



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI
CAUSE NO 2044 OF 2013

KENYA UNION OF DOMESTIC, HOTELS EDUCATIONAL

INSTITUTIONS AND HOSPITALS.....CLAIMANT

VS

EMBAKASI GIRLS SECONDARY SCHOOL.....RESPONDENT

RULING

Introduction

1. The Claimant's application dated 18th December 2013 which is brought under certificate of urgency seeks orders to restrain the Respondent from executing an intended redundancy of the Claimant's members pending determination of the dispute herein. When the matter went before my brother Rika J on 20th December 2013, he granted interim orders which were extended on 6th January 2014. The application was heard *inter partes* before me on 13th January 2014 with Mr. Tonge Yoya appearing for the Claimant and Mr. Simiyu for the Respondent.

The Claimant's Submissions

2. Mr. Tonge Yoya for the Claimant submitted that by letter dated 3rd December 2013, the Respondent notified the Claimant of its intention to declare 14 of the Claimant's members redundant by January 2014. In response, the Claimant wrote to the Respondent on 4th December 2013 calling for a joint meeting on 17th December 2013 which the Respondent failed to attend.

3. It was the Claimant's contention that the employees earmarked for redundancy were being victimised for having joined the Union. Further, the Claimant submitted that the intended redundancy of its members was aimed at reducing its membership with a view to defeating the Claimant's pending claim for recognition by the Respondent.

4. The Claimant challenged the reason advanced by the Respondent for the intended redundancy, being lack of adequate qualifications on the part of the affected employees. According to the Claimant, the intended redundancy was driven by malice and bad faith.

The Respondent's Submissions

5. Mr. Simiyu for the Respondent submitted that the Claimant's application did not meet the threshold for injunctive orders being:

- a. The existence of a substantive arguable case;
- b. Substantial threat of irreparable harm to the Applicant;
- c. Balance of convenience weighing in favour of the Applicant;
- d. Public interest.

6. Counsel told the Court that the Respondent had embarked on a process to restructure its operations with a view to putting in place relevant policies and human resource systems. In doing so, the Respondent had relied on Sections 3-6 of the Education Act which allows School Boards to employ the best qualified staff. The Respondent had retained the services of a consultant to guide the restructuring process.

7. On the role of the Union, Counsel submitted that Section 40 of the Employment Act, 2007 requires an employer who intends to carry out a redundancy to notify the union if recognised. He therefore took the view that since there was no Recognition Agreement between the Claimant Union and the Respondent, the Union could not purport to represent the affected employees. In spite of this position, Counsel told the Court that the Respondent had engaged the Claimant Union in good faith and had remitted union dues on regular basis.

8. In the absence of formal rules of engagement between the Respondent and the Claimant, the Respondent chose to consult with the employees directly. Towards this end, several meetings between the Respondent's Board and the employees were held, during which the rationale of the redundancy and the selection criteria was communicated. The issue of employee final dues was also discussed.

9. It was further submitted on behalf of the Respondent that after the Respondent had notified the Claimant of the intended redundancy, the Claimant did not raise any issues. In this regard, the Respondent denied receiving the Claimant's letter dated 4th December 2013.

10. On the extent of redundancy, Counsel for the Respondent told the Court that 2 positions would be declared redundant while 4 positions would be outsourced with the rest being filled by fresh recruits. Some positions had been merged and upgraded. By the time the case was filed, 6 positions had been advertised.

11. According to the Consultant retained by the Respondent, majority of the employees were not qualified for the positions they held and they could not be developed. Counsel denied the Claimant's claim of malice and bad faith on the part of the Respondent.

Ruling by the Court

12. The main issue for determination is whether the Claimant has made out a case for suspension of the redundancy exercise commenced by the Respondent. The Claimant Union argues that the exercise is being undertaken in contravention of the law in as far as the Respondent has not involved the Union.

13. The law recognises redundancy as a lawful form of termination of employment. Section 2 of the Employment Act, 2007 and the corresponding section in the Labour Relations Act, 2007 define redundancy as:

“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.”

14. Section 40 of the Employment Act sets out the conditions precedent to be met by an employer before terminating employment on account of redundancy.

The conditions are as follows:

a) where the employee is a member of a trade union, the employer notifies the union of which the employee is a member and the labour officer in charge of the area where the employee is employed of the reasons for and the extent of the intended redundancy not less than a month prior to the date of the intended date of termination on account of redundancy;

b) where the employee is not a member of a trade union, the employer notifies the employee personally in writing and the labour officer;

c) the employer has, in the selection of employees to be declared redundant had due regard to seniority in time and to the skill, ability and reliability of each employee of the particular class of employees affected by the redundancy;

d) where there is in existence a collective agreement between an employer and a trade union setting out terminal benefits payable upon redundancy; the employer has not placed the employee at a disadvantage for being or not being a member of the trade union;

e) the employer has where leave is due to an employee who is declared redundant, paid off the leave in cash;

f) the employer has paid an employee declared redundant not less than one month's notice or one month's wages in lieu of notice; and

g) the employer has paid an employee declared redundant severance pay at the rate of not less than fifteen days pay for each completed year of service.

15. It was submitted on behalf of the Respondent that since there was no Recognition Agreement between the Claimant Union and the Respondent, the Union could not purport to represent the employees in the redundancy exercise.

16. In the case of ***Transport and Allied Workers Union Vs DHL Global Forwarding (K) Limited (Industrial Court Cause No 745 of 2010)*** this Court has pronounced itself on the issue of recognition vis-a-vis the right of employees to be represented by their union as follows:

“While recognition allows Trade Unions to negotiate a Collective Bargaining Agreement, it is not a prerequisite to union representation. The right to representation is conferred by membership which itself is a right under Article 41 of the Constitution of Kenya, 2010.”

17. I have no reason to depart from this position and do not agree that merely because the Claimant does not have a Recognition Agreement with the Respondent, then the employees lose their right to be represented by their Union in the redundancy exercise. At any rate, the Respondent appears to be blowing hot and cold on this point since it issued a redundancy notice to the Claimant on 3rd December 2013 and thereafter proceeded to negotiate with the employees directly.

18. The submission by Counsel for the Respondent that the Union did not raise any issues with the redundancy exercise does not take away the Respondent's responsibility to negotiate with the Union on behalf of its members. From the minutes of the Special Executive Board meeting held on 7th December 2013 at Min.02/12/2013, the Board seems to have recognised the need to involve the Union and the Court was unable to understand why the Respondent did not discharge this onus.

19. For the foregoing reasons, I find that the procedure adopted by the Respondent in effecting the redundancy exercise amounts to a short circuit of the required legal process. Consequently, the

said redundancy is hereby halted pending negotiation between the Respondent and the Claimant. All the affected employees will continue in employment without any loss of benefits until further orders of this Court.

I make no orders for costs at this stage.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS

27TH DAY OF JANUARY 2014

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JUDGE

In the Presence of:

.....*Claimant*

.....*Respondent*