



REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT
OF KENYA AT NAIROBI
CAUSE NO. 611 OF 2013

AVIATION & ALLIED WORKERS UNION.....CLAIMANT

VERSUS

KENYA CIVIL AVIATION AUTHORITY.....RESPONDENT

JUDGMENT

1. The Claimant Union filed suit on 2nd May 2013 and sought to have the issue framed as *non-implementation of the collective bargaining agreement and unfair placement of some staff as per Claimant salary structure* resolved. The suit was premised on the strike and a return to work formula reached prior to the signing of the collective bargaining agreement. The Claimant asserted that in the agreement the Respondent was to address the two issues of salary increment and the stalled CBA negotiations. The Claimant averred that by letter dated 27th January 2012, the Claimant wrote to the Respondent and brought to its attention the unfair placement of staff where the staff members were placed at the minimum entry point instead of the level they were at prior. The Claimant averred that the Respondent contrary to its agreement with the Claimant, had purported to implement the collective bargaining agreement without proper placement of staff and without considering the length of service of staff. The Claimant averred by letter of 20th April 2012, the Respondent wrote and advised the Claimant that the Respondent's board of directors had approved the new salary scales and placement of all officers at the minimum of the new salary scales based on the revenue generated by the Respondent and the sustainability of the new salaries. The Claimant asserted that it was not true that the Respondent does not have enough funds to enable it meet the new salary scales and placement of officers. The Claimant asserted that it wrote a letter to demand that the Respondent implements the correct salary placement for the staff of the Respondent. The Claimant sought declarations that the implementation of the new salary structures by the Respondent was not correct and that the Respondent was duty bound to discuss and consult the Claimant on matters affecting its unionisable employees. The Claimant sought an order directing the Respondent to implement the new salary structures and the resultant salary arrears be paid forthwith. The Claimant sought that the Court do issue orders and give directions as it may deem fit and just to meet the ends of justice and that the Respondent be condemned to pay costs and interest at court rates on the salary arrears due to the employees.

2. The Respondent filed a memorandum of defence on 27th June 2013. In the defence, the Respondent asserted that it had signed a recognition agreement with the Claimant on 17th June 2009 following which the parties negotiated a collective bargaining agreement and in May 2011 the Respondent undertook key corporate reforms amongst them the restructure of the Respondent to align it to its strategy for effective and efficient discharge of its mandate. The Respondent asserted that subsequent to the new organisational structure there was an increase in all the salaries. The Respondent averred that the effect of the Claimant's

demand is that the Respondent carries out a conversion of the old salary points to the new structure which was unsustainable and that the new structure requires gradual implementation in line with improvements in revenue. The Respondent denied that it was bound to involve the Claimant union in implementing the new salary structures and submitted that the same is the preserve of management. The Respondent asserted that the Claimant had not shown a basis for the allegation that the new salary had not been properly implemented.

3. The parties agreed to resolve the matter in terms of Rule 21 of the Industrial Court (Procedure) Rules 2010. The Claimant filed final submissions on 14th June 2016 and the Respondent filed submissions on 20th July 2016. In its submissions, the Claimant submitted that the issues that the court should determine were whether a collective bargaining agreement can be besieged to suit an employer's interest and whether the Claimant's members are entitled to the relief sought. The Claimant submitted that there were no consultations before the placement of the Respondent's staff contrary to the collective bargaining agreement dated 1st March 2012. The Claimant submitted that the implementation of the new salary structures was unilateral and in disregard of the Public Service Commission Regulations 2005 on seniority and duration of service.

4. The Respondent submitted that the Claimant had sought a declaration that the implementation of the new salary structures by the Respondent was not correct. The Respondent submitted that whereas the Claimant had alleged that the Respondent amended or modified the CBA, no evidence or particulars of such amendment or modification had been provided. The Respondent submitted that it implemented the new salaries by moving all the staff members from their previous salary scales to the starting point of the new salary scales. The Respondent submitted that the determination of seniority was on the basis of the current grade of the employee, the date the employee entered the grade, the previous grade, the date the employee entered the previous grade, the date of employment and the date of birth. The Respondent submitted that there was proper implementation of the new salary scales. The Respondent submitted that there is no basis for a claim for arrears as the claim on arrears was not particularised. The Respondent submitted that costs follow the event as was held in the case of **Jasbir Singh Rai & 3 Others v Tarlochan Singh Rai & 4 Others [2014] eKLR** by the Supreme Court of Kenya.

5. The dispute is one on implementation of a return to work formula and the CBA entered into by the parties. The Claimant asserts that the Respondent improperly implemented the new salary structures leading to improper placement of employees of the Respondent and causing massive underpayments of its members. The Court has had the benefit of assessing the allegations made by either side. On the basis of the documents availed by the parties, it is clear there is a valid collective bargaining agreement between the parties. The CBA makes provision therein on the respective roles of the parties.

6. Under the return to work formula entered between the Claimant and Respondent under the guidance of the Ministry of Labour on 4th November 2011, the issues in dispute were noted to be salary increment and stalled CBA negotiations. Under the return to work formula, the workers on go slow or strike were to resume duty immediately without victimisation from either party. The Respondent had in full offered salary increments for all staff from KCAA scale 1 to 14 and the same was to be implemented immediately and the Claimant had consented to the offer and that the salary increments be effected from 5th May 2011. This agreement was superseding an earlier agreement on return to work formula signed on 13th October 2011. The genesis of the squabble before court is this return to work formula. The pleadings filed by the Claimant are devoid of any proof that there was no salary increment or that the agreement made on 4th November 2011 was abridged by the Respondent in any way. All that is made are allegations that the new salary scale led to underpayment. In the Claimant's bundle there is a payslip for one of the employees for October 2011 and another for the same employee for November 2011. Though the November one is placed before the one for October, it is clear there was an increment. The basic salary in October 2011 for the employee was Kshs. 43,400/- with Kshs. 5,000/- house allowance while the basic salary in November 2011 was Kshs. 74,984/- with Kshs. 15,000/- house allowance. This was a marked increase. Arrears were paid in the November payslip. From the evidence the Claimant advances, it is clear there was implementation of the new salary scales with improvements in pay. There is no basis to assert that the new structures led to underpayments. The case from all accounts is fit for dismissal as the Respondent has

the managerial prerogative to hire, promote, demote or dismiss employees. There is no basis for the Claimant to assert that the Respondent exercised its mandate without reference to it. The only aspects the Respondent is bound to consult the Claimant on are set out in law and on the agreement between the parties. There is no proof that the Respondent abridged the law or failed to honour its agreement with the Claimant.

7. The Civil Procedure Act cap. 21 Laws of Kenya provides under Section 27(1) as follows:

*27(1). Subject to such conditions and limitations' as may be prescribed, and to the provisions of any law for the time being in force, **the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction shall be no bar to the exercise of those powers:***

*Provided that the **costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order***

[emphasis mine].

8. In the case of **Joseph Oduor Anode v Kenya Red Cross Society [2012] eKLR** Odunga J. referring the above provisions in the Civil Procedure Act stated thus in relation to costs:-

.....whereas this Court has discretion when awarding costs, that discretion must, as usual, be exercised judicially. The first point of reference, with respect to the exercise of discretion is the guiding principles provided under the law. In matters of costs, the general rule as adumbrated in the aforesaid statute is that costs follow the events unless the court is satisfied otherwise. That satisfaction must, however, be patent on record. In other words where the Court decides not to follow the general principles the Court is enjoined to give reasons for not so doing.

9. I have not found cause why I should not adhere to the principle that costs follow the event. The upshot of the foregoing is that the suit is thus dismissed with costs to the Respondent.

Orders accordingly.

Dated at Nairobi this 9th day of August 2016

Nzioki wa Makau

JUDGE

Delivered at Nairobi this 16th day of August 2016

Linnnet Ndolo

JUDGE