



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

CAUSE NO. 2119 OF 2014

KENYA CHEMICAL AND ALLIED

WORKERS UNION CLAIMANT

VERSUS

EAST AFRICAN PORTLAND CEMENT

COMPANY LIMITED RESPONDENT

(Before Hon. Justice Hellen S. Wasilwa on 6th July, 2015)

JUDGMENT OF THE COURT

1. The Claimants herein filed their Memorandum of Claim on 26/11/2014 through the national General Secretary. The issue in dispute is failure by the Respondent to effect general wage increases to some unionsable employees as per the current Collective Bargaining Agreement.
2. The Claimants aver that they have a valid recognition agreement with the Respondent which dates back to 6th September 1961 as per their **Appendix 1**. The parties have voluntarily negotiated several Collective Bargaining Agreements with the last one becoming effective from 1st August 2012 having been signed on 19th December 2013 and registered by the Industrial Court of Kenya at Nairobi on 4/2/2014 as per **Appendix 2**.
3. It is the Claimants case that after registration of the Collective Bargaining Agreement in February 2014, the Respondent implemented the same from February 2014 selectively in that the Respondent did not effect new rates of pay as agreed in the current Collective Bargaining Agreement on monthly basic wages to some of its employees whom they classified as on contract though they are employed to work in unionisable jobs as contained in the Collective Bargaining Agreement and are also Claimant's members who pay union dues on monthly basis through check off system form facilitated by the Respondent in accordance to the provisions of Section 48 of the Labour Relations Act Number 14 of 2007. The list of some of the affected employees is attached as **Appendix 3**.
4. It is also the Claimants case that prior to this present case, there was a protracted trade dispute between the Claimants and Respondent being cause No. 1451/2011 (Appendix 4). The case culminated in the court ruling that the classified employees had a right to join a trade union hence the consent to deduct and remit their trade union dues (**Appendix 5**).
5. The Claimants have further submitted that during the life of the previous Collective Bargaining

Agreement, covering 1/8/2009 to 31/7/2012, the Claimant union negotiated with Respondents for general wages review of the same class of workers i.e. casual and contract employees where an agreement was drawn and signed by the parties representatives. The wages increases agreed upon for such employees was to be administered as per **Appendix 6** herein attached.

6. Prior to filing this case, it is the Claimants case that they tried to approach the Respondent to effect the payments as agreed but they didn't succeed. This prompted them to report a trade dispute to the Cabinet Secretary for Labour as required under Section 61 (2) of the Labour Relations Act 2007.

The Minister appointed a Conciliator who tried to reconcile the parties in vain. Subsequently the Conciliator released his findings recommending that the management staggers the wage increments awarded by the Collective Bargaining Agreement to the staff on fixed term contracts in sustainable installments, taking into account the wage increment awarded to the group of employees as from 1/1/2013 outside the Collective Bargaining machinery.

7. The Respondents later on however failed to implement the Conciliator's recommendation terming it unsustainable. It is for this reason that the Claimants are before this court seeking orders as follows:

1. ***A declaration that by the Respondent engaging unionisable employees to its enterprises and subjecting such employees to inferior pay, terms and conditions of employment under fixed term contracts violates or breaches clauses 1, 5 (iv) and 11 of the parties Recognition Agreement and the preamble or scope of application Clause No. 1 as well as Clause No. 2- Classification of jobs and wages structure of the existing Collecting Bargaining Agreement.***
2. ***An immediate withdrawal of the inferior pay, terms and conditions of employment and the expunging of the fixed term contracts issued by the Respondent, or through any other purported Agency for that matter to all employees individually and severally working at the Respondent premises.***
3. ***Immediate conversion of all unionisable employees under fixed term contracts who are Claimant members into permanent and regular terms under the registered Collective Bargaining Agreement with effect from the date one was first employed by the Respondent either under a fixed term contract or on temporary basis.***
4. ***The calculation of all salaries/wages and benefits accruing under (i) and (ii) above, and the immediate payment thereof by the Respondent to each employee.***
5. ***Special damages in terms of loss of benefits and salaries/wages arrears to all employees under prayer (i) and (ii) above unlawfully contracted on inferior terms.***
6. ***Any other suitable remedy which the Honourable Court may deem necessary to meet ends of justice.***
7. ***Cost of this suit be provided for.***

8. The Respondents filed their Memorandum of defence on 14/4/2015 through Raymond Molenje of Federation of Kenya Employers (FKE). They denied the Respondents averments but admit that they have a valid Recognition Agreement with the Claimant's since 6th September 1961 as per Claimant's **Appendix 1**. They also admit that they have negotiated numerous Collective Bargaining Agreements with the Claimants since 1961 and proceeded to fully implement them, the last ones being for the period 2009 to 2012 and 2012 to 2015 (**Annex 1 (a) and (b)**).

9. The Respondents aver that since 1961 there has been a standing agreement between the Claimant and the Respondent that the Respondents employees engaged on contractual terms have not been part of the Collective Bargaining Agreement and their terms and conditions of service was

determined by the Respondent as per a sample appointment letter **Appendix 29**.

10. The Respondents further contend that, that aspect of the contracted employees not being covered under the Collective Bargaining Agreement is well highlighted in an agreement made between the Respondent and Claimant on separate payment modes as per **Annex 3** of the defence which the Respondent proceeded to implement.
11. The Respondents therefore contend that the Claimants cannot be allowed to retract it and demand that all contract staff be covered under the Collective Bargaining Agreement without the parties negotiations.
12. The Respondents submitted that if the Claimants now wish to have the contract staff covered under the Collective Bargaining Agreement, the Claimants should make such a request during the Collective Bargaining Agreement negotiations and not lodge a claim for non-implementation when the issue has not been negotiated by the parties.
13. The Respondents have further submitted that the current total wage bill for all contract staff amounts to 38.8 million per month (**Annex 7 of defence**) and for all permanent unionisable staff is 44.5 million per month (**annex 8**) and therefore if all the contract staff are incorporated in the Collective Bargaining Agreement, the Respondent will be left with no alternative but to declare all contract staff redundant at a cost of approximately 156.6 million which will be to the detriment of both the contract employees and the Respondents (**Annex 9**).
14. It is also the Respondents position that the contract staff are well remunerated over and above the Statutory Minimum Wages and the Claimant's claim for poor working conditions is incorrect and misleading since the wages for the contract staff was negotiated separately between the Claimants and the Respondents (**Annex 10 of defence**).
15. The Respondents have also submitted that Article 41 of the Constitution is subject to limitation and therefore restriction of Management Staff to join union is a reasonable restriction and participation of trade unions in management of companies cannot extend beyond that which is agreed upon by the parties under their recognition agreement and the Collective Bargaining Agreement.
16. They also submit that the Employment Act 2007 makes provisions for casual employment, fixed term contracts and open ended contracts and therefore the Respondents fixed term contracts are legal, regular and in compliance with the Employment Law and Practice and cannot be termed as unfair.
17. The Respondents have cited several authorities – (see **Kenya Airways Limited vs Kenya Airlines Pilots Association (2013) eKLR** and **Kenya Plantation and Agricultural Workers Union vs Unilever Tea Kenya Limited (2013) eKLR** where the court declined to interfere with what is purely in the province of the parties to the Collective Bargaining Agreement within the confines of the applicable national and international law.
18. The Respondents therefore seek that this court finds this case without merit and direct the parties to negotiate over the terms and conditions of the contractual staff in the next Collective Bargaining Agreement cycle.

Issues for determination

19. Having heard both parties and having considered their respective submissions, the issues for determination by this court are as follows:
 1. ***Whether the terms and conditions of service of Respondents contract staff have been negotiated and agreed upon by Claimants and Respondents in their Collective Bargaining Agreement.***

2. ***If so whether the Respondents have breached the terms of the said Collective Bargaining Agreement.***

3. ***If so what remedies are available in the circumstances?***

20. On the 1st issue the Collective Bargaining Agreement in question is the one signed by the parties on 19/12/2013 and the Collective Bargaining Agreement was for a period of 36 months with effect from 1st August 2012, and this technically ends on 31st July 2015.

Under Clause 1:

“The terms and conditions of service set out in this agreement shall be observed by the company for those employees who are “members’ within the definition in the Memorandum of Agreement relative to the recognition and negotiating procedure between the company and the union”.

21. The term ‘Members’ is not defined in the Memorandum of Agreement. However under Section 48 of the Labour Relations Act:

“In this part ‘trade union dues’ means a regular subscription required to be paid to a trade union by a Member of the trade union as a condition of Membership”.

22. From the reading of this section, payment of trade union dues is what makes an employee, a member of a trade union. This payment should be made voluntarily by the member whereby deductions are only deducted by the employees on the express instructions of the employee.

23. From this finding, it is clear that members paying trade union dues are members of the union and therefore covered by the Collective Bargaining Agreement negotiated whether permanently employed or on contract. There was a previous dispute between the parties in case 1451/2011 where the issues in dispute concerned deduction and remittance of union dues and this suit was settled as per ***Appendix 5*** (Claimants documents) culminating in the Respondents agreeing to deduct the said union dues as per the list submitted dated 30th May 2011.

24. On the 2nd issue, the Respondents have conceded that the dues paid to staff on contract are different from that paid to staff who are permanent employees of the Respondent though unionisable. The reason the Respondents advance for this is that putting the wages on the same level is unsustainable and if implemented the Respondents would require 71.3 million per month which funds are not available to the Respondent. This, thus the Respondents contend can lead to redundancies being undertaken which can lead to loss of employment of over 632 contract staff.

25. By conceding that they are paying staff on contract less than those on permanent basis the Respondents have breached the terms of the Collective Bargaining Agreement.

In the cases cited by the Respondents, the issue was not on breach of terms of the Collective Bargaining Agreement but on a term the parties wanted included as a term of contract though not negotiated in the Collective Bargaining Agreement.

26. The Claimants have submitted that the Respondents are being discriminatory in the way they are treating the workers on contract.

27. Section 5 of Employment Act 2007 states as follows:

“(1) It shall be the duty of the Minister, labour officers and the Industrial Court:

a. ***to promote equality of opportunity in employment in order to eliminate discrimination in employment; and***

b. *to promote and guarantee equality of opportunity for a person who is a migrant worker or a member of the family of the migrant worker, lawfully within Kenya.*

(2) An employer shall promote equal opportunity in employment and strive to eliminate discrimination in any employment policy or practice.

(3) No employer shall discriminate directly or indirectly,

against an Employee or prospective employee or harass an employee or prospective employee:

a. *on grounds of race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, pregnancy, mental status or HIV status;*

b. *in respect of recruitment, training, promotion, terms and conditions of employment, termination of employment or other matters arising out of the employment.*

28. Article 27 of the Constitution of Kenya also guarantees equality and freedom from discrimination.

ILO Constitution 98 which has been ratified by Kenya at Article 1 provides that workers shall enjoy adequate protection against acts of anti-union discrimination in respect of their employment.

ILO Constitution 100 Equal Remuneration Convention also ratified by Kenya provides at Article 2 as follows:

“Each member shall, by means appropriate to the methods in operation for determining rates of remuneration, promote and in so far as is consistent with such methods, ensure the application to all workers of the principle of equal remuneration for men and women workers for work of equal value”.

29. Payment of different wages for workers performing similar work is discrimination. It would not in my view matter whether they are on contract or not so long as the work performed is similar. Being on contract job is bad enough when others doing a similar job who are on permanent engagements are being paid more and those on contract are paid less. That is discrimination.

30. I therefore make a finding that the Respondents breached terms of the Collective Bargaining Agreement by partially implementing it in favour of only workers on permanent engagement.

31. I therefore find that the Claimants case has merit and order that the Respondents do implement the Collective Bargaining Agreement as negotiated. Where there are problems of implementation for the reasons that it is unsustainable, the Respondents should renegotiate the implementation process for purposes of reaching an amicable settlement beneficial to all parties.

Read in open Court this 6th day of July, 2015.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Miss Oyombe for Respondent – Present

Mueke for Claimant - Present