REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COUR TOF KENYA AT NAIROBI

CUASE NO.95 OF 2014

BANKING INSURANCE & FINANCE UNION (Kenya) …..…… CLAIMANT

VERSUS

BARCLAYS BANK OF KENYA LTD ……..……..…. RESPONDENT

KENYA BANKERS ASSOCITION ……..…. INTERESTED PARTY

JUDGEMENT

1. Issue in dispute – violation of the Collective Bargaining Agreement (CBA) by unprocedural and unlawful intending to terminate the services of unionisable employees who have been issued with final warning letters.

Background

2. The Claimant has a Recognition Agreement with the Respondent and a Collective Bargaining and Agreement with the Interested Party. Upon the Claimant filing suit against the respondent, the Interested Party applied to be enjoined herein on the grounds that they have a Collective Bargaining and Agreement with the Claimant and the matters set out in the claim will affect their members. The court allowed the IP to be hereby enjoined. Pending close of the case several applications were filed and addressed. The Claimant called one (1) witness in support of the claim and the Respondent and IP opted not to call any evidence and rely on the pleadings. Following several delays and objections by the Claimant on the failure by the Respondent and IP to close their cases without call of witnesses, parties agreed to file written submissions which shall be addressed herein.

The claim

3.The Claimant is a registered trade union and represent unionisable employees in the banking industry, the Respondent is a commercial bank registered under the banking Act and the Interested Party is the Association under which the Respondent is member. The Claimant and Respondent have a Recognition s Agreement while the Claimant and the Interested Party have a Collective Bargaining and Agreement.

4.The unionisable employees have enjoyed negotiated terms and conditions of service under the Collective Bargaining and Agreement. The employees joined the Respondent bank on different dates and therefore each has an individual letter of appointment, upon joining the Claimant union, the unionisable employees are covered under the Collective Bargaining and Agreement terms and conditions.

5.The Claimant is that in 2008 the respondents arbitrarily and unlawfully changed the terms and

conditions of employment when they introduced Performance Development Plans (PDPs) as one of the offences which may lead to loss of employment. The employees were coerced, intimidated and threatened with dire consequences if they fail to acknowledge such revised terms and conditions of service. The introduction of Performance Development Plans in the employment contracts was in bad faith. In September 2013, 2 employees were terminated due to the Performance Development Plans and non-performance. Currently unionised employees have received warning letters and some have final warning letters for what is called 'non-performance'.

6.The claim is also that the Respondent has no basis to issue warning letters on account of non-performance as this is not a factor set out in the Collective Bargaining and Agreement as punishable with termination of employment. The changes to the employment contract was with ill intentions and to allow this to continue is to allow the Respondent to operate without checks and open to abuse. The performance rating are not objective and the intention of using the Performance Development Plans to deny employees bonuses, promotions or other benefits is unjustified punishment.

7.The Claimant is seeking;

a) Court to issue order prohibiting the Respondent from terminating the employment contracts of the unionisable employees who have already been issued with warning/final warning letters;

b) Court do issue an order compelling the Respondent to stop the already envisaged arbitrary and unlawful terminations of the unionisable employees until the Claimant union is fully involved in the introduction of the new terms and conditions of employment – performance development plans, performance improvement plans and capability hearing – in the CBA;

c) A declaration that all warning letters which were issued to the unionisable employee are illegal, unlawful and therefore null and void;

d) Court should declare that the new contracts of employment introduced in 2008 are a nullity since the introduction was not in tandem with the proper was of reviewing the parties Agreement as stipulated in the Recognition s Agreement, the Collective Bargaining and Agreement and the law; and

e) Costs of the suit.

8.In evidence, the Claimant witness was Hilary Mwania Munyalo an employee of the Respondent and member of the Claimant. He has a background in banking and in

the Respondent head office. Mr Munyalo joined the Respondent on 10th June 2006 as a Clerk and was promoted through the ranks to a supervisor. He is also a workers representative and shop steward and an elected chair, Central Staff Committee to represent all unionised employees of the Respondent. He also chairs the Joint Negotiating Council (JNC) – a body nominated and elected by the Claimant and the IP and comprising;

Workers representatives from the banks;

Management representatives from the banks;

2 union officials; and

2 IP representatives.

9.The Joint Negotiating Council has several duties and mandate;

To negotiate terms for unionised staff;

To handle disputes with the industry;

10.At the Joint Negotiating Council the Respondent is represented by Ooko Odhiambo whose position with the Respondent is that of Human Resource, Employee Relations Manager. The Joint Negotiating Council is the body talked with the duty to negotiate workers terms and conditions of employment.

11.Mr Munyalo also testified that since he joined the Respondent in 2006, the letters of employment have been changed with varying terms. The Respondent also issued memo to all Country Management Committee, the function heads and line managers revising the contracts noting that all employees upon promotion would be issued with new terms, by the human resource director, Lyn Mengich. As a result of this memo of 3rd November 2008, all staff contracts were replaced – paragraph 6 made reference to performance development plans. It was also set out that

-there would be annual targets agreed at the beginning of the year;

-Employment would be subject to good performance

12.This paragraph 6 was not in the original letter of employment. Upon this revision, staff got new letters of appointment and the Respondent gave Performance Development Plans – this was a concept of measuring performance of staff but it became a discipline tool that is not accommodated in the sector CBA.

13.Mr Munyalo also testified that, the Performance Development Plans was beneficial as set out by the Respondent in their annexure 5A (memorandum of response). The Performance Development (PD) is beneficial for the reasons;

-It maximises possibilities for career growth;

-Provides greater job satisfaction through broadening and depending of capabilities;

-Provides opportunities to undertake a variety of new challenges and responsibilities;

-It provides opportunities to work more closely with other teams and build new relationships and networks with other areas across the business;

-Performance Development develops transferrable skills and knowledge that will enhance each person’s competence and value;

-Through learning, colleagues can share knowledge and skills with each other; and

-It maximises the likelihood of performing well and thereby receiving greater reward and Recognition.

14. The Performance Development was conceptualised as a good concept. Those who did well under the Performance Development there was promotion, bonuses and salary increments. A good performer got bank facilities especially personal loans and other benefits. However, the Respondent changed this and where one was a non-performer, the benefits were not given and one is subjected to disciplinary process and warnings. The ratings done are not explained as they are done by the management staff. The ratings were classified to be distributed as follows;

Distribution= 10%= A being beyond all expectations;

,,20%=A being significantly above expectation;

,,55%=B being meets all, exceeds some expectations;

,,10%= C being meets some expectations; and

,,5% = D being does not meet expectations

15.The employees who got rating of A and B got benefits while those at C and D did not get the benefits. At any given branch it was not possible to get A+ rating as each centre had the highest and the lowest performer. Each curve had a projection of 10% best performers and a 5% of the poor performance which was a forecast and each manager had to submit such records in each branch. The employees are not involved in the ratings. One does the targets and objectives but determination of the grade is by management.

16.In a Joint Negotiating Council meeting held on 6th April 2009 the issue of Performance Development and payment of bonuses arose. The emerging issues were noted to be that;

-Line managers would communicate to the staff on rating changes after consultations;

-Fitting people performance on the HPO curve;

-Subjectivity during the Performance Development review;

-Staff were still not clear o the meaning of the different ratings

17.Agreed actions on the above issues were that;

-Put a team together to work through the issues;

-Look at the process to determine whether it was working;

-Staff with Performance Development grievances should be given an opportunity to be heard;

-Get a list of line managers names who did not communicate to their staff after their ratings were downgraded; and

-Re-issue a circular on how TSTR should be rated

18.Munyalo also testified that It was apparent that the Performance Development was very subjective. Those who developed it in London had a normal scenario but in the respondent's case it was what a manager perceived of an employee based on attitude, focus on the bonus, promotion – what a manager perceived of a subordinate and the bonuses one was to get. The concept was developed in London and each country had to tailor it to its needs. In this case, the employees were not clear on the ratings and it arose at the Joint Workers Council (JWC) meeting. There was no uniformity in the ratings. In each branch there was a high chance the employee who performed well and but achieved less got a good rating as against an employee who did well but was rated poor.

19.Munyalo also testified that the Respondent received a Performance Development Global Standards issued to all county offices which required the rating of employees subject to the application of the local legislation of applicable Collective Bargaining and Agreement. If the law and Collective Bargaining and Agreement are not addressed the Performance Development should not apply. The Performance Development is also supposed to be shared with the union and other stakeholders, and in this case, before the Performance Development was introduced, there was no union involvement.

20.In 2009 the Respondent involved the Joint Workers Council with members who are not union officials. This is only an internal body and the claimant union was not invited. The Performance Development has negotiable issues that only the union should address and not he members of Joint Workers Council. The Performance Development Plans and employee ratings have issues that the Respondent and Claimant should subject to negotiations and also involve IP;

-Rates of pay and overtime;

-Length of leave;

-Hours of work;

-Duration of individual contract;

-Principles of redundancies;

-Uniforms;

-Conditions;

-Medical scheme.

21.When the contracts of employment were revised in 2008, the issue of rating was to be negotiated. The Respondent should not have changed the contracts without involving the Claimant. There was no training before the Performance Development Plans was introduced. Before Performance Development Plans are set there are targets which are cascaded to all employees under line mangers and where an employee does not agree to their set targets, the manager has the last say. Some set targets are achievable while other are not. The Claimant is in court as some members and employees of the Respondent have been issued with waring letters. The reasons for warnings is poor performance. Since 2008 when the Performance Development Plans was introduced, 2 employees have lost jobs in April 2013. Over 200 warning letters have now been issued. Since every branch must have a poor performer and a good performer, once an employee is rated poor performer they are taken through the disciplinary process called capability hearing.

22.Since 2010 employees have been against Performance Development not as a policy but how it has been implemented. The Respondent should stop the subjective criteria and the rewards system of bonuses or promotions that are used against some employees. Under the Collective Bargaining and Agreement, non-performance under the Performance Development Plans is not a ground for termination. The union has no role in such a termination procedure. Employees should have the Performance Development as an improvement tool but not as a disciplinary tool.

23.Munyalo also testified that he is in support of the orders sought by the claimant; the Performance Development Plans should be declared as unprocedural and the capability introduced leading to loss of employment be found as unprocedural and the Respondent should be directed to consult with the Claimant on the introduction of such procedures.

24.On cross-examination, munyalo testified that upon employment he was issued with a letter of appointment setting out his terms and conditions of employment. Payment of salary was to be based on the applicable Collective Bargaining and Agreement and good performance on set targets and salary increments were to be based on achieved targets. It was therefore a clear condition that continued employment was to be on the basis of good performance and his meant the Respondent had the right to terminate if there was non-performance. There was also an annual evaluation.

25.He also testified that he is shop steward but does not represent BIFU, the Claimant at the negotiations table with the Respondent. His role as shop steward is to address internal grievances with employees.

26.From 2006 he was aware of the performance requirements and does not have a letter of complaint against him. Performance revaluation is a good thing to an employee but should not be used as a disciplinary tool. He Performance Development was a global initiative for Respondent group to standardise employment contracts but before the Respondent could implement, the union had to be consulted. Poor performance can be a ground for termination under the Employment Act. The law has the procedures to be followed. The practice adopted by the Respondent is that once one is rated as of poor

performance, a capability test is done – a meeting of poor performer to explain why there is poor performance and not meeting the set objectives before an independent panel. Those invited to the capability hearing can have several outcomes;

a)One is adviced to bring a union representative to the hearing;

b)a warning can be issued;

c)targets can be revised; and

d)status quo can be upheld

27.Upon such capability test, the subject employee is not eligible for bonus; no access to loans; no access to promotions. Many employees are at this level of capability test. The Respondent then sets the targets and there is no appeal on the set objectives or targets. Theoretically the Performance Development is good in grading but the Respondent has used it as a disciplinary tool and to deny some employees benefits.

28.The challenge posed by the Performance Development is that salary and benefits are negotiable items. Performance is not negotiable. When performance is used to terminate employment, such is a matter addressed under the CBA.

29.In response to the IP, Munyalo testified that an employer can terminate employment of any employee for performance but this is not discretionary. Once targets are set for an employee with the line manager, it became a negotiable issue and the management of the Respondent could not decide on it alone without the Claimant union involvement. When the contracts of employment were changed, the union should have been involved. To make such changes unilaterally was against the Collective Bargaining and Agreement and the Recognition Agreement. The Collective Bargaining and Agreement has set a disciplinary procedure which parties should follow and to use other methods of termination is contrary to set terms and conditions. Unless the Collective Bargaining and Agreement is changed, its terms and conditions should apply. Where an employee does not do their work properly or is careless, the disciplinary procedures set out in the Collective Bargaining and Agreement should apply and may lead to dismissal. Where an employee is underperforming, the employer should introduce a performance improvement plan by setting objectives and put the employee in a conducive environment to enable improvement. Such a plan is positive and not punitive. It is a good management tool.

30.Munyalo also testified that disciplinary proceedings are regulated under the Collective Bargaining and Agreement while capability hearings are done in accordance with the Respondent internal policy. In a disciplinary process, what is addressed is what the employee failed to do and it was their duty to do while capability hearings address what an employee is supposed to do and what the Respondent can do to help the employee. What the employee can do is determined by the work environment. Capability hearing and disciplinary hearings are therefore set to meet different objectives, motives and the originations is different. The Collective Bargaining and Agreement gives emphasis to disciplinary hearing while Performance Development recognises the need for capability hearing.

Defence

31. The Respondent in defence and through the Replying Affidavit of Odhiambo Ooko avers that in January 2008 the Respondent bank introduced globally a performance development standard as a framework through which to manage overall and individual performance of its employees across the world. The aim was to ensure that employees know what is expected of them with regard to performance; achieve line of sight from personal objectives to business goals, stretch performance and develop talent, recognise and reward good performance and address declining performance. The Respondent was thus required to align with the global standard and develop and review Performance Development Plans.

32. In December 2008 upon consultations with all stakeholders through Joint Workers Council, the

Respondent offered revised employment contracts to its employees. The purpose of the revised contracts were to ensure every staff had a valid employment contract was in sync with the group standard clauses. The revision did not affect or replace the appointment letters and a circular dated 3rd December 2008 was issued to this effect.

32.The new elements included in the revised contracts was the Performance Development Plans and stipulated that an employee would be required to agree on a Performance Development Plans with their line manager and that their continued employment would be subjected to good performance. It was stipulated that where performance was found wanting, the Respondent reserved the right to terminate employment on grounds of poor performance.

33.The decision to revise employee contracts was based on the respondent's global performance Development Standards and the aim of Performance Development Plans is to ensure effectiveness of employees so as the Respondent can achieve its overall business objectives. The Performance Development Plans is a tool used by the Respondent to make its business goals a reality through practical, tangible and measurable actions. The Performance Development Plans process provides for an annual cycle of performance monitoring with target setting and ends up with an appraisal. An employee would agree with the line supervisor set targets and reviewed at end of year. Upon the offer of revised employee contracts, Respondent employee accepted the same and signed. There was no coercion. The Performance Development Plans s were what previously annual performance targets was and the Performance Development Plans is not introduced as a draconian measure. The Respondent is not in breach of the Collective Bargaining and Agreement and any such allegations are misleading.

34.The Performance Development Plans was discussed at the Joint Workers Council meetings where the Claimant has a representative and no objections were raised and through the years the Respondent has informed the employees of the performance development process by giving guidelines and no new and arbitrary terms and conditions of work have been introduced save for what is discussed at the Joint Workers Council where the Claimant is represented.

35.The defence is also that it is an implied terms of each employment contract that an employee is obligated to carry out their tasks and achieve a standard of skill ad competence that can reasonably be expected of someone with experience and training. Upon breach of the terms of employment, an employee is liable for disciplinary action including termination of employment and the Performance Development Plans is a tool used by the Respondent to measure employee performance of their duties. The Performance Development Plans captures the specific tasks of an employee and failure to adhere to the same has a negative impact on the Respondent overall business objectives hence such an employee is subject for disciplinary action. As an employer, the Respondent is entitled to discipline its employees based on poor performance as the capability of an employee to perform their assigned duties is an essential requirement of an employee contract.

36.Section 45 of the Employment Act allow an employer to terminate an employee's contract of employment on valid reasons and based on performance, capacity and compatibility. The Performance Development Plans being a measure of an employee's performance, the employer is entitled to take disciplinary action against an employee who fails to meet their targets under the plan. The Claimant does not participate in the evaluation of an individual employee as this is the employer's administrative process and the outcome of the same is not limited to disciplinary action as this can result in rewards or a Performance Improvement Plan (PIP). Where the Performance Development Plans result in disciplinary action, the Claimant is invited for the hearing. Under the Recognition Agreement clause 5(b) (iii), the Respondent can dismiss an employee who fails to perform work which is her/his duty to perform or performs such work carelessly or improperly. To address the provisions of the Collective Bargaining and Agreement, the Respondent has developed the Disciplinary, Capability and Grievance toolkit setting out the procedures for disciplinary hearings on non-performance. The toolkit sets specific steps to address non-performance following the Performance Development Plans – each step has a first waring, second warning and final termination. The employee is allowed to call a representative.

37.The defence is also that there are no 200 employees who are on their final warning stage and Peter

Chege whose notification for disciplinary hearing was annexed as a sample case is facing disciplinary hearing for absence from duty. The Respondent as an employer is entitled to take disciplinary action against any employee issued with warning letter and has committed an offence. This is addressed in the Collective Bargaining and Agreement and the Claimant cannot seek to have an injunction against the Respondent against disciplining such an employee.

38.The Respondent is faced with grave danger of incitement to indiscipline if the Claimant demands are upheld or the orders issued on 30th January 2013 are upheld noting that following the orders, Peter Chege on 5th February 2014 issued email to all bank employees to rise up against the bank rules. The orders should be discharged as there were issued without disclosure of material facts. There are no final letters issued to 200 employees as alleged in the claim and the names of such employees are not set out. The court should not be used to issue orders that stifle the running of Respondent business or to issue a general order prohibiting the Respondent from following terms and conditions of employment contract that allow for termination of employment. The Respondent has complied with Collective Bargaining and Agreement and in addressing the Performance Development Plans the Claimant has been consulted. The claim should be dismissed with costs.

Interested Party

39.The Interested part was admitted into the proceedings noting the Memorandum of Interest and avers that they have a Recognition Agreement with the Claimant effective from 3rd October 2000 and with a mandate to negotiate Collective Bargaining and Agreement on behalf of all banks which include the Respondent and the last such Collective Bargaining and Agreement was signed on 19th August 2013. The Interested Party joined the proceedings herein as they are the sole employer's body representing the entire Banking industry in both trade and industrial relations.

40.The Interested party's case is that the changes in the terms and conditions of employment introduced by the Respondent as per the Performance Development Plans do not in any way constitute 'offences'. This is a management strategy geared towards enhancing performance in line with Kenya Banker's Association Constitution that emphasises on development. The performance plans focus on development of both the employer and employee as the same has a reward system available to the performing employee.

41.The Interested Party also states that no employee of the Respondent has ever been intimidated since 2008 and no formal complaint has been lodged with them by the Claimant over any harassment, intimidation, coercion or threats of dire consequences for non-compliance with the revised terms and conditions of service. The objectives of the Performance Development Plans were to create a subsystem that is consistent with the values and objectives of the banking industry worldwide and as such no element of bad faith that is decipherable from the policy.

42.The respondent's Performance Development Plans are in consonant with section 41 of the Employment Act, the Collective Bargaining and Agreement and the employment practice as constituting one of those offences called Gross Misconduct. The Interested Party considers non-performance a serious breach under the law and practice and derivation from the equitable principle of 'the mention of one is the inclusion of the other'. The other term of non-performance in this context is 'poor performance' cited in section 41(1) of the Employment Act 2007 as a ground for termination. Such non-performance is adequately covered under paragraph A 5(b) (iii) of the Collective Bargaining and Agreement entered into between the Claimant and the Interested Party on 19th august 2013.

43.The allegations by the Claimant ae therefore misconceived and false as employees are paid to perform their duties as required and the Performance Development Plans thereby set the required and equitable measure of performance short of which warning letters are a part of the due process in place to address the shortcomings. The revised contracts of 2008 are consistent with the provisions of the Employment Act and the Collective Bargaining and Agreement and there is no contradiction or breach of the law of the CB occasioned by the Performance Development Plans. The claims made are speculative as no employee has been victimised and if such were to occur there exists a grievance resolution mechanism set out in the

Collective Bargaining and Agreement between the parties herein.

44.Performance Development Plans falls within management practices and as such is not subject of negotiations. The capability interviews that could lead to any disciplinary action including termination falls within the law and the same were followed by the Respondent. The process is transparent and gives employees a fair hearing with the assistance of the claimant's representative. The practice worldwide is that when the management do the ratings and in the event of bias the same is subjected to a grievance handing system and arbitration before an independent tribunal. The Performance Development Plans are therefore meant to be an impetus to the employee to enhance their performance as the same is in the present case.

45.The Interested Party is seeking that the court should dismiss the assertions by the Claimant that Performance Development Plans, the Performance Improvement Plan and capability hearings are inconsistent with the provisions of the Collective Bargaining and Agreement and Recognition Agreement and that the Performance Development Plans, the Performance Improvement Plan and the Capability Hearings are sound management practices consistent with the good employment practices and sound labour relations.

Evidence

46.The Respondent and the Interested Party opted not to call any witness.

Submissions

47.The main prayers sought by the Claimant are that the Respondent should be compelled to stop the arbitrary and unlawful termination of the unionisable employees and members of the Claimant until the Claimant is involved in the introduction of the new terms and conditions of employment in the Performance Development Plans, Performance Improvement Plan and capability hearings as part of the CBA; that all the warning letters issued to unionisable employees are illegal, unlawful and ate null and void; the new contracts of employment introduced in 2008 are a nullity since the this was not in tandem with the Recognition agreement, the Collective Bargaining and Agreement or the law; and costs of the suit.

48.The Claimant also submit Clause 15 of the Recognition Agreement recognises the Joint Consultative Committee as the structure for consultative for matters subject for negotiations between the parties and clause 19 recognises the Joint Negotiating Council as the organ to handle non-negotiable items – loans, bonuses, sports, pension, provident fund and gratuities. Issues of termination of employment, warnings, duration of contracts, work hours, medical scheme – are addressed by the Joint Negotiating Council. Variations to the employment contract is regulated under clause 23 of the Recognition Agreement provides that the Agreement should not be varied, altered or rescinded without negotiations and where there is disagreement, the matter should be reported to the court as a dispute. In this regard therefore, section 10(5) of the employment Act stipulates that there should be no changes to employment terms and conditions without consultations with the employee and the same should be in writing.

49.Based on clauses 15, 19 and 23 of the Recognition Agreement, the Respondent and Interested Party did not follow due process in their introduction of the Performance Development Plans, Performance Improvement Plan and capability hearings and by introducing terms relating to termination of employment, warning procedures and duration of contracts - can only be varied upon negotiations. These are not management methods as presented by the Interested Party. The Respondent did not consult with the employees or the Claimant in making contract changes. Reference to clause A5 (b) (iii) of the Collective Bargaining and Agreement is not sufficient cause to terminate any employee. The claim by the Respondent and Interested Party that there exists a reason for termination known as performance 'below business expectation' is not a known reason for termination in the Collective Bargaining and Agreement or in law.

50.The Respondent introduced Performance Development Plans in 2006 and the contracts changed in

2008 with a new clause to the contract, which was illegal and without basis. The Respondent global policy on performance development has set objectives and requires an employee to agree with the line manager to agree on priorities. Such set objectives for each employees have not been submitted by the Respondent to show that unionisable employees failed to meet. There was no evidence called to controvert the claims and the court should make a finding in favour of the claimant.

51.The Claimant has relied on the case of Thomas Odol Ojwang versus Kenol Kobil Ltd [2015] eKLR. And the finding that poor performance is subjective and the employer must demonstrate the basis for such a finding. In Palace Engineering (PTY) Ltd versus Thulani Ngcobo et al, The Labour Appeals Court of South Africa, Johannesburg, Case No.JA20/2012 the court held that before an employer can dismiss an employee for poor performance, resources must be provided to the employee for the achievement of required standards and there dismissal must be for a fair reason.

52.The Claimant has also relied and made reference to ILO Convention 158 - Termination of Employment Convention, Recommendation No.166; the Recognition Agreement, Collective Bargaining and Agreement and section 10(5) and 45 of the Employment Act.

53.The Respondent on their part submit that the Claimant should not be involved in the development of the performance development plans within the Respondent as admitted by the Claimant witness that under the Recognition Agreement there are non-negotiable items at clause 17 which include management methods and the Performance Development Plans are such management tools. Mr Munyalo testified that he joined the Respondent on 10th June 2006 and his contract provided that 'continued employment with the bank would be subject to good performance'. The Claimant never opposed the introduction of the Performance Development Plans. Mr Munyalo confirmed that the Performance Development Plans should be used to reward, promote, grant loans and bonuses to employees without any disciplinary sanctions to poor performing employees as this was not provided for under the CBA.

54.The Respondent also submit that the Performance Development Plans has been part and parcel of their history and part of the employment contract. The inclusion of performance in the 2008 contracts was in tandem with global performance deve3lopment standard as a framework for managing the overall and individual performance of the employees across the world. The objective was for employees to know what is expected of them in relation to performance, achieve personal objectives to set business goals and be able to help the employer/Respondent identify declining and unsatisfactory performance. The Joint Negotiating Council between the Claimant and Interested Party has no role to play in the Respondent Performance Development Plans and the Respondent case is that the Performance Development Plans is a tool for the Barclays global business and the employees got new contracts.

55.The employees were consulted through internal Joint Negotiating Council, a body which includes the Claimant shop steward and management representatives. The purpose of revising employee contracts was to ensure each had a valid employment contract and the Respondent reserved the right to terminate employment on grounds of poor performance. Before the revision of contracts and the introduction of Performance Development Plans various Joint Workers Council meetings were held with the Claimant representatives; circulars were issued; Joint Workers Council had extensive discussions and the Claimant cannot claim not to have been involved through the Performance Development Plans was not a subject for negotiations.

56.The Respondent also submit that the warning letters issued to unionisable employees and the 2008 revised contracts of employment are not irregular or unlawful. It was an implied term of the contract that an employee was obligated to carry out their tasks and achieve a standard of skill and competence that can reasonably be expected of someone with their experience and training. A breach of such a term, there is a disciplinary action including termination of employment. The Respondent had the Performance Development Plans as a toll to measure its employee's performance of their duties. Sections 41, 44 and 45 entitle an employer to discipline its employees based on poor performance as the capability of an employee to perform their duties is an essential requirement of the contract of employment. Termination of employment due to poor performance is a valid and fair reasons for termination.

57.The Performance Development Plans is an administrative process and the outcome of which is not limited to disciplinary action and may result in rewards. It is a tool for determining whether or not an employee has satisfactorily performed the assigned duties and the Claimant union has no mandate to attempt to limit the Respondent as the employer in the use of the same. When the employee does not perform their duties according to the v, there is a capability hearing and the employee is allowed to invite their union. The Claimant has also been invited by the Respondent to all disciplinary hearings. Mr Munyalo testified that the performance rating is a managerial tool used by the Respondent to track the performance of employees based on the overall business objectives. The union is only entitled to participate at the disciplinary hearings and not in the formulation of management tools which is internal.

58.The Respondent also submit that the Collective Bargaining and Agreement permits dismissal of an employee due to poor performance and the internal tool for this purpose is the Performance Development Plans, the Performance Improvement Plan and the capability hearing. That in Cause No.100 of 2003 the Claimant admitted that the performance programme was already catered for under clauses AB5 and AB10 of the Collective Bargaining and Agreement and the allegation that the Performance Development Plans is a new measure by the Respondent is not correct.

59.The Claimant has not provided the 200 employees alleged to have been issued with final warning letters based on performance. Peter Chege was dismissed for reasons of absenteeism and not poor performance as alleged. The employer is entitled to take disciplinary action against employees who underperform by issuing warning letters and upon being subjected to a Performance Improvement Plan and fail, such a section should issue. This is per the Collective Bargaining and Agreement and the Employment Act. The Respondent faces grave danger if the orders of the court issue don 30th January 2014 on peter Chege are not vacated as this will incite other staff.

60.The Respondent has relied on the case of George Kabue versus Nokia Siemens network [2014] eKLR where the court held that a credible performance appraisal process must be participatory and a comment made by a supervisor without the participation of an employee cannot pass for a performance appraisal. In the case of Kenya airways Ltd versus Kenya Airlines Pilots association [2013] eKLR the court held that it cannot interfere on a matter within the province of the parties to the Collective Bargaining and Agreement and the interests of an employer are championed by its management who supervise employees as held in Kenya Game Hunting 7 Safari Workers union versus Lewa Wildlife Conservancy Ltd, Cause No.1567 of 2011.

61.The Interested Party on their part submit that Performance Development Plans,Performance Improvement Plan and Capability hearings introduced by the Respondent in 2008 are sound management tool and are not introduced in violation of the Recognition Agreement or the CBA. These tools were introduced in 2008 lawfully and where an employee does not perform his/her duties satisfactorily they are issued with warning and termination after a capability hearing.

62.Section 54 of the Labour Relations Act provides for the Industrial Relations Charter and for the recognition of a union for Collective Bargaining and Agreement on terms and conditions of work. The Claimant and the Interested Party have a Recognition Agreement and have agreed on what is negotiable or non-negotiable items. The procedure for negotiable terms or non-negotiable is clearly set out in law and in the Agreement between the parties. Clause 16 of the Recognition Agreement of 3rd October 2000 sets appendix A with subjects for negotiation whereas appendix B sets out non-negotiable items which are for the employer to address especially management methods. Since 2000 no proposals have been made to vary, alter or amend the Recognition Agreement and therefore management methods ae still non-negotiable items. Any grievances from the non-negotiable items go to the Joint Negotiating Council set out under clause 19 of the Recognition Agreement and no such matter has ever been presented as the Joint Negotiating Council.

63.Clause 15 of the Recognition Agreement provides that a Joint Consultative Machinery in e very bank should be established comprising of employees and management for discussion of matters that are not negotiable between the Claimant and the Interested Party and further provides that the claimant/union should not constrain its members in such a committee. Employers have the right to manage their business

as they wish and to decide on measures to take within the law and good labour practices. The only restrictions relate to negotiable items.

64.Section 41 of the Employment Act address the question of poor performance and clause A5 (b) (iii) of the CBA. The Respondent in response to the claim attached Performance Development Plans disciplinary procedures from non-performance consistent with the accepted standard which were set out in Thomas Odol Ojwang case. The court set out the principles that the Respondent has incorporated in the Performance Development Plans, the Performance Improvement Plan and the capability hearings which tools/practices are consistent with section 41 of the Employment Act and article 47 of the constitution and on fair administrative action. There is no evidence that the Performance Development Plans are imposed on employees as no employee has lodged a complaint.

65.The Interested Party also submit that the Claimant has mislead the court in stating that section 10(5) of the Employment Act was not followed by the Respondent. The employees were explained in writing the changes in the contracts with training. The contract of employment has since 2008 retained the clause that should performance be found wanting, the Respondent reserved the right to terminate employment. This is consistent with section 41 of the Employment Act.

66. The cited cases by the Claimant relate to dismissal and not on poor performance and are not relevant. The suit should be dismissed with costs and the court makes a finding the Performance Improvement Plan, Performance Development Plans and capability hearings are sound management methods.

Determination

Whether there is a violation of the Recognition Agreement and the CBA;

Whether new issues can be introduced in the suit issues that were not part of the report to the Minister;

Whether the Claimant should be involved in the development of management systems/tool/practices;

Question of performance in employment

67.It is common cause that the parties herein have a Recognition Agreement of 3rd October 2000 and a Collective Bargaining and Agreement after every 2 years the last being dated 19th August 2013. When negotiating for a new Collective Bargaining and Agreement both parties at clause 19 are required to exchange proposals and counter-proposals so as to convene for negotiations and where agreed, the Collective Bargaining and Agreement is registered with the court. If parties fail to agree, the matter is reported to the Minister and if conciliation fails a dispute is registered with the court. The procedures leading to the court dispute are therefore elaborate.

68.On the question raised by the Interested Party that the Claimant has introduced new issues to the dispute that had not been reported with the Minister and the question of whether the union should be involved in the development of Performance Improvement Plan within the Respondent shall be addressed jointly.

69.The Claimant and Respondent have a Recognition Agreement dated 3rd October 2000. Several Collective Bargaining and Agreement have been signed with the IP. These are key documents registered with the court to give the agreements between the parties the legal force of enforcement are set out under section 59(5) of the Labour Relations Act. The Recognition Agreement and the Collective Bargaining and Agreement therefore become the primary documents of reference between the parties herein that the court must refer unless there is a challenge to the legality of any part, which is the case here. The issue in dispute is that the Respondent has violated the Collective Bargaining and Agreement by unprocedurally and unlawfully intending to terminate the services of unionisable employees who have been issued with final warning letters. The remedy sought to counter the alleged violation is that the Claimant should be fully involved in the development of the Performance Development Plans, Performance Improvement Plan and the capability hearing and that the warning letters issued to unionisable employees pursuant to

the Performance Development Plans be declared null and void including the 2008 employment contracts.

70.First, the court has jurisdiction to hear all employment and labour relations matters. The dispute herein is not initiated by the Claimant as a consequence of issuance of the Certificate of Agreement or disagreement in accordance with the Labour Relations Act. Being aggrieved by the issue set out in dispute, the Claimant filed this dispute with the court as of right. The Claimant has heavily relied upon warning letters and termination issued to its members and attached 'APP.1' and 'APP.2' to the Additional Annexures in Reply to the Respondents Replying Affidavit of 12th February 2014 letters issued in 2012 and 2013 to various employees. These letters issued to employees of the Respondent are the core subject of the issue in dispute herein. They are alleged to be issued contrary to the Recognition Agreement and the Collective Bargaining Agreement as they stem from the Performance Development Plans which is also alleged to have been introduced in 2008 unprocedurally. As such, the Claimant has the right to register with the court their dispute even where the matter was reported to the Minister and there were issues not addressed then.

71.Second issue relate to the introduction of Performance Development Plans, Performance Improvement Plan and the capability hearings in 2008 and the revision of employment contract for all Respondent employees, both parties agree that the Performance Development Plans and the Performance Improvement Plan are management tools and part of management methods. Since 2008 when these tools were introduced by the respondent, new contract were issued to the employees including the Claimant members. No complaint has been raised since and or with regard to the terms of the contracts. Mr Munyalo was emphatic in his evidence that the employees are not opposed to the Performance Development Plans and Performance Improvement Plan as management tools as the concept is good but the Respondent has changed the same subjectively to pick on poor-performing employees and issue warning letters and leading to termination of employment. As such parties are agreed that as a management tool/practice the Performance Development Plans and Performance Improvement Plan are the prerogative of the employer and as agreed under the clause 17 of the Recognition agreement, there is the list of non-negotiable items. These include management methods. These were terms agreed upon way back in 2000 and the procedure to make any changes is well set out, which the Claimant has not addressed since. I find no merit to change what the parties have agreed as binding between themselves.

72.Thirdly, on the question of performance while in employment, most contracts of employment make reference to the employer's right to terminate on the ground of poor performance. With this right, there are other set rights due to an employee such as the right to give notice before termination. Such rights go with responsibility. With regard to poor performance, an employer is now required by the law, other than the employment contract, the employer should give the employee notice, give a hearing, and give reason(s) for termination on such a ground. It is not only a contractual requirement, there exists a legal requirement that before termination on the grounds/reason of poor performance, there must exist genuine, valid and fair reasons. The subject employee must be given a hearing in the presence of the employee's representative and most fundamentally, there must be a written notice stating the reasons upon which the employer intends to terminate employment to enable the employee give their defence. This notice must be issued before an employer has made a decision to terminate employment. Upon the issuance of the written notice, the employee where unionised is at liberty to notify their union as held in Jane Samba Mkala versus Ol Tukai Lodge Ltd.

73. The Respondent attached the Performance Development (PD) Global Standard in the Affidavit of Ooko Odhiambo of 12th February 2014 and at annexure 2, the objective are that;

Our approach to performance development and the way in which we recognise and reward performance, are key tools to help deliver excellent results. It is therefore that the group has a framework by which to manage overall and individual performance of people.

74. The Performance Development further at 3.4 stipulate a mechanism for review and sets out that;

A review should be conducted by the employee's team leader or line manager, at least twice annually, to discuss and provide clear feedback on the employee's performance, to decide their development needs

and training requirements and to provide coaching on ways to improve performance and capability …
75.At 3.5 the Performance Development set out that;

Unsatisfactory performance – where performance is unsatisfactory, action should be taken (in accordance with a reasonable improvement plan) to address the shortcomings and the employee should be made aware that continued ineffective performance will result in remedial action – a process consistent to the discipline, capability and grievance global standard.

It is the responsibility of each business area to ensure that the Performance Development process complies with any relevant employment legislation in the countries in which it operates.

76.Reading the cited cases especially the case of Jane Samba Mkala and the case of Thomas Odol Ojwang cited above, I find no major departure with the issues set out herein. The Respondent and by extension the Interested Party in their Recognition Agreement with the Claimant have gone several steps ahead to address the issue of poor performance by an employee. In the Performance Development as set out above, I find elaborate steps that the respondent, guided by the business global tool has to follow;

-That each employee must agree with their supervisor to a Performance Development Plans by setting out personal priorities/objectives for the year

-Each employee must 'own' their performance take responsibility over their own improvement;

-There is a review twice a year between the employee and line manager;

-Where there is unsatisfactory performance action is taken to have a reasonable improvement plan to address the shortcomings; and

-The employee is made aware that that continued ineffective performance will result in remedial action.

77.there are various levels of performance assessment. First the general requirement of all employees of the Respondent to have a Performance Development Plans annually with two 2 reviews. Where upon any review the employee is found not to have satisfactorily achieved their plans, a reasonable plan is agreed upon. Upon further review and the employee has not improved and is found to be of ineffective performance, remedial action is taken which include disciplinary action, capability and grievance mechanisms.

78.Therefore, I find the internal management system of the Respondent are such that the Performance Development Plans is to ensure that they meet their business objectives and that each employee performs in accordance to their role and where there is a lapse, there are internal systems to address the same and ensure each employee 'own' their performance and upon review, a reasonable plan is agreed upon.

79.I find the Performance Development Plans s and the Performance Improvement Plan are good productive tools. Up and until the capability hearings, there are clear steps the employer/Respondent should follow internally. The Respondent global Performance Development has an elaborate mechanism for training employees and line manager to ensure they understand and appreciate Performance Development Plans purpose, aims and objectives.

80.Annexure 'EXII' to Ooko's affidavit is the Discipline, Capability and Grievance tool. The tool sets out in great details what is considered as misconduct and gross misconduct. The list of matters that may amount to misconduct or gross misconduct is set out but none relate to performance or poor performance as a subject for misconduct or gross misconduct. Save that in taking the disciplinary steps,

Step one relates to investigations;

Step two elates to disciplinary meeting; and

Step three relates to decision and sanction.

81.it is at step 3 that the employees is supposed to be issued with warning letters

– first warning, final warning, and 'life' of warnings and the Respondent sets out that;

Action for misconduct – 12 months following issues;

Action for poor performance/capability – 12 months following the point at which performance reaches a satisfactory level.

82. With regard to capability hearings, the steps are also elaborate. A capability situation is defined as;

The procedure is used where concerns are raised about an employee in one or both of the following areas;

The standard of his/her performance required in his/her job

A failure to achieve a satisfactory record arising from intermittent absence, whether or not there are any connected medical reasons for the absences.

83.The above set out, the steps that follow relate to;

a)Identification of concerns

b)Capability meeting

c)Decision and sanction.

84.Upon the identification of concerns, the employee is issued with a show cause letter to which he/she must reply. Upon acceptable explanation, the matter is closed and a letter to this effect is issued. Where there is unsatisfactory response, a capability meeting follows with the line manager and the employee with the Performance Improvement Plan subject and leading to the concerns identification. The decision and sanction after the first capability hearing -The level of action at a first capability meeting would normally be a first written warning. The employee is also given sufficient and reasonable period for improvement in performance or attendance should be given. This far the Respondent policy on Performance Development is clear. Fundamentally, at page 288 of the Respondent bundle to Ooko Replying affidavit is sets out that;

[Part of the decision & sanction] as part of any decision, the manager may consider whether there are any alternative jobs available to which the employee is suited.

85. The decision to terminate upon capability meeting is therefore only made after the final written warning and the employee has been given sufficient and reasonable time to improve on their performance to the required level. Where the Respondent has not followed these procedures in any given case (individual case), the Claimant should pursue the same setting out the lapses and the unfairness of the same where there is such evidence. Such cases cannot be generalised herein for a blanket order. Each case must be on its merits.

86. Going back to the Recognition Agreement at clauses 16 and 17, the list of negotiable items agreed upon between the parties herein is that termination of employment is a matter negotiable and involves the Claimant. Performance Development Plans and Performance Improvement Plan as well as the capability hearings/meetings are internal and management prerogatives of the employer/Respondent. even where the employer does allow the employee to call his/her representative at the capability hearing/meeting, the steps leading to and subject of the capability hearings relate to internal mechanisms. At this point the Claimant union is not involved with what the employer has put in place to ensure that all its employees perform to the required standards and that they are trained, couched and supported so as to achieve the set

goals. Also that the Respondent as the employer has put the employee whose performance is below expectation on a reasonable plan and given couching, support or training for effective performance of their duties. And that where there is a capability meeting/hearing, the employer has considered other measures to ensure the employee has sufficient and reasonable time to be able to improve on their performance.

89. In this regard the court in Christopher Onyango & 24 others versus Heritage Insurance Co. Kenya Ltd, Cause No.781 of 2015, and the Court held;

The subject of poor performance of an employee is a serious matter. Such requires thorough investigations before an employer can use such a reason as the basis for termination. The rationale is that an employee is hired for being competent for the job and upon confirmation, such an employee has been put to the test and passed. Where an employee works for long periods and suddenly declines in their performance, the root cause must be established.

90. The right under section 41 of the Employment Act and under article 41 of the constitution read together with article 47 on fair administrative action require that a person faced with an adverse action must be supplied with an relevant materials, couching, training, time and resources necessary to be able to prepare their defence, improve on their performance, build on their skills. See Alex Wainaina Mbugua versus Kenya Airways Limited, Cause No.430 of 2016;

An employer can therefore not just rely of the grounds of poor performance to terminate an employee. The rationale is that, such an employee was hired and found fit for the job, any deterioration in performance must be interrogated and effort made to address it. It cannot be simply cited that the Claimant suddenly became of poor performance when all his quarterly performance appraisals were in the positive. The Respondent has the duty to demonstrate that from the October 2015 evaluation, the claimant’s good performance deteriorated so fast that this led to the alleged loss of $29.7 billion.

91. However such should be applied to enhance productivity of employees. Where an employee is of poor performance and is not productive as a result, such is a matter addressed in law, section 41 of the Employment Act procedures apply. Where there is poor performance at work, such becomes a ground for dismissal and the employer is by law required to take the employee through the motions of the law before such can be a genuine, valid of just reasons for termination.

92. This is acknowledged by the Respondent in the affidavit of Mr Ooko dated 12th February 2014 where at paragraph 24 he notes;

The Claimant union does not participate in the process of performance evaluation of an individual employee as this is part of an employer’s administrative action. The outcome of such a process is not limited to disciplinary action but in most cases result in rewards such as bonus, recommendation for development or training of the employee or being put on a performance improvement plan.

93.As such where the process results in disciplinary action, the Respondent having addressed the administrative part, the Recognition Agreement and Collective Bargaining and Agreement between the parties herein requires that the Claimant must participate is such proceedings as this is their role to represent their employee/member. The separation of roles must come to bear as the parties herein have agreed to be bound by terms and conditions that requires the participation of the Claimant in any disciplinary process against their member with the Respondent. This is also the essence of section 41 of the Employment Act.

94.This court has had occasion to address the issue of poor performance of an employee as a condition or ground and or reason for termination of employment. It is not sufficient for an employer to cite poor performance as the reason for termination. The employer must demonstrate what measures have been put in place to support a poor performing employee. That despite support, the poor performing employee has

not made effort to improve and hence the reason for termination.

95.Therefore, where Performance Development Plans, Performance Improvement Plan or capability hearing is used at the tool to address poor performance at the Respondent work place and by extension within the Interested Party membership, reason must be gone into its implementation. The employees must know from the onset that such a tool is not only meant to assess their levels of productivity but also as a tool to assess their work performance and in the event there is below required performance, then the motions of section 41 of the Employment Act shall fall into place. The Performance Development Plans as a good practice/tool can therefore not be used as the alternative to the application of section 41 of the Employment Act provisions. Each should serve its intended purpose. Once the employer is done applying the Performance Development Plans, Performance Improvement Plan and Capability hearing/meeting tools and they are satisfied that the employee has failed to improve, notice to show cause, notice for hearing, and the call of the Claimant union or an employee of choice are mandatory requirements. Such must be adhered to without being circumvented by the warnings envisaged under the internal tools of the Respondent. The material generated in the process would be in support of the allegation of 'poor performance' but on the applications of the tools alone without invoking the mandatory requirements of the law such would result in the process being unfair. In the case of Christopher Onyango & 24 others versus Heritage Insurance Co. Kenya Ltd, Cause No.781 of 2015, and the Court held;

… A credible performance appraisal process must be participatory with parties sharing comments and where the employee is left out, such cannot pass. …

96. In Alex Wainaina mbugua versus Kenya Airways limited, Cause No.430 of 2016 the court held that the employee must be given a performance improvement plan that must be signed by both parties as a binding and time bound plan setting targets to be evaluated with a view to see whether the employee who is of poor performance is improving. The court held;

Performance appraisal or evaluation is part of any employment. However every employee has a legitimate expectation that such an evaluation is done to improve on the business and employees so as to be able to give their best. To therefore engineer a performance evaluation targeting an individual employee and then set him up for termination is contrary to what a performance evaluation is intended for.

97. In Kenny Kinako versus Ringier Africa and in reference to the case of Jane Wairimu Muchira versus Mugo Waweru and Associates [2012] eKLR the court held;

The subject of poor performance … The rationale is that an employee is hired for being competent for the job and upon confirmation, such an employee has been put to the test and passed. Where an employee works for long periods and suddenly declines in their performance, the root cause must be established.

98. Mr Munyalo testified that the Performance Development Plans and Performance Improvement Plan were good tools to improve on performance but the assessment through the line mangers ended up being subjective and lost its set objectives. It became a tool to control benefits instead of being used to meet organisational growth. Indeed, where a sole manager is left unchecked and without set targets upon which an objective criteria is to be used, such can amount to an unfair labour practice. Where an employee is ordinarily of good performance, a negative score should be taken through a critique to ensure another level of review before a sanction of termination is imposed. It would also be expected that where an employee is of average performance and suddenly the line manager give an exceptionally high score, the same would be reviewed by another independent officer of the Respondent to ascertain that indeed there was an objective review of the employee.

99.To subject an employee to a termination would be a drastic measure without giving the benefit of the legal safeguards. Section 41 and 43 of the Employment Act envisage an employee whose rights to a hearing should be taken into account before termination, whatever the internal mechanisms of addressing the same are. Upon application of the Performance Development Plans and a confirmation that indeed an employee is of poor performance, before the sanction of termination is imposed, such an employee should be given a hearing to state their case, where unionised, the union such as the Claimant should be informed

and invited to attend at the hearing, and where the employee fails to give satisfactory defence, then the employer can find justification to impose the sanction. However, such a process should not be gone into for the sake of going through the motions of the law. The employer must have a genuine, valid and fair reason(s) to terminate the employee as otherwise, to go through the procedures of section 41 so as to justify a termination will be a sham and negate the entirety of the same.

100.Paragraph 15 Interested Party statement reference is made that– Performance Development Plans falls within management practices and as such is not subject of negotiation. However, as much as this process/practice of Performance Development Plans remain the prerogative of the employer, where such a practice result in the employee being subject to any disciplinary action, the terms and conditions of the Collective Bargaining and Agreement must be given reference to. Other than the CBA, the law applicable in terms of non-performance is section 41 of the Employment Act. Upon the employer finding that the employee is not undertaking his/her duties are required, the motions set out under the Collective Bargaining and Agreement must be followed. Where such provisions are not adequate or fall short of what the legal protections entail, reference must be given to section 41 and 43 of the Employment Act.

101.I find the Recognition Agreement is specific on the nature of relationship between the parties to it whereas the Collective Bargaining and Agreement is clear as to the applicable terms and conditions of employment. A Joint Negotiating Council under the Recognition Agreement is agreed as comprising claimant, Interested Party and Respondent members and chaired by a person to be nominated by the Interested Party and the Claimant from time to time. However this cannot be said of the Joint Workers Council as a body that include or incorporate the Claimant. Annexure 'EX7' to Ooko Replying Affidavit are minutes of the various Joint Workers Council setting out various persons in attendance. None is stated as representing the Claimant union. As its name suggests – the Joint Workers Council – this is a team within the Respondent workers. In all the minutes attached none raise the issue of discipline or termination of employment. Therefore Joint Workers Council membership may be drawn from unionised employees but not limited to membership of the Claimant. As such, the unionised employees seating at the Joint Workers Council are from the internal engagements of the Respondent should not be taken as representatives of the Claimant. Where the attendance of the Claimant is required, such should be specific. Where the shop steward representing the Claimant is a member of Joint Negotiating Council and Joint Workers Council, clarity must be borne by the Respondent that such an employee only attends as a member of the same and not as a representative of the Claimant. Where there is a conflict, such must be addressed in the subsequent Collective Bargaining and Agreement or the Claimant invited specifically to address the same.

102. Noting the above analysis of the case and the findings, I go back to the issue raised by the Claimant that the Respondent violated the provisions of section 10(5) of the Employment Act when contracts were revised in 2008. Section 10(5) states;

10. (1) A written contract of service specified in section 9 shall state particulars of employment which may, subject to subsection (3) be given in instalments and shall be given not later than two months after the beginning of the employment—

…

(5) Where any matter stipulated in subsection (1) changes, the employer shall, in consultation with the employee, revise the contract to reflect the change and notify the employee of the change in writing.

103.The subject contracts were revised/reviewed in 2008. Mr Munyalo testified that there was a memo issued to this effect and he signed on his new contract. That the Claimant was not consulted before the contracts were changed. That this was contrary to the Recognition Agreement and the Collective Bargaining and Agreement terms and conditions. Section 10 of the Employment Act in whole sets out a template of matters that should go into an employment contract. It gives the employer a clear path to follow and ensure that all changes effected to the employment contract and brought to the attention of the employee in writing. Therefore any change to the written contract of employment must be done in consultation with the employee so as to reflect the change and further, the effected change must be

brought to the attention of the employee in writing.

104.The new and revised contracts have been in force since 2008 and the employees have signed them. The employees have used the Performance Development Plans, Performance Improvement Plan and gone through the motions of capability hearings alleged to have been introduced in the new contracts of 2008. It is now over 3 years since such contracts came into force. As noted above, the introduction of the management methods into the business of the Respondent is appropriate for the business and there exists legal safeguards in section 41 and 43 of the Employment Act to address any issues arising with regard to the tools being used to apply a sanction such as warnings or termination of employment. I find no violation of section 10 as read in its whole and in its application herein.

Remedies

105.On the claim and application of Performance Development Plans, Performance Improvement Plan and capability hearings, I find the Respondent as the employer has the prerogative to set out management tools in support of productivity within its business. However, such tools should not negate agreed terms and conditions of employment between the parties with reference to the Recognition Agreement of Collective Bargaining and Agreement and or replace the set legal requirements that address termination of employment due to poor performance or any other ground.

106.The Claimant has attached final warning letters issued to its members but no evidence was led in this regard that the same was without due process and noting the finding above with regard to application of management tools such as the Performance Improvement Plan and capability hearings being the prerogative of the employer/Respondent. The claimant also attached termination letters of -

Francis Ndirangu Wachirah dated 10th may 2013;

Peter Mathuku Mulandi dated 10th May 2013;

107.There was no evidence led in this regard at all. The court was not invited to make any specific finding in this regard. However, as set out above, the grounds that may lead to misconduct or gross misconduct under the policy of the Respondent do not include poor performance as one such grounds. There was no evidence called by the Respondent to demonstrate that before the terminations of Francis Ndirangu Wachirah or Peter Mathuku Mulandi due process and steps envisaged under the steps set out with regard to poor performing employees were followed. As noted above, the Respondent as the employer has the duty to demonstrate to this court that upon appraisal of the employee and a finding that the Performance Development Plans was not met, sufficient and reasonable plans were put in place and where there was still no improvement, the capability hearing was put in motion before the notices envisaged under section 41 of the Employment Act came to bear. See the judgment in George Kabue versus Nokia Siemens Networks [2014] eKLR.

108.The terminations having taken effect, where time allows, the Claimant is at liberty to pursue separate claims.

109.On the warning letters that the claimant is seeking to be declared illegal and unlawful, without going into specific warning letters, and noting their issuance and motions to the same were not gone into and noting all such warnings are based on the Performance Development Plans, Performance Improvement Plan or capability hearings, I find the Respondent has not utilised all the motions/steps in their Performance Development policy. Such internal procedures are not a replacement of notices and procedures of the law. Such shall remain as internal records of the Respondent and where the issue of poor per romance arises, having exhausted internal procedures, the Respondent shall comply with the legal requirements under section 41 and 43 of the Employment Act.

110.I find the contracts issued to all employees of the Respondent in 2008 comply with section 10 of the Employment Act, such contracts have been in force for the last 8years without challenge. Where there are key concerns with the manner of formulation of contract terms and conditions of employment, these are

matters the Claimant is at liberty to address in subsequent Collective Bargaining and Agreement.

111.Before conclusion, I find the Claimant was keen to have the cases of Mr Munyalo Mwania and Peter Chege addressed. These two were set out as the main witnesses. Peter chege was however terminated in the course of these proceeding. The letter of termination is based on peter chege being absent from duty. Such I find to be a matter clearly addressed in the Collective Bargaining and Agreement as to what should happen on such a reason for termination. This matter does not fall herein with regard to the declarations sought.

112. With regard to Mr Munyalo, as the main witness in support of the claim, in the interim the court addressed concerns raised by the Claimant. However, where there is specific and targeted harassment, intimidation, discrimination against the witness, whether directly or indirectly, such are matters the Claimant should address specifically. By calling Mr Munyalo as a witness herein, he became a protected employee of the Respondent under the purview of section 46(h) of the Employment Act. Where there is evidence that there is a direct or indirect link between his testimony in court and matters negative and affecting his employment based on the conduct of the respondent, such can be addressed separate from herein by the claimant.

Conclusion

Save for matters set out above especially under paragraphs 78, 85, 95, 101 and 110 the claims as set out shall not be allowed. Each Party shall bear own costs.

Delivered in open court at Nairobi this 29th day of August 2016.

M. MBARU

JUDGE

In the presence of:

Court Assistant: Lilian Njenga