



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 36 OF 2018

(Before Hon. Lady Justice Maureen Onyango)

KENYA NATIONAL PRIVATE

SECURITY WORKERS UNION.....CLAIMANT

-Versus-

G4S KENYA LIMITED.....RESPONDENT

R U L I N G

Vide notice of motion dated 15th January 2018 and filed on even date, the applicant Kenya National Private Security Workers Union (herein after referred to as the claimant) seeks the following orders against the respondent, G4S Kenya Limited (referred to as the respondent) –

1. This motion application be certified urgent and be heard on priority and *ex parte* in the first instance.
2. Pending the hearing *inter partes* and determination of this application, the court do issue an interim preservative order to stop the respondent from victimizing, harassing or coercing, intimidating or otherwise dismissing or terminating any of the union members.
3. The respondent be restrained either by themselves or their servants, agents, officers or any other person whoever from downgrading and slashing, reducing or in any other way diminishing the employees' salaries or other allowances pending the hearing and determination of the application *inter partes*.
4. Pending the hearing *inter partes* and determination of this application, the salary reduction letters issued on 15th January 2018 and effective 1st February 2018 by the respondent to its employees be hereby revoked.
5. Pending the hearing *inter partes* and determination of this application, the respondent/or agents be and is hereby restrained from revising its employees' salaries downwards.
6. Pending the hearing *inter partes* the parties be allowed to exhaust all avenues, most importantly the guidance from the Ministry of Labour and the input of other stakeholders like FKE and COTU (K).
7. Pending the hearing *inter partes* and determination of this application, the Ministry of East Africa and Social Protection through the Central Planning and Monitoring Unit be allowed to investigate and give audited report on the true position of the company.
8. Pending the hearing *inter partes* and determination of this application the respondent and or agents be and is hereby restrained from inciting and intimidating the workers against the claimant.
9. Pending the hearing *inter partes* and determination of this application the respondent be ordered to allow the applicant to have scheduled meetings with the members.
10. That the cost of this application be awarded to the claimants/applicants.

The application is supported by the grounds on the face thereof and the affidavit of ISAAC G. M. ANDABWA, the National General Secretary of claimant union.

On 26th January 2018, the respondent filed a replying affidavit of ELIJAH SITIMAH, its Human Resource Director, sworn on the same date. The respondent also filed a list of authorities dated 26th January 2018.

In response to the replying affidavit, the claimant filed a supplementary affidavit of Mr. Andebwa sworn and filed on 7th February 2018.

The application was argued in court on 8th February 2018. Mr. D. B. Wati instructed by D. B. Wati and Company Advocates appeared for the union while Mr. Makori instructed by Hamilton Harrison and Mathews Advocates appeared for the respondent.

The facts of the case are not in dispute. The union has a recognition agreement with the respondent but the parties have not concluded any collective bargaining agreement. The parties are in the process of negotiations. The respondent who is in the private security business issued a notice to the Labour Officer, Nairobi giving notice of intention to declare 2000 employees redundant on 4th December 2017. Aggrieved by the notice, the claimant filed this suit on 7th December 2017 in which it sought to have redundancy stopped. The claimant simultaneously filed an application by way of notice of motion under certificate of urgency and obtained *ex parte* orders staying the redundancies.

After hearing the parties, the court directed the parties to carry out consultations before the redundancies could be effected. The parties subsequently met under the Chairmanship of the Deputy Chief Industrial Relations officer, Mr. J. A. Yidah of the Ministry of Labour on 18th December 2017 but no agreement was reached.

After the parties failed to reach agreement on 18th December 2017, the respondent opted to review wages of security guards by delineating day guards from night guards and paying each the minimum statutory wages as gazetted under the Regulation of Wages and Conditions of Employment (General) Order. Prior to this, the respondent had recruited all the guards and paid them as night security guards which is higher than that for day security guards.

The respondent thereafter held several meetings with both the shop stewards and the guards to explain why they intended to separate night security guards from day security guards. The explanation to the workers was that they had been experiencing losses after major guarding contracts were terminated by the clients and that this would avert redundancies.

On 15th January 2018, the respondent issued letters to the guards designating them as either day or night guards. The salary for day guards was shs.14,866 gross (basic of Kshs.12,927 and house allowance of kshs.1,939) while night guards would be paid Kshs.16,585 (basic of Kshs.14,421 and house allowance of Kshs.2,163).

The result of the view of wages was that the guards designated as day guards would be paid a reduced gross salary of shs.14,866 down from shs.16,584.

It is this review of wages that prompted the claimant to file the present suit. The claimant's displeasure is captured in the grounds in support of the application, which are reproduced below –

1. The claimant is the union representing guards employed in private security industry in Kenya.
2. The parties have a Recognition Agreement with the respondent and there are negotiations in place for a Collective Bargaining Agreement.
3. On 11th December 2017, in ELRC Cause No. 2326 of 2017 Kenya National private Security Worker' Union -vs- G4S Kenya Limited, the court delivered a ruling which restrained the respondent from continuing with the redundancy and that the respondent was required to give the union audience to discuss the redundancy terms.
4. On 18th December 2017, the court issued order: "that further mention on 20th February 2018 for parties to report on progress of discussion at the Ministry of Labour at their own level."
5. The parties were still progressing with the discussions chaired by Mr. Joseph Yida (Ministry of Labour), Mr. Ombokh (FKE) and Mr. Githinji, COTU (K) at the Ministry of Labour.
6. The Human Resource Director has ignored the engagements and even ignored the relations that existed with union by threatening the stakeholders and purported to change downwards the current terms of service.
7. On 10th January 2018, the parties agreed that the matter be referred back to the Ministry E. A Labour and Social Protection for Conciliators report.
8. On 15th January 2018 without the union's involvement, the respondent abruptly issued letters to the employees varying the working shift, salary and overtime accrual and calculations for security officers' salary, as opposed to the norms and practice in their set up for the last over 30 years.
9. That the General Amendment Order of 1st May 2017 envisages the day watchman and night watchman and not security officer as mentioned by the respondent by the letter dated 15th January 2018.
10. The respondent made a rush decision without exhausting all avenues, most importantly the guidance from the Ministry of Labour

and the input of other stakeholders like FKE and COTU (K).

11. The affected guards have been coerced to sign the letters, which varies the working shift, salary and overtime accrual and calculations.
12. The claimant union and the workers were not properly consulted on the reduction of salaries by the respondent.
13. The reduction of salaries from Kshs.14,420 to Kshs.12,926 effective 1st February 2018 is unlawful for want of express consent from the employees.
14. The union preliminary investigation and assessment indicate that the respondent is not facing any investigations and assessment indicates that the company is not facing any financial crisis.
15. A written contract cannot be amended by unilateral assumptions on the part of any party to the contract.
16. The workers have not freely and conscientiously signed the new term of the contract and therefore the respondent should not assume that the employees have accepted the change.
17. Contracts of employments are contracts like any other hence the principle governing variations of contracts should apply.
18. Unequivocal consent of the parties is one of the essential requirements for variation of a contract.
19. Article 41 (2) (a) of the Constitution states that every worker has the right to fair remuneration.
20. The remuneration cannot be reduced or valued negatively to the detriment of the worker.
21. To reduce an employees pay without any discussion or warning would disorganize the employees in question and may render the employee incapable of meeting his obligations and especially pre-arranged obligations including payment of rent and bills.
22. The respondent has not disclosed the 151 assignment lost and neither has it disclosed the number of guards affected.
23. The claimant has on several occasions written to the Cabinet Secretary, Minsitry of East Africa, Labour and Social protection on the terminology used and non-compliance within the sector, coupled with a conflict on several orders.
24. Under the new dispensation in the Private Security Regulation Authority, there is nobody referred to as “watchman”, the authority recognises Private Security officer, which is in order and accepted globally.
25. All private security officers, whether in day or night shift, spend twelve hours on the assignments, without a break; therefore, the general wages order is outdated.

I have considered the application herein together with the grounds and affidavit in support thereof. I have also considered the averments in the replying affidavit, the documents attached to both the affidavit in support of the application and replying affidavit, the oral submission made by respective counsels of the parties and the authorities cited.

The issues for consideration in my opinion are three. First; whether the respondent can engage directly with the members of the applicant and second whether the letters adjusting the wages of day security guards are effective and finally whether the claimant is entitled to the prayers sought.

Whether Respondent can engage directly with members of the applicant’s members

The right to union representation and collective bargaining is protected under the Bill of Rights in Article 41 of the Constitution, which provides as follows

Labour relations.

41. (1) Every person has the right to fair labour practices.

(2) Every worker has the right—

(a) to fair remuneration;

(b) to reasonable working conditions;

(c) to form, join or participate in the activities and programmes of a trade union; and

(d) to go on strike.

The right is also protected under Section 26 of the Employment Act, which recognises minimum terms of employment to include terms negotiated by a union in a collective bargaining agreement and Section 41 and 46, which protect employees from dismissal, imposition of disciplinary penalty or victimisation for membership or participation in trade union activities.

Sections 4 and 5 of the Labour Relations Act further protect employee's rights to membership and participation in trade union activities as follows—

4. Employee's right to freedom of association

(1) Every employee has the right to—

- (a) participate in forming a trade union or federation of trade unions;**
- (b) join a trade union; or**
- (c) leave a trade union.**

(2) Every member of a trade union has the right, subject to the constitution of that trade union to—

- (a) participate in its lawful activities;**
- (b) participate in the election of its officials and representatives;**
- (c) stand for election and be eligible for appointment as an officer or official and, if elected or appointed, to hold office; and**
- (d) stand for election or seek for appointment as a trade union representative and, if elected or appointed, to carry out the functions of a trade union representative in accordance with the provisions of this Act or a collective agreement.**

(3) Every member of a trade union that is a member of a federation of trade unions has the right, subject to the constitution of that federation to—

- (a) participate in its lawful activities;**
- (b) participate in the election of any of its office bearers or officials; and**
- (c) stand for election or seek for appointment as an office bearer or official and, if elected or appointed, to hold office.**

5. Protection of employees

(1) No person shall discriminate against an employee or any person seeking employment for exercising any right conferred in this Act.

(2) Without limiting the general protection conferred by subsection (1), no person shall do, or threaten to do any of the following—

- (a) require an employee or a person seeking employment not to be or become a member of a trade union or to give up membership of a trade union;**
- (b) prevent an employee or person seeking employment from exercising any right conferred by this Act or from participating in any proceedings specified in this Act;**
- (c) dismiss or in any other way prejudice an employee or a person seeking employment—**
 - (i) because of past, present or anticipated trade union membership;**
 - (ii) for participating in the formation or the lawful activities of a trade union;**
 - (iii) for exercising any right conferred by this Act or participating in any proceedings specified in this Act; or**
 - (iv) for failing or refusing to do something that an employee may not lawfully permit or require an employee to do.**

(3) No person shall give an advantage, or promise to give an advantage, to an employee or person seeking employment in

exchange for the person not exercising any right conferred by this Act or not participating in any proceedings in terms of this Act: Provided that nothing in this section shall prevent the parties to a dispute from concluding an agreement to settle that dispute.

Both parties herein have stated that they have a recognition agreement and are in the process of negotiating their first Collective Bargaining Agreement. The Recognition Agreement has not been availed to the court. However the model recognition agreement which is an annexure to the Industrial Relations Charter that the court take judicial notice of as referred to in the Labour Relations Act provides that upon recognition the trade union becomes the sole representative of its members on terms and conditions of service including wages and house allowance.

Section 48 of the Labour Relations Act provides for membership of trade unions through the signing of Form S (commonly referred to as the check-off form) while Section 54 of the Act provides for recognition of a union for purposes of collective bargaining.

The essence of the reference to the above provisions is to underscore the importance that legislation places on membership of trade unions by employees. Membership of trade unions give employees leverage of numbers to strengthen their bargaining capacity, which is the very essence of trade unionism.

In the present case, there were meetings between the claimant and respondent to discuss what is referred to as “Proposed New Wage Model” in the replying affidavit of Elijah Sitimah. The final joint meeting between the claimant and respondent’s representatives was held on 10th January 2018 at which it was agreed that the matter will be referred back to the Ministry of Labour and Social Protection for Conciliator’s report.

In spite of the agreement, the respondent without approval of the claimant whom it has recognised as the sole representative of the workers, engaged the workers between 12th and 24th January 2018 and “obtained” concessions on adjustment of salaries. I have used the word “obtained” deliberately as in the claimant’s supplementary affidavit of ISAAC G. M. ANDABWA sworn on 7th February 2018 which is filed together with several affidavits of persons who are alleged to have attended the meetings referred to by the respondent, they have denied ever agreeing to the implementation of the “Proposed New Wage Model.”

This therefore means that the issues as to whether or not there were any agreements by workers to the proposed New Wage Models remains a matter for determination after hearing evidence from both parties.

More fundamentally, upon recognition of a trade union, any direct engagement with the members of the union without the consent of the union in a matter under negotiation would be viewed as an attempt to interfere with the affairs of the union by applying the divide and rule principle and therefore is in direct conflict with the core principle of unionisation and collective bargaining. The court frowns upon such anti-union activities, as this is a right protected under the Bill of Rights and the various labour legislation that I have referred to above.

The respondent’s position that “*with no CBA the employer needs not consult the union*” is a misunderstanding of the meaning of “membership” of a trade union and “collective bargaining” as provided for under Section 48 and 54 of the Labour Relations Act. Membership is what is provided for under Section 48 and in the Bill of Rights at Article 41 (2) (c) as the right “*to form, join or participate in the activities and programs of a trade union*” while collective bargaining is provided for under Section 54 and Article 41 (2) of the Constitution. Section 48 of the Labour Relations Act require an employer to deal with the union on matter relating to rights and interests of members of the union and is not dependent on a collective bargaining agreement.

It is for these reasons that I find that the consultations held with members of the claimant without the consent of the claimant are not binding and are therefore of no legal effect. It was in contravention of Article 41 (2) (c) of the Constitution, Section 48 of the Labour Relations Act and the recognition agreement between the parties. For the same reasons, the letters adjusting the salaries of the union members based on the said consultations are null and void.

Based on the foregoing, I find that the claimant has established a prima facie case and that in view of the likely effects of financial strain that would be occasioned to the affected workers whose salaries would be reduced, the balance of convenience tilts in favour of granting the interim orders sought by the claimant. I therefore make the following orders which is a variation of the orders sought in the application –

1. The letters reducing the salaries issued to the claimant’s members on 15th January 2018 are hereby stayed pending the hearing and determination of this suit.
2. The respondent and the claimant are directed to exhaust the conciliation process that was ongoing at the Ministry of Labour within 30 days.
3. The case is fixed for mention for further directions on a date to be taken at the time of delivery of this ruling for parties to report on progress of conciliation.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 13TH DAY OF APRIL 2018

MAUREEN ONYANGO

JUDGE