



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 245 OF 2014
KENYA SHOE & LEATHER
WORKERS UNION CLAIMANT
VERSUS
BATA SHO CO. (K) LIMITED RESPONDENT

M/S. Maclanta Mbala for claimant

M/S Bonyo for respondent

JUDGMENT

1. The issue in dispute in this matter is conversion of long service contract employees to permanent and pensionable terms.
2. The suit was filed on 21st February 2014, after the parties failed to resolve the dispute amicably.
3. The dispute was referred to the Minister for Labour and Human Resource Development in accordance with Section 62 (1) of the Labour Relations Act No. 14 of 2007.
4. Mr. Boaz O. Musande of Kiambu Labour office was appointed conciliator in the matter and both parties were invited to a conciliation meeting on 25/10/2013 after submitting written memoranda. The parties attended the meeting but no agreement was reached. A certificate of unresolved dispute was issued in terms of Section 69 (a) and 73 (1) of the Labour Relations Act and the matter came to court.
5. The claimant and respondent have a valid recognition agreement and a valid Collective Bargaining Agreement (CBA). The CBA is registered by the court as RCA No. 193/2011. The CBA stipulates terms and condition of employment for the unionsable employees of the respondent.
6. The claimant relies on Clause 4 of the CBA to demand conversion of employees on fixed term contracts to permanent and pensionable employees.

Response

7. Respondent filed a memorandum of response on 3rd June 2016 in which it opposes the suit by the claimant. The respondent admits that it employs employees on both fixed term contracts and on

permanent and pensionable terms.

8. The 169 grievants were employed on fixed term contracts terminable under the terms of those contracts and were in employment as at 25th September 2012. Since then some of the grievants have left employment. The fixed term contracts are subject to renewal and or termination in accordance with the law and those contracts.

9. Respondent denies that it continues to hold the grievants under probation but they are all on fixed term contracts which are renewable.

10. That Clause 4 of the CBA refers to employees on permanent terms as a necessary probation period of not more than four (4) weeks which period is reasonable for orientation purposes.

11. That fixed term contracts are recognized by the Employment Law in Kenya and the respondent has not violated any law or employment rights of the grievants.

12. That the respondent has a factory business which has seasonal demands of labour thereby necessitating uptake of seasonal labour. During the “*back to school season*” there is an upsurge in the manufacture of school shoes thereby requiring uptake of additional employees to meet the glut but after this there is a slump in demand leading to a dip in business. This is replicated just prior to the rainy season when there is increased demand for plastic and gumboot shoes manufactured by the respondent.

13. This is the justification of employing personnel on fixed term contracts. That the employees on fixed term contracts are remunerated competitively and comparatively for work done.

14. That it would be financially crippling to the respondent’s business to maintain all staff on a permanent and pensionable basis when there is no demand for extra labour.

15. The respondent prays the suit be dismissed.

16. Determination

i. What is the proper interpretation of Clause 4 of the CBA?

ii. Has the respondent valid justification to employ grievants on fixed term contracts, while keeping other employees on permanent and pensionable basis?

Issue i

17. Clause 4 of the CBA reads;

“all newly engaged employees covered by this agreement will be required to serve a probationary period not exceeding four (4) weeks. During such probationary service the company may terminate employment by giving seven (7) days notice or payment of wages in lieu without assigning any reasons thereto. An employee on probation may also terminate employment by giving seven (7) days notice or forfeit wages in lieu thereof.”

18. This Clause does not state whether it applies to employees on permanent and pensionable basis or to employees on fixed term contracts. However Clause 3 of the CBA provides;

“all unionsable employees shall be covered by this agreement.”

19. The CBA has no clause dealing with employment on fixed term contracts. Clause 5 titled;

“contract and termination of employment” only covers notice period applicable to unionsable employees with one year service but less than three years service and those who have served for

more than three years.

20. The Clause also provides for service gratuity payable to employees who have served more than ten (10) years.

21. The CBA does not contemplate employment of unionsable employees on fixed term contracts and is silent on the issue.

22. Section 59 of the Labour Relations Act provides;

“(1) a collective agreement binds for the period of the agreement –

a) the parties to the agreement;

b) all unionsable employees employed by the employer, group of employers or members of the employers organization party to the agreement; or

c) the employers who are or become members of an employers’ organization party to the agreement, to the extent that the agreement relates to their employees.”

(2)

(3) the terms of the collective agreement shall be incorporated into the contract of employment of every employee covered by the collective agreement.”

23. It is trite employment and labour law that the terms and conditions of employment in a CBA become the new terms of employment in respect of all employees the CBA applies to.

24. The CBA herein applies to all unionsable employees of the respondent.

25. It follows therefore that all unionsable employees of the respondent must be employed in terms of the CBA. Any terms of an employment contract between a unionsable employee of the respondent and the respondent which contradicts and or is not in conformity with the CBA violates the CBA and such employees are entitled to enforcement of the terms and conditions of service contained in the CBA.

26. Therefore, provided the grievants are unionsable, are entitled to the terms and conditions of service contained in the CBA. These terms do not include a fixed term contract. They are to be employed initially on a maximum of four (4) weeks probation and thereafter converted to permanent and pensionable status.

Issue ii

27. Provided the CBA herein is in place, the respondent violates its terms when it employs a unionsable employee on fixed term contract. Nothing justifies a breach of contract between the parties unless the justification is an express term of the contract.

28. In conclusion, the grievants who are still in employment of the respondent provided are unionsable must be converted from fixed term contract to permanent and pensionable terms. The court orders accordingly.

No order as to costs.

Dated and delivered at Nairobi this 20th day of January 2017

MATHEWS NDERI NDUMA

PRINCIPAL JUDGE