REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.95 OF 2014

BANKING, INSURANCE AND FINANCE UNION..... CLAIMANT

VERSUS

BARCLAYS BANK OF KENYA LTD.....RESPONDENT

AND

KENYA BANKERS ASSOCIATION..... INTERESTED PARTY

RULING

The claimant, by application dated 24th February, 2017 brought under the provisions of section 22 of the Employment and Labour Relations Court Act, and Rules 5, 29 and 33 and seeking for orders that;

> *The court do restrain the Respondent from terminating or attempting to terminate the services of:* ……
>
> *The court do clarify its judgement dated 29th August, 2016 wherein the court concluded that 'save for matters set out above especially under paragraphs 78, 85, 95, 101 and 110 the claim as set out shall not be allowed. Each party to bear its own costs.*

The application is based on the affidavit of Joseph Ole Tipape and on grounds that there is need for the court to clarify its judgement. Under Paragraph 78 the court held that each employee was require dot own their performance and upon review, a reasonable plan be agreed upon; paragraph 85 the court held that upon a capability hearing the employee should be given time to improve on their performance and where the Respondent as employer has not followed fair procedure each employee's case should be heard on its merits; paragraph 95 the court held that on the use of PDP and PIP such must be brought to the attention of the employee and where there is below required performance, the motions of section 41 of the Employment Act are to be followed. Under paragraph 101 the court held that the parties have a Recognition Agreement and employees sitting at the Joint Workers Council are not representatives of the Claimant but address an internal mechanism and where there is a conflict, any new issues in a collective agreement must be addressed between the parties with recognition; and paragraph 110 the court held that the contracts of employment issued to employees where there are concerns by the claimant, such can be addressed in subsequent collective agreements.

Other ground sin support of the application are that the Respondent has resulted in issuing capability hearings, show cause letter and other disciplinary processes and unless the court clarifies the set out clauses in the judgement the Claimant members will soon lose their jobs unfairly and unlawfully. The Claimant was never involved during the introduction and implementation of performance improvement

plans (PIP) and performance development plans (PDP) and were unprocedural and therefore the Claimant ought to be involved in the future. The Respondent has understood he judgement to mean that they can terminate unionisable employees without involving the Claimant in cases of poor performance.

The Claimant is aggrieved by the respondent's action and application herein is filed for clarification and review so that the Respondent can be compelled to abide by the true meaning and intention of the judgement. Claimant members will lose employment unfairly if the judgement is not clarified for the benefit of all parties.

In response, the Respondent filed **Replying Affidavit sworn by Paul Ndugi**, Company Secretary and acting Head of Legal & Secretarial Services and avers that the court judgement on 29th August, 2016 made a finding that the application of PIP, PDP and capability hearings by the Respondent as the employer is within its prerogative but such should not negate terms agreed in a collective agreement with the Claimant on how to terminate employment due to poor performance. The claim was not allowed. The effect of the findings is that the Respondent was allowed to continue administering the PIP, PDP and capability hearings as this is a managerial prerogative. Following the judgement, the Respondent exercised its managerial prerogative and initiated capability hearing involving several unionisable employees and before such hearings the employees had been issued with show cause notices why disciplinary action should not be taken against them and at such hearings, the Respondent allowed the employees to be represented by the union representatives.

Mr Ndungi also avers that one of the employees, Mr Andrew Ongere is facing disciplinary action for fraudulent withdrawal of cash and is not subject to capability hearings. The Claimant has not disclosed any evidence that the Respondent is in breach of the judgmenet of 29th August, 2016 or any law.

In this application by the claimant, there is no prima facie case deserving of the orders sought even where the court can make a clarification of the judgement. The lawfulness of disciplinary action taken by the Respondent can only be addressed upon individual case being determined. There are no specific complaints set out by the Claimant on which the Respondent can give a reply. The individual employees must file suit for the Respondent to be able to give a response to any allegations made therein.

Each party has filed list of cases and documents.

Both parties made their oral submissions in court.

Determination

Rule 33(1) (c) of the Employment and Labour Relations Court (Procedure) Rules allow a party to make application for the court to make a clarification on its judgement, ruling or order. The required clarification must be clear and where it is apparent that such clarification as requested for is apparent, the court shall proceed and address the same. However, interpretation of a court judgement is a different matter altogether. Such cannot be done by this court as this would require the court to seat on its own case in appeal. An interpretation should not be construed to mean a review as a review are secured under Rule 33(1)(a) is over a matter that requires correction of an error apparent on the face of the record, upon discovery of a new matter or an apparent mistake on a point of law.

The Claimant while seeking clarification is also seeking the occur to interpret its own judgement of 29th August 2016. I will therefore address the issue of a clarification based on matters set out under paragraphs 78, 85, 95, 101 and 110 of the judgement.

Paragraph 78 of the court judgement of 29th August, 2016 is to the effect that the Respondent PIP is a tool meant to ensure the meeting of business objectives. Such is part of internal systems by an employer.

Noting the above and on paragraph 85, the court held that such internal tools have their procedure and objectives and are subject to challenge by the individual employee who has gone through its full course.

As such, each case must be seen on its own merits. As such, the internal tools do not replace the provisions of the law at section 41 and 43 of the Employment Act which are couched on mandatory terms. The employee must be accorded the rights set out in law even where the employer apply internal mechanisms as addressed under paragraph 95.

Paragraph 101 give emphasis on the role of the Claimant union, the Respondent as the employer and the internal structures such as Joint Workers Council regulated under the internal work structures at the work place and to have such a workers council is not by itself the replacement of the Claimant union's role. Where the Recognition agreement or Collective Agreement requires the Claimant union involvement in disciplinary matters, such role should not be replaced by the position and persons sitting in the workers council even where such persons may or are the shop steward. Such separation of roles is important.

The involvement of the Claimant in the formulation, introduction and implementation of PDP and PIP is a matter well addressed in the court judgement. The internal performance tools for respondent employees are sorely within the employer mandate. Matters that go into a CBA currently on-going cannot be revised by the court. Such can only be addressed by the parties in subsequent CBA. However, the court at paragraph 95 held that once the employer has the PIP and PDP procedures addressed, such should not circumvent the provisions of section 41 of the Employment Act where an employee has been found to be of poor performance or performing below the required standard or measure. The PIP and PDP should therefore remain the internal mechanisms for an employer to measure performance but such are not to replace the provisions of the law particularly provisions of section 41 and 43 of the Employment Act. Equally, where the Claimant union is concerned with business practices that place their members at a disadvantage while undertaking the PIP and PDP, such can well be addressed during negotiations of the collective agreements.

However, internally within the respondent, while developing the PIP and PDP, such can only achieve the desired or required business objectives and results where the same are developed and implemented with the participation of all parties to it. I take it the subject employee, the Respondent whose management is keen to ensure full productivity are key stakeholders to such a process. The participation of the individual employee in developing their PIP and PDP together with line manager will ensure the employee is fully aware of its objectives, measurement standards, timelines and outcomes so that at the point of appraisal or review, the employee does not challenge the same as being a foreign document to them. So that a PIP should not be developed by the line manager and the employee only signs to its contents. Such affirmation should be with the full knowledge of the employee that they will be measured based on these tools and hence their outmost best performance upon it is required. Such are details that i find the Respondent well versed to address internally. This is to ensure that the employee is at all times at work, giving his/her best for productivity under the assigned role. Ultimately, the salary paid at the end of the day should be for return of equal labour within a conducive work environment.

Once the motions of poor performance leading to possible terminate arise, section 41 of the Employment Act requires the Claimant as the union representing employees within the Respondent business to be informed and involved. Unless the PIP and PDP are still within the internal processes assessing performance but not subject to termination, such the Respondent can address internally. Where there is escalation of the same to the point of hearing with the view to terminate employment, section 41 of the Employment Act provisions rank in priority.

Following judgement of 29th August, 2016 any matters arising that the Claimant finds the Respondent has not complied with the workplace policy or the internal tools have been used to the disadvantage of its members or that the Respondent as the employer has unfairly and or unlawfully used such internal policies and tools, recourse is to this court. However, where the basis of the claims form a series outside the matter(s) of the judgement such as notices to show cause, capability hearings, warnings or any disciplinary action taken after the filing of this cause, I find to form a new series and matters in dispute and cannot be made part of the claim herein. Judgement herein delivered on 29th August, 2016 brought to a conclusion a set of facts and counter-claims or amended claims. Any new matter arising from the filing of this suit must as a matter of practice form a new dispute where each fact(s) is/are set out for the Respondent to respond therein. Where this suit forms a good persuasive value in its findings, the parties

can use the same in submissions.

The new matters now in dispute between the parties will be well addressed in a new suit. These are matters addressed in the judgement at paragraphs 111 and 112 with regard to cited cases of Peter Chege and Munyalo. As such, matters regarding the unionised employees in prayer (2) of the claimant's application, whatever action is faced should go into a new suit.

Accordingly, application by the Claimant is hereby declined. Each party shall bear own costs.

Dated, signed and read in open court this 21st day of April, 2017.

M. MBARU

JUDGE

In the presence of:

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