



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 324 of 2012

AVIATION AND ALLIED WORKERS UNION.....CLAIMANT

VERSUS

KENYA AIRWAYS LIMITED.....RESPONDENT

RULING

This is the ruling with respect to an application for interim orders filed by the claimant by way of the Notice of Motion dated February 29, 2012 brought under sections 11 and 12 of the Industrial Court Act, sections 41(1), 46 and 47(3) of the Employment Act, sections 54,57,58,59 and 60 of the Labour Relations Act and all the enabling provisions of the law. The claimant is praying for the orders for the suspension of the final warning letter dated January 9, 2012 and drawn by the respondent and served upon the grievant pending the hearing and determination of the application dated February 29, 2012; being the application subject of this ruling. However, the advocates for the parties in their arguments proceeded to make submissions as though the order prayed for was desired to persist pending the final hearing and determination of the claimant's case as commenced by the statement of claim dated February 29, 2012. In the statement of claim the claimant is praying that the court declares the disciplinary process commenced against the grievant as unfair and that the court issues a permanent injunction restraining the respondent, its servants or agents from constituting a panel to discipline the grievant on the basis of the grounds set out in the statement of the claim. The claimant also seeks the confirmation of the ex parte interim orders to subsist until the hearing and determination of the cause. At the hearing of the application the court orders given on March 1, 2012 and extended on diverse dates were in place, namely that the respondent was restrained from proceeding with any disciplinary process against the grievant, Mr. Antony Ojee Odiyo for the purpose of carrying out discipline until the application is heard and determined.

The grievant is a unionisable member of the claimant and an employee of the respondent. The claimant relied on the grievant's affidavit sworn on February 29, 2012 to support the application. The respondent relied on the replying affidavit of one Lucy Muhiu, the respondent's Employee Relations Manager, sworn on June 25, 2012 to oppose the applications. The respondent's counsel also filed a list and copies of authorities on August 27, 2012 and the counsel for the claimant was allowed time to consider them as requested.

The facts of the case in this application are as follows. The grievant was employed by the respondent on August 15, 2005. The grievant was bound by the company rules and regulations as well as provisions of the recognition agreement concluded between the parties in this cause in 2008 and 2009. The claimant and the respondent have also agreed upon a disciplinary procedure dated December 17, 2009 and revised in February 2011. The disciplinary procedure binds the grievant.

On February 9, 2012 the grievant received a show cause letter stating that on the same date he was rostered to operate flight KQ 550 but he "were a NO SHOW" on the flight. The transport provided by the respondent arrived at the grievant's house at 0450 hrs as scheduled and departed at 0520 hrs after waiting

for 30 minutes. During that time the grievant could not be reached on phone. Accordingly, the grievant was required to show cause why disciplinary action could not be taken against him for not being available to operate his rostered flight KQ 550 on February 9, 2012. The respondent's written and signed response, according to the letter, was to reach the respondent by 05.00 pm on the same February 9, 2012. It was further submitted for the claimant that fair labour practices under Article 41 of the Constitution require that the disciplinary process itself should not infringe on the process of the law. That in this case the disciplinary procedure is not fair and therefore is illegal and the court should intervene by granting the interim injunction. That the two parties have concluded valid recognition and collective agreements and the court has jurisdiction to ensure parties' compliance with the provisions of the agreements.

It was argued for the claimant that he was late and not absent. Accordingly, the disciplinary procedure applicable to lateness and not absenteeism should apply to the grievant's disciplinary proceedings. That lateness as a misconduct does not require a disciplinary process involving a disciplinary panel as the Respondent is proceeding in this case. Further that lateness may only attract a process leading to a warning. It was also submitted that the respondent had issued the final warning without first issuing the first and second warning as provided for in clause 32 of the Memorandum of Agreement on Terms and Conditions of Service made on August 8, 2011. In addition the grievant contested the circumstances under which the final warning had been issued but the respondent did not offer him the opportunity to appear before a forum the grievant believed could treat the matter differently especially that he was not called upon to respond to it. That the disciplinary panel the respondent was required to appear before was constituted pursuant to a disciplinary code unilaterally made by the respondent without input of the claimant and the code has not been domesticated into a collective agreement. The disciplinary code was an administrative instrument used to handle matters of terms and conditions of service. That once the disciplinary process is commenced illegally, it was submitted, then the process should not be allowed to proceed.

It was submitted for the respondent that disciplinary procedures have constitutional basis for a fair hearing founded upon the right to fair labour practices in Article 41 of the Constitution and section 41 of the Employment Act, 2007 which provides for hearing of employees in termination cases. That the disciplinary process is investigative to verify the allegations made against the employee for punishment to be imposed if the allegations are proved and for the employee to be exculpated if the allegations are not proved. It was submitted that in this case the respondent had issued a show cause letter and the disciplinary panel should be constituted and allowed to undertake the investigation. The court should not stop the disciplinary process at this stage because the details of the charge against the grievant cannot be addressed at this stage as the claimant is seeking to do in the application. The process should be allowed to continue to give the employee an opportunity to answer. The court, it was argued, should not preempt the respondent's internal process and which has been agreed upon between the parties. It was submitted that to interfere with the internal process would be unconstitutional since the Constitution itself provides for the need for investigation and a fair process. Further, such interference would be in breach of the ILO Convention No. 153 which provides that employees be heard before any contemplated disciplinary action is taken against them. That if the court were to interfere at this stage and the employee is subsequently punished, then its jurisdiction would be ousted for having participated in the initial process.

The following issues stand out for determination in this application:

1. Whether the respondent as an employer could make an administrative disciplinary code.
2. Whether the court has jurisdiction to intervene in a disciplinary procedure instituted but pending conclusion by the employer, and if yes, what would be the principles governing such intervention?
3. Whether the court should issue an interim order stopping disciplinary process by the respondent against the grievant pending the hearing and determination of this cause.

The relationship between the parties is governed by the recognition and collective bargain agreements. Under clause III(h) of the recognition agreement, the parties have agreed that staff rules and regulations, practices covered by staff notices, circulars and standing instructions of the respondent shall form part of

the agreement unless amended or superseded by the provisions of the agreement and the agreed terms and conditions of employment. The respondent as the employer is therefore entitled within the provisions of the recognition agreement to issue unilateral policy and terms and conditions of service binding upon its staff provided that the content is not inconsistent with the prevailing agreement between the parties or if such content is not in breach of an express provision of any relevant statute or the Constitution. The claimant has not shown or established such inconsistency in the instant case and the administrative disciplinary procedures made by the respondent would properly be invoked provided they uphold due process of justice and therefore fair labour practices as contemplated under section 41 of the Employment Act, 2007 and Article 41 of the Constitution. The court finds that the respondent was entitled to issue the disciplinary handling procedures applicable to its unionisable staff. In making this finding the court has carefully considered the provisions of the collective and recognition agreement.

The collective agreement provides that the grievances will be handled in accordance with the provisions of the recognition agreement. The recognition agreement then provides for an elaborate procedure for handling both the individual and collective grievances. Essentially the grievances are not disciplinary. A grievance is a dissatisfaction in the employment relationship falling short of a misconduct whose resolution or settlement is necessary to achieve good work relationships. A grievance handling procedure looks at concluding in harmonious employment relationship. On the other hand, disciplinary procedure or control as is sometimes called is a due process commenced in event of an alleged misconduct concluding in the imposition of a lawful punishment against the employee if the allegation is proved and the employee fails to exculpate himself or herself. The collective agreement provides for disciplinary measures, suspension as an interlocutory step pending investigations into serious misconducts and, the power of the respondent to make relevant staff rules, notices and standing instructions with involvement of the claimant. The recognition and collective agreements do not provide for disciplinary procedure and the institutional framework. These have been made by the respondent by way of the disciplinary handling procedures and which this court finds to be consistent with the two agreements. They are binding upon the parties and the grievant.

Whether the court has jurisdiction to intervene in a pending disciplinary procedure instituted by an employer is an issue settled by the Employment Act, 2007 and the provisions of the Constitution. Article 165 (5) of the Constitution provides for the establishment of this court to hear and determine employment and labour relations disputes. Questions relating to legality and other disputes of administrative disciplinary proceedings or actions pending before employers properly fall within the boundaries of this court as established in accordance with the provisions of the Constitution. The disputes relating to pending administrative disciplinary actions by employers fall within the jurisdiction of the court as provided for under section 12 of the Employment Act, 2007. The Act under subsection 12(3) (i) empowers the court to make interim preservation orders including injunctions in cases of urgency. The possible interim orders would include the preservation of a status quo or rights and obligations in the employment relationship as may emerge in an administrative disciplinary procedure. Where the court decides to make preservative orders, the court does not thereby usurp or participate in the right of the employer to discipline the concerned employee nor does the court thereby become part of the administrative disciplinary process. The court in such an instance would be exercising its constitutional and statutory judicial powers and it is not thereby incompetent to entertain the matter in view of the interim orders if a party dissatisfied at the end of the administrative disciplinary process decided to move the court in that regard. Indeed, subject to the law on finality of litigation, the court cannot be found incompetent or guilty of bias for exercising jurisdiction in a matter it has directly or indirectly handled before. Exercise of judicial powers cannot render a court biased or guilty of conflict of interest or want of independence should a dispute come before it related to an earlier case which directly or indirectly has been subject of the court's consideration and decision. Invariably, anticipation that parties before the court may in future come before the court on matters related to a current court proceeding cannot be a ground for the court to decline or deem its jurisdiction incompetent as far as such current proceedings are concerned. Thus, the court in this cause has jurisdiction to hear and determine the application for interim orders.

The court in exercising the jurisdiction to intervene in an administrative disciplinary procedure must proceed with caution so as to protect the employer's right to fairly terminate the employment relationship.

In **Miguna Miguna – versus- Permanent Secretary, Office of the Prime Minister and the Attorney General (2011) eKLR** the High Court held that the employer was entitled to commence disciplinary proceedings against the employee and it was the duty of the employee to justify in the administrative disciplinary process the continuation of his employment. The court further stated that its duty would be to stop a process started with ulterior motive or one based on outright illegality or one which is defective *ab initio*. In **Muthusi and 2 others -versus- Gathogo and 2 others (1990) KLR 90** the High Court held that it would be futile for the court to involve itself in the day to day running of a union which had its own governing rules. Thus, similarly this court would be reluctant to involve itself in a disciplinary process commenced by the employer unless in an appropriate case it is established that the disciplinary process has been commenced or is continuing unfairly. The intervention in disciplinary process by employers will be entertained by the court rarely and in clear cases where the process is likely to result into unfair imposition of a punishment against the employee. The court will intervene in an administrative disciplinary procedure if it is established that the procedure relied on by the employer offends fairness or due process by not upholding the rules of natural justice, or, if the procedure is in clear breach of the agreed or legislated or employer's prescribed applicable policy or standards, or, if the disciplinary procedure were to continue it would result into manifest injustice in view of the circumstances of the case. The court will normally not intervene if it is established that there exist mechanisms between the employer and the employee such as appeal or revision or review that the employee could invoke internally to remedy the dissatisfaction that would otherwise justify the court's intervention and, the employee has not exhausted such internal mechanisms.

The issue for determination is whether in the present case the applicant has met the threshold set out above to justify the court's intervention through issuance of an interim order stopping disciplinary process by the respondent against the grievant pending the hearing and determination of this cause. The claimant's case is that the procedure invoked by the respondent is unfair because it involves a disciplinary panel whereas that should not be the case in an allegation of the misconduct of lateness. The respondent's further case is that the alleged misconduct should be lateness and not absenteeism. The show cause letter dated February 9, 2012 refers to the grievant's absence. The letter of February 20, 2012 refers to the grievant's response and sets out the particulars of the misconduct. The court finds that the submission of the applicant that the disciplinary process should be stopped in the interim on account of disputed nature of misconduct subject of the proceedings is a ground that does not meet the threshold set out earlier in this ruling. The other ground advanced by the claimant for intervention by the court is that the process has been commenced such that it is unfair for want of sufficient time to respond to the allegations. The court finds that such, and other arguments for exculpation advanced in this case can be properly advanced and decided in the disciplinary process. The disciplinary panel in which the claimant is represented will be in a good capacity to hear and make a proper determination. The applicant has therefore failed to establish the necessary threshold for the court to order the temporary orders as prayed for.

While making this finding, the court notes that throughout the pendency of the application for interim orders before the court and administrative disciplinary proceedings before the respondent, the grievant has remained on duty and in the employment of the respondent. The court draws the respondent's attention to the provisions of section 46(h) of the Employment Act, 2007 that an employee's initiation or proposed initiation of a responsible and founded complaint or other legal proceedings against his employer shall not constitute a fair reason for dismissal or for imposition of a penalty or adverse decision. The court finds that in view of the complex legal issues raised in this cause, the complaint leading to this cause was responsible and with good foundation. Accordingly, the court makes the following orders:

1. The grievant shall remain in the employment and duty of the respondent until the conclusion of the disciplinary process occasioning the commencement of this cause unless otherwise lawfully disciplined on account of substantially different and proven misconduct.
2. The application dated February 29, 2012 is dismissed.
3. Parties to bear their own costs of the application.

Delivered at Nairobi this 29th day of August, 2012 in presence of counsel for both parties.

Byram Ongaya
JUDGE

Mr. Nyabena Nyakundi for the Claimant/Applicant

Mr. Geoffrey Obura for the Respondent