



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO. 2139 OF 2012

BANKING, INSURANCE &

FINANCE UNION (KENYA).....CLAIMANT

VERSUS

MAGEREZA SAVINGS & CREDIT

CO-OPERATIVE SOCIETY LIMITEDRESPONDENT

JUDGMENT

The Claim herein was commenced by Statement of Claim dated 23rd October 2012 filed together with a Notice of Motion under certificate of urgency.

The Claimant filed an Amended statement of Claim dated 23rd November 2012 and filed in court on 6th December 2012. The issue in dispute as stated in the Amended Statement of Claim is the unprocedural, unjustified, unlawful and unfair right sizing (redundancy) of Ms. Betty Dimba, M. Sarah K. Kithinji, Mr. George Oluoch and Mr. Martine Olilah. The Claimant seeks orders that the redundancy of the 4 grievants was unprocedural, unjustified, unlawful and therefore a nullity. The Claimant prays that the court orders re-instatement of the four grievants without loss of benefits and/or break in years of service.

The Respondent filed a Memorandum of Reply on 23rd January 2013 in which it denies that the redundancies were unprocedural. The Respondent avers that there were negotiations between the parties but the Claimant

rushed to court in bad faith during the negotiations. The Respondent prays that the claim be dismissed with costs.

The case was heard on 11th February 2014. The Claimant was represented by Mr. Isaiah Munoru an Officer of the Claimant Union while the Respondent was represented by Ms. Waruguru instructed by C.B. Mwangela & Co. Advocates and Mr. Masese of Federation of Kenya Employers. Mr. Munoru opted to proceed by way of oral submissions while the Respondent called one witness Mr. Samuel Thurata, the Honourable Secretary.

The Claimant's case is that the respondent which is a Savings and Credit Society is financially stable and does not have any excess staff. That the Respondent carried out a redundancy on 1st November 2012 without following the procedure laid down in Section 40 of the Employment Act. That the Respondent did not exercise fairness when determining who was to leave employment. Further, that the Respondent did not observe seniority in time, skill, ability and reliability of each employee in a particular class as

provided in Section 40. Mr. Munoru submitted that the exercise was done in secret and the employees were never told about the criteria used. That the Claimant applied for production of both educational and professional certificates but the Respondent failed to comply. Mr. Munoru

further submitted that the grievants were declared redundant orally as they never received any letters.

Mr. Munoru further submitted that the grievants have not been paid terminal benefits and that the redundancy was carried out while this case was pending in court.

The Respondent's case is that the redundancy was carried out in accordance with the law and the collective bargaining agreement. That the redundancy was in compliance with recommendations of the SACCO Societies Regulatory Authority whose mandate is to oversee the operations of SACCO Societies and deposit taking SACCO's. That the Authority directed the Respondent to address the gaps identified in the Authority's report before being issued with a licence. That at the time of the report the Respondent was operating on a temporary licence.

Both parties filed final submissions.

I have considered the pleadings, the evidence and the final submissions. The issues for determination are the following :-

- 1. Whether the redundancy was unprocedural and unfair?**
- 2. Whether the grievant's are entitled to re-instatement?**

The law relating to redundancy is provided for in Section 40 of the Employment Act while the procedure for reporting disputes for redundancies that involve trade unions is provided for under Section 62 and 74 of the Labour Relations Act. Section 61 provides for normal reporting of disputes while Section 74 refers to urgent referrals to the Industrial court.

The dispute herein was referred to this court under Section 74.

Section 74(b) provides that a trade Union may refer a dispute to the Industrial Court as a matter of urgency if the dispute concerns a redundancy where the trade Union has already referred the dispute for conciliation under Section 62(4) or where the employer has retrenched employees without giving notice.

The Claimant Union alleges that the Respondent failed to comply with Section 40(a) of the Employment Act and Clause 14 (b) of the Collective Bargaining Agreement between the Claimant and the Respondent. The two provisions are reproduced below.

Section 40 (a) of Employment Act

40. Termination on account of redundancy

(1) An employer shall not terminate a contract of service on account of redundancy unless the employer complies with the following conditions—

(a) where the employee is a member of a trade union, the employer notifies the union to 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 an 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 to an employee declared redundant severance pay at the rate of not less than fifteen days' pay for each completed year of service.

Clause 14(b) of Collective Bargaining Agreement

“Where it is necessary to terminate the employment of an employee on grounds of redundancy, the employer shall give the employee four (4) months' notice in writing of their intention to do so.”

It is these two provisions that the Claimant alleges were not complied with by the Respondent.

In the Amended Memorandum of Claim, the Claimant has exhibited a letter dated 12th October 2012 from the Respondent notifying the Claimant of the intention to right size its work force due to a number of factors. The letter invites the Claimant to a meeting on 16th October 2012. In a letter dated 19th October 2012 also exhibited by the Claimant in the Amended Statement of Claim the Respondent informed the Claimant of the intention to lay off thirteen (13) unionisable employees. The Claimant confirmed that the parties met on 16th, 23rd and 25th October 2012. At those meetings it was agreed to allow the 19 employees who were to be laid off to retire voluntarily. At the meeting held on 25th October 2012, it was agreed that employees who will not have opted for the voluntary early retirement (VER) be declared redundant. Their exit package was as provided in the Collective Bargaining Agreement (CBA) but with an enhanced severance pay of 3.5 months' salary per completed year of service instead of 3 months provided for in the CBA. The meeting of 25th October further agreed that

“all letters be released to the nineteen employees on Monday 29th October, 2012 without fail” and that the redundancies be effective from 1st November 2012.

The four (4) grievants herein are the only ones who did not accept the VER and were therefore declared redundant. They were however offered golden handshake of Shs. 255,000/- payable to employees who leave on VER in addition to the enhanced severance pay. They were in addition offered 4 months' salary in lieu of notice.

Section 26(2) of the Employment Act allows parties to agree on terms and conditions of Service outside those in the Employment Act provided that such terms are not less favourable to the employee.

Clause 14(d) of the CBA provides that “Termination of employment shall not be effected until the matter has been reported to the Minister of Labour for his/her action.”

In this case the Respondent notified the Minister for Labour by copy of letter dated 19th October 2012 which is copied to the Provincial Labour Officer Nyayo House. There is a copy of a letter dated 29th October 2012 exhibited as MN9(c) in the statement of Claim in which the County Labour Officer, Nairobi acknowledged the letter and advised that the redundancy should be carried out in accordance with Section 40 (1) of Employment Act and the CBA following which a report should be filed to the County Labour office.

From the foregoing I find that the redundancy was not unprocedural as it was carried out with consultation and agreement of the Claimant Union and the Labour Office was accordingly notified. I also find that the reporting of the dispute by the Union was in bad faith as the trade dispute was reported on 18th October 2012 while negotiations were ongoing.

The Claimant Union raised the issue of Selection of employees. Having been given the extent and particulars of the employees to be declared redundant and having agreed to their VER or redundancy, the Claimant cannot at this stage raise an issue on the criteria of Selection of the employees declared redundant.

The next issue for determination is whether the Claimants are entitled to the prayer for re-instatement of the grievants.

As I have observed above, the Claimant agreed to the redundancy of the grievants and negotiated an exit package for them. Having done so they cannot pray for the re-instatement of the grievant after they have been declared redundant.

I find that there is no merit in this prayer.

The grievants are however entitled to the exit package as specified in their exit letters. The same should be paid to them immediately if they have not already been paid.

Orders accordingly.

Dated and delivered at Nairobi this 17th day of June 2014

HON. LADY JUSTICE MAUREEN ONYANGO

JUDGE

In the presence of:

Isaiah Munoru for Claimant

Valery Angawa for Respondent