REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI.

(Before: Charles P. Chemmuttut, J.,

J.M. Kilonzo & O.A. Wafula.)

CAUSE NO. 44 OF 2000.

BAKERY, CONFECTIONERY, MANUFACTURING & ALLIED WORKERS' UNION (K).....Claimants.

v.

THE WRIGLEY CO. (E.A.) LTD.....Respondents.

Issue in Dispute:-

"Arbitrary demotion of Macharia Kimuhu and Job Mugesani" (hereinafter called the grievants).

G.M. Muchai, National Secretary General, for the Claimants (hereinafter called the Union).

M. Onyango (Mrs.), Advocate, of M/S Obura Mbeche & Co., Advocates, for the Respondents (hereinafter called the Company).

A W A R D.

This dispute was referred to the Court for consideration and determination by the Minister for Labour on 13th April, 2000, under powers vested in, or conferred upon, him by Section 8 of the Trade Disputes Act, Cap. 234, Laws of Kenya (which is hereinafter referred to as the Act); and his reference, together with the statutory certificate from the Labour Commissioner under Section 14(9)(e) of the Act, were received by the Court on 18th April, 2000. The dispute was then initially listed for mention on 10th May 2000, when Messrs. Muchai and Havelock, who appeared for the parties respectively, were directed to submit or file their respective written memoranda or statements on or before 7th and 30th June 2000, and the dispute was fixed for hearing on 27th July, 2000. The parties were unable to submit or file their memoranda or statements as directed by the Court until 17th October, 2000, when Mr. Muchai presented his main memorandum. Mr. Havelock filed his reply thereto on 22nd January, 2001.

Consequently, the dispute was heard on diverse dates between 5th February, 2002 and 14th March, 2006, but it suffered intervening lull and numerous and intermittent adjournments on the application or request of the parties for one reason or another, e.g.; the Company changed its representation on three occasions, from M/S Kaplan & Stratton, Advocates, to Federation of Kenya Employers (F.K.E.) and eventually to M/S. Obura Mbeche & Co., Advocates. Mr. Muchai and Mrs. Onyango agreed to submit or file, and indeed submitted or filed, their final written memoranda or statements in this matter on 24th March and 25th May, 2006.

The Union was registered as such on 6th December, 1977 under Section 11 of the Trade Union Act, Cap. 233, pursuant to a

decision by the High Court, and it won the right for recognition by the Company through a Court award in Cause No. 3 of 1981. Mr. Muchai submitted that the first grievant, Mr. Macharia Kimuhu was initially employed as a casual labourer by a contractor, who was renovating the factory for the Company, on 15th November, 1970, at a rate of Kshs. 5/= per day; and he was offered a permanent employment by the Company as a general worker in January, 1971, at a monthly salary of Kshs. 205/=. He underwent some training on preparation and production of orbit sugar coated gum and also operations of various machines for a period of three (3) to four (4) months. In January, 1972, he said, the first grievant was promoted to a position of a Charge-Hand in the Orbit Sugar-Coating Section (see Union Apps. I and I(a)). Admittedly, the first collective agreement between the parties became effective on 1st September, 1982. However, Mr. Muchai averred that this agreement established for the first time in the eleven (11) years of the Company's existence job categories and grading structure for the employees, and the first grievant, who was a Charge-Hand at the material time, should have been slotted under job grade 7. But the Company deliberately omitted, refused, failed and/or neglected to slot the first grievant into his rightful grading, i.e. grade 7, thereby denying him the appropriate earnings, and promises made by the Company to correct the situation did not materialize over the years. On 3rd September, 1992, the first grievant wrote to the Managing Director of the Company as follows:-

"REF: WAGES/GRADE ADJUSTMENT.

I hereby kindly draw your most humble attention to the above issue.

I was employed in this company in January 1971 in coating section as coater. After a period of two (2) years and two (2) months, l was promoted to the position of charge-hand until in 1982, when there was wage increment and grading was introduced.

My grade and wages were not adjusted accordingly, and have been stagnant without any grade.

These are my sincere complains and wish that, sir, you will investigate and reply me.

I hope to remain,

Yours worker,
(Sigd.)

MACHARIA KIMUHU."

On 25th February, 1993, Mr. Francis Mwendwa for the Company responded as hereinunder:-

"Ref: Your letter dated 3rd September, 1992

It has been established from our records that you were confirmed as a PK Operator but your grade should have remained that of a Sugar Coater.

It has also been established that your salary was not adjusted accordingly after the 1982 collective agreement which became effective from 1st September, 1982.

Your salary will be adjusted to that of Sugar Coater (Grade 6) and payments will be made to you accordingly.

Your grade will remain that of a Sugar Coater but you will continue to work as a PK Wrapping Machine Operator.

(Sigd.)

Francis Mwendwa."

By a further letter, dated 21st June 1993, the first grievant wrote to the Company wherein he allegedly pointed out the contradictions between the grading and the duties assigned to him and also requested the Company to appropriately address the issue and grant him his rightful grading and duties (see Union App. 4).

Mr. Muchai contended that in August, 1993 the Company, due to ulterior motive, began to crusade for the employees' withdrawal from the Union, and when the first grievant protested, he was demoted further and assigned the duties of cleaning single handedly in the factory where he was exposed to various risks after all the cleaners were arbitrarily sent on leave. This was meant to demoralize and force him to resign from employment. On 3rd October, 1994 he complained over the mistreatment he was receiving from the Company and expressed his concern about his health and safety with regard to the conditions of his new assignment and over the refusal by the Company to act on his letter, dated 21st June, 1993. But in response, the Company transferred the first grievant to the position of a Building Maintenance employee, which was in total disregard of the training that he had acquired from the Company (see Union Apps. 5 and 6).

In its main submission, the Company stated that the first grievant was employed on 1st February, 1971 as a Charge-Hand; but in its final or supplementary submission, the Company corrected its stand or position by submitting that the grievant was actually employed as a Sugar Coater and that he was never promoted to the position of a Charge-Hand, or indeed that such a position ever existed in the Company as a substantive post before the signing of the first collective agreement between the parties on 16th June, 1983 (see Company Ann. I). In any case, the previous collective agreement between the Kenya Union of Commercial, Food & Allied Workers and the Company ,for the period 1st September, 1980 to 31st August, 1982 did not contain the grade of a Charge-Hand, and the first grievant was then earning the salary of a Sugar Coater (see Company Ann. 2). Therefore, the position of a Charge-Hand did not exist in the Company's grading structure until it was introduced in the collective agreement which was signed on 16th June 1983, and even in the collective agreements from 1st September, 1982 to 31st August, 1994, the position of a Charge-Hand was reserved for employees in security and factory operations and not for a Sugar Coater. It was, therefore, not possible for the first grievant to be promoted to a non-existent position of a Charge-Hand for which the Union has not shown any correspondence or valid evidence to that effect, except an undated, unreferenced, unsigned and uncertified Newsletter (see Union App. I.).

Mrs. Onyango submitted that the first grievant had always been a member of the Union since it was afforded recognition by the Company, and has also held various positions with the Works Committee of the Union until 1994. She strongly denied that there were no job categories and grading structure of the Company's prior to the signing of the two years collective agreement from 1st September, 1982, wherein the Company merely agreed to new job categories and the grading structure with the Union. The Company maintained that the first grievant was employed in 1971 as a Sugar Coater, grade 6, and he was later promoted to a Charge-Hand Sugar Coater. However, on 6th November, 1980, he was demoted to an Orbit Wrapping Machine Operator on account of drunkenness (see Company Ann. A). Consequently, the first grievant was reinstated to his former position of Sugar Coater, grade 6, as a result of representation by the Union, and his salary was adjusted accordingly and the arrears paid to him in December, 1981 (see Company Anns. B,C and D). In the circumstances, the first grievant's letter (Union App. 2) was in error to the extent of the period November, 1981 to September, 1982, when the said collective agreement between the parties came into force. Mrs. Onyango pointed out that in 1993 the first grievant received salary and benefits in relation to the then grade 7, despite working as a PK Wrapping Machine Operator, but the then Managing Director of the Company, Mr. A.W. Munene, wrote to the then Financial Controller, Mr. B.K. Sikudhan regarding the salary and house allowance adjustments of the first grievant so as to take into account that although he was working as a PK Wrapping Machine Operator, the first grievant was actually to be paid for the higher grade of Sugar Coater (see Company Ann. E.).

Mrs. Onyango vehemently denied that the Company "crusaded" for its employees to withdraw from the Union, that the first grievant was demoted and exposed to some risk by sending its cleaners on leave and that it put pressure on him in order to demoralize and force him to resign. The Company maintained that the first grievant's two letters addressed to the Managing Director have no bearing upon or relevance to the dispute at hand (see union Apps. 4 and 5). Furthermore, Mrs. Onyango said, it would appear to be unclear in what capacity the first grievant was writing such letters whether in his individual capacity as an employee of the Company or as a representative of the Union. On 30th August, 1994 the first grievant was re-graded, and he accepted his re-grading (see Company Ann. 7); and in February, 1995, he was transferred from the Production Section to the Engineering Section as a building maintenance employee, under a similar grade 4 as he had been working in the former section. (see Union App. 6).

In her final or supplementary submission, Mrs. Onyango, adopted and relied on her main submission but stated further, *inter alia*, that the fact that the first grievant was earning the salary of a Sugar Coater in the 1980 collective agreement meant that there was no any higher unionisable position; or if there was any, then it was not a promotional or substantive position but a mere title that did not carry any benefits and which was not recognized in the Company grading structure. She said that the salary progression of the first grievant from the date of his appointment to the date he left employment did not reflect any reduction in salary that would imply or prove a demotion (see Company Ann. 3); and since he was employment upto the time of reporting the dispute, the first grievant had always been employed as a Sugar Coater. Thus, the first grievant could not have

been demoted from a position that he had never held in the first place. Mrs. Onyango contended that the Newsletter (Union App. I) is not an admissible evidence and cannot be used as prove of promotion as the contents therein are also not borne out by the subsequent collective agreements between the parties on the first grievant's grading, for example, the collective agreement for the period 1st September, 1980 to 31st August, 1982 did not have the position of a Charge-Hand during which the first grievant was paid as a Sugar Coater. Mrs Onyango also pleaded laches in view of the fact that if the first grievant was really a Charge-Hand from 1972 as alleged by the Union, then he would not have kept quiet until 1982 when he wrote the first letter demanding the adjustment of his grade (see Union App. 2). She averred further that if such a position existed, it must have lapsed over the period of more than 30 years that have gone by, and this raised the validity of the claim in view of the provisions of Section 20 of the Regulation of Wages and Conditions of Employment Act, Cap. 229, Laws of Kenya, and Section 4 of the Limitation of Actions Act, Cap. 22, Laws of Kenya (see Company Ann.4).

As regards the second grievant, Mr. Job Mugesani, Mr. Muchai submitted that he was employed by the Company as a general worker on 2nd September, 1974. In 1977, the second grievant was trained in operation of wrapping machine and subsequently promoted to the position of a full Machine Operator in 1979. Mr. Muchai pointed out that during the life of the first two years' collective agreement between the parties, which came into force on 1st September, 1982, the second grievant was correctly slotted in job grade 4 as a Machine Operator. He also continued being so graded in, and being correctly remunerated under, all the subsequent collective agreements. However, during 1993/94, when the Company allegedly crusaded to do away with the Union, the second grievant, who was in the forefront against such a move, earned the displeasure of the Company and the members of the management Works Committee, who were engaged in the revision of the grading structure in the Company. On 24th August, 1994, he said, the second grievant received a letter informing him, *inter alia*, that his grading had been revised from grade 4 to grade 2, which effectively meant that he was barred form enjoying, along with other Machine Operators with whom he worked under grade 4, the benefits brought about by the new grading structure and instead got a salary cut.

In reply, Mrs Onyango stated in a nutshell that the second grievant was never demoted as alleged, but his grade was adjusted according to the new grading structure which reduced the collective agreement grades from 12 to 6, and thus his grade changed from 4 to 2. (see Company Ann. 5). The second grievant's salary was also not reduced, but the same, together with the house allowance, remained consistently above the minimum levels of grade 2 for the whole period (see Company Ann. 7). Therefore, the figures in Apps. 13(a),(b) and (c) of the Union's submission are incorrect and do not reflect the true and actual wages received by both grievants as well the grades assigned to them by the Union (see Company Anns. 5 and 6).

The Company reiterated its stand that it did not crusade to do away with the Union as alleged, and maintained that the Union was guilty of *laches.*

In both cases, the Union intervened on behalf of the grievants, but the parties were unable to settle the matter at their own level. On 28th October, 1996, the Union reported a formal trade dispute to the Minister for Labour in accordance with the provisions of Section 4 of the Act. The Minister accepted the dispute and appointed Mr. P.N. Macharia of Ministry of Labour Headquarters to act as the Investigator; and in his investigation report, which was released to the parties on 28th October, 1999, the Minister found and recommended as follows:-

"FINDINGS

……. this dispute arose from September 1994 when the company revised its grading structure allegedly with the consent of the works committee. Previously the (there) used to be 12 job grades which the management reduced to 6 grades.

…….. the works committee which allegedly negotiated the restructuring with the management had no mandate from the Bakery Union to do so. This is because they had not been elected by the workers but had been appointed by the management.

……. without prejudice, the restructuring in itself was not made in good faith. In giving a ruling in cause no. 45 of 92, the Industrial Court directed that any job restructuring had to be done with collaboration with the union, the resultant restructuring can on the basis of the above be seen as unilateral.
Macharia Kimuhu.

Was employed in January 1971 as a general worker. He was subsequently trained on the job and promoted accordingly. By March 1972 he was confirmed as the charge hand (supervisor) in charge of the sugar coating section. In job grade 7 …….. his wages and increments were not adjusted accordingly after the 1982 collective agreement.

The management accepted to adjust this anomaly in February, 1993.

On 24/8/94 Mr. Macharia previous grading position 7 was revised to grade 4 with effect from 1/9/94, though his salary was not reviewed downwards he was not given any increments as was the case with other employees. On 23/2/95 he was formally transferred to the production department as a painter and ultimately terminated on 17/6/98.

Job Mugesani.

Was employed by the company as a general worker on 2/9/74. In 972(1972) he was deployed as machine operator and in 1982 his appointment as a machine operator job grade 4 was confirmed ……. on 1/9/94 following the management's unilateral restructuring his grade position was revised to 2. The effect of this was that whereas the previous position carried a salary of Kshs. 5,780 and Kshs. 892 as house allowance the revised grade salary was Kshs. 5,000 and Kshs. 850 respectively. The other effect was that he was not awarded subsequent salary increases as was other employees… in June 1998 Mr. Mugesani was further demoted to a general worker a position that he still holds todate.

…… the management could not give any concrete reasons for the demotion of the two employees as well as the freezing of their wages and allowances. Neither of them had any caution letter in their respective files as concerns their job performance or otherwise. In the absence (of) any evidence that the two employees performance was unsatisfactory or had deteriorated, the demotion of the two can only be viewed as unfair labour practice as the same lacked in good faith.

RECOMMENDATION.

…….. I recommend as follows:-

1. Mr. Macharia be reconfirmed to his position of charge hand grade 7 and be paid all the resultant arrears and increments upto the time of his dismissal.

2. Mr. Mugesani be confirmed to his former position and salary and that he be paid all resultant arrears todate."

The Minister finally appealed to the parties to accept the recommendation as a basis of settling this dispute (see Union Apps. 7 to 12).
The Union accepted the recommendation and Mr. Muchai proceeded to work out and tabulated the entitlements due to the grievants, amounting to Kshs. 850,344/= and Kshs. 449,788/= respectively (see Union Apps. 13,13(a),(b) and (c)). The Company rejected the said recommendation on the ground, *inter alia*, that the dispute arose from prior to September, 1994, when the first grievant was demoted for being drunk while on duty; that the Works Committee, which negotiated the re-grading of the jobs in September, 1994, was elected by the employees, and not appointed by the management of the Company as alleged by the Union, although such election was not sanctioned by the union; that the restructuring was carried out with the Works Committee elected by the employees, contrary to the Union's assertion that it was carried out unilaterally; that both grievants received wage increments or adjustments after the 1982 collective agreement, and that both grievants were not demoted as alleged.

Mr. Muchai stated that the ruling in Cause No. 59 of 1997, which was delivered on 23rd May, 2000, made big changes to the level of earnings of all the employees of the Company retrospectively with effect from 1st September, 1994 and 1st September, 1995, and the demand hereinabove would conform with the new rates of pay. He invited the attention of the Court to the requirements of ILO Convention No. 98 which concerns the application of the principle of the right to organize and to bargain collectively and to which the Government of Kenya is a signatory. Accordingly, Mr. Muchai strongly urged the Court to find that the grievants have suffered the worst discrimination in the hands of the management of the Company which misdirected its power of management to deprive and hinder them from reaping in full, along with the other employees, the fruits of their labour.

In conclusion, Mr. Muchai prayed that:-

1. the findings and recommendation of the Minister be upheld;

2. the Company be directed or ordered to reconfirm the first grievant to his position as Charge Hand, grade 7, and pay all the underpayments occasioned to him, including the resultant arrears and increments arising therefrom upto the time of his dismissal, and in the even of being reinstated, such payments be adjusted accordingly, and

3. the Company be directed or ordered to uphold the second grievant's position as a Machine Operator, grade 4, and he be paid all the underpayments occasioned to him, including all the resultant arrears and increments arising therefrom.

The position of the Company was that in September, 1994 it carried out job evaluation and adjusted the grading structure from twelve (12) grades to six (6) grades, which necessitated merging of certain
grades; but the wages and house allowances for the two grievants were not prejudicially affected. In her submission Mrs. Onyango submitted that the Court, in its ruling in Cause No. 59 of 1997, took cognizance of the said re-grading exercise when it held or observed at page 11 thereof as follows:-

"On Appendix "A" in view of the contradictory statements made by both the parties the Court directs the Respondents to discuss the question of re-grading with the Claimants with a view to rectifying or making any improvement therein."

The Company maintained that the grading structure introduced in 1994 remains valid and still in use, and indeed the same has been adopted in all subsequent collective agreements between the parties to date.

In the circumstances, Mrs. Onyango urged the Court to find that there was no arbitrary demotion of the grievants or at all, and prayed that the demand be rejected as unsubstantiated and baseless.

The submissions of the parties speak volumes, but the simple question for consideration and determination in this case is whether the grievants were arbitrarily demoted or denied promotion to grades 7 and 4 respectively, as a result of the grading structure introduced in 1994. The Union has maintained that the grievants were arbitrarily demoted to grades 4 and 2 respectively, but the Company insisted that their positions, wages and allowances were not prejudicially affected by the grading system or structure. In any case, the grievants consented and agreed to their re-grading. Demotion means lowering in rank. The Union based its demand of promotion and arrears of wages and allowances to the greivants on an undated, unreferenced, unsigned, unheaded and uncertified Newsletter, App. I, but the Company contended that the Newsletter is not admissible evidence and cannot be used as proof of promotion. Furthermore, the positions under contention were non-existent but were introduced for the first time in the collective agreement between the parties, which came into force in September, 1982. Promotion to a higher rank is always a matter of discretion of the management and not a right. The case at hand hinges on the re-grading of jobs which the Company undertook in 1994, and it is important to understand that *bona fide* job grading or classification, as in the instant case, is the sole function of the management and is determined in accordance with the requirements of work and exigencies of service and does not amount to demotion. We may say that it is entirely and purely the management prerogative to judge and decide the suitability of a particular employee for a particular job, taking into consideration his skill, cadre and grade, e.t.c. It is also the management who are in a position to judge the grade and category in which a particular employee is required to perform a particular job.

On 3rd September, 1992, the first grievant wrote to the Managing Director of the Company complaining that he had not been promoted and awarded wage increments since 1982 and that he had remained "stagnant without any grade" (Union App. 2). But on 25th February, 1993, the management of the Company advised him that his grade remained that of a Sugar Coater and his salary would be adjusted accordingly. In this case, therefore, nothing has been shown to us by the Union to support its contention that the two grievants had suffered some monetary loss as a result of the grading structure, which was undertaken by the management of the Company. Its tabulation or calculation of the alleged wage arrears and allowances were based on non-existent jobs at the material time. In our view, the grading structure that the Company put in place was, happily, not by way of punishment or prejudicial to the grievants. In the circumstances, we entirely agree with the submission or contention of Mrs. Onyango that the grievants did not suffer any monetary loss and have no vested right to be promoted, and it was not for the Union to guide the management of the Company as to how the promotions and job grading should have been done. Accordingly, we reject the Minister's findings and recommendation as shoddy.

Without going into any other considerations, we find the demand by the Union as absurd and baseless, and it is accordingly rejected.

DATED and delivered in Nairobi this 20th day of April, 2007.

Charles P. Chemmuttut, MBS.,

JUDGE.

J.M. Kilonzo, O.A. Wafula,

MEMBER. **MEMBER**.