



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT AT NAIROBI
CAUSE NUMBER 1148 OF 2011

BETWEEN

KENYA PLANTATION AND AGRICULTURAL

WORKERS UNION
CLAIMANT

VERSUS

UNILEVER TEA KENYA LIMITED
RESPONDENT

Rika J

CC. David Kipsang and Leah Muthaka

Mr. Wafula Assistant General Secretary of the Claimant, for the Claimant

Mr. Muthui instructed by Kaplan and Stratton, Advocates for the Respondent

ISSUE IN DISPUTE: NON PAYMENT OF REST DAYS

AWARD

1. The Claimant filed its Statement of Claim on 12th July 2011. The Respondent replied through a Statement filed on 18th August 2011. In a Ruling delivered on 9th December 2011, the Court ordered the Parties to attempt settlement through negotiation, under the auspices of their Joint Committee. They did not achieve such voluntary settlement. They proceeded with the hearing in Court on 6th February 2013. The Claimant was heard through the oral submissions of Mr. Wafula, while the Respondent supplemented the oral submissions of Mr. Muthui with the evidence of two witnesses, Messrs John Cheruyiot and Mark Suge. Cheruyiot introduced himself as the Operations Manager in charge of the Respondent's business at Limuru, within the Kiambu County. Suge is the Respondent's Human Resources Manager. Hearing closed on the 6th February 2013. The dispute was last mentioned on 30th April 2013 when the Parties confirmed the filing of their Final Arguments and were advised by the Court Award would be delivered on Notice.

2. The Claimant's position is that it is a duly registered trade union representing the agricultural sector. The Respondent is a registered company, involved in tea plantation and processing, with operations in Kericho and Kiambu Counties. The Parties have valid Recognition and Collective Bargaining Agreements. The CBA subject of the dispute was signed on 31st May 2010, running between 1st January

2010 and 31st December 2011.

3. The Respondent employs about 15,000 employees in both Counties. It retains both seasonal and permanent employees. The dispute relates to the daily rated ungraded employees. Since 2007, the Claimant has raised the issue over payment of their weekly rest days.

4. Clause 4 [ii] [e] of the CBA, provides that every employee shall be entitled to not less than one rest day, in each period of seven days. This is the law under Section 27 [2] of the Employment Act 2007. This category of employees has not been receiving pay during their one rest day.

5. The Claimant reported the existence of a trade dispute with the Minister for Labour. A Conciliator was appointed and proceeded to record a deadlock between the Parties, paving way for referral of the dispute to the Court for adjudication.

6. Mr. Wafula submits that while there is no contention as to the employees' right to have one rest day in a period of seven days, there is dispute as to whether such rest day is compensable. Relying on a previous decision delivered by Judge Charles Chemmutut [Cause Number 192 of 2008, between *Kenya Shoe & Leather Workers Union v. Bata Shoe Company*], the Claimant urges the Court to grant that:-

- a. The Respondent's refusal to pay employees' rest day is in violation of the Employment Act 2007; the CBA; and amounting to unfair labour practices.
- b. The Respondent to pay the affected employees weekly rest day effective October 2007.
- c. Respondent to pay the costs of the Claim

7. The Claimant gave samples of two employees- Kennedy Amukoye and Simon Kirui. The pay statements showed Amukoye received a total of Kshs. 4,050 for the month of July 2010. His daily rate was Kshs. 166.70. He worked for 27 days. He was denied pay during his rest day. Kirui worked for 24 days over the same month. He was paid Kshs. 6,943. He was denied pay for the 4 days rested. The Claimant urges the Court to grant employees arrears of pay due on rest days, dating back to 2007.

8. The Respondent adopts the evidence of its two witnesses; the Statement of Reply and the Supplementary Statement filed afterwards; and its Final Arguments.

9. Cheruyiot confirmed that the Respondent employs about 15,000 employees. These include graded and ungraded employees. Graded employees comprise among others the clerks, supervisors and drivers. This category is paid monthly. Ungraded employees are unskilled and work piece rate. There are no casual employees in the establishment. The daily rate is for purposes of measuring work done. The piece rate for tea pluckers for instance is 33 kilogrammes of green leaf. If an employee plucks 40 kilogrammes, he is paid the daily rate based on the 33 kilogrammes. This mode is provided for by the Parties' CBA.

10. Employees work for 6 days. If they work on the 7th day they are paid overtime. They are called upon to work overtime on occasion, because tea leaves are perishable. Clause 5[c] of the CBA provides for overtime. The Respondent acknowledges and respects its obligation to allow the employees one rest day every period of seven days. The Claimant had proposed to change the rest day clause, to expressly adopt one rest day with full pay, but this was not agreed upon by the Parties.

12. The case involving employees of Bata Shoe Company relied upon by the Claimant related to conversion of casual employees under Section 37. The dispute herein is not about casual employees under Section 37, but is about rest day for employees under Section 27 of the Employment Act 2007. Employees are not entitled to pay on rest day. The witness volunteered that his company pays its employees overall superior rates of remuneration, compared to other market players.

13 On cross-examination, Cheruyiot testified that there are 1,300 graded employees. The rest of the 15,000 employees are ungraded. The Respondent had not indicated anywhere that the ungraded employees were paid a monthly rate. There are no casual employees. The daily rate is a measure of work. The records, Cheruyiot conceded, showed these employees were not paid for the 4 rest days accrued

every month. The issue in dispute is not about payment of overtime work. The Respondent pays twice the hourly rate for work done during the rest day. The CBA provided for rest day. The Respondent allowed the employees rest day but did not make payment during such rest.

14. Redirected, the witness testified that the CBA is a negotiated document, and did not make a provision for paid rest day. All the ungraded employees work on monthly contracts as given in the CBA. If the proposal to pay the rest day is agreed upon at the collective bargaining forum, the Respondent would honour such an agreement. The intentions of the Parties are expressed in the CBA. If the Court allows the Claim, it would mean the employees are paid while resting, and paid twice the normal rate while they work during rest day.

15. Mark Suge was involved in the negotiation of the CBA subject matter of the dispute. The CBA was thereafter signed and registered by the Parties. It provides for rest day after every six days of work. There is no provision for pay while resting. If an employee works during rest day, he is paid twice the normal hourly rate. The clause adopted by the Parties prevails in the tea industry. It was borrowed from a CBA concluded between the Claimant and the Kenya Tea Growers Association [KTGA]. It reflects the industry practice. The proposal was made by the Claimant's Limuru Branch during CBA negotiations but was not accepted.

16. In answer to questions posed by Mr. Wafula, Suge testified that the CBA grants the rest day as an entitlement to employees. Daily rate was meant to apply to seasonal employees. The CBA alluded to paid rest day, in its appendices. The Association CBA defines the rest day clause in similar way to the CBA concluded between the Parties. Unilever is no longer a member of the Association. The law does not provide for paid rest day. The case involving employees of Bata Shoe Company related to casual employees. The witness reiterated that the Respondent has complied with the CBA in full.

The Court Finds and Awards:-

17. The Employment Act 2007 provides employees with rest days, statutory holidays, and paid annual leave. While the law grants employees a minimum of 1 rest day in every 7 days of work, there is nothing that compels employers to pay daily-rated employees anything while such employees are resting. Whether employees should be paid during the rest day is a matter that is left to the negotiation and agreement of the employers and their employees. It is not a term of employment that the Court can introduce into the employment relationship, the basic minimum standard being in the grant of the bare rest day. The Court is satisfied with the interpretation given by the Respondent, which has the support of the Employment Act 2007; the Regulation of Wages [Agricultural Industry] Order; and fundamentally, the governing CBA concluded between the Parties.

18. The Claimant appears to seek the coercive hand of the Court in imposing on the Parties' relationship a controversial subject. The law and practice within the Industry, as well as the law in comparative national jurisdictions, is that paid rest day, is a matter determinable by the Parties at the collective bargaining forum. The Claimant states the issue has been floated since 2007. This may well be the case, but the law has not changed, the parties have not agreed, and the practice in the industry endorses unpaid rest day.

19. Section 37 of the Employment Act cited by the Claimant does not relate to the ungraded employees of Unilever. It is accepted across the board that they are not casual employees; they are seasonal employees, working on monthly contracts. The daily rate is used as a measure of their output. The Parties have negotiated and agreed at their own level on the categorization of these employees. It is neither fair nor just, for one of the Parties to turn around and ask the Court to apply a law that relates to casual employees. The Parties appear to have agreed that owing to the seasonal nature of the agricultural activity undertaken by the Respondent, it is suitable to adopt seasonal labour. The Court accepts that labour is dynamic, and there should be little Court interventions, in labour agreements that capture the essence of this dynamism, so long as such CBAs are not in breach of the statutory minimum standards.

20. If the law intended that rest day is payable, it would have expressly stated so under Section 27. Rather than do so, the law merely gives the Parties the minimum standards, which is to have the

employee enjoy one rest day in seven days of work. Labour retains its flexibility and dynamism, by creating a mechanism for compensation of work undertaken during rest days, at twice the normal hourly rate. The dispute is not about overtime done during rest day; the argument by the Respondent on this form of compensation however, suggests that it is intended only actual work done is compensated by pay. It encourages employees with deep reservoirs of energy to forfeit rest, and earn double rate. It would not make economic sense, if at the same time, those who opt to stay home, continue to earn their normal hourly rate, in an environment of seasonal labour requirements, where the daily rate is a measure of work output. Employers apprehend they would be hard-pressed to raise double compensation for overtime work, while at the same time pay those who have not rendered any work, the normal hourly rate.

21. Section 37 offers employees converted from casual to regular employment, the right to have paid rest day. This is because under this law, they are deemed as permanent employees, enjoying regular terms and conditions of employment, rather than seasonal employees on monthly contracts. There are mechanisms within the collective bargaining structure, where the Claimant can pursue the conversion of seasonal employees into regular employment. Only after such conversion, in the respectful view of this Court, can the seasonal employees enjoy paid rest day under Section 37. It is only the employees recognized by law to be under continuous contracts, regular employees, who are eligible for paid rest day.

22. Majority of employees earning salaries at the end of the month enjoy the mandatory rest day on Sunday. Such rest day is taken as one part of the whole payable month. Employers do not seek to have any deductions for time spent off work by majority of regular employees over the weekends. The law does not contemplate such deductions. The hourly rate has no bearing on rest days for regular employees. Similarly, regular employees enjoy paid annual leave. The law has over the years established different rules between regular and irregular employees, all with the objective of creating and promoting stability, productivity predictability and industrial harmony in the employment relationship. It however must be noted that the law does not outlaw paid rest day for irregular employees such as the ungraded seasonal employees working for Unilever; the law leaves the window open, for the Parties to engage constructively, and determine if in their situation, irregular employees should earn pay during rest days. This is not a window which the Court should compel the Parties to move through. It is entirely left to their good judgment.

23. Cause Number 192 of 2008 between *Kenya Shoe Leather Workers Union v. Bata Shoe Company* revolved around confirmation of irregular [casual employees], into permanent employment. It is a Cause that is distinguishable from the present dispute. In the present dispute the employees remain irregular [seasonal] employees. They are so categorized, and work on monthly contracts, by agreement reached between their employer and their trade union. There is no claim for conversion or confirmation into regular terms of employment that would enable the Court to find that they are, like all regular employees, entitled to rest days with full pay.

24. In the conclusion of the Court, this is a matter that the Parties should pursue at their next collective bargaining platform. There was no agreement as to whether this subject has ever been discussed at the appropriate national level forum. It was an issue raised by Limuru Union Branch Officials of the trade union, and may therefore not have properly captured the attention of the top echelons of the Parties' decision makers. The Court thought the Parties would have engaged more comprehensively and in good faith at the outset, when the matter was referred to their Joint Committee. In the end:-

[a] The Claim is dismissed with no order on the costs, and parties directed to discuss the subject matter of this dispute comprehensively and in good faith, in their future collective bargaining and negotiations.

[b] No order on the costs.

Dated and delivered at Nairobi this 18th day of September 2013

James Rika

Judge