



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI
CAUSE NO. 1182 OF 2013.

AMALGAMATED UNION OF KENYA

METAL WORKERSCLAIMANT

VERSUS

UNITY AUTO GARAGE (NRB) LIMITED RESPONDENT

JUDGEMENT

1. The claimant union, Amalgamated Union of Kenya Metal Workers filed this claim on 26th July 2013 together with their notice of Motion seeking stay and revocation of Gazette No. 14722 of 19th October 2012 and that the respondent should continue deducting union dues from all employees' members of the claimant. the claim is therefore premised with these initial prayers that the claimant was seeking based on section 48 and 74 of the Labour Relations Act and the respondent non-compliance with section 49 of the Labour Relations Act intention to revoke the recognition agreement with the claimant vide gazette notice No. 14722. In defence filed on 27th August 2013, the respondent denied the claims setting out that the procedure applicable a under section 49(2) of the Labour Relations Act should involve the employer to confirm the list of employees subject to any union deductions which the claimant failed to follow. The respondent admitted that they have a recognition agreement and a Collective Bargaining Agreement (CBA) with the claimant union which regulate their relations. Both parties were heard and at the close agreed to file written submissions.

The claim

2. The claimant has a recognition agreement and a CBA with the respondent and upon registration the claimant applied to the minister to gazette agency fee which was affected through Gazette Notice No.14722 issued on 8th October 2012 and dated 19th October 2012. The claimant notice the respondent and attached a list of their members noting that the CBA was applicable to all their employees with regard to union dues or agency fees for unionised employees and the unionised employees respectively. The respondent in return applied to the Minister to have the gazette notice revoked and in breach of section 49(3) of the labour Relations Act refused to remit any dues to the claimant in the effort to undertake unfair labour practices. That in breach of section 82 and 49 of the Labour Relations Act, the respondent has failed to remit 2% of basic salary of the 44 claimant members in their employ despite a CBA being in force as between the claimant and respondent.

3. The claimant is therefore seeking that the respondent be directed to renegotiate the CBA, to pay a fine as under section 82 of the Labour Relations Act and to pay costs of the suit.

The Defence

4. in defence the respondent stated that they recognise that they have a recognition agreement and a CBA with the claimant but the procedure set out under section 49(2) of the Labour Relations Act requiring that a request be made to the Minister for the agency fee gazettement should be signed by the employer, supplied with a list of employees specifying the amount to be deducted, which was not followed by the claimant. This not having been done the respondent has sought advice from the Minister on the matter. The gazettement of the fee due to the claimant was unlawful as the claimant failed to observe the law in order to qualify for agency fees. That the claimant only has 8 members from the 52 employees of the respondent and therefore cannot claim to have simple majority for purposes of section 54(1) in order to be granted a recognition by the respondent and hence renegotiate the CBA. Hence the gazettement of Notice No.14722 of 19th October 2012 was obtained unprocedurally and hence invalid.

5. That the respondent informed the claimant that their employees are not willing to have their wages deducted for agency fees and the claimant cannot thus be found to make a demand of this fees as it is unlawful. The current members of the claimant in the respondent employ are 18% falling short of the 50% plus 1 threshold in law. That the orders sought by the claimant are not deserved for non-compliance with the applicable law.

In evidence the claimant through Mr Makale submitted that during the subsistence of the claim, the respondent applied for the revocation of GN N. 14722 which has now been affected by the Minister. Before this revocation, the respondent had stated that they only had in their employ 8 members of the claimant and upon the expiry of the current CBA they were not ready to renegotiate. However, there are now 26 employee members of the claimant and their deduction should be effected on a check off system as under section 48 of the Labour Relations Act.

6. The parties have a new CBA that is pending approval by the Minister and the prayer seeking the respondent to renegotiate the CBA has been overtaken by events. The pending question for court determination is the agency fees due to the claimant. The Gazette Notice has now been revoked but for 26 months it was in force and the respondent was to comply as directed by the court. The respondent made deductions for one month at Kshs.10,000.00, it was not accompanied with a list of the members to show how this was arrived at and the claimant seek agency fees from the 44 employees who enjoy the CBA benefit and were not members of the claimant. The respondent has the records and where they found it necessary to pay kshs.10, 000.00 then this should apply for the 25 unpaid for months all amounting to kshs.250, 000.00 as the Gazette Notice was in force and remained binding until revocation.

7. In evidence, the respondent called Mr Mohammed Rashid the Director of the respondent who gave testimony that the respondent did not refuse to comply with section 49 of the Labour Relations Act as the provisions of this law is clear to the extent that parties, employer and union must endorse the deductions of agency fees. Once a request is made, the employer has to approve and in this case the respondent was not involved by the claimant before sending the information to the Minister. Section 49(2)(b) require the employer to give a list which was not done in this case and without these specifications it was difficult to state the amounts payable and the claimant could not tell how much was to be deducted. The legal Notice only came to the attention of the respondent in 2013 and the respondent was not aware of it. That the respondent received the Gazette Notice on 23rd October 2012, the respondent complied by sending to the claimant a list of employees who were not willing to have agency fees deducted and in this case the respondent feared industrial action and therefore could not effect any deduction against the will of the employees who were not members of the claimant. The respondent reported the matter to their employers' association on 17th July 2013 noting that the gazette Notice was unprocedural. The Association contacted the Minister through a petition and there was a finding that the Notice was fraudulent and there was a revocation.

8. The witness also stated that there is a new CBA that has been negotiated in good faith and the respondent will not have any objections to collection of agency fees but on the previous CBA the respondent was unaware of the gazette Notice as the right procedure was not followed. There is no basis to the claim of kshs.250, 000.00 as agency fees as the kshs.10, 000.00 that was paid was without specifications. The respondent made a payment with no basis which was to be remitted until the gazette Notice No. 14722 was revoked which was done on 10th October 2013. The claim of Kshs.250, 000.00 is

not justified.

9. The witness also confirmed that he has a record of the claimant members and the non-member who wrote to him indicating that they did not wish to have any deductions made on their salary. That the CBA in force then contemplated an annual increase of 10% for year one and year two for all unionised employees while the non-union employees salary was different. The respondent got the Gazette Notice No. 14722 but did not comply since there was no list attached.

10. That the respondent keeps two pay systems, one for unionised employees and the other for non-union employees. For those not unionised, salaries are increased on a one-on-one basis while unionised employees get a 10% pay increase each year.

11. Both parties filed their written submission in support of their evidence in court.

12. In the determination of the issues herein, several questions emerge that must be addressed thus;

When are agency fees due?

What is the justification for agency fees?

Is agency fees due here for the claimant?

13. It is not in dispute that when the claim herein was filed on 26th July 2013, there was a CBA in force between the parties herein CA 124 of 2011 that was to end on 31st July 2013. That being the case, both parties were therefore aware of this written agreement concerning any terms and conditions of employment made between a trade union and an employer as defined under section 2 of the Labour Relations Act. This CBA was negotiated and agreed upon with binding terms and conditions that were to give effect by both parties. To sustain the work of Unions section 48 is applicable where union dues from members must be deducted by an employer;

48.(1) 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.

(2) A trade union may, in the prescribed form, request the Minister to issue an order directing an employer of more than five employees belonging to the union to –

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

(b) Pay monies so deducted –

(i) Into a specified account of the trade union; or

(ii) In specified proportions into specified accounts of a trade union and a federation of trade unions.

(3) An employer in respect of whom the Minister has issued an order under subsection (2) shall commence deducting the trade union dues from an employee’s wages within thirty days of the trade union serving a notice in the prescribed form signed by the employees in respect of whom the employer is required to make a deduction.

14. Therefore, the duty rests with the Union to request the Minister to issue orders directing an employer to deduct union dues and deposit the same into a specified account with a specified proportion. The trade union can further apply to the Minister to vary the order, revoke it or have it suspended. Once a union member resigns from a union, no union’s dues should be deducted.

15. However with regard to agency fees, section 49 is applicable thus;

49.(1) A trade union that has concluded a collective agreement registered by the National Labour Court with an employer, group of employers or an employers' organization, setting terms and conditions of service for all union sable 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 union sable employee covered by the collective agreement who is not a member of the trade union.

(2) A request in accordance with sub-section (1) shall –

(a) Be signed by the authorized representatives of the trade union and employer, group of employers or employers' organisation;

(b) Supply a list of all employees prepared by the employer in respect of whom a deduction shall be made;

(c) Specify the amount of the agency fee, which may not exceed the applicable trade union dues; and

(d) Specify the trade union account into which the dues shall be paid.

16. The collection of agency fees is couched in mandatory terms where a trade union must make a request to the minister based on specified condition that the employer **shall** supply a list of all employees in respect of whom a deduction for agency fees shall be made indicating the amount of agency fees which should not exceed the trade union dues.

17. Under the provisions of section 48 and 49 of the labour Relations Act, the law recognise the fundamental role played by trade unions in securing employee gains with regard to negotiated agreements. These gains not only benefit the union members but also go beyond the union membership to other employees. Where there are benefits that are secured through the efforts of the representative trade union in collective bargaining and are passed on to other employees who are not members of the representative trade union such employees should make contribution towards the costs which the representative union incurs in connection with its collective bargaining work. If they do not pay that is unfair members of the representative union pay for those costs. An agency fees seeks to make them pay without compelling them to join the representative trade union. The fact that such workers may be members of another union in the work place to which they pay union dues does not turn them into paying riders. They remain free riders as they make no contribution towards the collective bargaining costs of the representative union. This was affirmed by this court in **Cause No.1624 of 2013, Tailor and Textile Workers Union versus New Wide Garments Kenya (EPZ) Limited.**

18. It has not been contested that by the respondent that the agency fees and the CBA does not comply within the requirements of the law especially section 48 and 49 of the Labour Relations Act. In short the respondent does not contend that the CBA as between them and the claimant is invalid. What they do contest is that the agency fees, although lawful and binding in terms of section 48 of the Labour Relations Act, in this case the claimant union caused the Minister to Gazette the agency fees deduction through fraudulent means as the respondent did not attach a list that they had approved in terms of section 49(2) (b) of the Labour Relations Act. That the claimant acted unprocedurally and thus should not benefit from the same. The non-union members of the respondent wrote seeking not to have their dues deducted and to avoid an industrial action; the respondent decided not to effect agency deductions and initiated a petition through their employers' association to have the unprocedural Gazette notice No. 14722 revoked which was done on 10th October 2013.

19. The provisions of section 49 are however to be interpreted positively especially in a case where an employer is aware of an existing CBA and the responsibility due on their part to expedite a process where agency fees is to be deducted with their involvement. The non-compliance with a provision that the union

failed to follow does not substantially affect the whole and in this case the respondent had the option of issuing the approved and or authorised list of their employees subject to agency fees deductions when the respondent became aware of the Gazette Notice No. 14722. In principle, despite the procedure applied, once the Gazette Notice was issued on 19th October 2012, the respondent was to comply pending a challenge with the same. A Legal Notice remains a lawful direction until the same is revoked. Nothing prevented the respondent from approaching this court on 19th October 2012 or the day stated that they became aware of the Gazette Notice in 2013 to pre-empt and address any alleged fraud or any illegal action that they felt the claimant union committed. Once the CBA No. CA 124 of 2011 was registered, as an immediate consequence, union dues and agency fees were to follow cause.

20. The Minister on 8th October 2012 under Gazette Notice No.14722 directed;

...

- a. *That the company Unity Auto Garage (NBI) Limited ... is to deduct each employee who is not a member of the Amalgamated Union of Kenya Metal Workers herein referred to as the "union" but is covered by the Collective Bargaining Agreement RCA 124 of 2011 and ... sined between the union and the company a sum equal to two per cent (2%) from each employees basic monthly wage*
- b. *Deduction to commence within thirty (30) days of receiving the Order.*
- c. *To remit within ten (10) days, the sums deducted under item (a) by crossed cheque made payable to the union's account No. 0102002028800 at Standard Chartered bank, Moi Avenue Branch, Nairobi.*
- d. *Dated the 8th October 2012.*

21. Therefore from October 2012 until 29th November 2013 when there was revocation vide Gazette Notice No.14930, Gazette Notice No. 14722 remained in force. The revocation stated;

...

It is notified for the general information of the Public that the Cabinet Secretary, Ministry of Labour, Social Security and Services have revoked Gazette Notice No. 14722 of 19th October 2012, with effect from the date specified in this Order.

Dated 7th November 2013.

[Emphasis added].

24. Therefore the revocation became effective on the date of issue being 7th November 2013 and published on 29th November 2013. There is therefore no ambiguity in the Court reading of the two Gazette Notices, No. 14722 and 14930. The two are distinct and clear.

The respondent is therefore to pay the agency fees due from its employees not members of the claimant union a fees that is equal to two per cent (2%) from each employee's basic monthly wage calculated from wages due from 30th November 2012 up and until the 30th of October 2013. It is common practice that employers keep all employment records for each employee and thus the respondent is to make a tabulation of these dues within 14 days from today and remit a record of the same before this court for confirmation. The respondent will take into account the amounts of kshs.10, 000.00 already remitted as agency fees to the claimant in November 2013.

25. I note the parties have renegotiated a new CBA without prompting by court. This is an act in good faith and thus each party will bear their own costs..

Delivered at Nairobi and dated this 10th day of March 2014.

M. Mbaru

JUDGE

In the presence of

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