



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI
CAUSES NO 116, 241 AND 587 OF 2013
RIFT VALLEY RAILWAYS WORKERS UNION.....CLAIMANT
VS
RIFT VALLEY RAILWAYS (KENYA) LIMITED.....1ST RESPONDENT
RAILWAYS AND ALLIED WORKERS UNION.....2ND RESPONDENT

RULING

Introduction

1. On 22nd May 2013, I referred the Claimant's dispute in Cause No 116 of 2013 as consolidated with Cause No 241 of 2013 to conciliation under the Labour Relations Act. In the meantime, the Claimant filed Cause No 587 of 2013, seeking orders to restrain the 1st Respondent from deducting the sum of Kshs. 300 from the salaries of the Claimant's members and remitting the same to the 2nd Respondent as agency fees.
2. In a ruling delivered on 11th June 2013, the Court stayed the Ministerial Order dated 20th February 2013 appearing in Gazette Notice No 2621 for deduction of agency fees in favour of the 2nd Respondent pending determination of Cause No 116 of 2013 as consolidated with Cause No 241 of 2013.

Conciliator's Report

3. The Conciliator, Mr. R.J Twanga filed his report on 20th November 2013 and appeared before me on 10th December 2013. Mr. Twanga submitted that the Claimant had not submitted a Ministerial Order directing deduction of union dues as required under Section 48 of the Labour Relations Act. The Conciliator added that he had not seen the letters written by the employees instructing the employer to deduct union dues for remittance to the Claimant. Further, although the Claimant claimed to have recruited 500 employees of the 1st Respondent as its members, there was no disclosure of the total number of unionisable employees in the Respondent's establishment.
4. For some reason, the 1st Respondent did not have an opportunity to make its submissions before the Conciliator. I therefore allowed the 1st Respondent to file its submissions for consideration by the Court. I also directed that the submissions made by the Claimant and the 2nd Respondent before the Conciliator be filed for consideration alongside the Conciliator's report.

Submissions by the Claimant

5. In its submissions filed before the Conciliator, the Claimant stated that since it had recruited

over 500 members from the 1st Respondent's unionisable establishment, they were entitled to union dues. The Claimant further submitted that deduction and remittance of union dues was independent from the issue of recognition of the Claimant by the 1st Respondent for purposes of collective bargaining. The Claimant claimed that the 1st Respondent had continued to deduct agency fees in spite of the court order issued on 11th June 2013, staying deduction pending determination of Cause No 116 of 2013 as consolidated with Cause No 241 of 2013.

Submissions by the 1st Respondent

6. In its written submissions filed in Court on 17th December 2013, the 1st Respondent submitted that it had no Recognition Agreement with the Claimant since the Claimant had not recruited a simple majority of the 1st Respondent's unionisable employees as its members. The Claimant could not therefore claim recognition by the 1st Respondent.

7. Moreover, the Claimant's claim of representation of over 500 employees was not supported by any evidence. The 1st Respondent further submitted that it had not received any communication from its employees indicating resignation from the 2nd Respondent.

8. It was the 1st Respondent's contention that the Claimant did not meet the threshold for recognition since the Claimant had not recruited a simple majority of the 1st Respondent's unionisable employees as its members. In addition, a rival trade union already represented a majority of the 1st Respondent's unionisable employees and a Recognition Agreement and a Collective Bargaining Agreement between the rival union and the 1st Respondent were in force.

9. With regard to deduction of union dues for remittance to the Claimant, it was submitted on behalf of the 1st Respondent that no Ministerial Order as provided under Section 48(2) of the Labour Relations Act had been issued. Moreover, no check off forms had been submitted by the Claimant to the 1st Respondent.

Submissions by the 2nd Respondent

10. In the submissions filed before the Conciliator by the 2nd Respondent, it was submitted that there was a Recognition Agreement and a Collective Bargaining Agreement between the 1st and 2nd Respondents. In view of the Collective Bargaining Agreement negotiated between the 1st and 2nd Respondents, the 2nd Respondent was entitled to agency fees as directed in the relevant Ministerial Order.

11. On the issue of recruitment of some unionisable employees as members of the Claimant, the 2nd Respondent submitted that membership to a trade union could only be proved by recovery of union dues. It was therefore the 2nd Respondent's contention that the Claimant had no members among the unionisable employees of the 1st Respondent but only a list of names purporting to be members.

Ruling by the Court

12. There are 3 issues for determination in this case:

- a. Deduction and remittance of union dues to the Claimant;
- b. Deduction and remittance of agency fees to the 2nd Respondent; and
- c. Recognition of the Claimant by the 1st Respondent;

Union Dues

13. It was submitted by the 1st and 2nd Respondents that the Claimant was not entitled to union dues because there was no Ministerial Order directing the 1st Respondent accordingly.

14. Section 48(2) of the Labour Relations Act provides that:

2. A trade union may, in the prescribed form, request the Minister to issue an order directing an employer of more than 5 employees belonging to the union to-

(a) deduct trade union dues from the wages of its members;

15. The argument by the 1st and the 2nd Respondents which was supported by the Conciliator is that since the Claimant has not obtained a Ministerial Order for deduction and remittance of union dues, then the Claimant is not entitled to union dues. In my considered opinion, this view renders a constricted interpretation of the right of employees to subscribe to a trade union of their choice as guaranteed under Article 41(2) of the Constitution and Section 4(1) of the Labour Relations Act.

16. The argument adopted by the Conciliator and the Respondents effectively means that a Minister could override the wishes of employees to join and participate in the activities of a trade union of their choice by withholding a Ministerial Order for deduction and remittance of union dues. Such a position has no place in our current constitutional dispensation.

17. The 1st Respondent states that it has not received communication from the relevant employees signifying their resignation from the 2nd Respondent in favour of the Claimant. The 1st Respondent further claims that no check off forms have been served on it. I therefore direct the Claimant to serve the resignation letters and the check off forms within the next 14 days from the date of this ruling.

18. The 1st Respondent shall immediately thereafter commence deduction and remittance of union dues to the Claimant on account of all the employees whose resignation letters and check off forms will have been received by the 1st Respondent. The 1st Respondent is directed to allow the Claimant access to its premises for the purpose of service of the resignation letters and check off forms.

Agency Fees

19. The gist of the Claimant's claim in Cause No 587 of 2013 had to do with the process of obtaining the Ministerial Order dated 20th February 2013 for deduction of agency fees in favour of the 2nd Respondent. According to the Claimant, the Ministerial Order was obtained by non disclosure of material facts.

20. Section 49(1) the Labour Relations Act provides that:

(1) A trade union that has concluded a collective agreement registered by the Industrial Court with an employer, group of employers or an employers' organisation, setting terms and conditions of service for all unionisable employees covered by the agreement may request the Minister to issue an order requiring any employer bound by the collective agreement to deduct an agency fee from the wages of each unionisable employee covered by the collective agreement who is not a member of the trade union.

21. The rationale behind this provision is that an employee who is not a member of a trade union but nevertheless enjoys the benefits of a Collective Bargaining Agreement negotiated by a trade union should be made to pay for the services rendered by the trade union. In my view, this does not apply in cases where an employee expressly resigns from the trade union in favour of another union.

22. In the instant case, a number of employees have indicated their wish to resign from the 2nd Respondent in favour of the Claimant. I therefore find that no agency fees is recoverable from these employees. In its submissions, the Claimant stated that the 1st Respondent had continued to deduct agency fees in spite of the order of this Court issued on 11th June 2013. I therefore direct

the 1st Respondent to file a status report on this particular issue within the next 7 days from the date of this ruling.

Recognition

23. There is contention as to whether the Claimant has fulfilled the conditions for recognition of a trade union by an employer.

24. Section 54(1) of the Labour Relations Act provides that:

(1) An employer, including an employer in the public sector, shall recognise a trade union for purposes of collective bargaining if that trade union represents the simple majority of unionisable employees.

25. Attainment of a simple majority for purposes of recognition is a matter of evidence. I therefore direct the 1st Respondent to file a list of all its unionisable employees as at the date of this ruling, citing designation and current work station/department. This list shall be filed within the next 14 days from the date of this ruling. The 2nd Respondent and the Claimant shall thereafter file a list of their members showing evidence of membership within 14 days of service of the list of the 1st Respondent's unionisable employees.

I make no order for costs at this stage.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 24TH DAY OF JANUARY 2014

LINNET NDOLO

JUDGE

In the Presence of:

.....*Claimant*

.....*1st Respondent*

.....*2nd Respondent*