



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 20 of 2012

TAILORS AND TEXTILES WORKERS' UNION.....CLAIMANT

-VERSUS-

NAKURU INDUSTRIES LIMITED.....RESPONDENT

JUDGMENT

The claimant Tailors and Textiles Workers' Union filed the memorandum of claim on 17.10.2010. The respondent Nakuru Industries Limited filed the memorandum of response on 4.02.2013. The claimant prayed for several remedies in the memorandum of claim. However, at the hearing of the cause on 25.04.2013 the parties agreed that the main issue in dispute was clause 34 in the collective bargaining agreement (CBA) concluded between the parties as admitted in these proceedings and marked C1.

At the hearing the respondent called two witnesses namely Francis Mulunda Juma who had worked with the respondent for 30 years and one Joseph Mburu who had worked for the respondent for 17 years. Their evidence was that they were still in the respondent's employment and they were not members of the claimant union. In view of the agreed issue in dispute the court finds that their evidence was not material and relevant to the issue in dispute.

The parties are not in dispute that they have concluded a recognition agreement and the CBA. The CBA marked C1 for the period 1.7.2011 to 30.06.2013 was negotiated and registered as all clauses were agreed upon except clause 34 of the CBA on the gratuity rates. The issue in dispute specifically relates to the qualifying period for the gratuity. The claimant submitted that its initial position was that the staff being its members should qualify from the date of employment. The respondent's initial position was that they qualify after working for one year from the date of appointment. However the claimant informed the court that its predicament was that considerable numbers of their members were employed by the respondent to serve on less than one year contract and therefore could not earn any gratuity for a qualifying period of one year. Where such members approached a one year's service, the respondent would terminate them thereby making the issue emotive.

Under annexure 6 (b) of the memorandum of claim, the claimant submitted that the respondent proposed and therefore agreed that every employee will be entitled to gratuity or severance pay for every completed year of service. The conciliator in annexure 7 (d) on the memorandum of claim recommended a qualifying period of one year for staff on term contracts and seven years for staff on permanent terms of service. The court had considered the issues of the CBA in cause No. 1100 of 2010 the award being annexure 3 on the claim but the issue in dispute was not determined as it was submitted to be determined by conciliator. Annexure 5(c) on the claim shows that the respondent agreed to the qualifying period to be

one year. However the respondent's management later reneged and insisted that the qualifying period should be two years from the date of appointment.

The claimant further submitted that in the meantime the respondent forced staff to resign and the case of the chief shop steward one Jacob Asingo Andebo was cited as an example as at folio 1 and annexure 8 on the memorandum of claim. It was submitted that in total 74 employees resigned and they were seeking compensation in the tune of Ksh. 29,445,000. Folio 139 on the memorandum of claim was cited as the tabulation of the unpaid dues. The employees refused to take the gratuity because it was not fair. It was also submitted that the employees service be converted to permanent employment as envisaged in section 37 of the Employment Act, 2007.

For the respondent it was submitted that the issues raised had been settled in cause No. 1100 of 2010. Further it had not been established that the 74 employees had been terminate or were union members. For example, the respondent's witnesses were No. 22 and 44 on the list yet they were still in employment and they had denied that the respondent had any liability in their favour. Further, gratuity should be paid at the current rates being a qualifying period of two years for temporary staff and seven years for the permanent staff pending the coming into force of the next CBA to be negotiated. Also, folio 139 of the memorandum of response showed that some staff refused to collect their dues and the same had to be deposited with the Ministry of Labour. The respondent therefore prayed that the memorandum of claim be dismissed with costs.

The court has considered the pleadings, the documents on record and the submissions made for the parties and make the following findings:

1. The issue for qualifying period for gratuity was not determined on its merits in cause No. 1100 of 2010 and it was not an abuse of court process for the claimants to raise it in this cause especially in absence of amicable resolution by conciliation as was anticipated.
2. The question of the qualifying period for gratuity should be agreed between the parties failing which, as in this case, it would be guided by the benchmarks provided for in the Employment Act, 2007. The relevant basic policy and law is provided for in section 35(5) that an employee whose contract is terminated is entitled to service pay for every year worked and the terms of which shall be fixed. As parties in this case have by agreement fixed the applicable rates and related matters, in view of the statutory provision, the court finds that the basic qualifying period should be one year. Nevertheless, parties may enhance the qualifying period by agreement providing for a qualifying period less than one year.
3. As parties were still in negotiations as directed by the court, it would be an ambush to apply the qualifying period of one year to employees, whose employment may have been terminated as at 21st September, 2011. Further as there was no sufficient evidence before the court to make a finding that the listed 74 employees were terminated and that the termination was unfair, the court finds that the prayers for orders of twelve months compensation and payment of their arrears and other benefits have not been established. Similarly, no evidence and submissions were made regarding the other prayers in the memorandum of claim.

In conclusion, the court makes the following orders:

- a) Until and unless the parties agree to more favourable terms, the qualifying period for gratuity for both temporary and permanent union employees of the respondent shall be service of one year from the initial date of appointment; this provision taking effect from the date of this judgment.
- b) The Deputy Registrar shall cause the order in (a) registered as part of the collective agreement between the parties.
- c) Each party to pay own costs of this cause.

Signed, dated and delivered in court at Nakuru this Friday, 3rd May, 2013.

**BYRAM ONGAYA
JUDGE**