

**KENYAN DECISION ON REDUNDANCY OF EMPLOYEES
AVIATION AND ALLIED WORKERS UNION V KENYA AIRWAYS LIMITED AND 3 OTHERS**

The Kenyan Industrial Court, on 3 December 2012, made an Award against Kenya Airways Limited (“KQ”) requiring that KQ reinstate 447 employees who had been declared redundant on 4 September 2012.

A. Brief Facts

KQ made a decision to declare 554 employees redundant following an assessment of the financial performance of the company. Some of the employees were offered the opportunity to take advantage of an early retirement scheme and the rest were laid off with the pay packages having been computed.

The Labour Union was notified of the redundancy process and further that the employees too had been notified of the imminent redundancies.

447 of the employees proceeded to court through the Union seeking that the redundancy be declared unfair and wrongful. The employees sought to be reinstated to their positions without any loss of benefits and/or seniority and in the alternative, to be paid monetary compensation.

B. Finding of the Court

The Court reviewed all the evidence that was placed before it and found that the restructuring, redundancy and retrenchment processes carried out by KQ were substantively without justification and procedurally wrong and amounted to unfair termination of employment.

The Court considered the evidence that was presented to it and laid down the standards that an establishment is required to meet to justify a redundancy process.

These are:

1. Notice

The Kenya Employment Act requires that the employees and/or the Union be issued with notice in respect of the process of redundancy. This, the Court found, is to allow for discussions in respect of the process.

The Uganda Employment Act, 2006 (the “EA”) also requires an employer who is contemplating redundancy to provide the representatives of the labour union that represent the employees, if any, with information relating to the redundancy at least four weeks before the redundancy.

2. Consultation

Where the collective bargaining agreement provides for it, it is imperative that there be consultation with regard to the process of redundancy. Emphasis was made that consultation is not the same as notice. It requires participation and consideration leading to constructive dialogue.

3. Objective criteria

There is need to apply a fair selection criteria, advising the employees of the application of the criteria. The Court gave the example of the Last In First Out (LIFO) criteria as being one such objective test. The Kenya Employment Act requires an employer to have regard to seniority in time when selecting employees to be made redundant.

4. Recognition of Statutory and Constitutional rights

The Court buttressed the importance of Sections 41, 43 and 45 of the Kenya Employment Act. Section 41 gives the right to notification and hearing before termination on grounds of misconduct, Section 43 requires that there be proof of reason for termination and Section 45 prohibits unfair termination.

These sections can be compared with Section 66 of the EA on the right of notification and hearing before termination on grounds of poor performance or misconduct, Section 68 of the EA which requires that there be proof of reason for termination and Section 73 of the EA which sets out the criteria for unfair termination. Attached is a comparison of the Kenya and Uganda provisions.

Article 41 of the Kenya Constitution grants employees the right to fair labour practices. This was stressed by the Court, which referred to Article 23 of The Universal Declaration of Human Rights, which gives the right to work and to just and favourable conditions of work.

The Court indicated that the right to security of employment is a core value of the Employment Act.

C. Conclusion

The finding of the Court shows that the process of redundancy is open to scrutiny by the Court especially where the Court forms the view that the process is being abused and used as a ruse by the employer invoking it.

In the KQ case, the Court formed the view that the criteria employed was not clear, there was no consultation, there was misrepresentation to the employees as regards the security of their employment by KQ's management and there were no legitimate reasons to declare the positions redundant.

The Court went into great detail on KQ's financial status including hearing expert evidence on whether KQ was actually undergoing a financial crisis. The Court found that the reports did not reflect a visible correlation between the number of employees and the company's profit movement.

Further, the Court held that KQ's reports did not demonstrate cost per employee against revenue per employee in order to justify retrenchment on employee productivity.

The Court also commented that KQ appeared to be using the redundancy as an excuse to outsource labour and to hire foreign nationals at the expense of Kenyans.

This decision is being appealed and we await the Court of Appeal's consideration of it.

The case does provide further insights for Uganda on the interpretation of our still largely untested EA. Employers should exercise a high degree of caution in terminating employees and pay particular attention to the substantive justification and the procedural requirements when undertaking a redundancy.