



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI
CAUSE NO 1486 OF 2011

BANKING INSURANCE AND FINANCE UNION.....CLAIMANT

VS

CFC STANBIC BANK.....RESPONDENT

AWARD

Introduction

1. By an amended statement of claim dated 26th March 2013, the Claimant seeks relief for unfair and unlawful redundancies on behalf of the following Grievants:
 - a. Raphael Omollo
 - b. Eunice Abuga
 - c. Peter Makau
 - d. Philip Nzioka
 - e. Samuel N. Muhika
 - f. Peter N. Kabera
 - g. Mercy Ndung'u
 - h. Peter Linge
 - i. Peter Thiong'o
 - j. Josyline Kendi
 - k. Jefferson Kamiri
 - l. Joel K. Kioli

2. The Respondent filed an amended response on 21st May 2013 and the matter was heard on diverse dates between 20th March 2013 and 17th March 2014. The 1st Grievant, Raphael Omollo and the 9th Grievant, Peter Thiong'o testified on behalf of all the Grievants while Dickson Nyambori testified for the Respondent.

The Claimant's Case

3. The Claimant's case is that the 12 Grievants were subjected to an unfair and unlawful redundancy. In this regard, the Claimant states that the Respondent failed to comply with Clause 7 in the Collective Bargaining Agreement (CBA) between the Claimant and Kenya Bankers

Association. According to the Claimant, the redundancy exercise was marred with victimisation and discrimination.

4. With specific reference to the 1st Grievant, Raphael Omollo; the 7th Grievant, Mercy Ndung'u and the 9th Grievant, Peter Thiong'o, the Claimant avers that their redundancy was driven by the fact that they had been elected union representatives five days before their redundancy letters were issued. Further, only members of the Claimant were declared redundant.
5. The employees declared redundant were drivers, messengers, clerks, tellers, customer service officers and receptionists which positions the Claimant states still exist within the Respondent's establishment. Some of the positions were filled eternally while others were outsourced.
6. Upon being issued with redundancy letters on 25th May 2010, the Grievants were instructed to proceed on compulsory leave, awaiting the crediting of their terminal dues into their bank accounts on 24th June 2010.
7. The Claimant claims the following:
 - a. A declaration that all the 12 Grievants suffered unfair termination of employment by way of redundancy
 - b. Unconditional reinstatement of all the Grievants
 - c. As an alternative to reinstatement, an order for recalculation of the Greivants' terminal benefits using the correct basic salaries, house allowances and unutilised leave days as at 31st May 2010
 - d. Payment of salaries and allowances lost by the Grievants as a result of the redundancy
 - e. Costs
 - f. Any other relief the Court may deem just to grant

The Respondent's Case

8. In its Memorandum of response, the Respondent states that the redundancy of the 12 Greivants was neither unfair nor unlawful. In this respect, the decision to declare the redundancies was borne out of management decision to outsource services relating to Supply Chain Management Department which employed drivers, messengers, tea makers, mail room and held desk staff.

9. The Respondent denies that the redundancies were mooted in May 2010, stating that the said redundancies were a result of an ongoing restructuring process. The Respondent also denies that union representatives were targeted for redundancy and maintains that it no longer employs drivers, messengers, mail room staff and tea makers.

10. The Respondent avers that the restructuring did not affect management staff because they had management responsibilities that were not affected by the restructuring. The Respondent further states that the redundancy exercise did not affect clerks, tellers and customer service staff as alleged by the Claimant. According to the Respondent, these categories of staff form the bulk of the Claimant's membership.

Findings and Determination

11. The issues for determination before the Court are as follows:

- a. Whether the redundancies declared by the Respondent targeted union members and officials;
- b. Whether in effecting the redundancies the Respondent complied with the law and the Collective Bargaining Agreement;
- c. Whether the Grievants were paid all their terminal benefits;
- d. Whether the Grievants are entitled to the reliefs sought .

Union Membership

12. In presenting its case, the Claimant sought to establish a nexus between the redundancies and union membership. In this regard, it is the Claimant's case that the Respondent was hostile to union representation. Consequently, in declaring the redundancies the Respondent aimed at getting rid of employees who were members of the union and especially union officials. The Claimant therefore asks the Court to find the Respondent guilty of unfair labour practices.

13. However, apart from a general allegation, no specific evidence was led to support the Claimant's claim of victimisation of union members and officials. From the evidence on record, the Court finds that the redundancies targeted employees working in the Supply Chain Management Department, majority of whom were coincidentally unionisable.

14. The Claimant alleges that the positions held by the Grievants are still in existence. The Respondent's witness, Dickson Nyambori however told the Court that the services previously provided by the Grievants had been outsourced and in their testimony, the 1st and 9th Grievants confirmed this evidence.

15. 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.”

16. A review of the circumstances leading to the termination of the Grievants' employment indicates that the Respondent took a management decision to outsource certain functions within the Supply Chain Management Department. In my view, this falls within the legal definition of redundancy and I find no basis for the Claimant's claim of victimisation of its members in the declaration of redundancies.

Compliance with the law and Collective Bargaining Agreement

17. Section 40 of the Employment Act, 2007 sets the conditions to be met by an employer before terminating an employee's employment on account of redundancy 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.*

18. Clause A7(1) of the applicable Collective Bargaining Agreement reiterates the conditions set out in the law. The Claimant complains that when the Grievants were given notification of the intended redundancy, they were sent on forced leave. Additionally, the union was not notified of the extent of the redundancy.

19. The Respondent's response is that the Grievants' leave was due and that there was no obligation to provide details of the redundancy as this was a management issue within the Respondent's domain. On this score, the Court has reached the conclusion that in sending the Grievants on leave immediately upon declaration of redundancy, the Respondent was deliberately avoiding payment of the Grievants' pending leave days. The Court also finds that the Respondent failed to notify the union of the extent of the intended redundancy as required by law and the Collective Bargaining Agreement.

20. The provisions of Section 40 of the Employment Act, 2007 are meant to provide necessary safeguards to an employee facing redundancy and no employer should be allowed to circumvent any of these safeguards. In the case of *Francis Maina Vs Lee Construction [2014] eKLR* this Court held that a redundancy that ignores the conditions under Section 40 of the Employment Act amounts to unfair termination within the meaning of Section 45 of the Act. Applying this principle to the case before me, I find that in effecting the redundancies, the Respondent failed the fairness test required by law.

Calculation of Terminal Benefits

21. The Claimant states that in calculating the Grievants' terminal benefits, the Respondent used the wrong factor of applicable salaries. Clause A7(1)(h) of the Collective Bargaining Agreement provides that:

“Salary for the purpose of calculating pay shall be the salary of an employee on the date the employee ceases to be in the employment of the bank.”

22. The Respondent's witness, Dickson Nyambori told the Court in cross examination that the Respondent appeared to have used the wrong figures in calculating the Grievants' terminal benefits.

Reliefs

23. The Claimant claims reinstatement of all the Grievants. The Court however finds that this is not a case meriting such an order especially because the services previously offered by the Grievants have been outsourced meaning that their positions are no longer within the Respondent's establishment.

24. Nevertheless, in view of my finding that in effecting the Grievants' redundancies the Respondent failed to observe the law and the Collective Bargaining Agreement, I make the following orders:

- a. The Respondent shall pay to each Grievant the equivalent of 6 months' salary in compensation for unfair termination of employment within the next 21 days from the date of this award;
- b. The Respondent shall recalculate the Grievants' terminal benefits on the basis of their last salary and pay the difference within the next 21 days from the date of this award;
- c. The Respondent shall pay the costs of this case.

Orders accordingly.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 14TH DAY OF JULY 2014

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JUDGE

Appearance:

Mr. Odero (Union Representative) for the Claimant

Mr. Obura for the Respondent