



**REPUBLIC OF KENYA**

**Industrial Court of Kenya**

**Cause 732N of 2009**

**Kenya Union of Commercial Food & Allied Workers.....Claimant**

**Kapa Oil Refineries Limited.....Respondent**

**AWARD**

**The Claim**

1. The Kenya Union of Commercial Food and Allied Workers (hereinafter ‘the Union’) filed this Claim on 24 November 2009 against KAPA Oil Refineries Ltd (the Respondent).
2. Filed together with the Claim was a Motion under Certificate of Urgency but that application need not be considered in this award since the parties were heard on the main Claim.
3. The Respondent filed a Memorandum of Response together with a Replying affidavit sworn by one Nitin Shah on 8 January 2009.
4. The proceedings were taken by Justice Chemmutut on 3 December 2009 and 13 April 2010 when he ordered that he would pronounce an award on notice. Justice Chemmutut ceased to hold office of Judge of the Industrial Court sometime in July 2012 before delivering an award and it is under these circumstances, which are in the public domain, that the parties appeared before me on 4 October 2012 and agreed that I proceed to prepare and pronounce an award based on the pleadings and submissions taken by Justice Chemmutut.
5. According to the Memorandum of Claim, the issues in dispute were 3 namely:
  - (1) Casualisation of permanent jobs
  - (2) Outsourcing of permanent jobs
  - (3) Violation of the CBA Column ‘A’.
6. It is unfortunate that the parties did not indicate to the Court any law, policy or convention relied on despite the clear provisions of the Industrial Court (Procedure) Rules 2010.
7. It is also unfortunate that this dispute is being determined nearly two years after close of hearing and when the effective Collective Bargaining Agreement has long expired. These types of delays do not bode well for the administration of justice.

## **Union's contentions**

8. From the Memorandum of Claim, it appears that the root of the dispute between the Union and the Respondent is breach of the terms of the Collective Bargaining Agreement between the parties for the period 1 June 2007 to 31 May 2009.
9. According to the Union, in March 2009, the Respondent transferred several of its members working with the Respondent from their departments to plastic, refinery and effluent departments. Transfer letters of some of the employees were exhibited to the Memorandum of Claim and they indicate the transfers were temporary.
10. In the Union's viewpoint, these transfers were unprocedural and it sought to meet with the Respondent to solve the issue.
11. After the meeting, the Respondent despite agreeing to stop the transfers continued with the transfers thus forcing the Union to report a trade dispute to the Minister for Labour. The parties did not reach any compromise before the conciliator appointed by the Minister for Labour. The Union, from correspondence it wrote to the Respondent, was concerned that the Respondent was also employing temporary staff.
12. It is the case of the Union that some 335 employees were thus affected by the transfers, which in the view of the union were unprocedural.
13. According to the Union the transfers had adversely affected its members financially and placed them at the risk of being declared redundant and these transfers were contrary to Clause 16 of the parties Collective Bargaining Agreement.

## **Respondent's contentions**

14. The Respondent on its part pleaded that in 2009 it outsourced production services from various companies and the employees were given an option of being absorbed by the outsourcing companies after termination of the employees' services with the Respondent and payment to them of all benefits. The Respondent further contends that the process was fully discussed with the workers and union representatives and that most of the employees opted to join the outsourcing companies.
15. The Respondent also states that only about 50 and not 335 employees opted not to join the outsourcing companies and that it is these 50 employees who were transferred to other departments.
16. The Respondent also contends that none of the employees who were taken over by the outsourcing companies were placed at a disadvantage financially.
17. The Respondent submitted that Clause 16 of the Collective Bargaining Agreement was not applicable in the transfers and that the transfers were not illegal, outsourcing being a worldwide business practice.
18. Regarding the Casualisation of permanent employees, the Respondent's case was that no employee had been converted from permanent to casual or declared redundant.

## **Issues for determination.**

19. From the contention of the parties set out above the issues which emerge for the determination of the Court are:

- (i) Whether Clause 16 of the Collective Bargaining Agreement was breached
- (ii) Whether any employees were disadvantaged by the transfers and column A of the Collective Bargaining Agreement

## **Analysis of the issues**

### ***Whether clause 16 of the Collective Bargaining Agreement was breached***

20. Clause 16 of the Collective Bargaining Agreement provide:

#### **Transfer**

*An employee should be transferred from one job to another on promotion or on demotion basis. When promoted, he will earn the salary of the next grade. All transfers will be authorised in writing by the Management*

21. On the face of it, it appears that the transfers effected by the Respondent of moving employees from their departments to the departments of plastics, refinery and effluent was not in accord with Clause 16 of the Collective Bargaining Agreement.

22. This is so because it has not been established by either party that the transfers were effected on the basis of a promotion or demotion. According to the Respondent, the transfers were carried out as a business strategy, to enable it maintain a competitive business edge in the market.

23. But Clause 16 did not envisage the type of transfers in dispute between the parties. I would say that this Clause is under inclusive and did not capture comprehensively the various scenarios such as the one in dispute. And therefore the dispute cannot be settled by reference to Clause 16.

24. To my mind, if any dispute relating to outsourcing and transfer of unionisable employees arose, the proper procedure would have been for the Union and the Respondent to invoke the dispute settlement mechanisms which have been elaborately set out in the *Agreement Relative to Recognition & Negotiating Procedure* which was signed by the parties on 31 March 1993.

25. It is on record that the parties attempted to address the three issues in dispute but failed to reach agreement as a result of which a trade dispute was reported to the Minister for Labour. The parties did not reach any agreement before the Conciliator appointed by the Minister for Labour and therefore a Memoranda of Dispute was signed and produced in Court.

26. In appropriate cases, the Court can declare as unfair labour practice the transfer of employees by an employer who unilaterally transfers employees without holding discussions with the employees and their union representatives. But this is not such appropriate case because of what I discuss next.

### ***Whether any employees were disadvantaged by the transfers and column A of the Collective Bargaining Agreement***

27. According to the Union in paragraph 12 of the Memorandum of Claim, the employees who were contracted by the outsourcing companies were getting a better package than those who remained with the Respondent and thus putting these employees in financial constraints.

28. But the gravamen of the Union's case should be in relation to the employees who were transferred to the plastics, refinery and effluent departments. I have examined the payslips exhibited to the Memorandum of Claim but apart from the huge variations in the overtime payments for the months used for comparison purposes I do not find any detriment suffered by the employees in terms of the basic terms of employment regarding basic pay and housing allowance.

29. Overtime is worked as and when the dictates of an employer's business require and cannot be regarded as a contractual or legal right in itself. Loss of opportunity to work overtime and thus enhance an employee's earnings cannot on the face of it be a source of a justiciable right and I therefore hold that the Union has failed to establish that its members suffered any financial constraint or that column A of the Collective Bargaining Agreement was breached or that the Union is entitled to a declaration of unfair

labour practice.

### **Conclusion and Orders**

30. Bearing the foregoing I dismiss the Union's Claim.

31. Because of the ongoing relationship between the Union and the Respondent I make no order as to costs.

Dated and delivered in open Court at Nairobi this 2<sup>nd</sup> day of November, 2012

Justice Radido Stephen

**Judge**

**Appearances**

Mr Atela instructed by Kenya Union of Commercial

Food & Allied Workers For Claimant Union

Mr. Masese instructed by Federation of Kenya

Employers For Respondent