



REPUBLIC OF KENYA

Industrial Court at Nairobi

Cause 871 of 2010

KENYA ENGINEERING WORKERS UNION..... CLAIMANT

VS.

EAST AFRICAN FOUNDRY WORKS (K) LIMITEDRESPONDENT

Mr. Omolo for Claimant/Union

Mr. Muthanga for Respondent

AWARD

The issue in dispute in this claim dated 30th July, 2010 and filed on 9th August, 2010 is whether or not the employees, the subject of the claim are entitled to severance pay in terms of the parties' Collective Bargaining Agreement (CBA).

On 24th November, 2008 the Respondent wrote to the Provincial Labour Officer Nairobi informing him that they were to retrench 20 permanent staff and 13 workers referred to as casuals. The letter was copied to the Claimant Union. The retrenchment was effective from 1st December, 2008.

In terms of the notice, the retrenched were to be paid;

- (i) Salary for days worked plus overtime, if any
- (ii) Notice pay in accordance with the parties' CBA
- (iii) Payment in lieu of accrued leave and leave allowance
- (iv) Severance pay based on completed years of service in accordance with the CBA
- (v) Provision of certificate of service.

They were to be re-engaged if the financial situation of the Respondent improved in future. The list of affected employees was attached to the notice.

The Respondent paid all terminal dues to the employees declared redundant except full severance pay to the 13 employees referred to as casuals. The Respondent alleges that the 13 employees were paid daily wages and therefore were casuals and not entitled to severance pay. The Respondent further alleges that the said employees were not members of the union as no check-off system was presented to the Respondent to that effect during their tenure of employment with the Respondent.

That after all, the 13 employees received their terminal benefits which they accepted and acknowledged receipt by signing against their name and particulars of the amounts received. This list of payment is attached to the Respondent's statement of response and marked Annex 4.

The Respondent submits further that the Collective Bargaining Agreement between the parties provided in Clause 2 as follows;

"It is understood, and agreed that, the word 'employee' in this agreement shall cover all unionisable employees of the Company who are union members and it shall mean both males and females unless specifically stated 'otherwise'."

Furthermore, the Respondent submits that part 1 Clause 1 of the CBA provides;

"This agreement shall be observed in respect of employees of East African Foundry Works (K) Limited who are unionisable other than those excluded by the terms of the current Industrial Relations Charter."

It is submitted on the strength of these provisions that only union members were beneficiaries of the CBA and therefore the 13 casuals could not benefit from its provision.

Furthermore, the Respondent submits, Clause 18 of the CBA recognizes the employment of casual employees in that sub-clause 18(a) states;

"any casual working for an employer shall be employed in accordance with the provisions of the Employment Act, 2007", which was the case with respect to the 13 casuals subject matter of this suit.

Sub-clause 18(b) provides the daily rate formula to be the basic monthly minimum rates applicable to permanent employees divided by 26.

The Respondent submits that it paid severance pay to the 13 casuals at the rate of 15 days for every completed year of service. In this respect, they were treated as if they were not employed as casuals in the first place in terms of Section 37(1)(b) as read with Section 37(3). Accordingly, no further payments are due to the 13 employees and the suit should be dismissed.

It is noteworthy that Clause 22(f) of the CBA titled redundancy provides;

"in the event of an employee being declared redundant he/she will be entitled to:-

(iv) Severance pay on the basis of 30 days for each completed year of service".

From Annex '4' to the Respondent's statement of response, it is apparent that the 13 employees had served the Respondents for continuous periods ranging from 1 – 6 years, and were paid severance pay calculated on the basis of 15 days' salary for each completed year of service.

It is common cause that at the time the retrenchment took place on 1st December 2008, the law applicable was the Employment Act, 2007 and the Labour Relations Act, 2007.

The so called casual employees were therefore, deemed permanent employees in terms of Section 37(1)(b) and were in terms of Section 37(3) *"entitled to such terms and conditions of service as he would have been entitled to under this Act had he not initially been employed as a casual employee"*.

With respect to payment of service gratuity upon termination – Section 40(1)(g) provides that an employee declared redundant is to be paid *"at the rate of not less than fifteen days pay for each completed year of service"*.

However, Section 40(1)(d) provides;

“where there is in existence a Collective Agreement between an employer and a trade union setting out terminal benefits payable upon redundancy, the employer has not placed the employee at a disadvantage for being or not being a member of the trade union”.

The conduct by the Respondent to pay the 20 retrenched employees service gratuity at the rate of 30 days pay for each completed year of service and then paying the 13 retrenched employees initially recruited as casuals at the rate of 15 days pay for each completed year of service was in blatant violation of Section 40(1)(d) cited above.

Furthermore, Section 49(1) of the Labour Relations Act, 2007, provides;

“A trade union that has concluded a collective agreement registered by the Industrial Court with an employer..... Setting terms and conditions of service of all unionisable employees covered by the agreement may request the Minister to issue an order requiring any employer bound by the Collective Agreement to deduct an agency fee from the wages of each unionisable employee covered by the collective agreement who is not a member of the trade union”.

It is the court’s finding that the 13 employees initially employed as casuals, had converted to permanent employees by virtue of Section 37 of the Employment Act, 2007 cited earlier in this judgment and were unionisable employees covered and bound by the collective agreement between the two parties herein.

Accordingly, the court finds that the 13 retrenched employees are entitled to payment of gratuity calculated at the rate of 30 days for each completed year of service, less severance gratuity already paid in terms of annex 4 to the Respondent’s Reply.

The computation done by the Claimant dated 29th June, 2011 and filed on 30th June, 2011 is adopted as the amount due and owing to each of the 13 named grievants.

The sums payable are to attract interest at court rates from 1st December 2008, when it became due and payable.

The Respondent to pay costs of the suit.

It is so ordered.

Dated and Delivered in Nairobi this 7th day of June, 2013.

Mathews N. Nduma

PRINCIPAL JUDGE – INDUSTRIAL COURT