REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS

COURT OF KENYA AT KISUMU

CAUSE NO. 304 OF 2017

(Before Hon. Lady Justice Maureen Onyango)

KENYA UNION OF DOMESTIC HOTELS EDUCATIONAL

INSTITUTIONS HOSPITALS AND ALLIED WORKERS .....CLAIMANT

VERSUS

OFFICE OF THE VICE CHANCELLOR,

KIBABII UNIVERSITY ..... RESPONDENT

JUDGMENT

The Claimant **Kenya Union of Domestic, Hotels, Educational Institutions, Hospitals and Allied Workers** is a trade union registered in Kenya to represent employees in the sectors covered by its constitution, among them educational institutions. It has a recognition agreement with Kibabii University, the Respondent, signed on 30th August 2013 giving the Claimant union a right to represent the Respondent's eligible employees as set out therein in all labour matters. According to the Claimant its members consist of 63 regular and 47 temporary employees of the Respondent from whom the Respondent recovers and remits union dues to the Claimant on a monthly basis.

The dispute herein arose when the Respondent issued an internal memo dated 27th June 2017 addressed to all staff on short term engagement informing them that their contracts would come to an end on 30th June 2017. The union immediately protested through its shopsteward at Kibabii Sub-Branch by an undated letter terming the notice a lay off unlawful as it contravened Clause 12.0 of the collective bargaining agreement (CBA) between the Claimant and the Respondent and Clause 10.0 of the CBA between the Inter-Public Universities Councils Consultative Forum (IPUCCF) of the Federation of Kenya Employers and the Claimant Union.

On 3rd July 2017 the Respondent issued an internal advertisement for the positions held by the temporary employees which included General Labourers(Estate), General Labourers(Central Services), Welder, Farm Attendant, Data Entry Clerk, Painter, Carpenter, Glass Fitters, Library Checker, Kitchen Attendant, Cooks, Dining Hall Checker, Artisan II (Mason), Artisan III (Pump Attendant) and Cloak Room Attendant. The Claimant was aggrieved by the advertisement and on 10th July 2017 filed the present suit by Memorandum of Claim dated 6th July 2017 in which it seeks the following orders-

1. That, the Respondent be ordered by this Honourable courts unconditionally reinstate the affected employees forthwith pending hearing and determination of this suit.

2. **That**, the honourable Court do issue stay orders restraining the Respondent from conducting further interviews with a view to replacing the affected employees until this matter is heard and determined.

3. **That**, the Respondent be restrained from victimizing, intimidating and harassing these employees.

4. **That**, the Respondent to pay costs of this suit.

Simultaneously, the Claimant filed a notice of motion under certificate of urgency seeking the following orders-

i. **THAT**, the Honourable Court does certify this Application as urgent and be dispensed with ex-pate in the first instance.

ii. **THAT**, the Honourable Court be pleased to issued orders restraining the respondent from permanently executing the intended termination on account of redundancy of all the employees placed on short term contracts who have been working for several years and status quo be maintained until this matter is heard and determined.

iii. **THAT**, the Court gives orders restraining the respondent from continuing with the ongoing interviews to fill the vacancies arising from the unlawful redundancy until this matter is heard and determined.

iv. **THAT,** the Honourable Court, be pleased to issue orders for specific performance restraining the respondent from intimidating harassing coercing or victimizing these employees until the matter is heard and determined.

The motion is supported by the affidavit of BENJAMIN MUTORO the Claimant's Branch Secretary Bungoma sworn on 6th July 2017. The grounds in support of the application as stated on the face of the application and in the supporting affidavit are the following –

1. **THAT**, the employees about to be permanently affected by the redundancy notice total 47 employees have been part & parcel of the Unionized employees for several years, ranging from 5 years to 1 year, three months and their terms & conditions of service have been regulated by a recognition agreement dated 15th March, 2017.

2. **THAT**, the respondent has been deducting and remitting Union dues as per Cheque off attached to the affidavit and authority to deduct and remit union dues samples of which are also annexed together with a copy of an employee pay slip attesting to the same.

3. **THAT,** there is a collective bargaining agreement which has been negotiated and is currently at the Salaried and remuneration commission (SRC) awaiting approval.

4. **THAT**, there being a valid recognition agreement binding to the parties, any matter touching on terms and conditions of service should not be a unilateral decision from the management as consultation is mandatory.

5. **THAT**, according to the letter, dated 27th June, 2017 only three days notice was issued thus contrary to provisions of Section 35(c) & Section 40(a) and (b) of Employment Act 2007.

6. **THAT**, the respondent has not given any reasons for the intended termination contrary to provisions of section 40(a), 41 & 43 of the Employment Act, 2007.

7. THAT, the affected employees fall within the meaning of Section 37 of Employment Act, 2007 as they had served for several years in different capacities and no matters of gross misconduct or

incompatibility had been raised as a reason precipitating such cause of action.

8. THAT, the redundancy has deprived the workers off their right to social security under Article 43(e) of the Constitution of Kenya, 2010.

9. **THAT**, the shop steward Mr. Barasa Sikuku did send a letter to the Vice Chancellor over the unlawful intended redundancy of 47 temporary employees contrary to clause 10 & 12 of the CBA and recognition agreement and sought more clarification but the respondent declined to respond.

10. **THAT**, instead the respondent went ahead and declared all 47 employees on short term engagement contracts redundant and has already advertised the said positions as vacant vide internal memo dated 3rd July, 2017.

11. **THAT**, this letter too was not copied to the Union and hence a unilateral decision contrary to Clause 4 & 10 of the recognition agreement duly signed by the Vice Chancellor.

12. **THAT**, it is the contention of the claimant that the respondent has unlawfully terminated the services of these employees and targeted them due to their involvement on Union matters and disregarded the labour laws guiding on the same.

I heard the application exparte on 11th July 2017 and issued the following temporary orders-

1. THAT, the Application is certified urgent.

2. THAT, the Respondent is restrained from conducting interviews of filling the positions previously held by 47 grievants pending inter parties hearing of this application.

3. The Application is fixed for inter-parties **hearing** on **25th July, 2017** at 900 hours.

The Respondent filed a replying affidavit of DAVID BUTALI NAMASAKA, the Deputy Registrar in charge of Administration and Human Resource in which he deposes as follows:

(a) Prior to the 13th November, 2015, the Respondent University was a constituent college of Masinde Muliro University of Science and Technology.

(b) The Respondent was awarded its Charter constituting it on the 13th November, 2015 by His Excellency the President of the Republic of Kenya.

(c) That in its formative stage and in the transition period, the document that regulated the terms and conditions of service between the Respondent and the Claimant/Applicant is and has always been the Collective Bargaining Agreement **(CBA)** negotiated between the Claimant/Applicant and the Respondent.

(d) The Claimant/Applicant and the Respondent signed a **Recognition Agreement** on the 30th August, 2013**.**

(e) Pursuant to the signing of the Recognition Agreement, the Claimant/Applicant and the Respondent (Under the auspices of the Inter-Public Universities Councils Consultative Forum **(IPUCCF)** of The Federation of Kenya Employers **(FKE)** embarked on the negotiation of their very first CBA. The same is in progress with the current status being that the draft was sent to the salaries and Remuneration Commission **(SRC)** for perusal and approval, subject to satisfaction of the guidelines as stipulated by the said SRC.

(f) It is instructive to note that the applicant has made reference to paragraph 10 of the Recognition Agreement between it and IPUCCF to infer attempts to circumvent the implementation of the said

provision of confirmation of casuals. The deponent curiously at paragraph 8 of the Grounds in Support of the Application has pointed out that the 47 grievants are not casuals and do not fall within the meaning of section 37 of the Employment Act.

(g) The said draft has not been registered in this Honourable Court so as to confer actionable legal obligations upon the parties. No contractual engagement can be construed from the said draft CBA.

He further deposes that-

(h) The 47 employees referred to in the instant application were on fixed term contracts of three months which lapsed by effluxion of time on the 30th June, 2017.

(i) On or about the 27th June, 2017, the Respondent, via an Internal Memo merely gave notice to the 47 and others employees of the fact of the impending lapse of the contracts.

(j) Nothing in that Memo dated the 27th June, 2017 can be construed to mean that the provision of section 40 of the Employment Act, 2007 and Clause 12 of the operating CBA between the Claimant and the Respondent in respect to Redundancy was being invoked.

(k) As is standard procedure, after the notice aforesaid, the Respondent initiated a process as it has always done of recruiting new fixed-term employees, where priority would be given to the 47 workers, subject to vetting.

(l) Most, if not all of the 47 worker, did apply.

(m) The advertisement put the last date of such application at the 7th July, 2017 for which most of the 47 workers complied with.

(n) Ordinarily, the Respondent would have embarked on the Vetting process, actual recruitment and issuance of new fixed term contracts in readiness to the commencement of the academic year in September, 2017.

(o) The above process could not take off as the Claimant/Applicant under unexplained misapprehension rushed to court and obtained an Order stalling process.

Mr. Namasaka deposes that following the court orders obtained by the Claimant on 11th July 2017 the Respondent has had to reengage the 47 casual employees on a day-to-day basis. He deposes that section 34 of the Universities Act imposes guidelines in the governance of universities on the process of recruitment of staff that require the involvement of the Principal Secretaries of the National Treasury and the State Department of Higher Education, Ministry of Education Science and Technology.

Mr. Namasaka depones that the terms of employment of the 47 employees were governed by their contracts which were coming to an end on 27th June 2017 to pave way for fresh recruitment as has always been the case before a new academic year starts and the issue of redundancy does not arise. Mr. Namasaka further depones that no cause of action has been established to justify the orders obtained by the Claimant or those sought in the Claim. He prays that the application be dismissed with costs.

In a further affidavit sworn on 26th July 2017 Mr. Namasaka deposes that the staff on short term contracts had been reengaged and further that the majority of them had reapplied for employment following the impugned internal advertisement by the Respondent.

The application was argued in court on 27th July 2017 but after hearing the parties the court directed them to go back and try to reach amicable settlement in view of the urgency expressed by the Respondent. On 31st July the parties informed the court that they had a partial settlement to the effect that the

Grievants be offered one month temporary contracts pending the court's determination of the application. The parties further agreed that the court relies on the oral submissions of the parties and documents on record to finally determine the case.

Claimant's Submissions

Mr. Okwach who appeared for the Claimant/applicant submitted that the Claimant has a CBA with the Respondent covering the period 1st July 2012 to 30th June 2013, that on 15th March 2017 32 public universities among them the Respondent entered into a recognition agreement with the Claimant and signed a CBA. He submitted that the Respondent gave the 47 workers 3 days notice of redundancy in contravention of section 40 of the Employment Act and Article 41 of the Constitution. He further submitted that the Respondent contravened ILO Convention No. 158 which protects workers against unfair dismissal. He referred to a circular dated 5th May 2005 in which the then Minister for Labour raised the concern of the government over casualisation of labour and directed labour officers to intensify labour inspection and take remedial measures to ensure compliance with the law.

Mr. Okwach submitted that the temporary employees had been in the Respondent's employment for up to 5 years and 10 months, that the Respondent was guilty of unfair labour practices and had violated sections 5,40,43 and 46(d) of the Employment Act as well as Articles 36(1), 43(e), 47 and 50 of the Constitution. He submitted that this court has powers under Article 162 of the Constitution and section 12 of the Employment and Labour Relations Court Act to grant the orders sought by the Claimant.

Respondent's Submissions

For the Respondent Mr. Ouma submitted that although the Claim is premised on redundancy, there was no redundancy as the temporary workers were on fixed short term contracts which had lapsed giving room for vetting of new staff and that the old staff were free to apply for reengagement. He submitted that most of the staff had in fact reapplied as documented in the Respondent's affidavits on record and that the letter from the Respondent must be looked at within this perspective. He submitted that the Respondent's standard practice was that the existing employees would be given first priority. He submitted that the Respondent had even recalled some of the staff to be engaged during the none academic season.

Mr. Ouma submitted that the principle of reasonable expectation is that the Respondent does not intend to disengage with the group of workers and that the situation had been necessitated by restrictions by Treasury and Salaries and Remuneration Commission (SRC). He further submitted that the CBA between the Claimant and IPUCCF had not been registered and is not operational as it is awaiting approval of SRC. He submitted that the CBA between the Claimant and the Respondent is the one currently in force and does not have any provisions in relation to terms of engagement of temporary employees who are subject of this application.

On the circular on casualisation of labour Mr. Ouma submitted that the Claimant cannot seek to achieve that which is for negotiation in a CBA through the court and that the Claimant ought to make proposals for inclusion of the same in their next negotiations. With respect to the Claimant's allegation that some of the Grievants in this dispute had been in employment for over five years Mr. Ouma submitted that no evidence has been adduced by the Claimants and the Court must be governed by evidence before it. He submitted that the document produced by the Claimant is prepared by the shop steward who has not sworn an affidavit and does not constitute evidence upon which the court can make a determination. He urged the court to discharge the orders of 11th July 2017.

Determination

The main facts of this dispute are not contested. The parties are in agreement that they have a valid recognition agreement and a CBA governing the terms and conditions of service of the employees of the Respondent and that the employees who are subject of this dispute were on short term contracts of either 3 or 6 months respectively. It is not in dispute that the Respondent issued a circular dated 27th June 2017 notifying all the staff on short term contracts that their last day of work was 30th June 2017.

The issues for determination are therefore the following-

1. Whether the Grievants' contracts had lapsed;

2. Whether the notice dated 27th June 2017 was valid;

3. Whether the termination of the Grievants' contracts constituted redundancy;

4. Whether the Grievants have been in continuous employment and are entitled to confirmation;

5. Whether the Claimant is entitled to the orders sought;

1. Whether the Grievants' contracts had lapsed

The Respondent submitted copies of all the contracts of the Grievants. The contracts on record can be categorized into three sets. The first set are for a period of three months commencing 1st March 2017. Their expiry date is therefore 30th May 2017. They are 37 and constitute the majority. The second set are for a duration of 3 months commencing 1st December 2016. This means they lapsed on 28th February 2017. The third set are for 6 months commencing 1st December 2016. This means they lapsed on 31st May 2017.

From the foregoing it is clear that all the contracts had lapsed by the time the notice of termination of 27th June, 2017 was issued and the employees were therefore no longer serving on the fixed term contracts. By 30th June 2017 some contracts had lapsed on 28th February while others had lapsed on 31st May 2017, a period of 4 months and 1 month respectively. All the affected employees were therefore on open ended monthly contracts by virtue of section 37 of the Employment Act.

2. Whether the notice dated 27th June 2017 was valid

Under section 35(1)(c) of the Employment Act the employees were entitled to notices of at least 1 month as their contract terms had converted to monthly contracts by virtue thereof and also because their salaries were paid on a monthly basis. Section 35 provides for termination notice as set out below:

35. Termination notice

(1) A contract of service not being a contract to perform specific work, without reference to time or to undertake a journey shall, if made to be performed in Kenya, be deemed to be—

(a) where the contract is to pay wages daily, a contract terminable by either party at the close of any day without notice;

(b) where the contract is to pay wages periodically at intervals of less than one month, a contract terminable by either party at the end of

the period next following the giving of notice in writing; or

(c) where the contract is to pay wages or salary periodically at intervals of or exceeding one month, a contract terminable by either party at

the end of the period of twenty-eight days next following the giving of notice in writing.

(2) Subsection (1) shall not apply in the case of a contract of service whose terms provide for the giving of a period of notice of termination in writing greater than the period required by the provision of this subsection which would otherwise be applicable thereto.

(3) If an employee who receives notice of termination is not able to understand the notice, the employer shall ensure that the notice is explained orally to the employee in a language the employee understands.

(4) Nothing in this section affects the right—

(a) of an employee whose services have been terminated to dispute the lawfulness or fairness of the termination in accordance with the

provisions of section 46; or

***(b) of an employer or an employee to terminate a contract of employment without notice for any cause recognised by law**.*

From the foregoing the general notice of 3 days issued to the Grievants was not valid. Each of them should have been issued with an individual notice of one month or offered pay in lieu thereof.

3. Whether the termination of the Grievants' contracts constituted redundancy

The Claimant has alleged that the Claimants were declared redundant without the Respondent complying with the provisions of section 40 of the Employment Act. I do not find the circumstances of this case to constitute redundancy. As defined in section 2 of the Employment Act redundancy means:

the loss of employment, occupation, job or career by involuntary means through no fault of an employee, involving termination of employment at the initiative of the employer, where the services of an employee are superfluous and the practices commonly known as abolition of office, job or occupation and loss of employment;

In this case the services of the employees were not superfluous and neither was there abolition of their positions. As the Respondent explained in the replying affidavit, the Respondent acted in an attempt to comply with the ban on recruitment and upgrading of staff vide Treasury Circular No. 02/2016 which provides as follows:

i. Recruitment of Staff

It is reiterated that all new recruitments remain frozen except for security agencies, health workers and education sector. Recruitment of new staff other than replacement will only be considered after the institution has obtained approval from the National Treasury. In this regard, State Corporations/SAGAs must confirm availability of funds and seek approval from the National Treasury before the commencement of the recruitment. Such confirmation shall be communicated through a duly signed letter by the Principal Secretary/National Treasury.

I have read the circular in its entirety and I do not think what the Respondent has been doing with the Grievants is compliant with the circular. The circular does not prohibit recruitment. It only states that the Respondent has to get permission to fill the positions. The fact that the Respondent has been filling the positions back-on-back and cannot operate without the staff in question means that they are essential staff. The Respondent has not demonstrated that it has made any request to Treasury and/or SRC to authorize the filling of these positions on regular basis. Keeping the staff on fixed term contracts and requiring them to keep applying for the jobs periodically as has been done by the Respondent is therefore unfair labour practice which is forbidden by both Article 41 of the Constitution and section 5, and 37(4) and (5) of the Employment Act.

4. Whether the Grievants have been in continuous employment and are entitled to confirmation

The Claimant has contended that the Grievants have been in employment for between one year three months and five years ten months. The Respondent submitted that the Claimant has not adduced any

evidence to prove this fact. Under section 10 and section 74 it is the duty of the employer to controvert the allegations of an employee by producing employment records that it is obligated to keep. Although these allegations were made both in the claim and application filed in court the Respondent has not either substantively responded to the same or produced records to controvert the allegations by the Claimant as given in Appendix KB1 of the affidavit of Benjamin Mutoro. All the Respondent did was deny the same in the oral submissions by counsel. Under section 10(6) and (7) of the Employment Act if an employer fails to produce prescribed employment particulars the burden of proof shifts to the employer. In this case I find that the Respondent has not controverted the allegations of the Claimant and I am left with no option but to make the assumption that the averments are true. For these reasons I find that the Grievants have served the Respondent continuously for period of between one year three months and 5 years ten months as per Appendix KB1.

5. Whether the Claimant is entitled to the orders sought.

The Claimant prayed for reinstatement of the Grievants and orders restraining the Respondent from carrying out interviews to fill the positions of the Grievants. The Claimant further prayed for orders restraining the Respondent from victimizing or harassing the Grievants and for costs.

Having found that the notice purporting to terminate the employment of the Grievants was invalid and further having found that their employment was converted to regular terms of service by virtue of section 37 of the Employment Act, and taking into account that the Respondent reengaged the Grievants on temporary contracts and they are thus still in employment by virtue of such reengagement, further having found that they are occupying essential positions which the Respondent cannot operate without and having found the Respondent guilty of unfair labour practice, I make the following orders:

1. The Respondent be and is hereby restrained from terminating the employment of any of the Grievants for reason of expiry of their fixed term employment contracts

2. The Grievants be and are hereby declared to be regular employees of the Respondent and I hereby order the Respondent to issue them with letters of confirmation of appointment;

3. That should there be any reasons why any of the Grievants cannot be engaged on regular basis the Respondent must take them through due process as provided in law and in the parties collective bargaining agreement

4. There shall be no orders for costs.

Dated and delivered in Kisumu this 29th Day of September 2017.

MAUREEN ONYANGO

JUDGE