



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO 642 OF 2013

BANKING INSURANCE AND

FINANCE UNION OF KENYA.....CLAIMANT

VS

KENYA COMMERCIAL BANK LIMITED.....RESPONDENT

AWARD

Introduction

1. The Claimant, Banking Insurance and Finance Union of Kenya (BIFU) is a registered trade union generally covering the Finance Sector. The Respondent, Kenya Commercial Bank Limited is a member of an employer's association for banks known as Kenya Bankers Association (KBA). BIFU and KBA has a Recognition Agreement (RA) on the basis of which successive Collective Bargaining Agreements (CBA) have been negotiated and concluded. The CBA relevant to this claim is the one dated 19th August 2013.

The Claimant's Case

2. The Claimant's claim is contained in a Statement of Claim as amended on 17th April 2014. The dispute as pleaded in the Statement of Claim arises from unpaid salaries to reinstated employees, failure to consult the Union in the administration and management of workers' medical scheme, overtime compensation and meal allowances, frustration of workers' representatives, phantom promotion of unionisable employees to management level as well as the terms and conditions of service for management trainees.

3. The Claimant's prayers are as follows:

- a. Kshs.7,160,135.00 being withheld salaries and allowances for the period the affected employees were out of employment up to the date of reinstatement;
- b. Kshs.912,628.19 being overtime compensation;
- c. An order directing the Respondent to involve the workers' representatives in the administration and operation of the staff medical scheme as required under the CBA;
- d. A declaration that the Respondent's practice of putting newly engaged employees on a one year training followed by a six months' probation is a bad labour practice;

- e. An order directing the Respondent to include at least two members of the Central Staff Committee into the Respondent's Disciplinary Committee;
 - f. A declaration that all employees who were forcefully promoted and thus rendered non unionised are entitled to union membership and collective bargaining.
4. At the beginning of the trial, the Claimant abandonment the claims on involvement of the Union in the administration and management of the workers' medical scheme and payment of meal allowances. In its final submissions, the Claimant further abandoned the claim on phantom promotion of unionisable employees to management grades.

The Respondent's Case

5. In its Memorandum of Defence dated 9th September 2013 and amended on 23rd May 2014, the Respondent admits the existence of a Recognition Agreement between the Claimant and the Kenya Bankers Association. The Respondent also admits that several CBAs have been negotiated with the latest being the on signed between the Claimant and KBA.
6. With regard to the claim for back salaries for reinstated employees, the Respondent states that it was under no obligation to pay the reinstated employees during the period these employees were out of employment. The said employees were reinstated on appeal in which they were found culpable but their punishment was reduced from termination to warning.
7. Accordingly, their reinstatement letters notified them that the reinstatement would take effect from the date the employees reported for duty. The period of absence was thus treated as leave without pay as a condition for reinstatement. The Claimant's claim that the Respondent had violated Clause A5(c)(iii) of the CBA was therefore denied.
8. The Respondent denies that all newly recruited employees are placed on a one year probation. The Respondent however admits that it employs graduate trainees for a period of one year, after which the trainees, may be offered full employment after evaluation. The said trainees are not employees on probation as alleged by the Claimant. Employees on training learn on the job, at the expense of the employer and consequently are not employees under probation. The CBA does not cover trainees and the sliding salary scales do not apply to them.
9. While admitting that overtime compensation is payable under the CBA, the Respondent denies that it has failed to pay for any authorised over time.

Findings and Determination

10. At the close of hearing the parties both orally and by written submissions, the following issues remained for determination by the Court:
- a. Whether the reinstated employees are entitled to be paid salaries during the period they were out of work;
 - b. Whether Graduate Trainees are eligible for CBA cover;
 - c. Whether the Claimant has made out a case for payment of accrued overtime compensation.

Payment of Salaries to Reinstated Employees

11. On diverse dates, the Respondent Bank terminated the employment of the Claimant's members who are now the subject of this case. One such employee was Irene Munyao whose employment was terminated by letter dated 22nd May 2013 stating as follows:

“Dear Madam,

RE: TERMINATION OF EMPLOYMENT

This has reference to the correspondence exchanged, discussions held with you and the disciplinary interview held on 06.05.2013.

We advise that further investigations have been undertaken based on the issues you raised. Investigations have established that you committed acts of gross negligence, details of which are well within your knowledge. As a consequence, the Bank has lost confidence in you and your services with the Bank is (sic) hereby accordingly terminated with effect from today's date in terms of Clause 5(d) of the Collective Bargaining Agreement covering Section Heads, Check Clerks, Clerical, Technical and Subordinate Staff.

All money due to you including one month's salary in lieu of notice will be paid to you in due course.

Please arrange to clear your indebtedness with the Bank (if any) and surrender to the bank any bank property in your possession.

Your loans shall be converted to public terms with effect from 30.05.2013.

You are requested to contact the Head of Credit Administration within 15 days of the date of this letter with a proposal on how you intend to settle your loan liabilities.

In the event of non-submission of a repayment proposal within 15 days from the date of this letter, the debt recovery procedures shall be engaged in line with the original letter(s) of offer issued and accepted at the onset of the borrowings.

Kindly sign the attached copy to acknowledge receipt of this letter.

Yours faithfully,

(Signed)

ROBLEY NGOJE

BRANCH MANAGER, ONGATA RONGAI

12. Curiously, the Disciplinary Committee that sat to hear Irene Munyao's case on 6th May 2013, had not recommended the termination of her employment. On the contrary, the Committee had recommended as follows:

“There is no evidence of divulgence of password by the staff, either intentionally or negligently. Mr. Yatich has admitted to the management having been given the passwords by someone who is not an employee of KCB. Forensic should investigate and advise how the fraudsters managed to obtain the passwords of both the SQC Manager and the teller. From the explanations given we cannot confirm beyond any reasonable doubt the (sic) Irene Munyao gave out her password or was negligent resulting in her password being obtained and used by fraudsters. We therefore do not recommend any disciplinary action against Irene Munyao.”

13. It would appear that there were further internal processes regarding Irene Munyao's case and on 2nd December 2013, the Bank wrote to her as follows:

“Dear madam,

RE-EMPLOYMENT

This has reference to your appeal against termination from employment.

After examining the facts relating to the case that led to your termination from employment and your grounds of appeal, it has been decided that you be re-engaged in employment. You have been posted to Kipande House Branch.

The Branch Manager, Kipande House Branch will allocate you work that is comparable to that in which you were employed prior to your termination of employment or other reasonably suitable work.

Consequently, the termination letter dated 22.05.2013 has been cancelled. The days you have been away will be treated as leave without pay. All other terms relating to your service in the bank prior to your termination from employment shall apply with effect from the date you report for duty. It is a condition of this re-employment that you will work more diligently and apply yourself fully to the Bank's work and Policies.

Please report to the Branch Manager, Kipande House Branch as soon as possible but not later than 9th December 2013.

Please indicate your acceptance of the terms and conditions stated above by signing the duplicate copy of this letter and returning it to the Human Resource Division.

Yours sincerely,

CHARLES MARANGA

DIRECTOR, HUMAN RESOURCES

14. The cases relating to all the other reinstated employees followed as similar track. The terminations were remedied and are therefore not part of the dispute before the Court. What is in issue is the Respondent's decision to treat the period of termination as leave without pay.

15. Whatever the heading of the letters that brought Irene Munyao and her colleague's back to the Respondent's employment, it seems to me that the intention was to restore the employees back to the positions they occupied prior to their termination. Reemployment or reinstatement is ordinarily premised on the fact that no wrong is assignable to the employee.

16. From the evidence available to the Court, it would appear that the Respondent, through its own internal mechanisms, realised that the termination of the employees' employment, being the ultimate disciplinary action, was not supported by adequate evidence of culpability of the part of the employees.

17. The Respondent's Head of Employee Relations and Wellness, Laban Sogomo told the Court that the termination letters were replaced with warning letters. In the hierarchy of disciplinary actions, there is a wide gap between a termination and a warning. Significantly, a warning letter does not ordinarily lead to forfeiture of salary except in cases of surcharge while an employee on termination is never on salary. It is my view therefore that to introduce a clause that denies an employee salary in a letter of reemployment or reinstatement is to introduce an unconscionable term into an employment contract.

18. Black's Law Dictionary (Ninth Edition) defines an unconscionable agreement as:

“An agreement that no promisor with any sense, and not under a delusion, would make, and that no honest and fair promisee would accept.”

19. It was submitted on behalf of the Respondent that because the employees accepted the

condition that the period they were out of work would be treated as leave without pay, then they cannot be heard to complain at this stage. I disagree. Employment contracts are not the same as commercial contracts where the parties have equal bargaining power. An employee who is out of employment cannot bargain on a round table with the employer who holds the power to rehire the employee.

20. The Court therefore finds the clause in the employees' reemployment letters, that the period they were out of work would be treated as leave without pay unconscionable. Consequently, the offending clause is hereby quashed and set aside.

The Graduate Trainee Program

21. The Claimant states that the Respondent's Graduate Trainee Program is a ploy to deny a category of employees union representation and CBA benefits. In response, the Respondent states that the Program is aimed at affording fresh University Graduates an opportunity to gain valuable work experience to enable them enter the job market and the Bank does this at its own cost.

22. It is not in contest that the Respondent appoints fresh University Graduates. A sample appointment letter for this position states as follows:

“Dear xxxx,

LETTER OF APPOINTMENT-GRADUATE TRAINEE

We refer to the interview that you had with us and are pleased to advise that, subject to your passing the Bank's Medical Examination, and also subject to our receiving favorable letters of reference on you, we shall appoint you as a Graduate Trainee with effect from xxxxxx to xxxxxx. You will join the Bank on the Terms and Conditions set out here below:

- 1. Your place of work will be Othaya Branch in the role of Graduate Trainee.*
- 2. You will be paid a Consolidated Gross Salary of Kshs. 38,000 per month. Your performance will be assessed during the duration of the contract.*
- 3. Your services with the Bank may be terminated by either party giving one month's notice in writing or paying one month's salary in lieu of notice.*
- 4. For the duration of the contract, leave of 26 working days will be granted.*
- 5. The Bank's Medical Scheme shall be available to you, your spouse and four (4) children up to the age of 18 years for the contract duration.*
- 6. You shall be covered in respect of death or injury arising out of and in the course of your employment in accordance with the Work Injury Benefits Act.*
- 7. You will be expected to live on your salary and at no time incur debts without valid cause, which cannot be covered by your emoluments.*
- 8. You will not engage or be employed in any other business or occupation whilst in the service of the Bank, except with prior permission of the Chief Executive in writing.*
- 9. The strictest secrecy must be observed regarding the Bank's business, and no information whatsoever may be disclosed relating to the business transacted by the Bank or any of its customers.*
- 10. You will be expected to undertake a mandatory induction & orientation program through*

KCB Group Academy.

Please signify your acceptance of this appointment by signing the duplicate copy of this letter in the space provided, and returning it to us.

Yours sincerely,

XXXXXXXXXX

GROUP HUMAN RESOURCES DIRECTOR

23. The Claimant's argument is that because the Graduate Trainees perform the same duties as Graduate Clerks, then they ought to be covered under the CBA and their terms of employment adjusted accordingly. On its part, the Respondent states that Graduate Trainees enter the Bank through a one year training program after which they are either absorbed into the Bank establishment or are released to work for other employers. The important thing is that by the end of the one year training program, the Graduate Trainees are ready for the job market.

24. The question then is whether Graduate Trainees engaged under the Respondent's Graduate Trainee program run are unionisable employees within the meaning of the Recognition Agreement and Collective Bargaining Agreement between the Claimant and Kenya Bankers Association.

25. Section 2 of the Employment Act, 2007 defines an employee as ***“ a person employed for wages or a salary and includes an apprentice and an indentured learner”***

26. An indentured learner is defined under Section 2 of the Industrial Training Act, 2012 as ***“a person other than an apprentice, who is bound by a written contract to serve an employer for a determined period of not more than two years with a view to acquiring knowledge of a trade in which the employer is reciprocally bound to instruct that person”***

27. From the evidence on record, it seems to me that persons employed by the Respondent and other employers as Graduate Trainees are indentured learners within the meaning of the Industrial Training Act, 2012. I agree with the Respondent that the Graduate Trainee Program run by banks and other employers is a useful avenue for fresh University Graduates to acquire experience that is required for the job market.

28. To convert the trainees under these programs into regular establishment either under the unionisable category or as part of management would be to abolish the Graduate Trainee Programs, an action that would undermine the public interest. For this reason, I decline to grant the Claimant's prayer under this head.

Overtime Compensation

29. With regard to the claim for overtime compensation, the only thing I will say is that although the CBA provides for it, no evidence was led for specific accrued overtime not compensated. The claim must therefore fail and is dismissed.

Final Award

30. From the foregoing, the only claim that succeeds is the one on unpaid salary for the reinstated employees which I direct the parties to tabulate and pay to the respective employees within the next thirty (30) days from the date of this Award.

31. Each party will bear their own costs.

32. Orders accordingly.

**DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 18TH DAY OF
DECEMBER 2015**

LINNET NDOLO

JUDGE

Appearance:

Mr. Odero (Union Representative) for the Claimant

Mr. Molenje for the Respondent