



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 1530 of 2012

AVIATION AND AIRPORT

**SERVICES WORKERS UNIONCLAIMANT
VERSUS**

KENYA AIRWAYS LIMITED.....RESPONDENT

RULING

The Claimant Aviation and Airport Services Workers Union (Kenya) has made an application by way of the Notice of Motion dated 22nd August, 2012. The application is brought under Sections 54, 57, 59 and 60 of the Labour Relations Act, 2007 and Sections 3, 12, 13, 20 and 35 of the Industrial Court Act, 2011 and Sections 2, 5, 35, 40, 45 and 88 of the Employment Act, 2007 and Articles 27, 28, 30, 35, 36, 40 and 41 of the Constitution of Kenya, 2010 and all other enabling provisions of the law.

The Claimant is seeking that the application be certified urgent and be admitted for *ex parte* hearing in the first instance. Consequential to the *ex parte* hearing Mr. Cyprian Onyonyi, counsel for the claimant submitted that the court makes the following interim orders, namely:-

- (a) That an order be issued against the Respondent prohibiting it from unlawfully, unfairly, wrongfully conducting and or actualizing redundancy mentioned under staff notice number 035/2012, on the claimant's members pending the hearing and determination of the application.
- (b) That an order be issued prohibiting and restraining the Respondent from unlawfully, unfairly, wrongfully terminating the contracts of the claimant members in the employ of the Respondent pending the hearing and determination of this application.
- (c) That an order be issued prohibiting the Respondent from interdicting and restraining it from refusing or neglecting or failing to continue to employ claimant members in its employ under its staff rationalization exercise pending the hearing and determination of this application.
- (d) That the Respondent be restrained and prohibited from employing replacement labour and or employees in the same positions and or to perform the same or similar work as the claimant members in the employ of the Respondent pending the hearing and determination of this application.
- (e) That the Respondent be restrained and prohibited from hiring inferior, superior and on similar terms employees with comparable qualifications as members of the claimant pending the hearing and determination of the application.
- (f) That the Respondent be compelled to adopt a fair procedure in the redundancy and labour restructuring process under the staff notice number 35/2012 pending the hearing and determination of this

application.

(g) That the Respondent be restrained and prohibited from effecting unilaterally any amendments to the Collective Agreement for the year 2011/2012 entered between it and the claimant pending the determination of this application.

Counsel for the claimant stated that the application was urgent because if the interim orders are not issued the redundancy will take effect on 31st August, 2012 as the letter Ref. No. DM/094/2012 dated 1st August, 2012, signed by Titus T. Naikuni, the Respondent's Group Managing Director and Chief Executive Officer. The letter stated that it was anticipated that the Respondent's staff rationalization exercise would be completed by 31.08.2012. If the application is not certified urgent, the claimant's case would be rendered nugatory and its members would suffer irreparable injury to their socio-economic rights. In view of the submissions by the Claimant's Counsel and the evidence on record, the court finds that the application is urgent and is a good candidate for hearing *ex parte* in the first instance.

In supporting the interim orders enumerated above, Counsel for the claimant made a submission setting out the following justifications for the grant of the *ex parte* interim orders at this stage of the proceedings namely:

1. The Respondent is proceedings with the redundancy and staff rationalization process in breach of the provisions of Section 40 of the Employment Act, 2007. That the redundancy notice by the letter Ref. No. DM/094/2012 does not particularize the identities and exact numbers of the unionisable staff subject to the staff rationalization exercise as required under subsection 40 (1) (a) of the Act. In the circumstances the Respondent has breached subsection 40 (c) of the Act which requires the Respondents in selecting employ for redundancy process to have the regard to seniority in time and to the skill, ability, and reliability of each employee of the particular class of employees affected by the redundancy.
2. That the Respondent is proceeding with a redundancy process in a manner that the claimant's members are likely to be placed at a disadvantage for being members of a trade union and in circumstances in which a relevant collective agreement has been concluded. If the Respondent is allowed to proceed, the same would be in breach of subsection 40 (1) (d) whose provisions are in line with Article 27, 36, 41 and 41(s) all of which protect the claimant's members to trade unions rights and collective bargaining. The claimant's members would be disadvantaged because they have negotiated their terms and equating them to non-unionisable employees as per the redundancy notice in this case is unfair and unconstitutional.
3. That in the letter Ref. No. AAWU/07/2011 dated 5th July, 2011, the Respondent has made an undertaking that he will engage the claimant's union appropriately if its members will be declared redundant in the process of restructuring and out-sourcing. The redundancy notice dated 1.08.2012 cannot be sufficient such engagement and that since 5.7.2011 there has been no such conclusive engagement and yet the notice period is on 31.08.2012 coming to an end.
4. In the internal memo dated 3.08.2011 the Respondent promised all its staff that full consultations would be undertaken before effecting the redundancy. The claimant and the respondent held a meeting on 3.08.2012 and the respondent undertook to provide the details as mandated by the law. To date no such details had been provided by the respondent and the available time to do so has run out.
5. That proceedings with the redundancy process will visit an irreparable injury to the claimant members' rights and adversely affect the claimant. The redundancies if allowed to proceed will visit economic death to the claimants' members in breach of the constitutionally protected socio-economic rights in Articles 41, 36, 30 and 28. That the Respondent would also be acting in contravention of ILO Convention 98 for rights to organize and collective bargaining. Further the Respondent would have acted against ILO declaration on fundamental principles and rights at work since the redundancy would be wanting in substance and procedure. In particular the reasons for the redundancy in staff notice No. 035/2012 dated 1st August, 2012 are the large increase in staff headcount and unsustainable employee costs whereas the Respondent has publicly published a pretax profit of over two billion shillings. The

Respondent has also declared business expansion mission.

6. That the Claimant has requested for information in accordance with Article 35 of the Constitution but the Respondent has failed to provide it.

The Claimant counsel also submitted that the claimant will ensure that the unionisable staff do not go on strike until the application is heard and determined *inter-partes*. That the claimant's officials in court make the undertaking accordingly, both severally and jointly.

The court finds that the claimant has established a *prima facie* case that if *ex-parte* interim orders are not issued, the claimant's case will be rendered nugatory and the *inter-partes* hearing may not serve ends of justice in absence of such orders. The court further considers that there is a likelihood that the redundancy process may be proceeding in a manner that may irreparably and adversely affect rights of the claimant and its members. Thus *ex-parte* interim orders would be necessary to preserve the *status quo* and to protect the ends of justice.

Accordingly the Court:

1. Certifies the application as urgent to be served upon the Respondent for *inter-partes* hearing on 6.09.2012 at 9.00 a.m.
2. Grants interim preservation orders in terms of the enumeration and narrated in (a), (b), (c), (d), (e), (f) and (g) in this ruling's 2nd paragraph.
3. Orders that the claimant shall ensure that its members do not go on strike and maintain industrial peace with respect to the disputes in this cause and the claimant's registered officials are severally and jointly bound to implement this court order.
4. Orders that the costs of this application shall be in the cause.
5. Respondents to be served on 31.08.2012.

Delivered at Nairobi this 30th day of August, 2012 in presence of counsel for claimant and the claimant's officials.

**Byram Ongaya
JUDGE**