



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1512 OF 2016

(Consolidated with Cause No. 8 of 2016, 577 of 2016 and 1224 of 2016

(Before Hon. Justice Hellen S. Wasilwa on 27th September, 2018)

KENYA AVIATION WORKERS UNION.....CLAIMANT/APPLICANT

VERSUS

TRADEWINDS AVIATION SERVICE LIMITED.....RESPONDENT

JUDGEMENT

1. Before me were three Applications and three Claims.
2. In Cause No. 577 of 2016, the Applicants sought orders against the Respondents not to change shift patterns nor increase working hours without consulting the Claimant.
3. In Cause No. 1512 of 2016, the Respondents had wanted to commence disciplinary action against the employees and an injunction was issued against them. The Respondents went ahead and dismissed the said employees. What is now pending before me is payment of union dues.
4. In cause No. 1224 of 2016, the Respondents purported to commence a redundancy exercise without due process of the law. There were no interim orders.
5. When the Parties appeared before me on 7/6/2018, I directed that all these issues pending in the 3 Applications be collapsed and be argued within the main claim. I further directed the Parties to file a list of the agreed and disagreed issues and submissions for Court's consideration.
6. In the meantime, issues pending in Cause No. 8 were no longer alive. File No. 8 of 2016 was ordered closed.
7. The Parties have now filed a list of their issues and submissions. The Applicant filed the following issues for determination by Court:-
 1. *Whether the Respondent can change the working shift patterns (increase working hours) of its employees without consultation with the Claimant.*
 2. *Whether the Respondent can commence redundancy proceedings against its employees without following proper procedure of the law.*
 3. *Whether the Respondent can still hold the Claimants' Union dues after deductions without remitting them to the Claimant.*
 4. *Whether the Respondent can unlawfully and summarily dismiss its employees who did not participate in any strike.*
8. The Respondents set out 3 issues for determination:-
 1. *Whether the disciplinary process was intended to circumvent proceedings in ELRC 577 of 2016 and 1224 of 2016.*

2. Whether the Respondent breached the law when it issued the Show Cause Notice.

3. Whether the new shift pattern breached the Collective Bargaining Agreement (CBA).

9. Cause No. 577 of 2016 was filed on 11.4.2016 by the Claimants herein through the firm of M/S Evans & Company Advocates. The issue in dispute was arbitrary disregard of recognition agreement contrary to the provisions of Part VII of the Labour Relations Act.

10. The Claimants averred that on 24th April 2014, they signed a recognition agreement with the Respondent clearly spelling out the rules of engagement between them.

11. The Claimants averred that one of the core terms of the Recognition Agreement was the establishment of negotiation machinery. It was agreed that matters relating to salaries and terms and conditions of service shall be negotiated between the Claimant and the Respondent.

12. The Claimant contend that on 1.4.2016, the Respondent circulated a memo to its employees which memo had the effect of altering the terms and conditions of service of the employees. The Claimant aver that they were never consulted on such changes and so the changes were viewed as arbitrary.

13. The main prayer by the Claimant was to order the Respondent to abandon the new working shifts implemented on 4th April 2016 and desist from victimizing and harassing members of the Union. The Claimant had also sought interim injunctive reliefs to compel the Respondents to revert to the old terms and conditions of service. No interim orders were issued.

14. In Cause No. 1512 of 2016, the Claimants filed their Claim on 2.8.2016 through the firm of Mengich & Company Advocates. The main contention was a Notice to Show Cause (NTSC) that had been issued against an employee one Humphrey Ndiema Mayabei on allegations of absconding duty. The Claimants averred that this notice was issued in hatred.

15. Their main prayer in the Claim was a permanent injunction against the disciplinary panel scheduled for 3rd August 2016. They also sought reinstatement of the said employee to work.

16. The Claimant had also approached Court under Certificate of Urgency seeking an injunction to ban the intended disciplinary process. This Court (Hon. J. Nderi) granted the injunction against this process on 3.8.2016.

17. Cause No. 1224 of 2016 was filed on 22.6.2016 by the Claimant Union where the main contention was redundancy. The Claimants contention was that the Respondent issued a redundancy notice against their employees who are union members without any reason for the layoff. The Claimants contended the redundancy was done without following due process.

18. The Claimants sought a judgement against the Respondent for stoppage of the redundancy process and also general damages for the unlawful termination. The Claimants had also come to Court under Certificate of Urgency. This Court granted interim orders restraining the Respondents and its servants and agents from commencing or continuing with the redundancy process.

19. Having set out the facts of the three claims before me, I note that the Respondents in Cause No. 577 of 2016 never filed any Response.

20. In Cause No. 1512 of 2016, the Respondents filed their Defence on 14.10.2016. They denied the Claimants' case. They insisted that Humphrey Ndiema absconded duty on 25th July 2016 without lawful cause. They then served him with a Notice to Show Cause (NTSC) and hearing notice in compliance with Section 41 of Employment Act 2007. They asked this Court to dismiss the Claimant's case.

21. In Cause No. 1224/2016, the Respondents filed their Defence on 13.7.2016. They averred that they gave reasons as to why they were declaring employees redundant. They also aver that they had a meeting with the Claimant's representatives on 24.5.2016 and informed them of the reasons of the redundancy. That they also informed them the extend of the redundancy exercise which involved 37 unionized staff of 291 unionized employees and 12 non-unionisable employees.

22. The Respondents contend that the redundancy exercise was carried out legally. They want the claim dismissed.

23. I have considered the evidence of both parties and submissions filed accordingly. There are four issues for determination:-

1. Whether the Respondent's action of changing their employees shift working pattern was done properly without consultation with the Claimant.

2. Whether the action of the Respondent in issuing show case letter to their employee Ndiema was done procedurally and with valid reasons.

3. Whether the redundancy exercise by the Respondent was done procedurally.

4. Whether the Respondent can hold Claimants Union dues after deductions without remitting them to the Claimant.

24. On the 1st issue, I note that the Claimant and the Respondent have a recognition agreement which spelt out their rules of engagement. Clause 1 of the recognition agreement stated as follows:-

“Consultation and Negotiation”

The management agrees that matters relating to salaries, terms and conditions of service of the staff shall be negotiated between the Management and the Union”.

Under Cause (c), “Terms and Conditions of service shall include:- leave, pensions, salaries, shift patterns (emphasis is mine), maternity leave etc”.

25. It is therefore clear that the recognition agreement was explicit that the management could not explicitly alter terms and conditions of service of their employees unilaterally and without consulting the Union.

26. There is no indication that this was ever done and therefore any action by the Respondent to change shift hours without consultation by the union was against the parties recognition agreement and therefore illegal.

27. Section 27 of Employment Act allows employer to regulate working hours of each employee. However, having included this issue within their recognition agreement as part of their regulation, the Respondents were bound to follow it to the latter. In the circumstances, I order that the Parties should revert to the old shift hours until this issue is re-negotiated.

28. On the 2nd issue, is the show cause letter issued to one Humphrey Ndiema. Indeed this intended disciplinary process was stopped pending hearing and determination of this cause on merit. The understanding of this Court is that the show cause was related to absenteeism. This was following hot on the heels of the changing shift patterns contested in Cause No. 577/2016, which I have already determined in this judgement.

29. Given that the Notice to Show Cause (NTSC) relates to the absenteeism as a result of the unilateral decision by the Respondent to change shift hours, this is an issue the Respondent should relook into to avoid absenteeism in the conflict following the changing shift pattern.

30. In the circumstances, I order that the disciplinary issue if any should be based on tangible discipline issues and not on absenteeism following the changes in the shift hours. Given that the contention was that the absenteeism is based on the contested shift changes, the grievant should not be punished for this and the intended disciplinary hearing on account of absenteeism should no longer be carried out.

31. On the 3rd issue, the issue of redundancy comes in play. The Claimant challenges redundancy notice dated 24.5.2016 issued by the Respondent. The Claimants aver that the Respondent did not give reasons for declaring the employee redundant.

32. The law on the redundancy is clearly spelt out under Section 40 of the Employment Act 2007 which states as follows:-

1) ***“An employer shall not terminate a contract of service on account of redundancy unless the employer complies with the following conditions:-***

a) Where the employee is a member of a trade union, the employer notifies the union to 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 an 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 to an employee declared redundant severance pay at the rate of not less than fifteen days pay for each completed year of service.

33. The Respondents contend that they gave reasons for the redundancy in a meeting on 24.5.2016 to the Claimants.

34. The Union contends that the redundancy notices did not bear reasons. They were served however with the notice as envisaged on 24.5.2016 during the meeting of that day as admitted.

35. From the letter reasons for the redundancy was given as economic downturn of the company. There however seems to have been no

consultation on this issue as the notices took effect immediately.

36. The Claimants wrote to the Respondents on 14.6.2016 opposing the redundancy notices and requesting for a meeting for details of the employees targeted in the exercise. It is not clear what really occurred after this save that the redundancy exercise was not stayed by Court. On 23.6.2016, the Respondents proceeded to terminate the services of their employees.

37. The issue of redundancy has since been overtaken by events since the Union members were terminated in June 2016. In the circumstances, the only claim the Claimants can pursue is of either illegal termination or redundancies. There are no orders to give in respect of the redundancy, which has been overtaken by events.

38. On issues of union dues, this was never prayed for since Parties are bound by their pleadings, I issue no orders on the issue.

39. In the circumstances of this case, the upshot of my judgement is that the shift period should be re-negotiated; the disciplinary action that was commenced is stayed forthwith.

40. The Respondent will pay costs of this cause.

Dated and delivered in open Court this **27th day of September, 2018.**

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Mugo holding brief for Budotich for the Respondent – Present

Claimants – Absent