



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.641 OF 2013

BANKING, INSURANCE & FINANCE UNION (KENYA) CLAIMANT

VERSUS

COMMERCIAL BANK OF AFRICA LTD RESPONDENT

JUDGEMENT

1. The issues in dispute herein are the unfair/unlawful redundancies and violation of the collective bargaining agreement (CBA) by underpayment of the grievants – Samuel Kimani Muigai and Shadrack Mburu Wambui.
2. The claimant, Banking, Insurance & Finance Union (Kenya) also called BIFU, filed the Claimant for the grievants Samuel Kimani Muigai and Shadrack Mburu Wambui on 8th May 2013 against the respondents Commercial Bank of Africa Ltd a commercial bank. The defence was filed on 4th June 2013 and the Respondent admitted employing the Claimant but that their contracts of service expired and were not renewed and hence denies the claims. On 3rd March 2014, the Court allowed the Respondent to amend the defence and the Claimant Respondent thereto. At the hearing the Claimant called Samuel Kimani Muigai gave evidence and the Respondent called Irene Wanjiru Kamau. At the close of the hearing both parties agreed to file their written submissions. However on 11th May 2015 when the Court was to confirm such filing and allocate for judgment, both parties were absent and no submissions had been filed.
3. The claim by Shadrack Mburu Wambui has since been settled and no withdrawn on 8th April 2014.

Claimant's case

The claimant's case is that the two grievants Samuel Kimani Muigai and Shadrack Mburu Wambui were employed by the Respondent who unfairly declared redundancies that caused the termination of the grievants and in the process failed to adhere to the collective CBA between the parties. Samuel Kimani was employed on 8th December 1998 as a Messenger and was posted to work at the Respondent Branch along Wabera Street on a consolidated salary of Kshs.17, 256.00. Upon confirmation the Claimant was not accorded the benefits under the CBA especially house allowance or owner occupier house allowance but he continued in service. For 15 years the Claimant remained in service.

4. On 7th January 2013 the grievant got a letter from the Respondent seeking to renew his contract for 3 months – January to March 2013. He received the letter under protect on the ground that he was being discriminated against as some union members had permanent jobs and better terms while he remained on short term contract. The grievant reported to the Claimant and when negotiations failed to bear fruits with the Respondent the union applied the provisions of section 60 of the Labour Relations Act and reported a

dispute with the Minister. Parties did not agree and the appointed conciliator filed a certificate of an unresolved dispute.

5. Upon the employment of the grievant, there was a CBA with the claimant. All staff were engaged on permanent and pensionable terms and employees based on an agreed scale stating the allowances that included housing, leave, and meals. The grievant was not given his allowances. The CBA had no provision for short terms contracts and when the Respondent engaged the grievant as such, it was a breach of the CBA and amounted to discrimination to treat staff differently. The employees on contract were 15, all were confirmed into full time employment save for the grievant.

6. When the Respondent declared redundancy, clause A 7 of the CBA was never followed as well as section 40 of the Employment Act. The failure to renew the grievants contract after serving for 15 years was contrary to section 45 of the Employment Act, and thus unfair. The Claimant is seeking for a declaration that the grievant termination of his contract is unfair; reinstatement back to their positions without loss of benefits; payment of due salaries; compensation for unfair termination together with costs.

7. In evidence, Samuel Kimani Muigai testified that when he was employed by the respondent, he was on contract from 1998 and his position was that of a Messenger. His contracts were for two years and had a condition for renewal subject to availability of work and satisfactory performance. After probation he was confirmed and he understood this to mean that he was engaged permanently. In 2012 he was promoted to Clerical officer and to lead a team in meeting the respondent's objectives. When each contract expired, the Claimant was issued with a new one. He acknowledged receipt of each new contract under duress for fear that that he would lose his job.

8. The grievant also testified that he was in a team of 15 employees who were all taken on permanent basis. In January 2013 he was issued with a 3 months contract and on 31st March 2013 he was terminated without being given any reason. He was terminated together with another colleague while the rest became permanent. When the Claimant was confirmed, he joined the union which had a CBA with the respondent. He did not get all the benefits in the CBA. His salary was kshs.17, 256.00 without allowances and the CBA scales for the same position had a provision for Kshs.15, 936.00. He was paid more than under the CBA. After the 15 years, his last salary had progressed to kshs.55, 813.00 and his allowances were at kshs.4000.00 lower than the CBA and hence an underpayment.

9. The Claimant is seeking reinstatement as there was no basis for the termination, the Claimant was aged 46 and not able to get a new job and has a family that depends on him.

10. In cross-examination, the grievant confirmed that while in the employment of the Respondent he was under a contract. Upon its expiry, he was issued with a new one. Upon expiry of each such contract he was paid gratuity. That he was underpaid. In March 2013 he was paid Kshs.55, 800 while the CBA provided for kshs.65, 000.00. When he received his gratuity, he took it to be a *thank you* for his good performance.

Respondent's case

11. In defence, the Respondent stated that when they employed the grievant, he was on contract at all material times. Each contract gave the time period, the remuneration, gratuity applicable, and a termination clause. Upon the expiry of each contract, the grievants was paid his gratuity which he acknowledged. In this case section 35 of the Employment Act applies in that the fixed term contract had a fixed term that expired and the CBA did not outlaw the application of contract employment.

12. The Respondent also stated that the grievant was neither declared redundant or terminated as his fixed term contract came to an end and was not renewed. Section 45 of the Employment Act has no application in this case and the claim should be dismissed with costs.

13. In evidence, Irene Wanjiru Kamau testified that she is the respondent's group Human Resource officer since 2010. This is not a termination case of redundancy, the grievant was issued with a contract

with a fixed term that has since expired and was not renewed. In this case, the grievant was under a contract and upon its expiry, he was paid gratuity.

14. The witness also stated that the Respondent was rebranding its business and internally it was agreed that each work team should have a Brand Commissioner, where the Claimant was elected, not as a promotion but as a team leader in that regard. He was issued with a letter by the Respondent to this effect. In 2011 to 2012 the Respondent assessed all its roles to see if they fitted the business need, and some staff was laid off. The Respondent offices sat with each affected staff member; all the affected staffs were given 3 months contracts to cushion them and to allow them to look for anything else. The grievant in this regard was called and the witness explained to him about this development. All the staffs in each category were treated equally without discrimination.

15. The witness also stated that when she held a meeting with the grievant, he expressed his fear with regard to his daughter and it was agreed that he would be retained on the medical scheme; he said that he was undertaking a course and the Respondent agreed to bring the fees schedule but he never presented it; all these being support measures taken to make the grievant competitive in his area of work and to ensure that by the time of the expiry of his contract he was ready.

16. The Respondent only entered into a CBA with the Claimant in December 2013 and from January 2010 the grievant was paid the applicable CBA amount and when it was time to renegotiate the CBA, the Respondent noted an underpayment in house allowance of kshs.4, 000.00 instead of Kshs.5, and 000.00. The salary amount was better than the CBA amount. That the Respondent is willing to pay the acknowledged underpayment.

17. The Claimant for reinstatement is not possible as there is no position that is vacant. The Respondent has since outsourced messenger function to an independent entity.

Determination

Whether there was a redundancy

Whether there was a violation of the CBA and underpayments

Whether there are Remedies

18. The Claim by the 2nd grievant Shadrack Mburu has been settled.

19. In labour relations, the right to contracting is inherent. In an employment relationship, the law has made it an intrinsic requirement to contract in writing. Therefore, the right to exercise the power of contracting has not been extinguished by the Employment Act. It has actually been enhanced by section 7, 8, 10 and 9 which require written contracts of service that outline the terms and conditions of service. In this case, the grievant admitted that he under a written contract at all material times during his employment with the respondent. When new terms or periods were changed, there was a written communication to this effect.

20. On the question as to whether there was an unfair redundancy, this is twofold in that where an employee is on contract with a fixed period, once it has expired; there is automatic termination by effluxion of time. Termination of employment can also occur in a case where there is a valid contract but due to a situation of redundancy, the employer is forced to terminate. In this case there was a contract that expired in time however the Claimant is seeking that there was also a process of redundancy and that this was unfairly applied to the grievant. Based on the evidence on record, it is apparent that the Respondent was in the process of reducing its staff, the grievants being a messenger and on contract similar to Shadrack Mburu, was given notice. On the one hand the grievants qualification was wanting and his position was outsourced to an independent entity while Shadrack Mburu was terminated as his function abated with the death of the Respondent chairperson. I take it then the Respondent took advantage of the fact that they had a contract with the Claimant that lapsed in January 2013 and to cushion him for the

eventuality of what would have been otherwise a redundancy process, gave him a short term contract of 3 months. In the intervening period, both parties confirmed that there were negotiations to ensure the grievant was on his feet even as he completed his last contract. Due to family needs his medical cover was extended and the Respondent offered to address his ongoing course/training fees upon production of the fees structure. These I find, are good efforts in labour relations for an employee under a fixed term contract. Where redundancy arose, the Respondent did not violate the terms of the existing contract they had with the grievant. All agreed terms and dues were settled and acknowledged by the grievant. There was therefore no unfair redundancy in this case.

21. On the applicable CBA and submission that there was a violation, it was agreed by both parties that there is now a new CBA that took effect on December 2013, a period after the grievant had been terminated. However since January 2010, the grievant had been paid as under the CBA applicable. The grievants evidence was that his contract remuneration was in some case higher than the CBA scale however his house allowances were lower to which the Respondent admitted and was willing to pay. In this regard, I note the Claimant had an existing CBA with the Kenya Bankers Association where the Respondent was a member. The terms and conditions of unionisable employees applicable in this CBA therefore became applicable to the grievant who had since joined the Claimant union. The benefits that accrued to the reinvert under the applicable CBA are due. In the analysis of the case and evidence, the only underpayment is as admitted by the Respondent at kshs.126, 000.00 as due from 1999 to 2013.

In conclusion, save for the admitted underpayments due at Kshs.126, 000.00 that is confirmed, other claims shall not be granted. For the continued industrial peace with the parties herein, each party shall bear their own costs.

Delivered in open Court dated and signed in Nairobi on this 25th day of May 2015.

M. MBARU

JUDGE

In the presence of

Lilian Njenga: Court Assistant

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