REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT AT NAIROBI

CAUSE NO. 370 OF 2009

(Before Hon. Justice Maureen Onyango on 13.3.2015)

UNION OF NATIONAL RESEARCH & ALLIED

INSTITUTES STAFF OF KENYA (UNRISK) ..... CLAIMANT

VERSUS

KENYA INDUSTRIAL RESEARCH &

DEVELOPMENT INSTITUTE (KIRDI) ..... RESPONDENT

JUDGMENT

This case was commenced by a Notice of Motion dated 16th July 2009 filed under certificate of urgency. It was supported by supporting affidavit of Zacharia Achacha, the Secretary General of the Union of National Research and Allied Institutes Staff of Kenya (UNRISK), the claimant herein. Filed together with the Notice of Motion was a Memorandum in support of the application and a verifying affidavit sworn by Zacharia Achacha.

The application was heard *ex parte* by **Justice Mukunya** (as he then was) with members Mr. Udoto and Mr. Alumande on 22nd July 2009.

In the Notice of Motion the claimant/applicant sought the following orders:-

1. This application be certified as urgent and be heard *ex parte* in the first instance.

2. The honourable court do issue an order of injunction to restrain the respondent from declaring the 52 grievants redundant as per it's letter dated 1st July 2009 and received by the claimant union on 14th July 2009.

3. Pending the hearing and determination of the Memorandum of Claim herein the respondent be restrained from terminating the 52 grievants from their employment.

4. That this honourable court do issue such orders and give such directions as it may deem fit and just to meet the ends of justice.

The application was supported by the following grounds:-

i. That the respondent through a backdated, letter received by the grievants on 13th July 2009 has purported to terminate the grievants from employment on account of redundancy.

ii. That the claimant union has not received the mandatory three (3) months notice of the proposed redundancy as required under Clause 10.4 of the parties Collective Bargaining Agreement (CBA).

iii. That the respondent has purported to declare the grievants redundant without issuing the one (1) month statutory notice to the Minister for Labour.

iv. That there are no good grounds for declaring the grievants redundant.

After hearing the claimant *ex parte* the court granted orders as follows:-

"That the respondent be and is hereby restrained by injunction from interfering with the employment of unionisable employees based on the 15 day notice issued on 1st July 2009 until the hearing and determination of the application."

The application was heard inter parties on 31st July 2009 by the same bench (**Mukunya J** with members Udoto and Alumande). After hearing the parties on the application the court stayed the proceedings and directed the parties to pursue conciliation of the dispute as reported to the Minister for Labour. The court further directed that the report of the Minister be filed in court within 90 days and fixed the case for mention on 10th November 2009.

The Minister's report was however not filed as directed. After numerous mentions and orders, the report was eventually filed on 2nd March 2012.

Parties were thereafter directed to file submission in respect of the report. The claimant opposed the report while the respondent filed submissions in support of the same.

The facts of the case as can be gleaned from the pleadings, submissions and report of Minister are summarized below.

The claimant union had a recognition agreement with the respondent and at the time material to this case had a valid collective bargaining agreement signed on 23rd July 2008. On 1st July 2009 the respondent issued letters of termination to 52 of its employees giving them notice of termination of employment.

A sample of the letter is reproduced below:-

"Our Ref: Temp.0109/08/1

Moraa K. Omwoyo

KIRDI

Thro' Head FTD-South B

Dear Madam.

RE: REVIEW OF TEMPORARY EMPLOYMENT

Reference is made to the above subject matter.

This is to inform you that due to the financial challenges currently being experienced by the Institute, the Board of Directors has decided that all staff on temporary employment be released.

You are therefore advised to note that your services will cease w.e.f 15th July 2009.

Management wishes to take this opportunity to thank you for your contribution to the Institute during your short stay and look forward to working with you when another opportunity arises.

By copy of this letter, the Payroll is advised to take note and act accordingly.

J. OMBUI

FOR: DIRECTOR

CC: HRO Compliment Control Payroll."

The employees had worked for the respondent on continuous 3 months renewable contracts of between 6 months and 2.5 years (according to the Minister's report).

The claimant contends that the terminations were redundancies while the respondent insists they were normal terminations.

The claimants prays that the court finds that the claimants were unprocedurally declared redundant and issues the following orders:-

a. **That the court finds the respondents action to be unlawful and unprocedural and that the letters be declared null and void.**

b. **The grievant employees be reinstated back to their former employment with full pay for the entire period they were out of employment and without loss of other benefits.**

c. **Withdraw termination letters dated 1.7.2009 given to 52 grievant employees.**

d. **Respondent to meet the cost of this application.**

The claimant has tabulated the terminal benefits to include notice of 3 months, accrued leave and leave pay, and golden handshake as provided in the CBA.

The Minister's report made the following **findings** and **recommendations**:-

"**Findings:**

- **Conciliation revealed that all the 52 employees were employed by KIRDI on diverse dates.**
- **Conciliation revealed that all the 52 employees were engaged on temporary appointment and were paid one month salary in lieu of notice.**
- **Conciliation also revealed that all the 52 employees had letters of employment being reviewed after every three months without breaks leading to a continuous service for the period of 6 months to 2 and half years.**
- **Conciliation revealed that the parties CBA prohibited temporary employees from being union members and as such the union failed to draw the attention of the management on unfair labour practice for keeping employees on temporary terms on such a long period.**
- **Conciliation established that all the 52 employees were terminated as per their letters of appointment by being given a month salary in lieu of notice.**
- **Conciliation established that KIRDI is a parastatal which operates on voted funds provided by Treasury.**

Recommendation:-

- **After careful consideration of both parties oral and written submission, I recommend that all the 52 employees be paid their terminal dues if any based on termination and not redundancy. As much as the employer cited financial crisis this can not lead to abolition of offices.**
- **The union and the management are both to blame for allowing temporary employees to be engaged on 3 months contract without breaks and from the foregoing its in the best interest the parties amicably resolve this dispute in a win-win situation by owning the genesis of the problems while adhering to the principle of utmost good faith.**

- **Finally I hope the parties will accept this as a basis of settlement of this dispute and ensure the same does not occur in future".**

The claimant submits that the findings and recommendations by the conciliator failed to recognize the contents of Clause 10.4 of the collective agreement on redundancy entitlement and the recognition agreement at paragraph 7 of page 1 under the title COGNISANT. The claimant further submitted that the findings and recommendations are in total violation of both the recognition agreement and collective bargaining agreement. The claimant urged that the conciliation report be rejected.

The respondent submitted that the 52 grievants were temporary employees who were not eligible to join membership of the union. The respondent further submitted that the contracts of all the affected employees had expired on 30th June 2009 and the respondent was justified in releasing the employees by serving them with 2 week notices by the letters dated 1st July 2009, and that the notices were generous as the respondent's rules and regulations provided for 7 days notice and that they were all given one months salary in lieu of notice.

The respondent further submitted that the provisions of the collective bargaining agreement were followed to the letter even though the 52 employees were not eligible for union membership, that the release of the employees was in good faith as the respondent was facing financial challenges. Further that the respondent being a parastatal had requested the Central Government for more funding to support employment of temporary staff but were unsuccessful. The respondent denied that the terminations amounted to redundancy.

From the foregoing the issues for determination are the following:-

1. Whether or not the 52 grievants were temporary employees.

2. Whether the grievants were entitled to union membership and to benefit from collective bargaining agreement.

3. Whether or not the grievants were declared redundant.

4. Whether the claimant is entitled to the reliefs sought.

1. Whether or not the 52 grievants were temporary employees:-

Clause 2.1 of the parties CBA under the title "CATEGORIES OF APPOINTMENTS" provides at Clause 2.1(a) as follows:-

"(a) Temporary Terms

Employees engaged on temporal terms shall work for a period not exceeding three (3) months after which their contract shall be reviewed. Management shall reserve the right to engage staff under these terms. Those engaged on temporal terms shall not be eligible to join the union".

As stated in the findings of the Minister which the respondent agreed with and supported, the grievants were employed on back-to-back contracts ranging from 6 months for the shortest term to two and a half years for the longest serving. This means that all the grievants were not casual employees as they had been in the continuous employment of the respondent for periods longer that 3 months provided for in the CBA.

I therefore find that the grievants were not temporary employees.

2. Whether the grievants were entitled to union membership and to benefit from CBA.

The CBA defines employee at PART "A" as follows:-

"EMPLOYEE" - means an officer in the service of the institute as defined in the Employment Act 2010 and **"INSTITUTE"** - means KIRDI

The CBA further provides at PART "B" Clause 2.0 under the title APPOINTMENTS as follows;

(a) DISCRIMINATION IN EMPLOYMENT

"No employee shall be discriminated against on grounds of race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, pregnancy, mental status or HIV status. This shall be in respect of recruitment, training, promotion, terms and conditions of employment, termination of employment or other matters arising out of the employment. An employer who contravenes this provision of the section commits an offence".

At paragraph 1.2 under the title "THE AGREEMENT" at sub-clause (a) it reads:-

"(a) SCOPE OF AGREEMENT

This agreement shall apply to all employees of the Institute from job group (IR.1) to job group (IR.15).

and at sub-clause (e);

"(e) UNION SHOP

(i) All the employees covered by this agreement shall become members of the union Membership.However, this is not mandatory.

(ii) This clause shall not become effective to the newly engaged employees until after they have been in the Institutes employment for one month".

From the foregoing provisions of the CBA, it is clear that temporary employees are not excluded from eligibility to join the union nor to benefit from the terms of the CBA. Clause 1.2 (e) (ii) specifically provides for membership of employees after they have been in the Institute employment for one month".

As stated in the Minister's report all the grievants had been in employment of the respondent for between six months and two and-a-half years. They were all therefore entitled to union membership and to benefit from the CBA.

3. Whether or not the grievants were declared redundant.

Redundancy is defined in Section 2 of Employment Act as:-

"Redundancy" means the loss of employment, occupation, job or career by involuntary means through no fault of an employee, involving termination of employment at the initiative of the

employer, where the services of an employee are superfluous and the practices commonly known as abolition of office, job or occupation and loss of employment".

The letter terminating the employment of the grievants gives the reasons for termination as financial challenges. This is obviously a redundancy.

I therefore find that the grievants were declared redundant.

4. Whether the claimant is entitled to the reliefs sought?

Having found that the terminations were in fact a redundancy, the redundancy was unlawful as the respondent did not comply with the procedure laid down in Clause 10.4 of the CBA. Due to lapse of time and the grounds of redundancy having been financial challenges, it is not possible to reinstate the employees as prayed by the claimant union. I therefore order that the grievants be paid as follows:-

i. 3 months basic salary as severance pay.
ii. 3 months basic salary in lieu of notice.

In view of the length of service of the grievants, I order that each of them be paid compensation of 3 months basic salary.

The parties are directed to embark on calculation of the payments due to each employee which should include any pending leave not taken by each employee for the duration of employment.

The respondent shall pay the claimant Kshs 50,000/= as costs for the case.

The case will be mentioned on 29th May 2015 before the duty judge for parties to confirm compliance.

Orders accordingly.

Dated and delivered in Nairobi this 13th day of March, 2015

MAUREEN ONYANGO

JUDGE

In the presence of:

…..... for claimant(s)

…..... for respondent(s)