



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 1340 OF 2014

KENYA SCIENTIFIC RESEARCH

INTERNATIONAL TECHNICAL AND

INSTITUTIONS WORKERS UNION (KSRTAIWU)CLAIMANT

VERSUS

HEALTHY (U) 2000 LIMITED.....RESPONDENT

Mr Wilson Onduto for the Claimant

Mr Njoroge for the Respondent

JUDGEMENT

1. The issue in dispute in this matter is refusal by the respondent to implement Collective Bargaining Agreement (CBA) on job category 7: health advisors and nutritionists.
2. The CBA in question was negotiated and concluded and registered by the court as RCA No 337 of 2012 on 25th March 2013. The employees affected by the alleged intragrance by the Respondent have their names set out under paragraph 10 of the memorandum of claim.
3. The CBA covers two years from 1st October 2012 upto 30th September 2014. Efforts by the Claimant Union to get the Respondent to implement the CBA have been futile. A dispute was reported to the Ministry of Labour and Social Security, who appointed Mr. J. M. Kiraguri to conciliate. Conciliation took place and the conciliator prepared a report vide a letter dated 3rd April 2014 to the parties directing the Respondent to implement the CBA by paying the affected employees salary arrears for 18months amounting to Kshs 2,053,519 within 7 days. The Respondent did not heed the request by the conciliator hence the suit.
4. The Claimant states that this is a clear case of under payment of basic salary and housing allowance agreed upon by the parties in a CBA.
5. The Respondent in an attempt to evade payment sought to re-categorize the employees as shop attendants under job category (4) instead of Advisors and Nutritionists. The Claimants pray the court to enforce the CBA duly registered.

Response

6. The Respondent filed a replying affidavit dated 18th September 2014 in response to the notice of motion and memorandum of claim. The affidavit is sworn by Mr Stephen Amadalo Naminyangi, the Human Resource Manager of the Respondent.
7. The gist of the defense is that the alleged employees were employed as shop attendants and

- Respondent relies on employment contracts of the specific employees which Respondent states confirm that indeed the employees were employed as such and therefore not underpaid.
8. The Respondent further alleges some of these employees and in particular; Byrum Okwami, Josephine Wanjiru Kinoti; Evelyn Echesa, Raphael Bwire; Richard Kioko and William Shikanga Lumumba have since resigned as members of the Claimant Union and therefore, the Claimant lacks locus standi to file the suit on their behalf.

Determination

9. The issues for determination are:
 - i. Whether the concerned employees are shop attendants in job category '4' or are Health Advisors and Nutritionists in job category '7'.
 - ii. Whether the claimant is entitled to the relief sought.

Issue i

10. It is not in dispute that the parties concluded a CBA dated 21st November 2012 effective 1st October 2012 and covering a period of two (2) years until 30th September 2014. It is also true that the CBA has job categories 1 - 7 with different basic minimum wage rates exclusive of housing allowance. The CBA was registered on 25th March 2013 as RCA No 337 of 2012.

11. In terms of the Labour Relations Act 2007, the CBA once registered supercedes the prior terms and conditions of service of the affected employees. In terms of clause '2' of the CBA, the employees were to receive 16% on the basic salary as housing allowance and clause '2a' is the schedule of the basic minimum rates.

12. The Claimant relies on payslips from page 4 to 5 of the memorandum of claim which show the designation of the affected employees in the payslips and on the check off roll on page 55 to 58 as 'nutritionists' and 'health advisors' as in the year 2013.

13. The Claimant submits therefore that the affected employees fall under job category '7' and not '4' and should be remunerated accordingly. The Respondent on the other hand relies on Employment contracts dated 1st July 2011 for David G. Muriu, Byrum Okwami; Manyala ; Josephine Kinoti; Evelyn Echesa; Raphael Bwire; Richard Kioko; William Shikanga; Aggrey Ollavu; Christine Juma Ogolo and Rose Mary Amola; one dated 8th June 2012 for Diana Irungu; 31st March 2012 for Samuel Mungai Kariuki which show the said employees to have been shop attendants. Evelyn Echesa was a Retail Shop Manager; one by Raphael Bwire dated 14.11.2011 which show he was a nutritionist and one dated 26.10.12 for Halima Godana showing he was a nutritionist.

14. Upon a careful evaluation of the evidence by both parties, it is clear that payslips for the year 2013/2014 clearly show the employees concerned held the position of either 'nutritionist' or 'health advisors' is to be reflective of the correct position as compared to employment contracts concluded two years earlier in the year 2011. The designation in the payslips is on a balance of probability true and the court finds that the employee held those designations as at the time the CBA was concluded on 25th March 2013.

15. The salary check off system which shows these employees to be 'nutritionists' and 'health advisors' in 2013/2014 is further corroborative evidence of the actual positions the affected employees held.

16. Indeed, in respect of Raphael Bwire and Edith Khadambi the Respondent signed an agreement conceding that the two were nutritionists yet the Respondent has not honoured the CBA by paying their arrear salary.

17. Overall, the court is satisfied that the Claimant has proved on a balance of probability that the employees listed under paragraph 1 of the memorandum of claim were either 'nutritionists' or 'health advisors' as at the date the CBA was concluded and are therefore entitled to the specific amounts claimed in respect of each one of them as an under payment resulting from a wrong designation by the Respondent under clause 29 of the CBA.

18. The evidence by the Respondent is inconsistent and in capable of belief especially because the payslips generated by the Claimants show a different story.

19. Accordingly the court awards the Claimant Kshs 2,372,358 as set out under paragraph 11 of the memorandum of claim and prayed for by the Claimant.

20. The award is payable with interest at court rates from the backdated award in the CBA on 1st October 2012 till payment in full. The Respondent is also to pay the costs of the suit.

Dated and delivered at Nairobi this 18th day of March 2016

MATHEWS N. NDUMA

JUDGE