REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 1365 of 2011

KENYA PLANTATION & AGRICULTURAL WORKERS UNION.....CLAIMANT

VERSUS

MAJI MAZURI FLOWERS LTD…….... RESPONDENTS

AWARD

Mr. Meshack Khisa for the Claimant

Mr. Harrison Okeche for the Respondent

The parties herein agreed to abandon the Notice of Motion dated 9th August 2011 wherein an injunction was sought by the Applicant/Claimant to restrain the Respondent from dismissing the grievants the subject of this claim. This was in the light of the evidence that the employees in question had already been dismissed and therefore an injunction would not serve the intended purpose.

Accordingly, the parties agreed to proceed with the main claim/suit and that each party would file written submissions in support of their case.

The Claimant and the Respondent have both filed their written submissions and the Court has fully taken them into consideration in deciding this matter.

The following facts in this matter are common cause. That on the 5th August, 2011 employees of the Respondent engaged in a strike action and picketed at the gate of the Respondent's premises thereby preventing other workers from reporting to work.

That the said strike was not protected the Claimant having not complied with the provisions of Section 76 of the Labour Relations, Act 2007.

That in mid-morning of the 5th August, 2011 a conciliation meeting was convened between the parties by the District Labour Officer, Uasin Gishu and the meeting resulted in a Return to Work Formula dated 5th August, 2011 which contained the following terms:-

"1. All the workers to get back to work on 6th August 2011, in the morning.

2. That there shall be no victimization of any employee for participating in the strike.

3. That there was common understanding in most of the issues raised by the workers and there was General Agreement that all matters be handled in accordance with the Collective Bargaining Agreement and the Employment Act 2007".

The Agreement was signed by the authorized representatives of the Claimant and the Respondent and was witnessed by the District Labour Officer, Uasin Gishu.

It is not in dispute that when the employees returned to work on 6th August, 2011 the Respondent issued a notice to show cause to over 50 employees who were identified to have participated in the unprotected strike especially those classified under Clause 26 of the parties' Collective Bargaining Agreement as providing essential services and therefore prohibited from participating in any strike.

Out of these, 19 were found culpable and were dismissed after appearing before a disciplinary tribunal on the same date. The notice to show cause and the minutes of the disciplinary hearing are attached to the Statement of Response.

In its submissions, the Claimant has stated in paragraph 21.1 that only

Robert Kirwa, Aynea Matuli, Grace Ajuba, Esbon Esendi, Luka Ewoi, Jane

Khakasa, Linah Komen, Joseph Gogo, Jennifer Menjo, Geoffrey Mabonga

and Peter Lokaibei are grievants in this claim.

The rest of the employees who were dismissed received payment in full and final settlement and discharged the Respondent from any liability arising from their dismissal.

The Claimant alleges, which is denied by the Respondent that the dismissal of the grievants was unlawful, unprocedural and therefore unfair in all circumstances of the case in that:-

1. The Respondent was bound by the Return to Work Formula not to dismiss and/or victimize any of the grievants.

2. That the Respondent did not accord the grievants a fair hearing in that

the notices given were short and the grievants were not given opportunity to be represented by a Union representative or by an employee of their choice.

The Claimant therefore prays the court to find that the dismissal of the 11 employees was unprocedural, wrongful and unfair and accordingly reinstate them to their employment in terms of the Return to Work Formula without loss of benefits. In the alternative, the grievants claim for payment of terminal benefits and compensation for unfair dismissal.

On the contrary, the Respondent deponed in the Replying Affidavit that the Claim by the Grievants has no basis since they had embarked on an unprotected strike. That Section 80(1) of the Labour Relations Act, 2007 provides:-

"An employee who takes part in, calls, instigates or incites others to take part in a strike that is not in compliance with this Act is deemed to have breached the employee's contract and –

(a) is liable to disciplinary action; and

(b) is not entitled to any payment or any other benefit under the Employment Act during the period the employee takes part in an unprotected strike".

As earlier stated in the judgment, it is common cause that the strike action that took place on 5th August, 2011 only lasted for a few hours. The same came to an end when parties reached an Agreement and crafted a return to work formula presented before court by the Claimant.

It was agreed therein that the employees were to return to work the following day which was the 6th August, 2011. It was also a term of that agreement that no employee would be victimized. The issues for determination are:-

(a) whether the Respondent was bound by the Return to Work Formula not to dismiss the employees for engaging in an unprotected strike.

(b) whether the termination was substantively and procedurally fair.

(c) what remedies if at all, are the grievants entitled to.

(a) whether the Respondent was bound by the Return to Work Formula not to dismiss the grievants for engaging in an unprotected strike.

From the facts presented before the Court, the grievants were among a group of about 50 employees who were suspected of having participated in an unprotected strike. The strike took place at the behest of the Claimant Union to whom the grievants were members. The strike lasted for a very short time because the matter was resolved through conciliation presided over by the Ministry of Labour.

One of the primary objectives of the Labour Relations Act, 2007 as derived from the preamble is *"promotion of orderly and expeditious dispute settlement"*.

Section 68(1), titled *'Dispute resolved after conciliation'* provides:-

"If a trade dispute is settled in a conciliation the terms of the agreement shall be:-

(a) recorded in writing, and

(b) signed by the parties and conciliator."

The Return to Work Formula dated 5th August, 2011 satisfied all the requirements of Section 68 of the Industrial Relations Act, 2007.

The intention of this piece of Legislation was to ensure resolution of disputes at conciliation. It is intended that as many disputes as possible should be resolved through conciliation resulting in a minority of disputes going to the Industrial Court. This is a cornerstone of industrial peace in the country.

The enforceability of conciliation outcomes is an important feature of dispute resolution on processes. This is intrinsically linked to the principle of self-determination. It is for the parties to determine whether an agreement reached through conciliation is to be a legally enforceable contract or a non-binding agreement. Where the parties conclude a written agreement signed by all parties and the conciliator, this is clearly intended to be a binding contract between the parties and therefore, enforceable. Such an agreement ordinarily is presented before court and is made an order of the court.

The Respondent clearly reneged on the Return to Work Formula even before the ink had dried on the paper it was concluded. This is a bold display of lack of good faith and portends very badly on the Industrial Relations between the Claimant and the Respondent.

It is common cause that the Claimant is a registered Union and has a Recognition Agreement with the Respondent and therefore have in terms of the Labour Relations Act, 2007 and the Recognition Agreement capacity to enter into legally binding agreements.

In *Thakrar V Cir Cittero Menswear plc (in administration),{2002} EWHC 1975 (ch), The English High Court* held that a mediated settlement was an enforceable contract.

However, in many jurisdictions including ours, the principal methods of enforcing a settlement agreement reached at a mediation or conciliation is as a contract. This is "unsatisfactory result since that enforcement mechanism leaves the party precisely where it started in most cases, with a contract which it is trying to enforce". Edna Sussman in *"The Final step issued in Enforcing Mediation Settlement Agreement"*, Fordhan Law School, Newyork, 2008.

Cognisant of these difficulties of enforcing agreements reached in mediation or conciliation, it is desirable to specifically provide in the agreement itself that the parties have agreed to present the same before court to be reduced into an order of the court. This should be done without the necessity of having to commence judicial proceedings as in the present case. It is the court's considered view that the Respondent was bound by the terms of the Return to Work Formula entered into on 5th August, 2011.

(b) Was the termination of the employment of the grievants substantively and procedurally fair?

Having found that the Respondent was bound by the terms of the Return to Work Formula entered into by the parties on 5th August, 2011, the Respondent was under legal obligation to implement its terms by not terminating the employment of the grievants. It is apparent that the Respondent blatantly acted against the express terms of the Agreement. One of the direct consequences of the Agreement was to prevent the Respondent from relying on the participation of the grievants in the unprotected strike to terminate their employment contracts.

An employer is obliged by Section 43(1) of the Employment Act 2007 to prove the reason or reasons for termination. Where the employer fails to do so the termination is deemed to have been unfair within the meaning of Section 45.

Section 45(1) on the other hand provides that:-

"No employer shall terminate the employment of an employee unfairly".

Section 45(2) adds that:-

"A termination of employment by an employer is unfair if the employer fails to prove:-

(a) that the reason for the termination is valid;

(b) that the reason for the termination is a fair reason –

(i) Related to the employee's conduct, capacity or compatibility; or

(ii) based on the operational requirements of the employer; and

(c) that the employment was terminated in accordance with fair procedure."

As observed earlier, the Respondent committed itself not to rely on allegations of participating in an unprotected strike to terminate the employment of the grievants in a Written Agreement entitled "Return to Work Formula". The Respondent therefore relied on an invalid reason to terminate the employment of the grievants on the 6th August, 2011.

The Respondent has not preferred any other reason for terminating the said contracts of employment. It has failed therefore to prove on a balance of probabilities a valid reason or reasons for the termination of their employment. The termination of the grievants was therefore substantively unfair. The Respondent not only failed the substantive threshold but it is also patently clear that the grievants were

not given adequate notice to respond to the allegations leveled against them and that as a matter of fact, they were not allowed to have representatives of their choice in the disciplinary proceedings that were hurriedly conducted on the same day the notices to show cause were served. This was also a blatant breach of Section 41 of the Employment Act, 2007. The Respondent did not therefore terminate the employment of the grievants in accordance with a fair procedure.

Taking all the factors into consideration, especially the blatant breach of dispute resolution Agreement, the Court finds that the conduct of the Respondent was enimical to dispute resolution between the parties and in the Country at large and the same was not just and equitable.

(c) What Remedies if at all, are the grievants entitled to.

In the final analysis, the grievants pray for reinstatement to their employment in terms of Section 49(3)(a) of the Employment Act.

The Section reads:-

"(3) Where in the opinion of a labour officer (read the court per Section 50) an employee's summary dismissal or termination of employment was unfair, the labour officer may recommend to the employer to:-

(a) Reinstate the employee and treat the employee in all respects as if the employee's employment had not been terminated";

In the alternative, the grievants pray that the Court orders that they be paid full terminal benefits in accordance with the Collective Bargaining Agreement in force; award of damages and compensation for the unlawful and unfair termination.

Upon consideration of all the circumstances of the case and in particular :-

(i) The wishes of the employees*;*

(ii) The circumstances in which the termination took place after a return to work formula had been agreed upon;

(iii) That the termination took place about a year and two months ago;

(iv) That the grievants are low cadre employees and therefore capable of effective supervision by their immediate managers;

The court directs the Respondent to immediately reinstate the eleven (11) grievants named in this judgment and treat them in all respects as if their employment had not been terminated.

The Respondent is also to pay the costs of this suit.

It is so ordered

DATED and **DELIVERED** at Nairobi this 21st day of November, 2012.

Mathews N. Nduma
PRINCIPAL JUDGE