



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 1168 of 2011

CLAIMANT

Banking, Insurance & Finance Union (Kenya)

RESPONDENT

Telepost Co-Operative Savings & Credit Society Limited

JUDGMENT

Background

1. On 14 July 2011, the Banking, Insurance & Finance Union (Kenya) (hereinafter BIFU) filed a Statement of Claim against Telepost Co-Operative Savings & Credit Society Ltd (hereinafter the Respondent).
2. The issues in dispute were stated as: COLLECTIVE BARGAINING AGREEMENT
 1. Retrenchment and Voluntary early retirement
 2. Medical allowances
 3. Salaries and wages
 4. Pension scheme
 5. Commuter allowances
3. The Respondent filed its Replying Memorandum on 18 August 2011.
4. On 27 March 2012, retired justice Chemmutut sought a report from the Central Planning & Monitoring Unit (CPMU) and the same was filed in Court on 14 September 2012.
5. BIFU and the Respondent informed the Court when the matter came up for hearing on 18 September 2012 that they relied on their pleadings and submissions which formed part of the pleadings. However, they made brief oral submissions by highlighting the written submissions.

BIFU's case

6. BIFU's case is that they forwarded to the Respondent a Collective Bargaining Agreement for 2010 - 2012 on 13 July 2010 who in turn submitted its counter-proposals and that the parties thereafter met and reached agreement on some items but there was no agreement on some 5 or 6 issues.

7. As a result BIFU reported a trade dispute to the Minister for Labour which was accepted but the parties failed to reach agreement on 5 issues during the conciliation and therefore a certificate was issued pursuant to Section 69(a) of the Labour Relations Act.

8. The proposals by BIFU were that the on retrenchment/voluntary early retirement the golden handshake be increased from the current Kshs 110,000/- to Kshs 500,000/ and transport allowance be increased from Kshs 30,000/- to Kshs 80,000/-The Respondent sought to have these retained at the current levels.

9. Regarding the issue of medical allowance BIFU sought the same to be increased from Kshs 24,000/- per annum to Kshs 60,000/-.BIFU sought the increase on the grounds that the Respondents managers enjoyed a generous medical cover and that the market conditions had changed.

10.On salaries and wages, BIFU wanted an increment of 30% spread over 2 years at 15% per year. It was BIFU's case that the consumer price index /cost of living had become very high and that the wage differentials between the Respondents management staff and BIFU's members was very high. BIFU also claimed that the productivity for the Respondent during the material time was very high and the surplus should be shared with the staff.

11.On the pension scheme/provident fund, BIFU wanted the Respondent to contribute 22.5% of an employee's gross salary while the employee would contribute 7.5%.BIFU argued that the current rate of Respondent contributing 10% and employee contributing 5% was not adequate and not in compliance with the legal requirements of the Retirement Benefits Authority.

12.The last issue over which the parties did not agree regarded commuter allowance.BIFU wanted this increased to Kshs 5000/- per month from Kshs 1000/- per month.BIFU's case was grounded on the claim that the Respondent's management staff were getting a commuter allowance ranging from Kshs 5,000/- to Kshs 12,000/- per month and that matatu fares had also risen.

13.For its claims, BIFU;s exhibited to its statement of Claim Appendices 1-4b which included a memo dated 21 August 2009 increasing management salaries by a margin of 30% and house allowances to 60% of the salary and renewed management terms and conditions of service.BIFU also relied extensively on the CPMU report.

Respondent's Case

14.According to the Respondent, the demands by BIFU are unreasonable, unjustifiable and in-justiciable.

15.According to the Respondent, the Claim to increase the golden handshake and transport allowance to Kshs 500,000/- and Kshs 80,000/- respectively are unreasonable and unjustifiable and out of step to what is normal and beyond the financial ability of the Respondent. The Respondent contends it is operating in a harsh financial and economic environment. Regarding the transport allowance for employees declared redundant, the Respondent submitted, was agreed at Kshs 50,000/- while those going for early retirement should get Kshs 30,000/-.

16.On the claim to enhance the outpatient medical allowance to Kshs 60,000/- per annum, the Respondent contends that its management staff are entitled to a cover of Kshs 25,000/- and therefore the variance is only Kshs 1000/- from the Kshs 24,000/- its unionisable employees are entitled to.

17.The outpatient medical package according to the Respondent is generous compared to organisations similar to the Respondent.

18.On increase of salaries and wages by 30% of each year of the Collective Bargaining Agreement, the Respondent's case is that the wage guidelines of 23 November 2005 provide only 3 parameters and these are cost of living, productivity and ability of the economy to sustain the increased labour costs.

19. But the Respondent states that the post election violence of 2007-8 impacted negatively on its business.

20. The Respondent denied that its lowest management staff earned Kshs 39,865/- and instead its case is that the correct figure is Kshs 29,268/- and therefore the wage differential is Kshs 6917/- and not Kshs 17514/-. The Respondent's case is that its wages are above the minimum standard of living and more favourable than similar organisations.

21. Finally regarding wages, the Respondent's case is that management wages were last reviewed in 2009 and that it is not true that it had a high productivity and surplus during the period under review. It asserts that it had to carry out a staff rationalisation due to a shrinking membership base due to retrenchment at Postal Corporation of Kenya and Telkom Kenya Ltd. It had to refund the retrenched workers and that it has an outstanding bill of Kshs 183,994,385.74. As a result of these factors the Respondent has not declared a dividend payment.

22. The Respondent further submitted that should the Court accede to BIFU's demands, the Respondent may be forced to fold up.

23. Regarding the case to increase contributions to the Pension scheme/provident fund to 22.5% of an employee's gross salary, it was the Respondent's case that during the negotiations, BIFU had sought an increase of 15% contribution from the Respondent and not 22.5% as pleaded. The Respondent proposes that this be increased by 2.5% per centum by each party respectively to make the contributions at 12.5% for the Respondent and 7.5% for the employees.

24. The last issue in dispute was the increase of commuter allowance to Kshs 5000/-. The Respondent proposes that it be reviewed to Kshs 1800/- per month.

Evaluation

25. Before evaluating the parties' cases I think it is in order to give a brief overview of the report by the Central Planning & Monitoring Unit of the Ministry of Labour as it will impact my decision.

26. According to the report there was a sharp decline in the annual wage bill of the Respondent's unionisable employees from Kshs 6,600,000/- in 2009 to Kshs 2,900,000/- in 2011. At the same time the management staff wage bill increased from Kshs 4,834,518/- in 2009 to Kshs 6,680,000/- in 2011 due to increase in the number of staff.

27. According to the report, there was a 30% increase in the Consumer Price Indices between July 2006 and June 2008. However, the report does not state if there was improved labour productivity during the period under review.

28. The report also notes an increase in the net surplus of the Respondent from Kshs 982,139/- in 2009 to Kshs 6,102,528/- in 2011.

29. The report also notes that there has been a decline in membership of the Respondent from 16,000 in 2006 to 1800 at the time of reporting because of restructuring at parent entities.

30. The report indicates, based on the rise in Consumer Price Indices, that the Respondent's wage bill will increase by Kshs 442,431 in the first year and Kshs 508,795/- in the second year thus totalling Kshs 951,225/- as against a total of Kshs 2,035,182/- were BIFU's demands be upheld.

31. I will proceed to evaluate the contestations of the parties under the subtopics which were in issue.

Retrenchment and Voluntary early retirement

32. BIFU seeks that the golden handshake be increased to Kshs 500,000/- from Kshs 110,000/-. The

Respondent's view is that it should be retained in the sum of Kshs 110,000/- as was in the expired Collective Bargaining Agreement.

33. None of the parties addressed the Court on the purpose of paying a golden handshake to retrenched employees or those taking voluntary early retirement. The purposes could be many, such as to give the retrenched or retiring employee a soft landing or a thank you for services rendered. The Court was also not informed whether the golden handshake is paid on top of either severance pay for those retrenched or service gratuity for years worked. In fact it was not clarified whether the golden handshake is the same as the severance pay. BIFU only annexed select parts of the expired Collective Bargaining Agreement.

34. Under these circumstances it becomes extremely difficult for the Court to pluck a figure from the extremes thrown by the parties and impose it upon the parties. This is unlike the salaries or wages which can be calculated based on the criteria identified in the Wages guidelines.

35. I therefore do not accede to BIFU's demand to have the golden handshake increased to Kshs 500,000/-

36. On the issue of transport allowance for retrenched/early retired employees, it is public knowledge that there has been a tremendous rise in transportation costs and based on this factor I would enhance the transport allowance from Kshs 30,000/- to Kshs 45,000/-.

Outpatient Medical Allowance

37. The parties did not have an issue with inpatient medical cover/allowance. Again the parties did not address the Court on whether the employees are covered by the National Hospital Insurance Fund. The Fund has in the recent past conducted public information campaigns on the benefits applicable to its membership.

38. Be that as it may, the management staff of the Respondent enjoy an outpatient cover of up to Kshs 25,000/- while the unionisable employees enjoy cover up to Kshs 24,000/-

39. The Respondent covers up to 90% of inpatient cover for all employees, unionisable and management. The Employment (Medical Treatment) Rules 1977 is also quite clear on the obligations of an employer in case of sickness of an employee. Should an employer refuse to comply with its provisions there is recourse.

40. Considering the above factors I also decline to accede to the demand of BIFU to increase the outpatient medical cover to Kshs 60,000/- per annum.

Salary and Wages

41. This appears to be the most contested issue. BIFU wants a 30% increase per year. The Respondent opposes any increase. The Respondent's submissions on this issue cover some four and a half pages of the Replying Memorandum. It has set out elaborately the reasons for opposing the wage increase.

42. The report by the Central Planning & Management Unit has given the implications of the different scenarios were the Court to uphold the plea of BIFU. According to the report, it is not denied that there was a significant change in the Consumer Price Index of 30% between July 2006 to June 2008. I don't know why the report was based on the year 2008 rather than the material time when the report was made. I can only assume that is so either because the expired Collective Bargaining Agreement covered the period 2008-2010 or the statistics were not available from the Kenya National Bureau of Statistics.

43. The report however notes that the net surplus of the Respondent had improved between 2009 and 2011. It also notes the decline in the Respondent's membership.

44. The report recommends an increase of 15% per year spread over the years 2010-11 and 2011-12. It is noted that had the Collective Bargaining Agreement the subject of this proceedings been agreed it would

have expired on 30 June 2012. In essence any increases awarded would be paid in arrears or be backdated. Ideally the parties should be negotiating a Collective Bargaining Agreement for the period 2012-2014.

45. When addressing an application such as this to determine a wage increase where the parties have failed to reach agreement, the Court is called upon to carry out a delicate balancing act. Its order must take into cognisance the financial state of the Respondent and the economy in general and the need to cushion the employees against the changes and rise in the cost of living as indicated in the changes in the Consumer Price Indices.

46. Based on the parties' submissions and the report of the Central Planning & Management Unit and balancing the interests of both parties, it is my view that a wage increase of 25% spread over the 2 years i.e. 12.5% for each year.

Pension Scheme

47. BIFU demanded that the Respondent contribute 22.5% of an employee's gross pay towards the pension scheme while the employee would contribute 7.5% of the same. The Respondent on the other hand asserted that it pays 12.5% while the employee contributes 7.5% of the gross pay. The Respondent's case was that during negotiations BIFU had demanded it contribute 15% and therefore the demand for 22.5% was misplaced.

48. I do find that the proposal by the Respondent is reasonable. Having acceded to an increase in the wages over the period under review, it is obvious that the amounts to be contributed by both the employees and the Respondent in real terms towards the scheme will also go up.

Commuter Allowance

49. This was the last issue in which the parties had failed to reach agreement. BIFU sought to have the commuter allowance increased from Kshs 1300/- per month to Kshs 5000/- per month. One of the reasons was because the management staff was entitled to between Kshs 5000/- to Kshs 12,000/- car allowance. The Respondent proposed to have the commuter allowance increased to Kshs 1800/- per month.

50. The report by the Central Planning Unit referred to variously above notes the increase in the Consumer Price Indices. The data given was for the period ending 30 June 2008. The determination of this dispute is in 2012, nearly four years after the data in the report. There must have been further changes. Putting into consideration changes which must have occurred in the intervening period and considering the financial status of the Respondent as reflected in the report, I am of the view that the commuter allowance should be set at Kshs 2000/-.

51. Before concluding I believe it is incumbent upon me to address one issue. The Collective Bargaining Agreement which is the subject of this judgement was meant to be effective from 1 July 2010 up to 30 June 2012. The Claim was filed on 14 July 2011. The case is being determined after 30 June 2012 long after. A lot of changes might have occurred in between in the general economic outlook for the country generally and the Respondent company. It is like the Court is carrying out a post mortem. Some employees may have retired or died. In such type of scenario, the Court may not be able to do justice between the parties! It is a regrettable situation. Cases of this nature should be determined as soon as a dispute arises.

Orders

52. The Court therefore orders as follows:

[a] The Claim to increase the golden handshake from Kshs 110,000/- to Kshs 500,000/- is declined

[b] The Claim to increase the transport allowance for retrenched employees or employees taking voluntary early retirement is allowed and set in the sum of Kshs 45,000/-.

[c] The Claim to increase the outpatient medical cover to Kshs 60,000/- is declined.

[d] The Claim to increase the salaries and wages is allowed and set at 25% spread over 2 years at 12.5% per year for the period under review.

[e] The Claim to increase the contributions of the Respondent and Employees towards the pension scheme/provident fund are allowed and set at the rate of 12.5% and 7.5% of gross pay from the Employer and Employee respectively.

[f] The Claim to increase the commuter allowance is allowed and set at Kshs 2,000/- per month for the period under review.

[g] There will be no order as to costs.

Dated and delivered and signed in open Court at Nairobi this 26th day of October 2012.

Justice Radido Stephen

Judge

Appearances

Mr. Isaiah Munoru instructed by Banking

Insurance & Finance Union (Kenya)

For Claimant Union.

Ms. Onyango instructed by Macharia Ngaru

& Wetangula Advocates

For Respondent.