants' final benefits. On 29th June 2013, the Grievants were issued with termination letters on account of redundancy. The Grievants were paid all their terminal dues.

19. It is the Respondent's case that there was a genuine case of redundancy and the attendant legal requirements were duly complied with.

Findings and Determination

20. There are two (2) issues for determination in this case:

- a) Whether the termination of the Grievants' employment was lawful and fair;
- b) Whether the Grievants are entitled to the remedies sought.

The Termination

21. On 5th April 2013, the Respondent wrote to the Claimant as follows:

"Dear Sir

RE: TERMINATION OF EMPLOYMENT BY REASON OF REDUNDANCY

We hope this letter finds you well. We appreciate the working relationship we have had with you so far. As discussed in your offices yesterday, the purpose of this letter is to notify you of the outcome of a recent review by Deepa Industries Limited of its operational requirements.

As a result of the introduction of a new technology in our production department due to the purchase of a new machine, changes in operational requirements have come up whereby we require less

staff. The positions of about seven employees, five of which are union members will no longer be needed.

Regrettably, this means their employment will be terminated. This decision is not a reflection on performance and the employer has made the following arrangements for the affected employees:

The employment will end 30th April 2013. Based on the length of service, the outlined notice period is 1 month. Instead of receiving that notice, the employer will pay the sum one month (sic) salary in lieu of notice plus an additional one month salary making it two months salary in lieu of notice. The employer shall also pay all redundancy entitlement set out in accordance with the collective agreement between Deepa Industries Limited and the Bakery, Confectionery, Food Manufacturing and Allied Workers Union as outlined based on number of years of service in accordance to (sic) accrued entitlements and any outstanding pay, as per clause 10 of the collective agreement.

Thanking you in advance for your cooperation.

Yours faithfully,

Deepa Industries Ltd

(Signed)

Navin Shah

Managing Director

cc: Labour Officer

22. Upon receipt of this letter, the Claimant called for an urgent meeting with the Respondent on 22nd April 2013. On the same day, the Respondent wrote to the Claimant confirming the declaration of redundancy. It would appear that there was no agreement on the redundancy and by letter dated 22nd May 2013, the Respondent sought the intervention of the Ministry of Labour. There was also an attempt by the Federation of Kenya Employers to broker an agreement, which appeared not have borne any fruit.

23. Finally, the Respondent wrote to the Ministry of Labour on 25th June 2013, indicating that the redundancy would take effect on 30th June 2013. The affected employees were issued with termination letters on 28th June 2013, setting out the dues payable to them, including pay in lieu of notice.

24. The law recognises redundancy as a legitimate mode of employment subject to the following conditions set out under Section 40 of the Employment Act, 2007:

a) Where the employee is a member of a trade union, the employer notifies the union of which the employee is a member and the labour officer in charge of the area where the employee is employed of the reasons for and the extent of the intended redundancy not less than a month prior to the date of the intended date of termination on account of redundancy;

b) Where the employee is not a member of a trade union, the employer notifies the employee personally in writing and the labour officer;

c) the employer has, in the selection of employees to be declared redundant had due regard to seniority in time and to the skill, ability and reliability of each employee of the particular class of employees affected by the redundancy;

d) where there is in existence a collective agreement between an employer and a trade union setting out terminal benefits payable upon redundancy; the employer has not placed the employee at a disadvantage for being or not being a member of the trade union;

e) the employer has where leave is due to an employee who is declared redundant, paid off the leave in cash;

f) the employer has paid an employee declared redundant not less than one month's notice or one month's wages in lieu of notice; and

g) the employer has paid an employee declared redundant severance pay at the rate of not less than fifteen days pay for each completed year of service.

25. The obtaining collective bargaining agreement between the parties buttressed the foregoing conditions.

26. In ***Thomas De La Rue v David Omutelema [2013] eKLR***), the Court of Appeal decisively made a distinction between a redundancy notice and termination notice, the effect being that in a termination of employment on account of redundancy, there must be two separate notices of at least one month each. In affirming this position in ***Kenya Airways Limited v Aviation & Allied Workers Union of Kenya & 3 Others [2014] eKLR Maraga JA*** (as he then was) stated as follows:

“...when an employer contemplates redundancy, he should first give a general notice of the intention to the employees likely to be affected or their union. It is that notice that will elicit consultation between the parties”

27. I have looked at the documents placed before the Court and find that the Respondent duly issued a redundancy notice to the Claimant and the Labour Officer as far back as 5th April 2013. There was also evidence of genuine attempts made by the Respondent to resolve the matter through discussions. It would however appear that the Claimant had taken the firm position that there should not be any redundancies.

28. The reason given for the redundancy, being introduction of technology, whose direct effect was elimination of manual production was, in my view valid. The selection criteria which targeted employees engaged in the manual production line was credible and fair. Additionally, the Court saw documents evidencing that the affected employees were paid their dues.

29. In light of the foregoing, the Court finds no fault in the subject redundancy, either in substance or procedurally. The result is that the Claimant's entire claim fails and is dismissed.

30. Each party will bear their own costs.

31. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 4TH DAY OF JANUARY 2018

LINNET NDOLO

JUDGE

DELIVERED IN OPEN COURT AT NAIROBI THIS 19TH DAY OF JANUARY 2018

MAUREEN ONYANGO

JUDGE

Appearance:

Mr. Amalemba for the Claimant

Mr. Kilonzo for the Respondent