



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

**AT NAIROBI**

**CAUSE NO.1130 OF 2011**

**UNION OF NATITIONAL RESEARCH AND ALLIED**

**INSTITUTES STAFF OF KENYA (UNRISK).....CLAIMANT**

**VERSUS**

**KENYA INDUSTRIAL RESEARCH AND**

**DEVELOPMENT INSTITUTE (KIRDI).....RESPONDENT**

**JUDGEMENT**

1. The claimant union filed the Memorandum of Claim on 12<sup>th</sup> July, 2011. Defence was filed on 16<sup>th</sup> September, 2011. Hearing proceed ex parte on 19<sup>th</sup> April, 2016 and an award made on 20<sup>th</sup> April, 2016. The award and decree thereof were set aside on 7<sup>th</sup> December, 2016. Both parties agreed to address the claim by way of written submissions.

**Claim**

2. The claimant is a registered trade union with a Recognition Agreement with the respondent. the parties have a Collective Agreement (CBA) registered by the court as RCA No.198 of 2008.

3. The claim is that the respondent employed a total of 335 employees out of which 93 were claimant members; 240 were not members but have benefited from the CBA.

4. On 10<sup>th</sup> December, 2008 the claimant wrote to the respondent asking them to compile a list of all non-union members for purposes of effecting deductions of agency fees in accordance with section 49 of the Labour Relations Act, 2007.

5. The claimant's gazetted union dues collection order by the Minister was published on 4<sup>th</sup> February, 2005 and the order for the collection of agency fees is vide Gazette Notice No.13179 of 11<sup>th</sup> December, 2009.

6. The claim is also that the respondent has failed to comply with section 49 of the Labour Relations Act, 2007 by failing to deduct and remit the due agency fees. The respondent effected deduction of agency fees from 98 employees in January, 2010 and left a total of 154 employees who had benefited from the CBA out by failing to effect a deduction.

7. The claimant is seeking to enforce the order for agency fees deduction with regard to the 240 employees of the respondent who have benefited from the CBA but are not members of the claimant. The 86 employees whose agency fees were effected should be recovered for the period covering 1<sup>st</sup> July, 2008 to December, 2009. The agency fees should be deposited in the gazetted account of the claimants at KCB Account No.234 793 886, Moi Avenue branch.

#### Defence

8. In defence, the respondent's case is that following a meeting held with the claimant on 25<sup>th</sup> March, 2009 the claimant received a list of all unionisable employees. The claimant failed to submit the list of its members who had revoked their membership so as to have agency fees deducted as required by law. The recruitment of members for the claimant is not the mandate of the respondent.

9. There is no evidence that the claimant recruited members given in a list attached to the claim. The respondent has complied with the CBA terms with respect to unionisable employees.

10. The defence is also that the respondent has a total of 330 employees and not 335 as alleged by the claimant. There is therefore full compliance with Gazette Notice No.13179 where the respondent had deducted agency fees from unionisable employees.

11. Parties attended conciliation and there were recommendations made and the claimant has not stated why they disagree with such recommendations. The claim should thus be dismissed with costs.

#### Submissions

12. The claimant submits that there is a CBA between the parties registered RCA 198 of 2008 and applicable to unionisable employees of the respondent. that there should be no discrimination of any employee on the basis of job grade so as not to benefit from the CBA. The respondent partially effected agency fees deductions in January, 2010 with respect to Job Grades IR 1 to IR 7 only. This was refusal to comply with the minister's order with regard to deduction of agency fees vide Notice No.13197 of 15<sup>th</sup> October, 2009 which related to all employees from Job Group IR 8 ad above.

13. Parties filed Cause No.319 (N) of 2009 but as withdrawn and the court partially had ordered that the claimant was at liberty to file a new suit.

14. There should be agency fees deducted and remitted to the claimant for the 240 employees benefiting from the CBA.

15. The respondent submits that the claim that the respondent has failed to comply with the provisions of section 49 of the Labour Relations Act, 2007 is not correct as there is full compliance with the same. The parties herein have a Recognition Agreement which paved way for a CBA. The claimant has recruited 98 unionisable employees from the respondent employees. Such members enjoy the benefits under the CBA. The claimant is seeking to benefit from agency fees for the other employees who are in management cadre and who are not covered by the CBA.

16. The claimant can only benefit from agency fees with regard to employees who derive a benefit from the CBA. This was addressed by the conciliator but the claimant failed to adhere to the recommendations.

#### Determination

17. It is common cause that the parties herein have a Recognition Agreement and a CBA registered with the Court as RCA No.198 of 2008. There is also Gazette Notice No.13179 dated 15<sup>th</sup> October, 2009 where the Minister order is to the effect that there should be a deduction of trade union agency fees from employees covered by the CBA and are not members of the claimant union.

18. The condition of the Gazette Notice No.13179 issued by the Minister is thus clear to the extent that the trade union agency fees are to be deducted as flows;

*.....From the basic wage of his/her employees who are covered by the terms and conditions of the concluded Collective Bargaining Agreement and are not members of the Union of National Research and Allied Institutes Staff of Kenya (UNRISK).*

19. The claimant attached the subject CBA registered between the parties. Clause 1.0(a) of the CBA provides as follows;

*.....as the negotiating bodies, provides for terms and conditions of employment which shall apply to all scientists and support staff of KIRDI whom the union has been recognised to negotiate.*

20. At clause 1.2 (a) of the CBA, parties agreed that the CBA was to cover the following;

*This agreement shall apply to all employees of the institute from job group (IR.1) to job group (IR.15)*

21. To the CBA, a schedule of job grades and cadres covered by the CBA are outlined.

22. The respondent asserts that since January, 2010 they have complied with the CBA and orders of the Minister on the basis that in their employees grading unionisable employees fall under the categories of job group IR.1 to IR.7 and from job Group IR.8 to IR.15 these are management employees who do not benefit from the CBA. That for the employees who are union claimant members and have benefited from the subject CBA the respondent has effected the agency fees deductions and remitted to the claimant.

23. Indeed the claimant in submissions confirmed that the respondent remitted agency fees with regard to 86 employees. The demand is that all employees should be deducted the agency fees.

24. Section 49 of the Labour Relations Act, 2007 requires an employer who has a CBA with a trade union to deduct agency fees from employees who have benefited from the CBA and are not members of the trade union. Section 49(1) provides as follows;

*49. Deduction of agency fees from unionisable employees covered by collective agreements*

*(1) A trade union that has concluded a collective agreement registered by the Industrial Court with an employer, group of employers or an employers' organisation, setting terms and conditions of service for all unionisable employees covered by the agreement may request the Minister to issue an order requiring any employer bound by the collective agreement to deduct an agency fee from the wages of each unionisable employee covered by the collective agreement who is not a member of the trade union.*

25. As such, save for parties making agreement in the CBA, the law is clear and ranks in priority in addressing any conflict within the CBA. The averment by the claimant that the CBA covered all employees of the respondent and that they are beneficiaries of the CBA becomes a matter of evidence. The fact of the employees of the respondent benefiting from the registered CBA must be established. The CBA and section 49 of the Labour Relations Act, 2007 must be read together.

26. Parties herein agreed to be heard by way of written submissions. With that and the claimant assertion that the CBA covers all respondent employees, the duty was on the claimant to establish this fact. On the evidence by the respondent that out of its total 335 employees only 93 are active members of the claimant and thus beneficiary of the CBA becomes the only available evidence in this regard. Where the other 156 employees benefit from the CBA, the claimant should have filed affidavit or sought to call evidence in this regard.

27. It cannot be that a CBA will follow in a blanket manner and cover the claimant's interests

even where the law is clear. Where the claimant has members within the respondent workforce, nothing stopped the claimant from seeking a verification of the unionisable members as against the unionised members for the purpose of asserting the orders sought herein.

28. It would therefore be a dangerous practice and trend to move and registered a CBA and then seat back and seek agency fees without doing anything much. The rights under section 49 of the Labour Relations Act, 2007 are not absolute. Even where there is a registered CBA, the union must do more and ensure all unionisable employee covered by a CBA are verified and thus deducted the due agency fees. This cannot solely be left to the employer to undertake as the attendant benefit is to the trade union.

29. I find to order as the claimant seeks would infringe on the rights of third parties not parties herein and even with the best application of section 49 of the Labour Relations Act, 2007, to proceed as sought would not meet the ends of justice. This is not to lock the claimant out. Not at all. This is to encourage the claimant to undertake a verification exercise and where indeed there exists good basis that from the workforce of the respondent there exists cadres of employees who have benefited from the CBA subject of these proceedings, then as a matter of law, agency fees shall be deducted from such employees and where the court makes a finding that indeed the respondent, with the knowledge of such employees failed to deduct the due agency fees, the penalty shall be to order such agency fees be paid from the respondent's own accounts.

30. I find no evidence to warrant the orders sought. There is no evidence as to whether parties have concluded other CBAs from the one dated 23<sup>rd</sup> July, 2008 and registered as RCA No.198 of 2008 and how the oblivious gap in the separation of different cadre of employees can be addressed. There is therefore a window for parties to address any gap in subsequent negotiations of suit.

**Accordingly, based on the analysis above, the claim lack merit and is hereby struck out. Each party to bear own costs.**

Dated and delivered in open court at Nairobi this 10<sup>th</sup> day of August, 2017.

**M. MBARU JUDGE**

in the presence of:

Court Assistant: David Muturi

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