



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE 150 OF 2016

THE LONG DISTANCE TRUCK DRIVERS

AND ALLIED WORKERS UNION.....CLAIMANT

VERSUS

MALVA COACH BUILDERS LIMITED.....RESPONDENT

JUDGEMENT

1. The parties herein dispersed with oral hearing and proceeded to file written submissions. According to the claimant, the issues in dispute were: refusal to sign negotiated CBA, refusal to pay transport allowances and dismissal of employees without following the right procedure.
2. The claimant contended that between May and July, 2013 it recruited members in the respondent's employ and attained a simple majority yet the respondent has refused to sign a CBA and further the respondent had been paying transport and service allowances to its workers until it joined Nairobi Couch body Builders in 2014 which group is a group affiliated to FKE consisting of five companies and does not pay its workers transport allowances.
3. The respondent however indicated its willingness to continue paying its workers transport allowance hence the clause was included in the CBA. On 29th January, 2016 the respondent however informed the employees that it will not be paying them transport allowance and this led to disagreement with the workers. On 2nd February, 2016 the respondent issued fifty four dismissal letters to its employees on the allegation that they had participated on an illegal strike. The claimant union intervened in the matter but respondent refused to sign a return to work formula and insisted that the affected employees should apply afresh for work.
4. The respondent in its memorandum of response did not deny that in 2014 it joined the Nairobi Coach Body Builders Group of FKE and Association of five companies whose mandate was to negotiate with the claimant union CBA in respect of workers across the board so as to harmonize industrial relations and benefits enjoyed by workers and prevent unfair competition practices in the industry.
5. According to respondent once it joined the Nairobi Coach builders Group of FKE (NCBG-FKE), it ceased to negotiate individually with the claimant union. The respondent further stated that the claimant union sought to negotiate with NCBG -FKE and introduce a new clause on Transport allowance which provision was not acceptable to all the group members as the same was not previously negotiated and agreed with them.
6. The claimant union consequently issued a strike notice on 12th January, 2016 on the issue, however, the notice was withdrawn to pave way for social dialogue once the Minister appointed P.N. Macharia as a conciliator. A joint meeting was called on 28th January, 2016 where all clauses were agreed on except the clause on transport allowance which the claimant union insisted on. On 1st February, 2018 Labour officers from the Industrial Area Labour Office visited the respondent's premises to find amicable solution but the claimant's Secretary General walked out refusing to engage in talks toward finding a solution.
7. When the negotiations between the claimant and NCBG-FKE failed the former resorted to coercing the respondent to negotiate directly with them in abuse of statutory protection enjoyed by the respondent under Section 7(2) of the Labour Relations Act. The respondent further stated that the claimant's members continued with the unlawful and unprotected industrial action prompting the respondent to issue Notice to Show Cause letters requesting the workers to resume work failing which disciplinary action would be taken against them but they declined to resume work.
8. The main bone of contention in this matter is continued payment of transport allowance in the new CBA. This item was payable under the previous CBA but sought to be discontinued by the respondent for the sole reason that it joined NCBG-FKE consisting of five companies and where such allowance was not payable. No reasons or justification has been provided by the NCBG-FKE why such allowance was not

payable by members of the group. Further the NCBG-FKE did not make available to court any counter- balancing provision in the CBA which would make unfair or double payment for the respondent to continue paying the allowance. All the court has been told is that NCBG-FKE does not pay transport allowance without more.

9. Salary and emoluments of an employee comprise a significant aspect of his livelihood. Once set an employees life revolves around it. Removal or discontinuance of any allowance must be properly explained and justified. It amounts to variation of an employee's contract and in extreme cases can be construed as constructive dismissal of an employee to which he reserves the right to sue for unfair termination of service.

10. To this extent the court is not satisfied that any justifiable reason has been given by the respondent for refusal to sign or cause the CBA to be signed. Nothing new will be introduced in the CBA which the respondent could suffer additional financial burden.

11. On the issue of dismissal on account of participation on unprotected strike. The court does agree that the respondent reserved the right to dismiss employees who participated in unprotected strike. However, there was disquiet over the respondent's intention to discontinue paying the transport allowance. As already observed, the discontinuance amounted to revision downwards of a lifestyle the employees had been attuned to.

12. In the circumstances, the court will order reinstatement of the dismissed employees except that they shall not be paid for the period they have been out of employment and subject to the availability of the positions they held prior to dismissal. In the alternative, the respondent shall pay the dismissed employees all their terminal dues if it was not paid at the time of dismissal and in addition five month's salary as compensation for unfair termination of services.

13. In conclusion, the respondent is hereby ordered to sign or cause to sign the negotiated CBA and that the terminated employees be reinstated or compensated as set out above.

14. It is so ordered.

Dated at Nairobi this 21st day of September, 2018

Abuodha J. N.

Judge

Delivered at Nairobi this 21st day of September, 2018

Abuodha J. N.

Judge

In the presence of:-

.....for the Claimant

.....for the Respondent.