



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA
AT NAIROBI
CAUSE NO. 1796 OF 2011

KENYA UNION OF COMMERCIAL FOOD AND ALLIED WORKERS.....CLAIMANT

VERSUS

NATIONAL SOCIAL SECURITY FUND (N.S.S.F.)RESPONDENT

JUDGMENT

1. This suit has commenced by way of memorandum of claim dated 24th October 2011.
2. The Claimant seeks the following prayers;
 - i. the Court do issue a permanent order restraining the Respondent from implementing the results of the Job Evaluation Exercise.
 - ii. that the Court declares the results of the Job Evaluation Exercise, the intended unfair / arbitrary transfers and the intended mass displacement of employees null and void.
 - iii. that the Respondent be ordered and directed to carry out an all-inclusive Job Evaluation Exercise if at all there is a need for one.
3. Simultaneously with the filing of the memorandum of claim was filed an interlocutory application of the same date seeking prayers 1 – 9 set out in the Notice of Motion.

Prior to the hearing of this suit, the Court recorded a consent order to this effect;

“By consent of the parties the order 1, 2, 3, 4, and 5 sought by the Claimant in the application dated 24th October 2011 are spent and the only outstanding issue sought is prayer 6 be canvassed in the hearing of the main suit.”

4. The effect of this consent order was to confirm that the new job grading structure was already implemented at the work place and the same did not result in unfair / arbitrary transfers and mass displacement of employees.
5. The only issue for determination at this stage is whether or not the Job Evaluation Exercise conducted by Pricewaterhouse on behalf of the Respondent was done in violation of the

Recognition Agreement between the parties and the Collective Bargaining Agreement by failing to consult and / or involve the union in the process leading to the conduct of the exercise.

6. In this regard, the Claimant opted not to lead any oral evidence in this regard and relies only on the averments in the memorandum of claim; the Affidavit of Charles N. Mwaniki deposed to on 24th October, 2011 in support of the same date and the annextures to the memorandum of claim.

7. On the other hand, the Respondent filed a statement of Reply dated 24th November, 2011 on the same date with annextures that detail the process followed in the Job Evaluation exercise.

The Respondent in addition called one Wilson Gachoni, the head of employee relations at the National Social Security Fund who took the Court through the various stages towards the completion of the Job Evaluation exercise.

Both parties filed written submissions on 20th February 2014 and 13th March 2014 respectively.

Claimant's submissions

9. It is common cause that the parties have a valid recognition Agreement and a CBA registered on 22nd January 2010.

The Job Evaluation exercise carried out by the Respondent was not all inclusive. The Claimant was inspite protestation excluded from the same as seen in the protest letters filed on 26th October 2011 dated 24th October, 2011, Appendix 2 & 4 (iii) and on bundles filed dated 28th May 2013 Appendix B, C, D & E.

10. It is the Claimant's case that only the Secretary General of the Union has the powers and authority to appoint any officer / official to represent him in any forum or meeting touching on negotiable matters in terms of **Clause 2(a) & (b)** of the Recognition Agreement.

11. That the Shopsteward who sat in various meetings with the Respondent were not tasked by the Secretary General to represent the union in the Job Evaluation Exercise.

12. That in terms of **Section 2(9) of The Labour Relations Act, 2007**, "**authorized representative**" means;

“(a) the General Secretary of a trade union;

(b) an employer or the Chief Executive Officer of an employer;

(c)

(d)

(e) any person appointed in writing by an authorized representative to perform the functions of the authorized representative.”

13. It is the Claimant's submission therefore that the exercise was not all-inclusive and therefore unlawful.

Claimant states that annextures 4 & 5(a) to (l) produced by the Respondent do not satisfy the aforesaid requirement and ought to be ignored by the Court.

The Claimant further submitted that in the **Industrial Cause No. 499 of 2010; KUCFAW and**

BAT the Court ruled that an employer cannot hand pick its employees and task them to represent a union. This was declared unfair labour practice by the Court.

14. The Claimant urges the Court to find that no union representative appointed lawfully by the General Secretary participated in the Job Evaluation Exercise and therefore, the process was unfair, *ab initio* and therefore null and void.

Based on the consent order recorded by the parties, the issue regarding the right to implement the Job Evaluation Report before first discussing the same with the Claimant, the effect of the implementation of the report are spent.

15. It is submitted however by the Claimant, in terms of **Section 12** of the **Industrial Court Act 2011**, as read with **Article 41** of the **Constitution**, this Court has authority to declare the job Evaluation Exercise null and void for failure to include the proper union representatives in the process towards its development.

Respondent's Submissions

16. It is the Respondent's submission that the Job Evaluation Exercise was commenced by the Board of Trustees of NSSF in September 2009. That the exercise was carried out by Pricewaterhousecoopers in consultation with all stake holders including the Board's Human Resource Committee steering committee, managements and the staff of the fund at all levels.

That employees involved included those in management and unionsable cadre. In this regard, the claimant union representative members in the organization were involved as members of the steering committee that was engaged with the consultants on a day to day steering of the exercise on behalf of the Respondent.

17. Three shopstewards, **Mr. Genge Odongo** the Chief shopsteward, **Mrs Lucy Ndung'u** and **Mr. Reuben Macharia** as seen on page 149/150 of the Evaluation Report (appendix 2 to the Respondent's memorandum of 24th November 2011).

18. The deliverable of the exercise includes new organizations structure, staffing levels for each department, job grading structure (including a job grading manual and trained panelists), salary structure and the estimated cost of assimilating staff into the new structure.

The final report of the consultant dated August 2011 is appendix 2 to the Respondent's memo.

19. Following the approval of the Job Evaluation Report by the Board of Trustees for implementation, the Respondent formed a Project Management Office (PMO) to; entrust the Managing Trustee spearhead the implementation of report, establish the implementation timetables and deliverables. The PMO members included the Chief Shopsteward as seen in the minutes of the first meeting of the committee dated 20th May 2010 (appendix).

All aspects of the implementation were championed by the PMO and minutes are available as seen in the appendices 5(a) – 5(h) of the Respondent's memorandum of 24th November 2011.

20. The Respondent is presently engaged in Collective Bargaining on terms service affecting unionsable employees and in this process the union has been fully briefed at every stage of implementation of the Job Evaluation Report. Indeed on 18th October 2010, the Respondent held a consultative meeting with the General Secretary **Mr. Okoth Korombo** regarding the progress of implementation and updates to all staff on the matter are appendices 6(a) – 6(f) to the Respondent's memorandum.

21. The Respondent in sum has engaged the Claimant union in the implementation process by

appointing its officials in the implementation steering committee and direct negotiation on issues of salary and grading structure.

Determination

22. It is noteworthy that the Claimant did not call any witnesses to support its allegations that the union was not involved in the process of development of Evaluation Report and its implementation.

23. The Respondent on the other hand testified on this matter extensively and produced documentation which clearly point to the involvement of the Claimant union in the development and implementation of the job Evaluation Report.

24. It is common cause that the Report has by and large been implemented and accepted by all staff including management and unionsable staff.

25. It is also common cause that the Respondent and the Claimant union is engaged in Collective Bargaining which includes various respects of the Job Evaluation Report that concerns and affects the unionsable employees and members of Claimant union.

26. It is also common cause that the Evaluation Report has resulted in establishment of a new organization structure and grading. Indeed all staff have enjoyed increased remuneration following implementation of the Job Evaluation Report.

27. It is trite that he / she who alleges, has the burden of prove.

The Claimant has made bald allegations unsupported by any oral or documentary evidence to the effect that the Respondent engaged in unfair labour practice in violation of **Article 41** of the **Kenya Constitution 2010** by failing to include the union in the development process of a Job Evaluation Report and its implementation.

28. The evidence before Court shows otherwise.

The Court is satisfied that the Respondent did not violate any of the provisions of the Recognition Agreement and the applicable clauses of the CBA in the process of preparing the Job Evaluation Report.

29. It must be remembered that it is the prerogative of the employer to manage its business in a fair, transparent and lawful manner.

The only duty the employer has to the Claimant is to ensure that any of its measures, that may in any way affect the negotiable terms in the CBA and individual contracts of the service of the employees are not implemented without consultation but not necessarily concurrence with the Claimant union.

The employer must ensure however that its conduct does not amount to breach or repudiation of the contracts of service.

30. The Court is satisfied that the Job Evaluation exercise has not in any manner negated the process of Collective Bargaining and conclusion of a negotiated CBA which takes care of all the concerns by the Claimant union.

Accordingly, the suit is dismissed with costs to the Respondent.

Dated and Delivered at Nairobi this 1st day of October, 2014.

MATHEWS N. NDUMA

PRINCIPAL JUDGE