



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 77(n) of 2009

**KENYA UNION OF DOMESTIC HOTELS,
EDUCATIONAL INSTITUTIONS,
HOSPITALS & ALLIED WORKERS
(KUDHEIHA) CLAIMANT**

VERSUS

NAIROBI CLUBRESPONDENT

RULING

This is a Notice of Motion filed by the Respondent/Applicant, Nairobi Club, dated 25th March 2013 brought under Section 16 of the Industrial Court Act and rules 16 of the industrial Court (Procedure) Rules, 2010. The application is supported by the annexed affidavit of Paul Oganga, the Chairman of the applicant and dated 25th March 2013. The Claimants/Respondents filed their Replying Affidavit dated 12th April 2013, sworn by Anthony Odari, in his capacity as a representative of the claimants.

The applicants are seeking a stay of execution of the award of the court made on 24th September 2009 pending their prayer for review and clarification of this Award. The same is on the grounds that the Award as made by this court is not clear, the claimants have threatened the respondent herein with execution and to meet the ends of justice, it is desirable that the award of the court be made clear and unambiguous for purposes of enforcement.

That the Award the respondent is seeking to have reviewed was delivered by Justice C.P. Chemmutut on 24th September 2009 where the Respondents felt aggrieved and filed a Notice of Appeal for purposes of preserving their rights of appeal. They also simultaneously considered a judicial review application against the Award and that application was filed in the High Court on 16th October 2009 where the High Court Stayed the execution of the Award pending the hearing and determination of the judicial review application. The judicial review was heard and a ruling delivered on 24th November 2011 where the Court declined the judicial review application.

That the respondent being aggrieved by the High Court Decision filed a Notice of Appeal for purposes of an intended appeal and also invoked the provisions of Rule 5(2)(b) of the Court of Appeal Rules and applied for stay of execution of the Award herein pending the hearing and determination of the intended appeal. That the Court of Appeal granted a stay of execution pending hearing and determination of the application and in a ruling delivered on 15th march 2013, the Court of Appeal declined to grant a stay of execution of the Award.

That immediately the claimants wrote to the respondent threatening execution of a colossal sum of Kshs.117, 624,600.00 an amount that had not been granted by the industrial Court in its award as the only

relevant portion of that Award was the order for reinstatement of the dismissed claimants together with payment of their back wages within the 30 days of the order. That despite the threat to execute, no decree and certificate of costs have been extracted by the claimants.

That after the respondent filed their application for stay of execution at the Court of Appeal they proceeded to notify all claimants to take up their former employment positions and majority agreed and resumed their duties with 49 taking up the reinstatement while the remaining 35 declined to take up the offer of re-employment and insisted on payment of back wages from the date of dismissal for an unspecified period of time while the court Award was clear that back wages were to be paid for a period when the former employees were dismissed to the time they were reinstated.

That the Award as it stands is ambiguous and uncertain in terms of the payment of back wages as that was not specific and needs clarification on the basis that back wages cannot be for a period of more than 12 months as envisaged by the law.

On the other hand the Claimants stated that the orders in the Award of the court dated 24th September 2009 has never been complied with to date when the court ordered the respondent to pay claimants their back wages, salaries, privileges and other benefits within 30 days from the date of the Award. That the Court in making the orders for back payments also directed the respondent to reinstate the claimants within 30 days which orders have not been complied with and in an attempt to comply the respondents sought through a newspapers advert on 19th April 2012 to call the claimants back a time that is two and a half years after the Court Award.

That at every stage the respondents have obtained stay orders either from the High Court in Misc. Civil Application No. 605 of 2009 and in Court of Appeal Application No. NAI 287 of 2011 and all these applications have been dismissed and effectively they have failed to comply with the Award of this court denying the claimants the fruits of their litigation. That the back wages for the 35 claimants have now accumulated to kshs.117, 624,600.00 and that it is in the interests of justice that the Orders in the Award of the Court be reviewed to incorporate the claimants back wages or salaries, privileges and other aggregating to Kshs.117, 624,600.00

A Court can review a judgement where a new and important matter of evidence is produced that was not possible to be produced at the time the decree was passed or on account of some mistake or error apparent on the face of the record or for any other sufficient reason. Therefore the criteria for the court to apply in an application for review are;

- a) Discovery of new and important matter or evidence;
- b) There is an error or Mistake apparent on the face of the record; or
- c) For any other sufficient reason.

The Court reading of these principles that apply in an application for review only apply where the aggrieved party has not preferred an appeal as a good ground for appeal in not necessarily a good ground for review. In an application for review, the error or omission must be self evident and it is not sufficient to say neither that the Court would have taken another view nor that the judge proceeded on an incorrect exposition of the law and therefore reached an erroneous conclusion of the law. Therefore a misconstruction of the law or other provisions of the law is not a good reason for a review.

I note both parties are agreeable that there are sufficient reasons for a review as to what constituted back wages and in the Courts assessment how and when they are payable and based on the Court award how they can be arrived at.

In labour relations the concept of 'back wages' has a long history and it is important to identify some of the antecedents to how this concept found its way into the labour regime before Kenya attained independence and even to this date where the Industrial Court has made orders, directions and continued

to apply this concept in resolving labour disputes. The term 'back wages' has been interchangeably been used with the terms 'back pay' which involves a process designed to prevent as well as remedy the commission of unfair labour practices especially where an employer makes an unfair labour practice determination and issues an order that may mean a layoff, demotion, transfers, pay reductions, or other changes in employment status involving financial loss. A back-pay order generally provides that employees shall be made whole for any loss of pay resulting from the unlawful action of the employer, who is required to pay each individual a sum of money equal to the amount which that individual would normally have earned between the date of the discrimination or that unlawful and unfair practice and, in an appropriate case, to the date of the employer's offer of reinstatement, less the individual earnings during that period.

In an old case in from the United States in **Nabors versus National Labour Board, 323 (U.S.C. 1963)**, in a case of discriminatory failure to give employees an opportunity to qualify for higher-paying job, the Supreme Court held that the employees were entitled both to the opportunity and to back pay even where they did not qualify. This reasoning was based on the fact that had the discriminatory practice not happened against the employee, they would have had the opportunity to competitively take the opportunity and if the employees had qualified they would be earning a high wage and the back pay was to take care of that earning they would have had had there been no discrimination against them.

The Court said:

... Offer to the employees names below immediate and full reinstatement to their former or substantially equivalent positions without prejudice to any seniority or other rights and privileges previously enjoyed and make them whole for any loss of pay suffered as a result of the discrimination against them, with interest thereon.[emphasis mine].

However despite the very simple stated order of the Court, its application in individual cases is not always a simple arithmetic. It comes with various complexities and the computation of back pay is not undertaken during a hearing on the merits of an unfair labour practice but during a separate hearing or a subsequent application following a court decree enforcing or affirming an order. In labour relations practices this is what may be called the *compliance stage of proceeding*. This may be the employer and tor the Union and a claimant beneficiary.

to arrive at the back wages/pay payable to a claimant, the Court must reconstruct the economic life of each claimant and place him/her in the same financial position he would have enjoyed had he not been treated unfairly. Thus, it is necessary to determine as accurately as possible the sum an employee would have earned in the employment he lost through the unfair practice known as the '*gross back wages*' then determine how he actually faired financially during the period between the unfair practice and the reinstatement offer, the period known as the '*back wage period*', and then subtract any sum earned during this period. This would result in what is called the '*interim earnings*' which less expenses and statutory deductions from the '*interim earnings*' the result is the amount of back wages due, called the '*net back wages*'. A formula I would outline as:

Net back wage = gross back wage – (interim earnings – expenses).

the effective period for consideration is therefore the time from the summary dismissal to the time a Court finds for a claimant that there was an unfair labour practice. Date of Court award less the date of dismissal.

Gross back wage is the amount which would have accrued to a claimant during the back wage period in addition to basic salary, promotions, wage increases, bonuses, overtime and other incidentals as allowed during the time of employment. Back pay remains the amount an employee would have earned had he remained in employment were it not for the unfair treatment. Certain deductions would have been made from this figure and the result is the amount of net pay actually due to the claimant. The gross back pay entails in addition to basic pay there would have been promotions, wage increases, bonus, overtime pay and other incidental of the employment relationship like tips at the respondent Club. The employer

policies and evaluation of staff for promotions can help in this computation, the annual salary increments and the government policy on wage increments.

This is not a mechanical process. It is based on every individual case as each employee has individual records. However if there are employees who were not dismissed and were of the same rank as the claimants, the formula used over the period of the claimants unfair dismissal and their current earnings can be replicated.

Gross back wage is based upon the earnings of the claimant's other similarly placed employees in the same job/group/classification who performed comparable work during the same period of unfair dismissal. However there are variations in this regard based on an individual case, seniority and the last role before layoff. Where certain positions are seasonal and would ordinarily require employees not to work in their character or would ordinarily not earn a bonus or pay increase due to the subsisting collective agreement even if placed at the same job level as employees not dismissed/laid off would be factors for consideration. Gifts, bonus, tips are in most cases discretionary or based on the gross performance of the employer.

On the other hand, interim earnings relate to the claimant's duty to mitigate back wages and are deducted from gross back wages. This is income from other employment or from the performance of odd jobs which requires a claimant to honestly; in good faith make effort to obtain interim employment instead of seating back waiting for the court to Award. Otherwise, how did the claimants manage to sustain themselves in the interim? Claimant's efforts to find work is reasonably expected and where a reinstatement is ordered while that claimant is able to get a better job, back wages are still payable in the context of the interim earnings and the claimant allowed to keeping the better paying job. This is a reasonable expectation that a good employee did not just seat back and even if they had remained in the employ of the respondent, there were chances of leaving that job for a better paying job.

Self employment is also a bona fide employment in compliance with the obligation imposed on a discharged employee to use reasonable diligence to keep him in gainful employment and thus discharge his obligation of minimising his damages. It is also a reasonable expectation that a person who leaves a job for self employment expects to improve his financial position rather than incur a wilful loss. The fact that upon the Court Award 49 claimants immediately took up their positions with the respondent is indicative that they may have been unable to get alternative employment or were only able to get odd job. It is also reasonable to assume absent special circumstances that prevented the 35 claimants who failed to resume their job with the respondent. They are not incurring any wilful losses and are gainfully engaged elsewhere.

In the Labour Appeals Court of South Africa, at Cape Town, in **National Union of Mineworkers Obo 112 Employees versus Commission for Conciliation Mediation and Arbitration and others, Appeal Case No. 11/2007**, where employees who were not paid their back wages due and went on strike, the court held that despite undertaking an unprotected action there were valid reasons in the circumstance of the case to pay the dues owing before the unprotected action – the back wages.

Also in the Labour Court of South Africa in Johannesburg in **Independent Municipal and Allied Trade Union and Another versus South Africa Local Government Association and Another, case No. 1255/2010**, some of the questions the Court faced were to determine whether an order of back pay ought to be with benefits of the wage curve agreement retrospectively where the union insisted that employees they represented ought to have the back pay computed retrospectively for 24 months whereas the respondent employer contested that there should be no back pay at all. The Court held that in the absence of an agreement on the issue by the parties, a reasonable application would entail looking at covering the period when employee were laid off to the time and Court delivered its judgment.

The practice of the Industrial Court has been to award back wages for the full period from the date of the unfair practice or layoff to the date of an offer for reinstatement. Though a back wage is a remedy, the same is designed in labour relations to vindicate not the private rights of employees involved but to achieve the ends of justice as outlined in remedies available under the Employment Act Section 49, where

in arriving at an appropriate remedy for unfair termination the Court may;

(1) Where in the opinion of a labour officer summary dismissal or termination of a contract of an employee is unjustified, the labour officer may recommend to the employer to pay to the employee any or all of the following—

(a) The wages which the employee would have earned had the employee been given the period of notice to which he was entitled under this Act or his contract of service; [emphasis mine].

(b) where dismissal terminates the contract before the completion of any service upon which the employee's wages became due, the proportion of the wage due for the period of time for which the employee has worked; and any other loss consequent upon the dismissal and arising between the date of dismissal and the date of expiry of the period of notice referred to in paragraph (a) which the employee would have been entitled to by virtue of the contract.; or

(c) The equivalent of a number of month's wages or salary not exceeding twelve months based on the gross monthly wage or salary of the employee at the time of dismissal.

Any or all of the above may be awarded by the Court. A reinstatement can therefore be directed by the Court without any other benefit or together with other remedies. In this case a back wage would cover the period as from the date of layoff to the date the Court made the Award to a claimant. This is because the remedy of a back wage is not comparable to a suit for damages.

The Award subject of this Court review was delivered on 24th September 2009 and related to a dispute that had commenced by the summary dismissal of the claimants on 20th January 2009. On the merits of the case the Court directed that:

... Demand the reinstatement of all the grievant is allowed and the management of the Club are ordered to reinstate them to their former employment, with back wages or salaries, privileges and other benefits, within thirty (30) days from the date of the award.

We may while disposing of this case, observe that the Court cannot direct the management of the Club to act in a particular way regarding the employees, if any, who might have been engaged after the wrongful summary dismissal of the grievant. The management of the Club are expected to consider their cases in a way that would show that they have applied their minds reasonably and equitably.

These were the Court directions. Based on the application before Court for review and to build clarity in addressing what was due as back wages, noting the extensive submissions of the parties and the assessment of the Court as above, I find that the back wages due to the claimant relate to wages or salaries due to the claimants from the date of termination being 20th January 2009 to the date of the Award/judgement being the 24th September 2009, both dates inclusive. The process of reinstatement and payment of back wages was to be effected within thirty (30) days of the Award within which time the employer was expected to factor the current status of the claimants, those who had been engaged after the wrongful summary dismissal and to apply these interim earnings in a manner that was reasonable and equitable in arriving at the net back wages. This is what I have defined as interim earnings less the expenses incurred as from the gross back wages to help the parties arrive at the net back wages.

Any party that was aggrieved by the failure to comply within the terms of the Court Award within 30 days set out by the Court had recourse in law that is not subject of this review. Any subsequent action or actions taken by either party to preserve their rights or in any other way cause any delay, there is equally recourse in law but not subject of this review.

As noted above, to arrive at back wages due is not a mechanical process that would involve a standard arithmetic. I therefore direct that the respondent/applicant herein to use the reviewed formula to table a re-worked schedule of back wages due to the claimants calculated from the 20th of January 2009 to 24th September 2009, both dates inclusive [Net back wage = gross back wage –

(interim earnings – expenses] within 14 days from today and serve upon the Claimants upon which the claimants will have an opportunity to give their reviewed schedule using the same criteria noting in arriving at the interim earnings will require their cooperation and reasonable application. This is to be done within 7 days of service. The matter will be mentioned in the next 30 days for the Court to confirm compliance and direct on payable dues.

Costs awarded to the Claimants.

Delivered in open Court this 10th day of May the year 2013.

**M. Mbaru
Judge**

In the presence of:

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Court Assistant: Jacob Kipkirui