



IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO. 616 OF 2010

BANKING INSURANCE & FINANCE UNION (KENYA) CLAIMANT

VERSUS

MURATA SACCO SOCIETY LIMITED RESPONDENT

JUDGEMENT

I Monoru for BIFU appearing for the Claimant

J Kariuki Advocate for Grievants

FKE for Respondent

1. The claimant, Banking Insurance and Finance Union (Kenya) (BIFU) is a Trade Union representing employees in the banking, insurance companies, financial organisations and Sacco. The Respondent herein, Murata Sacco society Ltd (Murata) is a credit ad savings society registered under the Society's Act and the Co-operatives Act. On 4th June 2010 the BIFU filed the claim herein for and on behalf of 93 grievants for wrongful termination, unprocedural/unfair retrenchment, and involuntary early retirement from employment. On 27th June 2013, BIFU filed an Amended statement of claim. The Respondent filed their defence on 14th March 2011 and amended defence filed on 23rd July 2013. At the hearing, the Claimant called two grievants/witnesses in support of the claimant's case, Charity Gitau and Bernard Mucheru Muchiri and the Respondent called James Kamau Gachau the Deputy General Manager Finance. At the close of the hearing both parties filed their written submissions dated 1st sept 2014 and 25th sept 2014 for the Claimant and Respondent respectively.

Claimant's case

2. BIFU and Murata have a Recognition Agreement signed between them dated 7th June 2005 and at the time relevant herein there was a Collective Bargaining Agreement (CBA) dated 18th September 2006. The grievants are members of BIFU and former employees of Murata.

3. The Respondent terminated the services of the 93 grievants without consultations or following due process as under the CBA on the reasons that there was reorganisation or retrenchment and voluntary early retirement. On 18th May 2007, the grievants received letters from the General Manager stating that their services had been terminated under clause 12 of the CBA. Despite this termination, no terminal dues were paid as under the CBA at clause 9(a). The Claimant reported to the dispute to the Minister on 21st May 2007 and a conciliator was appointed. The recommendations made were accepted by the Claimant but the Respondent refused to abide in settlement of the dispute.

4. The Claimant is therefore seeking;

The court to make an order and enter judgement in favour of the Claimant in that;

- i. The termination of the grievants was without just cause or excuse,*
- ii. The grievants be compensated for unfair/wrongful loss of employment at the rate of 12 months (12) gross salary/wages,*
- iii. The grievants be paid their unpaid benefits of gratuity calculated at the rate of two (2) months basic salary for each completed year of service at the time of wrongful termination as per clause 9(a) of the CBA,*
- iv. The grievants be issued with individual letter and other supporting documents including the calculations showing individual tax overpayments to enable them claim their tax refunds from KRA*
- v. Interest on all the above*
- vi. Costs of the suit*
- vii. Any other relief the court deems fit to grant.*

5. In support of the claim, **Charity Wambui Gitau** testified that she was an employee of the Respondent from 4th January 1993 as a Banking Clerk and joined BIFU in 2005 and became Chief Shop stewards. There was a CBA between BIFU and Murata where she participated in the negotiations. There was CBA in operation throughout her employment. On 19th May 2007, she was at work at Maragwa Branch of the Respondent and being a Saturday the day ended early. Around Noon the Branch manager called for a meeting and told the employees that some of them were going to leave their employment. He was holding a branch of letters. The witness was asked to pray and the Manger proceeded to call the names and issued the letters. Upon reading the contents, it was a termination notice and some grievants fainted, some went into shock, some were unable to complete their day tasks and first aid had to be administered on others. Everybody was in shock. There was no information prior about the terminations or notice and the employees were caught off guard in the middle of the day work.

6. The manager asked those with termination letters to do their handing over immediately. That the letters had been delivered from the head office and the reasons for termination was due to reorganisation as Murata wanted to reduce its staff. As the shop steward she called others from different branches and learnt that the issuance of the termination letters had been simultaneously issued. 93 BIFU members were affected.

7. The witness further gave evidence that there was no justification for the mass retrenchment as immediately upon termination the Respondent employed new staff and promoted junior staff to take over from them as the old and more experienced employee members of the Union. The CBA applicable at the time was never followed and when BIFU looked at those terminated, there was discrimination as those from Gatanga region of Murata operations were never terminated. Even where the Respondent was to undertake such a retrenchment clause 12 of the CBA was not followed as retrenchment was to be voluntary and a seminar be held prior to such a decision and those to be affected were to receive notice.

8. The process of termination was therefore unfair. Clause 9 of the CBA was not followed with regard to payment of terminal dues as gratuity was to be paid at 2 months' salary for each year worked. She was earning kshs.14, 000.00 at the time and was supposed to get 14,000.00 x 2 x 14 years served but these dues have never been paid. The clause also provided that each employee was to be paid for notice and 23 days salary for each completed year.

9. All the grievants had loans pending at the time and the terminal dues were used to repay this loan even without prior notification to help them reorganise their finances as this was abrupt and some left without anything or in arrears due to pending commitments. There was a provident fund that was different from the dues under retrenchment package and the Respondent cannot rely on this Fund to deny the grievants their dues.

10. The Respondent justified the termination on retrenchment but this was not the case here as the

principles that govern retrenchment were not followed. Newly employed staff were left under the guise that the Respondent was introducing computers in their systems which was not the case as most staff were trained in computers and were using them in their networked system. The witness thus outlined the claims for compensation for unfair termination, 2 months' salary for every completed year, interest on the dues, compensation from trauma and costs of the suit. The claim of KRA tax has been resolved and not part of the claim. The claimants also admitted that they received one months' notice pay, 23 days of work and leave days due.

11. The 2nd witness for the Claimant was **Bernard Mucheru Muchiri** also a grievant and former employee of the respondent. He was employed July 1993 by the then Murang'a District Farmers' Co-operative as a Savings Clerk. When the larger Murang'a district was split into 3 – Gatanga, Murang'a and Maragwa – the Respondent also changed to Mugama and Murata where the witness remained as an employee until termination on 19th May 2007. He was at Kandara branch. It was a Saturday and around Noon, the Branch Manager called all the staff at the close of the day business and informed them that there were letters from head office and he distributed them to some employees including the witness. The letters were for termination on the reasons that the Respondent had reorganised its business. Those who received these letters went into shock and some started screaming, crying and there was a lot of drama at the office. Those terminated were asked to immediately hand over but some could not due to the trauma and the resultant shock.

12. The witness also gave evidence that he was a member of BIFU and the Secretary at the time of termination. He checked with the others terminated and the reasons were the same, that of reorganisation. The Respondent also made reference to a CBA clause 12 as the basis of the termination. He therefore called the Union chairman based at Murang'a Branch and other BIFU officials only to learn that the terminations were all happening in all branches of the respondent.

13. The witness was serving in the Accounts Department and also working with the general manager to help install computer and was one of the best staff working on computer. His skills were therefore still relevant to the respondent. When the Union official met to address the terminations, they realised that the employees with most experience were the ones terminated leaving behind new employees who had to take over from the old employees. Also that there was discrimination as employees hailing from Gatanga district were not terminated there was no particular criteria used by the Respondent to justify the termination of the grievants.

14. The witness also gave evidence that he was part of the negotiation team for the CBA and it was not followed during the termination. The CBA made provision that where there were layoffs, this would commence with training and awareness so as to avoid shock. The layoffs were to be voluntary; then notice given and finally terminal dues were to follow which included gratuity of 2 months, severance pay based on 23 days for each year, notice pay and leave days due – all these provisions in the CBA were violated. Had this been followed the witness package would have comprised of basic salary at 16,000.00 paid for two months for the 15 years he had served – $16,000 \times 2 \times 15$.

15. The witness also gave evidence that the other reasons used by the Respondent for termination was that they had introduced computers to network their systems and thus the termination to leave those who were computer literate. That this was not a justifiable reason as before the witness moved to Kandara Branch he was based at the head office in working on computer and the general manager would call him to help with office computer. Other grievants had gone for computer training. There were new computers at the office but were not installed to enable the Respondent test who was unable to use them. It was therefore not possible to assess the grievants and state that they had no knowledge of computers and use this as a reason for termination.

16. The witness was 35 years old at the time of termination and had 25 more years to retire. Most of those terminated were below 45 years old, were of high performance and experience and had skills that were ignored. The termination was done in the most inhumane manner noting that there was no notice, the CBA was not followed and there was no reorganisation that had been planned. The CBA made provision for layoffs and clause 9 was to apply. The witness therefore reiterated the Claimant outlined in

the Claimant and in support of the first witness for the claimant.

17. The grievants were members of the provident Fund where the witness was a trustee since 1991. Every member paid 17% of their salary and the initial contribution was done by the Respondent at two months' salary as the pension. This changed from a defined pension to a defined contribution with Respondent having 17% and the employee having 5% contributions. The operative Union then was Kenya Commercial Food and Allied Workers (KUCFAW) and then BIFU. There was no Agreement on pension but gratuity was based on percentages. The Unionised employees had their gratuity at 2 months' salary for each year served while the provident Fund was a separate entity running separate from the Respondent as the witness is still a trustee. Therefore at the time of termination, gratuity was payable. This gratuity does not come from the provident fund as the two are distinct from each other. The provident Fund is regulated by the Retirement Benefits Authority Act.

Respondent's case

18. The Respondent stated that they have a Recognition Agreement with the Claimant Union from 7th June 2005 and before there was KUCFAW. Several CBAs have now been negotiated, the last being the one dated 31st December 2009 covering 1st January 2008 to 31st December 2009. For this claim, the applicable CBA is the one for the period 1st January 2006 to 31st December 2007. The Respondent operate a retirement benefits scheme established in 1996 for its pensionable employees originally called Murang'a District Co-operative Union Staff pension Scheme but later changed its name to the current one, Murata Sacco Limited Staff provident Fund. The initial deposit for the fund was by the Respondent for an amount of two months' salary for each employee for every year served based on the gratuity clause of the parties CBA as the scheme was non-contributory. The scheme was later converted to a defined contributory scheme with the Respondent contributing 17% of the basics salary and the employee contributing 5% of basic salary. In 2006 the Respondent updated the scheme and made top-up payments for the employees whose contributions were not up-to-date. This was on the understanding by both parties that when paying the lump sum, this benefit would replace the gratuity referred to in clause 9(a) of the CBA hence the reasoning that the deposit by the Respondent was equal to two months' pay as in the case of gratuity.

19. These changes and contributions had been discussed with KUCFAW and not the claimant. The Claimant thus took over a CBA that had a redundant provision as the benefits under the clause had already been converted into a retirement benefits scheme. In addition to the gratuity the parties had negotiated a specific benefit of 23 days per completed years of service for retirement and this was effected in the CBA covering 1st January 2008 to December 2009.

20. With this background, on 18th May 2007 the Respondent released 100 employees under clause 11 and 12 of the CBA for the reasons that computerisation of services necessitated reduction of staff; release of staff that were not able to be trained on use of computers due to their age or educational level; and the Respondent considered productivity, performance and ability. The employees who had not attained age 45 were released on retrenchment under clause 12 of the CBA while those who were above 45 were retired under clause 11 on the CBA. All benefits were paid according to the relevant clause in the CBA in force at the time which comprised;

- a. *Salary for days worked*
- b. *Severance/service pay at the rate of 2 days salary per year worked;*
- c. *One months' salary in lieu of notice of annual leave*
- d. *Leave allowance*
- e. *Half salary arrears.*

21. These payments were accepted by the grievants. The terminations were therefore lawful as those below 45 years of age were retrenched and those above 45 years of age were retired. The gratuity claimed was converted into a provident fund scheme where the Respondent made a contribution of 17% basic salary.

22. The Claimant reported the dispute to the Minister but the Respondent rejected the recommendations on the grounds that these findings were not correct in finding that the termination on redundancy was not lawful, the CBA contravened the law on the issue of notice and that most of those retrenched went home with nothing. The claim should therefore be dismissed as it has no merit, the terminations were lawful and all terminal dues were paid and nothing remains outstanding for the respondents to pay.

23. In evidence, the Respondent called **James Kamau Gachau** who testified that he is the acting Chief Executive Officer of the Respondent and at the time the claimants were terminated he was the Deputy General Manager, finance and so familiar with the case before court. He joined the Respondent in 1987 under the name Murang'a Farmers Co-operative, there were changes that saw the cooperative split and he has remained with the Respondent for 27 years.

24. In 2007 the Respondent was computerising its services and found that the staffs that were there were in excess of what the Respondent required and a decision for layoff was made. There were many factors to be considered especially those who lacked IT literacy; looked at performance of each staff; staff behaviour in the office; attendance and punctuality and this helped the Respondent arrive at who was to be laid off. There was a CBA in force and most of those laid off happened to be members of the Union but some remained. Management staffs were also affected. He did not directly deal with the retrenchments made the payments as the person responsible for accounts at the time.

25. The CBA applicable at the time was with BIFU but before BIFU the Respondent had a CBA with KUCFAW with whom gratuity had been negotiated noting that it was possible for the Respondent to go under in a scenario where provident fund was paid from within and thus was removed and separated to make it earn interest for members and to ensure it was secured and that there was proper accounting as the Respondent would not access it only employees got their shares when due. This provident fund was gratuity where the Respondent made the initial deposit. In 1997 when the Respondent changed and became a bank, the entire provident fund was placed under a new scheme on a formula of a deposit of two months' salary for every year worked for all employees. The scheme is now regulated by the RBA rules as negotiated with KUCFAW. The Respondent does not therefore pay gratuity and the applicable clause in the CBA was removed in the subsequent CBA as the Union, BIFU realised it was a duplication with regard to terminal dues. It was deleted and all the funds to go to the provident fund.

26. The terminal dues of the grievants were based on the new CBA that did not have provision for gratuity and the payments that were thus given comprised of;

- a. Severance pay;
- b. Notice pay;
- c. Leave due;
- d. Allowances, and any other salary arrears or overtime.

27. These payments were calculated and the grievants acknowledged receipt. The Respondent thus expended over 16 billion Kenya Shillings in paying the terminal dues to the grievants besides the pension they are to receive under the scheme. At the time the Retirement Benefits Authority (RBA) had prohibitions on payments before retirement but this has changed and the grievants can now access 50% of their deposits. The Respondent calculated a sum total of 2 months' salary for each employee and deposited this in the provident fund in place and instead of a gratuity payment.

28. The witness also stated that most grievants had short time financial commitments that were offset by the terminal dues. This is compensated by the provident fund deposits which earn interest. All the grievants can access this fund. The Respondent has no right to access the provident fund under RBA rules. To pay any gratuity as claimed would be to pay the grievants twice over the same thing.

Submissions

29. In submissions the Claimant stated that as the Union that represent and grievants herein have a

Recognition Agreement signed on 7th June 2005 and a CBA with the Respondent for the period of 1st January 2006 to 31st December 2007 both relevant to the claim. The grievants being members of the Claimant were terminated vide the unilateral decision of the Respondent on the reasons of reorganisation, retrenchment and voluntary early retirement. The Respondent purportedly was relying on Clause 12 of the CBA.

30. The Claimant also submitted that the retrenchment of the grievants was without just cause and the same was unprocedural and was contrary to the applicable CBA. The Respondent only paid 23 days' pay, one month notice pay, and clearance for the grievants to collect their pension fund deposits. The clause upon which the Respondent relied on was not followed as agreed with the claimant. This was illegal in the circumstances. This caused the grievants to suffer psychologically as the termination was abrupt and without notice and shocking as it was unexpected. Majority had financial commitments that the Respondent was aware of but went ahead with the retrenchment without following the principles for such a process. The purported voluntary early retirement was not the case as there were no consultations. The Claimant relied on **Civil Appeal No. 46 of 2013, Kenya Airways limited versus Allied and Aviation Workers Union Kenya;**

... the redundancy notice provided that the procedure to be followed to identify affected staff were their skills and experience, standard of work performance, displayed work initiative, respective competencies, defined for different roles in the organisation design. There is no evidence to demonstrate how this was determined.

31. The grievants are therefore entitled to gratuity as part of their terminal dues. The CBA applicable herein covering the period 1st January 2006 to 31st December 2007 at clause 12 made provision for gratuity which was reviewed by consent in the subsequent CBA for the period 1st January 2008 to 31st December 2009. The new change deleted gratuity payments as there was now in existence a contributory pension fund. Gratuity at the rate of two (2) month's salary is due to the grievants. The Claimant should thus be awarded as prayed in the memorandum of claim.

32. The Respondent on their part submitted that the employment of the grievants with them ceased on 31st May 2007 and the applicable law then was the repealed Employment Act, Cap 226 and not Employment Act, 2007. A number of the grievants were fairly and lawfully retired by the Respondent under clause 11(ii) of the CBA while the rest were retrenched as provided under clause 12 of the CBA. That vide letters dated 18th May 2007 all the grievants were either retired under clause 11(ii) or retrenched under clause 12 of the CBA between the parties herein. Clause 11(ii), an employee was at liberty to retire at 45 years of age or the Respondent could retire the employee with reasons. There was a reorganisation that resulted in the Respondent terminating the grievants. A total of 100 employees were released. 33. The notice letters to the grievants were copied to the Claimant Union. All dues were paid for;

- a. Salary for days worked;
- b. Severance pay at the rate of 23 days per year worked;
- c. One months' salary in lieu of notice;
- d. Pay in lieu of leave days earned but not taken;
- e. Leave allowance; and
- f. Half salary arrears.

34. The termination was lawful and followed the applicable law. The claim for unfair termination does not arise as the effective law at the time did not make provision for the same. Gratuity is also not due as this had been converted to the pension fund under Murata Sacco limited Staff provident Fund that the grievants can access. In this Fund the Respondent made a contribution of 17% basics salary for each employee to take care of gratuity provision. Nothing is due from the Respondent to the claimants.

Determination of the issues;

What is the applicable law in this case?

Whether the retrenchment and voluntary early retirement were properly applied

Whether the Claimant are entitled to the remedies sought

35. It is not in dispute that the Claimant and the Respondent herein have a Recognition Agreement going back to 17th May 2005; which Recognition Agreement the Claimant took over from their transition with KUCFAW and have had a CBA in force since to date. Equally it is not contested that on 18th May 2007, the Respondent terminated 93 members of the claimant, the grievants through retrenchment or voluntary early retirement. It is therefore granted that parties herein had written terms and conditions of their relationship at all material times. The CBA renewed once the previous one lapsed took care of the terms as mutually agreed on by the parties for the benefit of the grievants and the Respondent work force.

36. 17th May 2007 therefore becomes an important date as it is the focal point of other claims relevant herein. This being the date the grievants were terminated. By 17th May 2007, the law operative then was the Employment Act, Cap 226 [now repealed] as the Employment Act, 2007 though before Parliament then, it only got assent on **22nd October 2008** and commenced and or took the force of enforcement on **2nd June 2008**. Any claims before the court as of 1st June 2008 back to **3rd May 1976** all were to apply the Employment Act, Cap 226, now repealed. With the cause of action herein having arisen on the 17th of May 2007, the applicable law that regulated the relations between the parties herein remained the repealed Employment Act, Cap 226.

37. It is settled law that parties to an employment relationship should have their terms and conditions of service in writing even under the repealed Employment Act, Cap 226. Such written agreements are to guide the parties in enforcing the terms and conditions and also where a dispute arises, such written terms and conditions of service become as of necessity to go back to. In this case the parties had a Recognition agreement; the Claimant transitioned from KUCFAW and accepted the terms as between them and the respondent; which fact is not contested. At the time there was also a CBA in force one covering the period 1st January 2006 to 31st December 2007. I take it then at all material times all relations between the parties was regulated and the same was evidenced in writing by an active CBA.

38. Termination of the grievants having occurred on 17th May 2007, the applicable CBA was the one covering this period, one for 1st January 2006 to 31st December 2007 and cannot be the CBA covering the period 1st January 2008 to 31st December 2009. To apply the later CBA would be to act retroactively which is not what the parties had contemplated. Also where there were changes to the CBA covering the period 1st January 2006 to 31st December 2007, the parties were at liberty of putting this in writing. I find no evidence that what was agreed on to declare some parts redundant or make changes to the operative CBA was put into writing. For purposes of this claim, I find the relevant CBA is the one for the period **1st January 2006 to 31st December 2007**.

39. By 17th May 2007 Redundancy provisions were set out under the repealed Employment Act, Cap 226 as defined under the Trade Disputes Act, Cap 234 [now repealed] to mean;

"redundancy" means 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 due to the Kenyanization of a business; but it does not include any such loss of employment by a domestic servant;

40. Thus so defined, redundancy is the involuntary loss of employment through no fault of the employee due to abolition of an office. The employee's skills, competences and capacity is not the challenge, rather, due to reorganisation of a business toward better productivity, some portions are abolished affected the employment held by an employee. Redundancy is also a term used differently is

various jurisdictions to mean reorganisation, retrenchment or restructuring. All these terms have the end result of a discharge of surplus labour or staff by an employer for any reason whatsoever, otherwise than punishment inflicted by way of disciplinary action, as positions and not employees, become redundant as held in **Malaysia Court of Appeal in the case of William Jacks and Company MSdn. Bhd. v. Balasingam [1997] 3CIJ 235**. When the position becomes redundant, the employee can be re-deployed, which means the employee is given another job, or the employee is retrenched, meaning the employee loses the job altogether.

41. In the eventuality of a redundancy process, section 16A of the repealed Employment Act, Cap 226 applied thus;

16A. (1) *A contract of service shall not be terminated on account of redundancy unless the following conditions have been complied with -*

(a) *The Union of which the employee is a member and the Labour Officer in charge of the area where the employee is employed shall be notified of the reasons for, and the extent of, the intended redundancy;*

(b) *The employer shall have 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;*

(c) *No employee shall be placed at a disadvantage for being or not being a member of the Trade Union;*

(d) *Any leave due to any employee who is declared redundant shall be paid off in cash;*

(e) *An employee declared redundant shall be entitled to one month's notice or one month's wages in lieu of notice;*

(f) *An employee declared redundant shall be entitled to severance pay at the rate of not less than 15 days' pay for each completed year of service as severance pay.*

(2) *For purposes of this section -*

"Trade Union" means a Trade Union registered under the Trade Union Act (Cap 233); and

"Redundancy" has the meaning assigned to it in section 2 of the Trade Disputes Act (Cap 234).

42. As above outlined in the unfortunate incident of a redundancy, a contract of service in existence at the time was not to be terminated unless;

- a. The Union and the Labour Officer are notified and given reason for the redundancy;
- b. Apply a set criteria;
- c. Not place any employee at a disadvantage;
- d. Pending leave days be paid in cash;
- e. One month's notice or pay in lieu of such notice; and
- f. Payment of severance pay.

43. These provisions of the law are set out in mandatory terms. They are to be followed by every employer as redundancy does not occur overnight. It is a process. It is necessitated by operational requirements of the employer. Companies restructure not necessarily because they are in financial distress, but for such other reasons as mechanization of the modes of production. **Chapman v. Goonvean & Rostowrack China Clay Limited [1973] 2 All ER, 1973**, Lord Denning M.R. held that it is not a genuine redundancy, where the requirements of the business for the affected employees continues, just the same as before. In this case the employer terminated the contracts of certain employees on the basis of redundancy, but went ahead to recruit new employees to undertake the same roles.

44. Thus reading the applicable law together with jurisprudence on how a redundancy should be undertaken, conducted and or processed; it involves the existence of genuine business reasons that require consultations, development of a pre-set criteria looking at seniority of affected staff; skill, ability, reliability and the class of each employee before arriving at the decision to terminate. Such a process must involve the Union without disadvantaging employees not Unionised and as of importance, the Labour Officer responsible for the area where the Respondent employer is situate must be informed and involved. The Labour Officer is the government representative, neutral in the redundancy process to advice both the employer and employees on the applicable law and adherence to best practice especially as regards the set criteria. The inclusion of the Union where applicable and the Labour Officer is not optional; the law is framed in mandatory terms. Any resultant redundancy process without compliance with the law is unprocedural and a breach to the employment contract. Such breach where pleaded is curable by payment of damages.

45. Beyond the application of the law, where parties have a contract of employment; a CBA or any other written Agreement with regard as to how a redundancy process is to be addressed, this written Agreement must be complied with unless the same is proved to apply to illegal provisions or going below the legal minimum. Any such Agreement is to be respected as the wishes of the parties.

46. In this case, the Respondent in the *Respondent's Reply to Memorandum* at paragraph 4, 10, 11 states;

4. The Collective Bargaining Agreement relevant to the claim is for the period 1st January 2006 to 31st December 2007;

10. The understanding of the parties when paying the lump sum into the scheme was that the benefits under the scheme would replace the gratuity referred to in Clause 9(a) of the CBA. This is why a lump sum equal to the gratuity payable in respect of each employee at the material time was deposited by the employer into the scheme on inception.

11. at the time of the changeover the Respondent did not have a Collective Bargaining Agreement with the Claimant and the process had been discussed with the previous Union which was Kenya Union of Commercial Food and Allied Workers (KUCFAW), the Claimant Union thus took over a CBA that had a gratuity clause that was redundant as the benefits under the clause had already been converted into a retirement benefit scheme.

47. What is apparent is that the relationship between the parties herein was covered through written agreements or CBA. There is no record of any change to the CBA for the period covering 1st January 2006 to 31st December 2007. Where such changes existed, the Respondent never produced such evidence. Even where it does exist, based on the applicable law, the Respondent commenced a redundancy process *suo motto*; they arrived at who to terminate and did terminate on 17th May 2007 without any due regard to existing law, applicable CBA with the claimant, reference or prior notice to the Labour Officer. Where the Respondent knew that there was an Agreement either with KUCFAW or with the Claimant with regard to the application of Clause 9(a) of the CBA, such Agreement should have been reduced into writing. Otherwise any discussions that may have been held in this regard to make any changes, where not agreed upon, this court cannot rely on the same. Equally the Respondent remained the only party to the relationship who knew of the impending redundancy process. Where there was an intention to rely on clause 9(a) as deleted while undertaking this process, nothing prevented the Respondent from waiting for the new negotiated CBA that had clause 9(a) of the subject CBA deleted. The hurry and rush to terminate the grievants though unfortunate, left them covered under the operative CBA as of 17th May 2007.

48. The evidence of the Respondent witness, **James Kamau Gachau** that;

Retrenchment is a sensitive issue and Respondent only discussed it at the board level. It was a board decision ...the termination of the grievants may not look fair but the Respondent business is sensitive being a financial organisation. It would be strange to tell a person handling cash that

they are about to be terminated. In a financial institution it would not work. I am sure other banks also do the same thing. The Claimant was not given notice of the termination. There was no notice but there was compensation for lack of notice. Not all the terminated employees were cashiers. Bernard Mucheru was an Accountant at Kandara Brach but he was not at the till and did not handle cash.

49. As outlined above, a retrenchment or redundancy process is not a secret. It is not done by an employer simply because they can do it. It does not relate to *sensitive* or other kind of business. The law applicable is uniform. The Respondent retrenchment and voluntary early retirement package was outlined under clause 12 of the CBA as;

In case of retrenchment, the modalities to be followed shall be as follows:

- i. Voluntary subject to approval by the employer*
- ii. Twenty three (23) days salary for every completed year.*
- iii. One (1) month salary in lieu of notice*
- iv. Seminar/training to be offered*
- v. Staff to be given clearance to collect pensions as provided in the RBA Act.*
- vi. In the case of retrenchment the selection of the employees must be just and fair and the targeted employees to be informed in advance.*
- vii. The affected employees will be deemed to have retired normally.*
- viii. In case of voluntary early retirement scheme, the exercise shall purely be voluntary. There shall be no coercion, intimidation or undue influence on the part of the Society.*

50. Did the Respondent follow these guidelines? Was the Respondent capable of following these guidelines? I find no evidence of compliance with these set rules governing the issue of retrenchment and voluntary early retirement by the respondent. The Respondent flouted each and every principle of their own terms. The affected employees though paid part of the terminal dues; there was more to a retrenchment and voluntary early retirement process than just payment of dues. There was to be a seminar and or training, a process that was just and fair where the affected staff were to be informed in advance and the *voluntary early retirement* was to be *voluntary*.

51. On the question whether the retrenchment and voluntary early retirement were properly applied, on the above analysis and finding that the entire process of retrenchment and voluntary retirement undertaken by the Respondent failed the statutory requirements, the same became of no consequence. Without evidence on the essence of the redundancy process undertaken, the grievants should have retained their employment with the respondent.

52. Pension, retirement benefit or a scheme and fund for retirement are measures taken by an employer and in majority of cases with the employees' contribution to set funds aside to make provision for an employee once out of work, retirement or no longer able to work due to age, disability or illness. Such a fund is embargoed so that it is not accessible to either party to ensure its protection, investment and growth. Such a fund in majority of cases is invested with an independent agency so as to spate it from the employer and the employee to ensure that when due and needed, the employee will be able to access it. It is not part of terminal dues as in a termination or dismissal as the fund; scheme of pension has its own regulations and rules such as the RBA Act and its operative rules. Once an employer makes deposits with the fund, pension and or scheme, these funds cannot be retraced back to the employer. Only the employee is beneficiary.

53. In this case, where the Respondent commenced a pension fund that was non-contributory, they caused the same to be contributory where the Respondent deposited the initial deposit equivalent to each employees two months basic salary and transitioned to a contributory scheme with a deposit of 17% and the employees had 5% deposit. This fund, scheme or pension was also regulated under the CBA. 54. Under the 1st January 2006 to 31st December 2007 CBA, the parties herein had agreed by mutual consent at the time of the CBA registration to include as part of the terminal benefits a gratuity calculated at the rate of two (2) months basic salary for each year of service at the time of termination. This is clearly

outlined under clause 9 of the subject CBA. More benefits are outlined under clause 11 and 12. The defence by the Respondent that the where the grievants are paid gratuity they will be getting double pay is not correct. There is pension and gratuity. One payable for retirement purposes while the other a token of appreciation at the end of employment. The two are not equal. This token was however removed in subsequent CBA. There was mutual Agreement to this removal. While it existed as under the CBA covering 1st January 2006 to 31st December 2007 the period within which the grievants were terminated on 17th May 2007, the gratuity agreed upon became due.

Remedies

55. KRA tax dues are admitted as having been paid. This is thus marked as a settled claim.

56. Notice due in the redundancy under the law is one month or payment in lieu of such notice. The parties in the CBA agreed to two months' notice or payment for one month. The Respondent paid for one month in lieu of notice. This was as agreed by the parties. I find no justification in the Claimant seeking to be paid for two months. This was not as articulated in the CBA.

57. The claimants are also seeking orders for reinstatement of the grievants. Termination was on 17th May 2007, a period of over seven (7) years ago. The Respondent must by now have undergone tremendous changes. Orders or reinstatement are also only granted in the rarest of cases as this would require specific performance. Noting the time taken to arrive at the conclusion of the matter, the number of employees involved and noting that some grievants have moved on to new employment like Bernard Mucheru who is now employed by Waumini Sacco Limited, reinstatement would not be an appropriate order.

58. The Claimant is in the alternative to the grant of reinstatement seeking compensation for wrongful termination of the grievants. The concept of unfair labour practice, unfair termination of employment is a matter now best articulated under Article 41 of the Constitution, 2010 and section 45 of the Employment Act, 2007. The Constitution, 2010 and Employment Act, 2007 only came into force after the 17th May 2007 after the cause of action arose. Compensation as claimed cannot be granted in the contest of this case as that would be to apply the law retroactively. The transitional provisions of the Employment Act, 2007 do not apply in a case like this one. This will not be granted.

59. However, upon the finding that the grievants were wrongfully terminated and should have retained their positions with the Respondent as at 17th May 2007, this Court is empowered to make orders that are deemed fit, just and reasonable in the circumstances of the case. Damages are herein appropriate. This is assessed at three (3) months of gross salary for each grievant based on the last salary received at of 31st April 2007.

60. The Claimant is also seeking gratuity based on clause 9(a) of the subject CBA at the rate of two (2) months basic salary for each completed year of service. This is due to grievants terminated under retrenchment or voluntary early retirement as applied by the Respondent as at 17th May 2007. To be allowed to benefit from the subsequent CBA covering a different period within the context that the same was wrongful would be the injustice to the affected employees. The Respondents to pay the dues as outlined under the correct CBA, one covering 1st January 2006 to 31st December 2007. Gratuity is thus due and the same calculated at 2 months basic salary for each completed year of service.

61. Noting the matter of termination, how the process was carried out at the whims of the Respondent and the mental anguish caused to the grievants, the Respondent will meet the costs of the suit. Monies payable for gratuity shall be paid with interest.

In conclusion therefore, judgement is herein entered for the Claimant as against the Respondent in the following terms;

- a. The termination of the grievants was wrongful;**

- b. Each grievant to receive three (3) months gross salary in damages;
- c. Each grievant to receive two (2) months basic salary for each full year worked;
- d. The Claimant is awarded costs of the suit;
- e. Monies payable under (c) to be paid with interest; and
- f. Dues arising under (b), and (c) to be computed by the area Labour Officer where the Respondents situate [Murang'a County] within the next 14 days and the Court shall mention the matter on 28th October 2014 to confirm and give directions on modalities of payments.
- g. The Respondent to grant the Labour Officer access to the grievants work records in compliance with (f) orders as above.

Delivered in open Court at Nairobi this 7th Day of October 2014

M. Mbaru

JUDGE

In the presence of;

Lilian Njenga: Court Assistant

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