REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 1114 of 2012

KENYA CHEMICAL AND ALLIED

WORKERS UNION…….……CLAIMANT

V

EAST AFRICAN PORTLAND CEMENT AND

COMPANY LIMITED ……. RESPONDENT

Rika J
CC. Leah Muthaka

Mr. Jackson Mueke, Industrial Relations Officer, instructed by the Claimant Union

Mr. Harrison Okeche instructed by the Federation of Kenya Employers, Advocate for the Respondent

ISSSUES IN DISPUTE:-

a. SHIFT DIFFERENTIAL

b. MODE OF CALCULATING RETIREMENT BENEFITS

RULING

1. The Claimant is a registered Trade Union, representing unionisable employees, in the Chemical and Allied Industries. The Respondent is a Cement Manufacturing Company, whose unionisable employees, are represented by the Claimant. The Parties registered a Collective Bargaining Agreement on 31st March 2010, vide entry RCA No. 30 of 2010. The CBA covers a period of three years, commencing 1st August 2009.

2. Two issues were not agreed upon: clause 13 on shift differential; and clause 21 on mode of calculating retirement benefits. The CBA states that the two issues would be resolved through arbitration by a third party, and the outcome of arbitration incorporated in the parties' CBA. Pending arbitration, parties would continue to implement the two clauses as contained in the outgoing CBA.

3. The parties do not seem to have engaged in arbitration, as agreed. The dispute was instead referred to the Minister for Labour under Section 62 of the Labour Relations Act Number 14 of 2007. The Minister appointed a Conciliator, but the conciliation process did not yield settlement. The Claimant filed the

Claim in Court.

4. The CBA contained a valid arbitration agreement. No arbitration has taken place. Conciliation by the Minister is a statutory process, overseen by the State. It is a public process, not a private mechanism. It is not arbitration. Arbitration is a private dispute resolution mechanism. There is no evidence that arbitration has been exhausted. There is no record of any arbitration proceedings. There is no Award, from any arbitral panel in the records filed by the parties.

5. Section 58 of the Labour Relations Act Number 14 of 2007 states:

[1] An employer, group of employers or employers' organization and a trade union, may conclude a collective bargaining agreement providing for-:

[a] the conciliation of any category of trade disputes identified in the collective agreement by an independent and impartial conciliator appointed by agreement between the parties; and

[b] the arbitration of any category of trade disputes identified in the collective agreement by an independent and impartial arbitrator appointed by the agreement of the parties.

Both conciliation and arbitration processes under this Law, are private mechanisms, wholly owned by the two parties. They have nothing to do with the State.

6. The CBA registered in this Court identified two issues in the CBA, which would be referred to an independent and impartial arbitrator appointed by the parties. The parties opted for the Alternative Dispute Resolution created under Section 58[1] [b] of the Labour Relations Act. They then deviated, and went for conciliation, not to a Conciliator appointed by themselves under Section 58 [1] [a]-there was no agreement for such conciliation - but preferred conciliation through the Minister under Section 62. This was wrong.

7. The Minister ought not to have taken cognizance of the dispute with the arbitration agreement in place. The Minister is not an independent and impartial arbitrator appointed by the agreement of the parties. The Industrial Court is not an arbitral Institution; its role is adjudicatory. The Judge is not an arbitrator; he is State Officer. Under the CBA registered as RCA No. 30 of 2010, the correct approach would be for the Claimant and the Respondent to appoint an Independent and Impartial Arbitrator, who would then hear the parties, and make an Award. The role of the Court would be as provided for under Section 58 [3] which states:

'' [3] An Award in an arbitration in terms of a collective agreement contemplated in subsection [1] is final and binding and-

[a] is subject to appeal on points of law to any court;

[b] may be set aside by the Industrial Court on any ground recognized in law; or

[c] may be enforced by the Industrial Court.

[4] An application to review an arbitration Award shall be made to the Industrial Court within thirty days of the Award.''

8. The Industrial Court would only be involved in appeal against the arbitration Award; in setting aside the arbitration Award; or in enforcement of the arbitration Award. The Court has not been asked to exercise any of these functions, but is being asked to determine a matter directly, in a case where the CBA contains a valid arbitration agreement. The Industrial Court can only come in, in aid of the arbitration process, not assume the role of the arbitration panel.

9. The Constitution of Kenya under Article 159 [2], demands that in exercising Judicial Authority, this

Court is guided by certain principles, among them, the promotion of Alternative Dispute Resolution mechanisms, including [re?] conciliation, mediation, arbitration and traditional dispute resolution mechanisms. The Labour Relations Act was enacted for among other purposes, to ensure there is orderly and expeditious dispute resolution settlement, conducive to social justice and economic development.

10. The Court does not think that in view of these legal arguments, and in view of the arbitration clause in the CBA subject matter, it should proceed to render a decision on the two disputed collective bargaining subjects. Where parties have selected one of the dispute settlement mechanisms given by the Labour Relations Act and the Constitution, they ought to exhaust that mechanism, before deviating into other Alternative Dispute Resolution Mechanisms, or seeking the Adjudication of the Court. It is also important that the different ADR and Statutory mechanism are not confused. There would be no orderly dispute settlement, if parties were allowed to disregard valid agreements on the mode of dispute resolution between them.

11. The Claimant and the Respondent are hereby ordered-:

[a] To appoint an independent and impartial arbitrator/ arbitrators by agreement, who shall proceed to hear and determine the two disputed collective bargaining subjects;

[b] The Industrial Court shall only entertain the matter further, in the manner provided for under Section 58 [3] of the Labour Relations Act; and

[c] No order on the costs

Dated and delivered at Nairobi this 29th day of May 2013

James Rika

Judge