



**REPUBLIC OF KENYA**

**Industrial Court of Kenya**

**Cause 377 of 2012**

**AVIATION & ALLIED WORKERS UNION (K).....CLAIMANT**

**VERSUS**

**KENYA AIRWAYS LIMITED..... RESPONDENT**

**RULING**

On 8-3-2012, the Claimant filed a Memorandum of Claim challenging disciplinary process against the grievants seeking the following orders:-

- (a) Declaration that the disciplinary process was unprocedural, null and void.
- (b) Permanent injunction restraining the Respondent from proceeding with any hearing panels for disciplining the grievants on the grounds stated in the claim.
- (c) Declaration that the only legal document which governs the terms and conditions of service for unionisable staff shall only be the Collective Bargaining Agreement and not the Cabin Crew Manual.
- (d) Nullification of the Suspension Letters dated 23-1-2012, 27-2-2012 and 16-2-2012 and any other proceedings arising from the hearing panel(s) convened or constituted for disciplining any or all of the grievants on account of the grounds raised in the claim.

The Claimant also filed a Notice of Motion simultaneously with the

Claim mainly seeking:-

- (a) Injunction to restrain the Respondent from proceeding with a panel to hear Ms. Sally Wangari Githae, George Mepukori Kesh and Sally Mkawura Kililo for the purpose of conducting a discipline on them on 7-3-2012 or any other date until the hearing and determination of the Motion.

(b) Stay of any decision of the hearing panel on proceedings constituted for purposes of disciplining any of the grievants or all of them pending the hearing and determination of the Motion.

The Motion was first heard *ex parte* on 12-3-2012 before Justice Madzayo who delivered a brief ruling on 14/3/12 granting the two reliefs on

interim basis. The orders were extended severally by consent of the parties for one reason or another and they are still in force.

The Application was then heard *inter partes* on 20-6-2012, 22-6-2012

and 25-6-2012. Mr. Nyabena for the Claimant/Applicant relied on the Supporting Affidavit dated 8-3-2012 and 19-6-2012 respectively. The Motion is brought under Sections 11 and 12 of the Industrial Court Act 2011, Sections 38, 39, 40, 41, 42, 44, 45 and 46 of the Employment Act 2007, Sections 173 and 174 of the Kenya Civil Aviation Act, Cap. 394 Laws of Kenya and “any other enabling provisions of the Law”.

The Claimant and the Respondent have a Recognition Agreement and a Collective Bargaining Agreement where the parties have agreed to engage each other on matters of Employment and Industrial Relations touching on the unionisable employees who are members of the Claimant.

According to the Claimant, the issue in dispute is the disciplinary proceedings initiated against the three grievants aforesaid which is allegedly in breach of the Recognition Agreement, Collective Bargaining Agreement, Kenya Civil Aviation Act and Rules of Natural Justice. That the disciplinary proceedings are illegal as they violate the legal provisions and the Collective Bargaining Agreement. That the Court has the power to intervene where the process is in violation of the law. That Section 12 of the Industrial Court Act has the power to intervene on application of this nature where there is violation of Recognition Agreement and Collective Bargaining Agreement.

The grievants are also offended by the Respondent’s violation of the law and Collective Bargaining Agreement when she forced the grievants to undergo medical examination against the Constitution. That the Recognition Agreement and the Collective Bargaining Agreement does not provide for forced medical test. That the Kenya Civil Aviation does not also give Kenya Airways the power to force its employees to undergo medical tests.

According to the Applicant, Kenya Airways should not be allowed to use extra legal means to do disciplinary proceedings. Under the Kenya Civil Aviation Act, Kenya Airways lacks the power to undertake Medical test on Cabin Crew Members. That the evidence/information being used by the Respondent was obtained illegally and in breach of the grievants’ Constitutional rights and as such the disciplinary proceedings should be declared null and void. That once the process is found to be premised on a wrong principle, then the whole process should not be allowed to proceed at the expense of the grievants.

According to the Claimant a prima facie case had been established and the balance of convenience favoured the grievants. That the Respondent will suffer no prejudice if the grievants were allowed to continue working.

Mr. Obura for the Respondent opposed the Application and asked the Court to dismiss it. He argued that the gist of the Claimant’s application was to restrain the Respondent from conducting an investigation into allegations that the grievants attended duty while under the influence of alcohol or psychotropic substances. That such investigation is in accordance with the regulations in the industry which require high safety standards for the benefit of the Aircraft, passengers and crew members. That the grievants are alleging that they are being punished unheard yet they were represented in the hearing with the Claimant at the panel. That the hearing of the disciplinary panel is to give the grievants an opportunity to air their defence before disciplinary action can be taken. That the suspension and show cause letter had already gone through when the interim order of injunction was issued. Annex ‘D’ to the

Replying Affidavit confirms that the process had been completed save for a decision. That such investigation was in line with the ILO Convention No.158, Article 7 at page 75, which is adopted in Article 41 of the Kenya Constitution as right to fair Labour Practice and Section 4(2) and Section 41 of the Employment Act, 2007.

The Court is being asked to stop an investigation into an alleged misconduct. In a way the Court is being invited into the arena of Industrial Relation machinery of probing the behaviour of the crew that is not proper. The Court cannot do so because according to Mr. Obura, the investigation has just started.

The Court was referred to several Authorities which may not be repeated herein. Under the Civil Aviation (Air Operator Certificate and Administration) Regulations on Regulation 13, 17, 45 and 55, the Respondent believes to have power to undertake medical tests on its crew members for purposes of safety. The Respondent has also relied on Document Acceptance and Certification on her Cabin Crew Members Manual and the approved Manual on Crew Health Requirement Chapter 4.1.2.2. "testing of the presence of alcohol or narcotic drugs" to justifying its investigations process.

It is the Respondent's submissions that even if there was no law to allow to undertake medical test, it was still the duty for the Respondent to ensure safety of the Aircraft by not allowing Cabin Crew who were under the influence of alcohol. That the alleged Constitutional right of the grievants were not absolute but subject to the rights of the passengers' safety as consumers.

According to the Respondent, the issues in the claim before this Court should have been raised as defence before the panel investigating. The claim herein is premature as the grievants seek to stop the disciplinary

process. The Court was referred to several Court Authorities all of which agree that the court should not interfere with disciplinary investigations. These include:- *Prakash Bissoun Vs. Level Ponds (Pry) Ltd and Gavin Ward* and a decision by *the Labour Court of South Africa; Mohammed Rizwanul Haque Vs. Central Wakf council and Others*, a decision by *the Delhi High Court and Miguna Miguna Vs. The Permanent Secretary, Office of the Prime Minister and Another*, a decision of *the High Court of Kenya*.

The process is meant to exonerate the grievants or find them guilty and only then can the Claimant come to court. The Respondent has insisted that disciplinary procedure is part of the Recognition Agreement and asked the Court not to confirm the injunction order.

In a brief rejoinder, the Claimant has maintained her position that the Respondent has no power to carry out medical test on Crew Members as stipulated under the Law. That the Kenya Airways has no powers to make the manuals which empower her to test level of alcohol. That such rules are *ultra vires*, null and void for being inconsistent with the Kenya Civil Aviation Authority. The Claimant maintained that the Recognition Agreement and the Collective Bargaining Agreement did not authorize forceful alcohol tests on the grievants.

On the judicial precedents cited by the Respondent, the Claimant was of the view that they are not binding on this court. That this court can intervene where it is demonstrated that the disciplinary process is illegal or founded on illegality. The Claimant sought to differentiate the present case with the precedents cited in that the present case there is demonstrated illegality while in the precedents cited there was no illegality.

I have perused the entire court record and the submissions by the Learned counsel for the two parties. I have also perused the judicial precedents and statutory law relied upon and agonized about the real issue in dispute. The issue for determination before me is whether the Claimant/Applicant has satisfied the requisites for granting interlocutory injunction. The requisites for granting injunction were set out in the case of

*Giella Vs. Cassman Brown Ltd [1973] EA 358.*

- (a) Prima facie case with probability of success.
- (b) Irreparable harm if injunction is not ordered.
- (c) Balance of convenience.

The main question for determining whether or not a prima facie case exists with probability of success is the legality or otherwise of the process of disciplining the grievants adopted by the Respondent.

The Applicant has insisted that the process is illegal because it is founded on illegally obtained evidence or information. This position is premised on the allegations that the Respondent did obtain blood samples from the grievants for determination of alcoholic levels while on duty. The claimant maintains that such medical test should only have been undertaken by the Kenya Civil Aviation and not the Respondent. That the basis of such demand for medical test is a manual which is *ultra vires* the Kenya Civil Aviation Act and the Recognition Agreement and the Collective

Bargaining Agreement between the parties to this dispute.

On the other hand, the Respondent has maintained that the disciplinary process was within the law and indeed part of the Recognition Agreement. That such process is investigative in nature and only aimed at determining the guilt or otherwise of the grievants. That the Claimant's arguments in the case should have been raised as defence in the disciplinary proceedings.

Upon careful consideration of all the matters discussed above, I am satisfied that the disciplinary process being undertaken by the Respondent is lawful. As submitted by the Respondent's counsel and fortified by the several judicial precedents which have persuaded me, the objective of the said disciplinary process is to either exonerate or find the grievants guilty as charged. The process allows the grievants to defend themselves and even to be represented by their union. I find that all the foregoing freedoms not curtailed in any way.

All the above is what constitutes an arena for Labour Relations matters. I do not think that the Court would want to decent to such forum. I will allow the parties to engage one another without this court's interference. I see no point of addressing myself to the other two requisites of granting an injunction if the first one has failed.

Before I conclude, let me say that, my attention was caught by the chronology of events in this dispute. The suspension of the grievants was done on 23-1-12, 16-2-12 and 27-2-12 respectively. That the disciplinary proceedings commenced on 20-2-2012 and much had been covered by the time the Court issued Interim Injunction orders. That while the disciplinary proceedings were going on, the Claimant filed the present case before this Court.

Two things emerge from the above observations:-

Firstly, the process started and proceeded swiftly and without unreasonable delay. Secondly, the Claimant acted in dishonesty by not disclosing to the Respondent that she had already commenced this case to stop the disciplinary process. I did not see such notice in the minutes of the proceedings Annexed as "D" in the Replying Affidavit. Instead, the grievants and the Claimant Union continued as if no parallel proceedings had been filed.

**Having so observed, it is my decision that the Application by the Claimant lacks merit, and I dismiss it.**

**I decline to award costs because the Respondent's process has benefited from this decision.**

**Orders accordingly.**

**DATED** and **DELIVERED** at Nairobi this 28<sup>th</sup> day of September, 2012.

**Onesmus Makau**  
**JUDGE**