



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF
KENYA AT NAIROBI
CAUSE NO 1693 OF 2015

KENYA CHEMICAL AND ALLIED WORKERS UNION.....CLAIMANT

VERSUS

POLYSACK LIMITED.....RESPONDENT

JUDGEMENT

1. The claimants pleaded that they were respondent's employees employed on diverse dates as machine attendants. They worked for the respondent until around 25th September, 2015 when the respondent terminated their service on account of redundancy without payment in lieu.

2. According to the claimants, the reasons the respondent gave for the termination were not genuine and that the procedural requirements under section 40 and 41 of the employment Act were not followed further that the claimants were never issued with notice to show cause why they should not be terminated and further the respondent refused to pay them their salary arrears and other dues. The claimants further pleaded that they were paid partially their dues but the respondent has refused to pay the balance.

3. The respondent on its part pleaded that from the last quarter of the year 2014 it suffered reduction in production capacity due to among others lack of ready market for its finished products leading to stock pile and increased overheads. According to the respondent, on realizing it could not sustain the existing workforce it informed the claimants and Ministry of Labour by a letter dated 26th February, 2015 of the intention to retrench and lay-off part of its workforce and immediately sought a meeting with the officials of the claimants union in an effort to strike an agreeable formula for retrenchment.

4. By a letter dated 21st July, 2015 the claimants union cancelled the proposed meeting date of 23rd July, 2015 and proposed a new date of 30th July, 2015 but which the claimant union subsequently cancelled. By a letter dated 8th September, 2015 the respondent informed the claimant union of the decision to lay-off 98 of its unionisable employees and by a letter dated 10th September, 2015 the claimant union agreed for a meeting on 18th September, 2015 whose main agenda was to discuss the decision to retrench some of its employees but the discussions were never concluded.

5. By a letter dated 23rd September, 2015 the respondent informed the claimant union that it was impossible for it to continue sustaining the status quo and proceeded to draw up a list of 73 employees to be rendered redundant and compiled heads of claim to be paid as follows:

- i. Wages for days worked in September, 2015
- ii. Salary in lieu of one month's notice
- iii. Encashed accrued leave dues
- iv. Severance pay

6. The respondent also prepared certificate of service for each of the affected employees and discharge voucher but only 47 executed the discharge voucher and collected their terminal benefits while 26 who did not show up and sign the discharge vouchers had their dues remitted to the Ministry of Labour for collection.

7. In his oral evidence, Mr Benard Nyanyuki who gave evidence on behalf of the rest stated that in 2012 they were not receiving their salary regularly and that they were stopped from work. According to him they were declared redundant through a days notice. No hearing was done before declaration of redundancy. It was his evidence that the respondent never followed the procedure in the CBA. Mr Nyanyuki

further stated that they never went on leave for the period they worked for the respondent nor paid in lieu. He further stated that on being declared redundant, they were paid some money but it was little. He also stated that they were paid severance pay.

8. In cross examination he stated that clause 20 of the CBA provided for what should be paid during redundancy. He further stated that the payment made did not cover overtime. Mr Nyanyuki also stated that they were never called for any negotiations before the redundancy. He however stated that they were aware of meetings between the union and respondent. He further stated that the union was supposed to keep them aware of the negotiations.

9. The respondent's witness Mr Nicholas Kamau Maina on the other hand stated that the respondent experienced financial constraints since 2010 and the claimants' union was informed from time to time. In 2015 the respondent was unable to pay the workers and letters were exchanged with the union. The last meeting was on 10th September, 2015 where redundancy was discussed and the union said they would come back to the respondent but never did. The respondent therefore had to declare the claimants redundant.

10. In cross-examination he stated that several notices were issued to the union and the shop stewards on the issue of redundancy. The crux of the dispute before the court before me is not whether redundancy should have been declared but according to the claimants the declaration was not done in accordance with the provisions of section 40 of the Employment Act. The claimants further contended certain dues such as leave not taken, baggage allowance and notice of termination were not paid upon declaration of redundancy. Both parties concede that the respondent's business was not doing well be the time redundancy was declared.

11. Under section 40 of the Employment Act, a redundancy shall not take effect unless an employer intending to so declare has among others where the employee is a member of a union, notified the union to which such employee is a member and the labour office in charge of the area of the reasons for the intended redundancy. This notice shall be given not less than one month prior to the date of intended redundancy. The employer shall further where leave is due to an employee who is declared redundant, paid off the leave in cash. The section also requires such employee to be paid not less than one month's notice or one month's wages in lieu of notice and further, payment of severance pay at the rate of not less than fifteen days pay for each completed year of service.

12. Section 3(6) of the Act however provides that the terms and conditions of employment set out in the Act constitute minimum terms and conditions and an agreement to relinquish, vary or amend the terms therein set shall be null void, which implies parties can contract to better terms than the minimum set in the Act. Under clause 20 of the CBA the claimant union and the respondent agreed that in the event of redundancy the respondent undertook to hold prior discussions with the union concerning the reasons for and the extent of redundancy.

13. Clause 20(e) further provides that an employee declared redundant shall be entitled to payment in lieu of notice, payment of overtime and any other remuneration which may be due, pro-rata leave allowance and severance pay on the basis of 15 days pay for each completed year of service.

14. By a letter dated 20th February, 2015 addressed to the Sub-county Labour Officer Thika the respondent informed the Labour Office of intention to lay-off part of its workforce totaling in number to 30 workers. The letter stated therein the reasons for which the intention to lay-off part of its workforce totaling in number to 30 workers. The letter stated therein the reasons for which the intended lay-off was to be done. By a letter of even date and of the same content, the claimant union was informed of the intended lay-off which was intended to commence in March 2015. By a letter dated 20th July 2015 the respondent referred to their letter of 20th February, 2015 and a meeting between the parties on 10th June, 2015 to deliberate on the layoff issue and stated that it intended to continue with the layoff and called for a meeting on 23rd July, 2015. The claimant union however called for the postponement of the meeting to 30th July, 2015 as they had prior commitments on 23rd July, 2015.

15. It is not clear from the record what happened on 23rd July, 2015 however by a letter dated 8th September, 2015 the respondent once more reiterated the urgency of the exercise and called for an urgent meeting on 10th September, 2015 to deliberate on the issue. This letter was acknowledged by the claimant union but the meeting was apparently rescheduled by the parties to 18th September, 2015. By a letter dated 23rd September, 2015 the respondent made reference to the meeting of 18th September, 2015 which the respondent stated was not concluded because the claimant union sought more time to consult their office and indicated they would respond by 21st September, 2015 however, this did not happen as the claimant union called and said they had urgent matters to attend to and wanted the meeting postponed again. This the respondent did not accede to and stated the planned lay-off would proceed as planned.

16. The claimants have faulted their redundancy as contrary to section 40 of the Act, more particularly that the process was carried without notice or proper notice however from the above evidence on record appear to point to the contrary. The respondent first brought up the issue of redundancy in February, 2015 and it was only until 25th September, 2015 almost seven months later when the redundancy exercise was implemented. From the correspondence between the parties referred to above, it would seem the claimant union was on the path of postponing indefinitely the intended redundancy exercise. To this extent, the court does not agree with the claimants that the redundancy was carried on a days' notice and that it was done contrary to section 40 of the Employment Act.

17. Concerning claim for redundancy terminal benefits, the claimants do not deny they were paid the heads of compensation as set out under clause 20(g) of the CBA. Their complaint was that they felt the amount was little. The claimants have sought to be paid for 36 days worked, annual paid leave for the period they have been employed, baggage allowance, leave travelling and compensation for loss of employment.

18. The respondent during the trial conceded to paying the claimants one month salary in lieu of notice and have since made good the difference through a cheque to the claimant's counsel.

19. The claimants in their memorandum of claim and evidence in court did not provide any evidence or sufficient evidence to support their other heads of claim. Besides, this claim was brought by the claimant's union, it is therefore not only incredible but also laxity on the part of

the union to continue negotiating CBA's with the respondent every cycle yet their members were continuously not going on leave, not being paid baggage allowance and other head of claim that were now raised when the claimants felt their redundancy was contrary to law. The court is continuously taking note of the tendency in employment claim to raise all manner of claims some even statute barred once employment relationship has ceased without giving any reason why they were not pursued, not necessarily through litigation when the relationship existed. This habit must be frowned upon and discouraged.

20. In conclusion the only head of claim which was merited having been settled, the court will not make any further order except that the other heads of claim pleaded herein are found without merit and are hereby dismissed with no order as to cost.

21. It is ordered.

Dated at Nairobi this 7th day of December, 2018

Abuodha Jorum Nelson

Judge

Delivered this 7th day of December, 2018

Abuodha Jorum Nelson

Judge

In the presence of:-

.....for the Claimant and

.....for the Respondent.