



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL 216 OF 2007

(CONSOLIDATED WITH HCC. NO. 219 AND 255 OF 2007)

JOHN O. OCHANDAPLAINTIFF
[Suing on his own behalf and on Behalf of 996 former employees
of Telkom Kenya]

VERSUS

TELKOM KENYA LIMITED.....DEFENDANT

Coram : Mwera J.

Letangule for plaintiffs

Chiuri for defendant

JUDGEMENT

The decision about to follow is a result of 3 cases brought against one defendant, Telkom Kenya Ltd by its staff who were retired/retrenched. The 3 suits consolidated and heard together are:

- i) HCCC 216/07 – John Ochanda Vs Telkom
- ii) HCCC 219/07 - Naphutah Kibutu Kanyoro Vs Telkom
- iii) HCCC 255/07 – Michael Akeyo & Ors Vs Telkom

Along, the line besides consolidation, other plaintiffs joined and at the end of the proceedings, wherein corrections were made to the total number, there were in all 996 plaintiffs (993 according to the defendant) whose claim is due for determination. The consolidation was no doubt on the basis, *inter alia*, of common parties, pleadings, issues, prayers etc.

Before settling to go over the evidence presented, perhaps it is prudent to note some factors of/on each file:

- (i) HCCC 216/07:
 - (1) A plaint dated 2.3.07
 - (2) Two (2) statements of defence dated 3.9.07 (one for HCCC 216/07 and another for HCCC 219/07)
 - (3) A reply to the defence(s) in CC 216/07 consolidated with CC 219/07 dated 18.9.07
 - (4) Amended plaint for CC 216/07 consolidated with CC 219/07, filed in court on 12.03.08. It was neither dated nor signed.

- (ii) HCCC 219/07
- (1) A plaint dated 2.03.07
- (2) Plaintiffs' statement of issues dated 19.11.08
- (3) Defendant's statement of issues dated 26.11.08

[Note: the statement of defence is on CC 216/07,

(above)]

- (iii) HCCC 255/07
- (1) A plaint dated 6.3.07
- (2) An amended plaint dated 16.5.07
- (3) Agreed and signed issues dated 27.10.09

[NOTE: No defence on record]

In all the 3 cases parties filed or did not file lists of documents but during the trial they agreed on bundles which were produced as exhibits. They contained most basic documents that were more or less the same. In both sets of bundles not all documents in there were produced but as it shall be seen, those relied on were marked as individual documents by pages.

After taking evidence parties submitted. While the defendant did not allude to the specific defence to be relied on, the plaintiffs simply said:

“6. The plaintiffs seek orders in terms of:

i. Prayers a, b, c, d, e, f, g of the amended plaint.....”

It has been noted above that the amended plaint filed in court on 12.3.08 in CC 216/07 consolidated with CC 219/07, was neither dated nor signed. Accordingly, it is no pleading. But that both CC 219/07 and CC 255/07 had plaints. The plaint on CC 255/07 was amended and dated 16.05.07. That file also had agreed and signed issues, but no defence. In view of the factor that all principal pleadings whoever filed in the 3 cases, now consolidated, were heard and will be determined together. They had similar/common features including prayers and evidence, to enable the court to arrive at a determination. It is considered that no party will suffer prejudice. The pleadings relied on are:-

- a) The amended plaint in CC 255/07 dated 16.5.07
- b) Either of the defences (in CC 216/07) as consolidated with CC 219/07 dated 3/9/07
- c) A reply to the defence(s) in CC 216/07 consolidated with CC 219/07, dated 18.0.07
- d) Agreed and signed issues dated 27.10.09

Perhaps it may be admitted that making cross-references to 3 files can create challenges. But it is equally helpful if a factor brought up during trial which does not feature in all three files is picked up and considered for determination in the final analysis. Proceedings were recorded on CC 255/07.

In the amended plaint dated 16.05.07 (on CC 255/07) the plaintiffs averred that they were unionisable former employees of the defendant company [Note: PW1 John Ochanda, plaintiff in CC 216 was in the management]. That about 1999 the defendant's predecessor, Kenya Posts and Telecommunication Corporation, KPTC, was wound up and 3 separate entities were born: the defendant, the Postal Corporation of Kenya, and the Communications Commission of Kenya. By virtue of the Kenya Communications Act of 1998 the plaintiffs, claimed their services were transferred to the defendant company from KPTC in terms of salary scales, starting and maximum entry points, annual incremental credits etc. That other terms included: probationary terms becoming permanent & pensionable terms; automatic house allowance or provision of official accommodation; non – accountable leave allowance; non-contributory pension scheme and any staff who was retrenched or had employment terminated, being

given reasons for the same.

It was pleaded that the non-contributory pension was in 1999 made contributory and the plaintiffs did comply. However, it was a unilateral decision on the part of the defendant, whereupon it resulted in underpayment of the plaintiffs' lump sum payments and other terminal benefits. When the contributory pension scheme was put in place, there was Telposta Pension Scheme which took over the pension benefits prior to 1999. It was then registered with one outfit called the Retirement Benefits Authority, to manage the pension funds.

The plaintiffs claimed that they were not paid their pension contribution made to the defunct KPTC, yet the said 1998 Act required such transfer and eventual payment.

Then between May 31 and June 2001 the defendant terminated the plaintiffs' services following a government decision to restructure/privatise the defendant's services. That to that end, the defendant issued a schedule by which the exercise could be carried out: phase 1 involved staff aged 50 years and **above**, while phase 2 was covering the staff whose age was **below** 50 years. It was pleaded that the defendant then adopted the retrenchment process which was **discriminatory** between same category of staff - **based on age**. In doing that the defendant elected to give **severance** pay on the years of **service outstanding** for staff aged over 50 years, while staff in the below 50 bracket were paid on the basis of **years of service completed**. The plaintiffs saw all that as discriminatory because paying their group severance sum at the rate of one month for every year of service outstanding (this meant in evidence, service before retiring at age 55) while those staff members who were aged below 50 years at the time of retrenchment, got 2 ½ months' pay for every completed years of service was not fair. That the circular which saw the plaintiffs out also stated that they would get 3 months' salary in lieu of notice, transport allowance, medical allowance and long service bonuses. However, in their last payslips which reflected house allowance, excluded 3 months pay in lieu of notice. It was pleaded further that the Civil Service Reform Programme (Regulations) issued in June 2000 set out severance pay due to both pensionable and non-pensionable staff, yet the defendant's retrenchment circular did not conform to the said Civil Service Regulations, which was more favourable in terms of cushioning the retrenched from economic hardships.

Delving into some aspects of the said regulations, the plaintiffs averred that their terminal benefits were not meant to be less than what one could be entitled to in the event of normal termination of employment as per, the Employment Act and the Wages & Conditions of Employment Act. That the retrenched were also entitled to some benefit titled the **Golden Handshake** when exiting the service and that exercise was not to alter the employees' terms and conditions of service.

It was the plaintiffs claim that when paying the **golden handshake** the defendant discriminated between one group from the other when it came to the packages. The plaintiffs were not paid allowances pertaining e.g. to medical and housing. And that while a government gazette notice issued on 23.6.06 did free the retrenched' lump sums from tax, he defendant did not observe that. The plaintiffs had entered into loan agreements while employed with the defendant, setting out rates and periods of repayment. But when being retrenched the defendant required the plaintiffs to swear and file affidavits that outstanding balances on the loans could be recovered immediately from the lump sums payable. It was a coercive act on the part of the defendant who could not otherwise release lump sum payments. That all this occasioned the plaintiffs suffering, inconvenience and loss. Added to this, were deserved salary increments that were neglected or declined to be paid by the defendant. That that affected pension payments.

Accordingly, the plaintiffs stated their claim as consisting of:

- i) Severance pay at the rate of 3 months basic salary for every year of service completed;
- ii) 3 months salary in lieu of notice;
- iii) Transport allowance of sh. 40,000/=;
- iv) Medical allowance for the last year of service;

- v) Payment of long service loans;
- vi) Payment of outstanding annual increments;
- vii) Payment of due increments on promotion;
- viii) Damages for unlawful recovery of loans;
- ix) Golden handshake of sh. 150,000/=.

Therefore the plaintiffs prayed for in the judgement:

- a) a declaration that the benefits paid to them were grossly undervalued in the light of the terms of retrenchment circulars and regulations;
- b) a mandatory injunction directed to the defendant to calculate the claimed payments correctly and pay the same as regards severance pay, terminal benefits;
- c) a mandatory injunction to ensure that the “golden handshake’ was paid to all retrenchees equally and without discrimination together with long service bonuses, unpaid leave etc.;
- d) a permanent injunction against the defendant not to privatise its services so as to effect its assets to the detriment of the plaintiffs;
- e) General damages;
- f) Costs and interest.

May it be recalled that earlier on, it was noted that there was no defence to this plaint on CC 255/07. But due to the similarity of the pleadings in all the 3 cases the court opted to take the defence(s) on CC 216/07 for all. The plaint on CC 216/07 dated 2.3.07 was quite similar to that in CC 255/07. The defence to that plaint took this path:

That the defendant could not be the employer of the plaintiffs whose letters of appointment were issued by the defunct KPTC, unless their services were transferred to it – the defendant. The defendant’s staff – rationalization programme was undertaken due to economic necessity. The notice that the defendant published on 16.3.06 spelt out clearly the approved terminal benefits to be paid to the affected employees in the two phases. The plaintiffs were not civil servants and so the terms of retrenchment for civil servants did not apply to them. The plaintiffs who fell in phase one of retrenchment were entitled to payments as per the notice published on 16.3.06. Further, that the marked difference in terminal benefits paid to the staff in the two different phases, were premised on their terms and conditions with respect to retirement on attaining the age of fifty years. It was the defendant’s position that the Treasury did exempt income tax not to be paid on the lump sums. It was entitled to payment by the plaintiffs of all outstanding debts. The plaintiffs did acknowledge in writing such payments to facilitate administrative clearance.

The defendant averred that pension payment was pegged on basic salary as per the terms and conditions of service and that it paid any lawfully earned salary increments during employment. It was added that when the Kenya Communications Act (1998) established 3 separate corporations the former employees of KPTC were transferred to those corporations. That 1998 Act did put in place Telposta Pension Scheme, with trustees vested with assets for the purposes of discharging accrued and accruing pension liabilities. KPTC had a non-contributory pension scheme under which the plaintiffs could not claim rights. That the plaintiffs were paid for deferred or earned leave as well as lawful terminal benefits.

In reply to the defence (consolidated CC 216, 219, of 2007) the plaintiffs joined issues as averred in the defence and more or less reiterated what they pleaded in the amended plaint including maintaining that there was no legal or policy framework permitting discriminatory payments made to those

retrenchees who were in phase 1 and those who fell in phase 2. Following the pleadings, we have the twenty (20) agreed issues duly signed to be considered when the determination of the consolidated suits is on. Those issues, the court opines, will be condensed, consolidated or dealt with individually or left out altogether if that be of necessity here. Then the evidence came next.

John Opiyo Ochanda Khoji (PW1) of Nakuru, aged 56 years, was once an employee of the defendant, having initially been hired by KPTC as technician trainee on 23.6.1975. When he retired in May 2006 he was an assistant manager in scale 6. At this point the parties agreed that their two representative bundles of documents be marked as exhibits – Exh P1 and Exh D1.

PW1 pointed to his letters of appointment and other related documents (Exh. P1 – 1 to 9). He added that there were 1121 retired staff/plaintiffs in the 3 consolidated cases. Their relevant documents were in the bundle (Exh P1 – 10 to 76). That the plaintiffs also exhibited payslips and other documents to show that they were either or all the time, employees of the former East African Posts and Telecommunications Corporation, and/or the Kenya Posts & Telecommunications Corporation (KPTC) which later became the defendant company. Their numbers initially were few, but by the ruling of Visram J, as he then was, more plaintiffs joined but all with similar claims. (Exh P1 – 76 to 113, 114 to 130).

That their 5 claims were on:

- i) Severance Pay
- ii) Golden Handshake
- iii) Taxation
- iv) Leave Allowances
- v) Loans

That the plaintiffs understood that (i) severance pay was to be computed according to the then Employment Act (Cap 226) section 16 (e) (f) – based on years completed in service and not on the years left before retirement.

The defendant published a circular (Exh P1 – 147 to 150) in which it announced that it would retrench its staff in 2 phases. Phase 1 did not allude to severance pay. Only that those who fell in that category would be paid one month's salary for every year remaining before the retiring age of 55 years, while those in phase 2 would get 2 ½ months salary for every year worked. The plaintiffs did not understand why this difference when all staff retiring in the 2 phases had been employees of the defendant. In both phases they were employees who were below 50 years of age or above e.g. one John Kimani Kuria (PW3) (Exh P1 – 46) who was retrenched when he was 50 years and 10 months old.

That there was published a special edition of communication dated 29.3.06 (Exh P1 145, 146) about the manner of paying of severance allowance. The plaintiffs understood that to mean one month's salary pay for each year worked. There was this circular dated 23.6.00 (Exh. P1-177 to 180) from the Office of the President to all permanent secretaries that severance payment was to be based on 2 ½ months' salary for each year worked. Seemingly, this circular applied to non-pensionable (unionisable) staff, who among them are some of the plaintiffs. All retrenchees pensionable or not, were entitled to severance pay. The court heard that on 18.6.03 the defendant sought authority to retrench (exh P1 – 173 to 174). It had asked for each member involved to be paid 3 month's salary for each year worked for the 3 officers named in that letter seeking authority to retrench. That 3 of them were all aged over 50 years (Majani, Njorohio, Gakure). Each got paid 3 month's salary for each year worked. But PW1 who was also over 50 years at the time of his retrenchment was paid one month's salary for each year remaining before retiring at 55 years. He got a total of sh. 90,742/= after 30 years service while Majani (see above) who had worked for 32 years and 2 months was paid sh. 6.4m. That while PW1 left at 53 years, Majani was 57 years of age. The difference in packages given was so disparate so that the plaintiffs faulted the formula adopted

by the defendant while computing severance pay.

Then PW1 moved to the other claim – the so – called (ii) **golden handshake**. To him whoever had worked for the defendant for 30 years and was over 50 years of age, expected this package. The defendant issued a circular dated 13.3.06 (Exh P1 – 134 to 136). That circular stated THAT those retiring aged over 50 years could not get the **golden handshake** while those who retired before age 50 were entitled to sh. 150,000/= of this package. Referring to (Exh P1 – 173) Majani and his 2 colleagues (above) the court was told that those who were over 50 years of age were paid sh. 300,000/= each. And John Kimani Kuria (PW3) in phase 2 who was 50 years and 10 months old was paid sh. 150,000/=. The witness saw this disparity of the payments to the plaintiffs who were in phase 1, as discriminatory and without basis. They too were entitled to sh. 150,000/= **golden handshake**.

The witness moved to (iii) **taxation**. He agreed that the plaintiffs were bound to pay tax. But at the time of their retrenchment, the Treasury issued authority on 24.5.06 (Exh P1 – 184) in G. N. no. 95, that lump-sum payments could not be taxed. That this seemed to re-echo the circular the defendant issued on 23.3.06 (Exh P1 – 137, 138) explaining that lump sum payments would not be taxed. But that such pay to PW1 was, in a letter of 1.09.06 from Telposta Pension Scheme, affected by taxation when he got a net sum, after taxation by that scheme, of sh. 137,851/=. PW1 told the court that he was not aware of whatever arrangement the defendant had with the Pension Scheme but that is what befell him – taxed. At this point the court was minded to observe that tax exemption was only as regards lump-sum payments from the defendant and that aspects touching on pension were in the hands of the Pension Scheme – an independent entity from the defendant.

The issue of (iv) **Leave Allowances** was next. PW1 told the court that this was an entitlement of all staff. Leave was granted on conditions and if it was accumulated due to the exigencies of duty, it had to be paid for by the defendant. The defendant stated in its circular (Exh P1 – 137 to 139) that this allowance could be paid. The witness told the court that there were among the plaintiffs those who were not paid this allowance. He himself had leave balance of 122 days but only 45 were paid for.

Then the dispute went over to (v) **Loans**: That the plaintiffs had loans both with the defendant and from outside (the banks). The loans were pegged for repayment on years one still had before retirement at 55 years. The defendant was usually the guarantor. Some loans were secured and others were unsecured. That on 23.3.06 (Exh P1 – 137 to 139) the defendant announced that unsecured loans would be recovered immediately from payments that were due while secured loans would be recovered over 6 months. But when the time of exiting came the defendant coerced the plaintiffs to swear affidavits (Exh _1 – 205 to 211) and sign bonds to pay up. Then demand notices were sent out. This was all untenable.

In cross-examination the court heard that the defendant maintained two job categories – the management and the unionisable staff. The plaintiffs consisted of retired staff from the 2 categories. The witness referred to appendixes before court – one referring to unionisable staff and another to the management members in salary scales 2 to 7. He referred to them as consolidated pay packages. PW1 maintained that there were no retrenchment agreements involving the plaintiffs. The actions taken in that regard were unilateral on the part of the defendant.

There were retrenchment guidelines given to the defendant but it did not apply them to the plaintiffs. However, when he referred to a Collective Bargaining Agreement (CBA) of 04.04.06 giving benefits to the plaintiffs the witness said that the defendant neglected to register that agreement. PW1 was aware of the CBA as well as the one dated 12.04.06. Both applied to unionisable staff. He said that HCCC 216/07 was mainly brought by the retrenched management staff. And that the circular from the Office of the President (Exh P1-175 to 176) was not applied to the plaintiffs. PW1 repeated that he had 122 days of leave to be paid for but only 45 were, with no reason assigned. He then repeated the differential rates at which severance pay was made – some getting 1 month's salary for each year remaining before retirement while others got 2 ½ months' salary for each year worked. And those who left earlier got 3 months pay for each year worked. This was an issue in contest. And the golden handshake was not paid to the plaintiffs. Referring to the OP's circular of 27.5.04 (Exh P1-175 to 176) PW1 told the court that it affected many retirees. And also referring to the other OP circular of 23.6.00

(Exh P1 – 177 to 180) PW1 said that the two did not form part and parcel of the plaintiff terms & conditions of service. But that the managing director's letter of 18.6.03 (Exh P1 – 173, 174) only regarded the five (5) general managers therein named – not the witness.

His loan was recovered from his terminal benefits. Further, that John Kuria (PW3) was retrenched in phase 2 – on 14.12.07 among people who were below 50 years of age.

PW1 then referred to Exh D1 1 to 103, Teleposta Pension Scheme Rules – it was a contributory scheme and he was a member. Evidence unfolded that this scheme was set up by a Trust Deed. The trustees managed out the scheme including paying out benefits to the members. At this point the court was informed that the plaintiffs had withdrawn the claim on pension benefits and only remained to prove:

- i) Golden Handshake
- ii) Severance Pay
- iii) Leave Allowances
- iv) Loan deductions and
- v) General Damages, Costs & Interest

In reexamination, PW1 looked at the CBA of 4.4.06 (Exh D1 – 50 & 52) for unionisable staff only. It read in part that the aspects covering severance pay and golden handshake had been deferred for further consultations and report back (Exh D1 – 52, (1.a)). And that while unsecured loans could be recovered from the terminal pay packages, secured loans would be recovered over 6 months.

Coming to the 2nd agreement dated 12.4.06 between the workers union and the defendant, the management would seek approval on golden handshake and severance pay and the union would lower the golden handshake claim to sh. 150,000/=. But to the knowledge of this witness, no consultative meetings were held and no reports were returned on the outstanding items – golden handshake and severance pay, yet retrenchment proceeded. All days of leave could be paid to all exiting.

Jesse Njoroge Muigai (PW2) was employed by the defunct KP& T on 16.1.79. He rose to the level of assistant manager by 1998. He was retrenched after 27 years in service. He was among those retrenched – plaintiffs from both the management and unionisable staff cadres, who left between 1.5.06 and 31.12.06 in phase 1. Those affected were aged 50 years and above. They were discriminated against as regards payment of the 4 items (above) as compared to those who left in phase 2 – ie between 1.7.07 and 31.12.08. PW2 went over the circulars, letters etc that spelt out details, terms, numbers etc for retrenchment. That all took place when the defendant was still a government wholly government owned outfit under the Ministry of Transport & Communications. So the OP's circular dated 27.05.04 was to guide the exercise. PW2 referred to his last payslip (Exh P1 – 51) before retrenchment – December 2006. While his gross pay was sh. 74 815/=, the net was sh. 43,889/= per month. PW2 was retrenched at age 50 years with 7 days. He had 5 more years to serve before retirement. When he exited he was only paid 5 month's salary for those 5 years when he expected to be paid severance allowance for every 2 ½ months per years of service – ie 27 years of service. The witness had loans including one of a car, each loan with terms including period of recovery. Referring to Kuria (PW3) who had 4 ½ years to retirement he was paid at the rate of 2 ½ months for each of his 27 years of service. He got a tidy sum of sh. 1,468, 314/= while PW2 got only sh. 196, 986/=. That phase 2 had those who existed voluntarily and compulsorily. PW2 gave another example of one Patricia Mbula (Exh P1 – 43 (a) (b) (c) (d) who earned basic salary of sh. 18 301/= per month. She drew severance pay of sh. 1,161 486/= and golden handshake of sh. 150,000/=.

Regarding his house loan of sh. 724,884/= it was recovered at once like those employees in phase 2. Had the severance pay been computed as it was done for phase 2 staff, PW2 could have gone home with a sensible balance like Kuria and Mbula. Instead his January 2007 pay slip showed **NEGATIVE** sh.

182,825/= - a liability owed to the defendant. Both Kuria and Mbula were seven (7) grades below PW2. The disparate packages without explanation were therefore discriminatory and unfair. That should be put right as per prayers.

In cross examination, PW2 said that he was retrenched under the compulsory retirement scheme and the OP circular on retrenchment did form part of his employment terms. The CBA of 30.6.05 (Exh D1 – 1 to 26) concerned unionisable staff of which PW2 was not. That of 12.4.06 (Exh D1 – 55 to 58) applied to the management staff. The retrenchment affected unionisable and management staff over a span of two phases in the age brackets of 50 years – those below and above that limit as the case was. That as per Exh D1 – 55 to 58, the CBA affecting management staff, there was no agreement that disparate payments do issue between phase 1 and phase 2 retrenchees. There were outstanding issues (Exh D1 – 57) to be concluded later.

Next was John Kimani Kuria (PW3), born on 20.2.57 and hired as a technical assistant trainee on 20.5.76 with the then EAP & TC. He fell in the unionisable cadre. He knew that the plaintiffs were retrenched in the first phase in 2006. He himself was retrenched in phase 2 aged 50 years and 10 months. His views were that those who fell in phase 1 were paid differently from his lot in phase 2. He referred to his payslip already produced (Exh. P1 – 46 (b)) to the effect that he was earning sh. 18 604/= per month. On retrenchment, he got severance pay of sh. 1,468, 314/= worked out on the basis of 2 ½ months' salary per a year worked – 31 years. He got a golden handshake of sh. 150,000/= . Even after loans were deducted, PW3 took home sh. 1,524,948/=. With that PW3 testified that retrenchees in phase 1 like Njoroge (PW2), were not fairly treated. There was no reason for the defendant to effect these different pay packages.

In cross examination PW3 told the court that there were some agreements governing retrenchment for both phases. But he knew of none which defined severance pay between the 2 phases. In each of the 2 agreements in issue, PW3 added, there were clauses regarding outstanding issues on golden handshake and severance pay. Nonetheless, retrenchment proceeded and payments were made. That closed the plaintiffs' case and the defence called its witness Mrs. Khadija Mire (DW1), who was the human resource manager of the defendant at the time these causes of action arose, now in private consultancy sector.

DW1 knew that the plaintiffs had put forth claims for payment of the golden handshake, severance and leave allowances for the court to determine. The witness played a role in the retrenchment (phase 1) and was familiar with the plaintiffs terms of service with the defendant company. Retrenchment covered 3 phases. While the plaintiffs fell in phase 1, those above 50 years of age, phase 2 was for those below 50 years like John Kimani Kuria (PW3) whose letter of retrenchment DW1 signed (Exh. P1 – 44 to 46).

The witness introduced the defendants' HR policy manual (Exh D1 – 144 to 275) containing policies rules and regulations to govern all its staff. She went into some aspects of it e.g. appointments and promotions. She confirmed that John Ochanda (PW1) was appointed as an assistant manager on 24.1.05. The appointment was approved. On the subject of leave the court heard that staff had to take leave during leave year and only up to 15 days could be carried forward with sanction of her division. If leave was not taken then it was forfeited. Regarding the claim by PW1 that he had a total of 122 days of leave, DW1 considered that impossible.

Referring to Personnel Circular No. 1 of 2000 dated 8.5.00 on Review of Terms of Conditions for Management Staff, the court heard that its purpose was to consolidate pay packages. It remained in place until retrenchment started.

Moving to the CBA, of 1.9.03 (Exh D1 – 1 to 26), it was signed by the witness. It was to cover unionisable staff only – not those in the management. The agreement was registered. At clause 40 that agreement provided that the management and the union would discuss and agree on packages for staff rationalisation. This would take the form of staff reduction by way of redundancy and retrenchment.

On 4.4.06 a CBA was concluded by the union and the defendant (Exh D1 – 50 to 58). This agreement regarded how staff rationalisation was to be effected. It covered both unionisable and management staff

of the defendant. When the retrenchment (in phase 1) took place, staff were paid according to that agreement. It covered salary adjustments, outstanding allowances, packages, ages brackets (over or below 50 years). This age factor gave different packages, to those in phase 1 and those in phase 2. Those in the 50 years and above bracket could access their pension right away while those in the below 50 years group could not. Clause 9 catered for payment of golden handshake to the staff who were on salary scale 11, aged 50 years and above – ie messengers, drivers etc. Unless there was an omission, the record has it that DW1 said that there was no agreement reached about the retrenchment package because once the Cabinet approved the terms there was no going back to it and the union was informed. Reference was made to some payslips of retrenched staff (Exh P1 – 35, 37 – Odiero T.E. and Chebu P. E) to emphasise that no tax was imposed on the lump-sum payments made whether one was retrenched in phase 1 or 2. That was government policy. While the defendant was liable to pay terminal benefits, it was Telposta Pension Scheme to make pension payments. At this point DW1 referred to PW1's communication with that body (Exh P1 – 181) regarding that issue.

In cross examination, DW1 was taken through virtually all she had said adding that retrenchees in phase 2 were paid golden hand shake (she herself was paid this on leaving the defendant), salary in lieu of notice and severance allowance computed at 2 ½ months' salary for every year of service.

The court was told that the people who left service while aged above 50 years were paid less severance allowance compared to those who left while aged below 50 years. But that there was no discrimination in that. The first group would access pension right away. The latter group would only do so on attaining the retirement age. That was all and not that the defendant was avoiding to pay the older staff. DW1 asserted that that was government policy or directive. Perhaps it should be noted at this point that the defendant did not place such government policy before court or the basis why the older group had to access pension right away while the younger lot had to wait.

DW1 continued that at the time the retrenchment took place, the defendant was wholly owned by the government. The defendant had to fully apply Government directives. When government circulars etc came to the defendant DW1 and others could peruse them in order to apply them. The 3 circulars (Exh P1 – 173 to 177) were guidelines on the retrenchment exercise.

At this point Mrs. Kitonga appearing for the plaintiffs reiterated to the court that their claims were mainly three

- i) Golden handshake
- ii) Leave entitlements and
- iii) Severance pay

Severance pay was generally understood to refer to years served (Exh. P1 – 175, 179) as per the said circulars. In employment regulations the rate of computing this pay is on 15 days per month for the years served. That the 2 CBA agreements were the bases of retrenchment. The witness referring to Clause 9 above, (Exh D1 – 50 to 55) said that it contained outstanding issues on severance pay and golden hand shake which had not been concluded even as the agreement was being signed. The same feature was also in the last CBA (Exh D1 55 to 58). Nonetheless, because the two agreements had been signed by both sides, payments were made with no complaint. That closed the trial and both sides submitted.

The plaintiffs went over the pleadings, the evidence and crystalised their claims base on 4 items:

- i) Severance pay
- ii) Golden handshake
- iii) Outstanding leave allowances
- iv) Loans

They maintained that the defendant discriminated against them in phase 1, when dealing with those matters *vis a vis* those retrenched in phase 2. Particularly that the latter group was paid a golden handshake of sh. 150,000/= while the plaintiffs were paid nothing. The phase 2 group were paid severance pay based on 2 ½ months' salary for every completed year of service while the plaintiffs were given one month's salary for every year remaining before retirement. The defendant on its part held its ground in that there was no discrimination in the way it saw off its former staff in phases 1 and 2 of the retrenchment.

To reduce the matters in dispute to be determined at this stage the court has this to say. There were 3 files to be heard at once. The witnesses cannot be said to have been many but they were sufficiently lengthy. The parties put forth large bundles of documents as exhibits and took quite some time to locate, note and peruse those that were relied on. Then, examination-in-chief, cross examination and re-examination. Indeed that is how a trial of this type ought to be. However, at this point the court decides that from the evidence before it two of the 4 claims (above) should go out.

(i) Loans: The court heard that these fell in 2 categories – secured and unsecured. While it was intended that unsecured loans could be deducted from the terminal benefits packages of the retrenchees, the secured loans could be repaid in 6 months. Seemingly, there is no dispute or complaint that the unsecured loans were properly deducted from the lump-sum payments. That was done against the plaintiffs (phase 1) and against their colleagues in phase 2. The plaintiffs claimed that they were coerced into signing bonds and affidavits binding them to pay the secured loans from their last packages. They paid up. According to the defendant this was necessary for administrative action to clear the payees. Definitely that could be seen to have gone against the expectation that a provision had been made to repay these loans over six months. But at the end of the day, these loans had to be paid. It was painful to do so at once but they were paid. No loss has been shown to have befallen the plaintiffs. And the defendant has not filed any counter-claim to claim any unpaid loan. And that a similar method to recover both categories of loan at once and for all, was also applied to the phase 2 retrenchees. To this end PW2 whose house loan (secured) was recovered at once said:-

“Also for those in phase 2 house loans were recovered once.”

Fair enough. If retrenchees in both phases were treated the same in recovering both secured and unsecured loans at once, the plaintiffs cannot sustain a claim here that they were discriminated against regarding loan repayment. And DW1 was not asked any question about this claim at all. This claim is thereof disposed of at this point.

The other claim that needs to be disposed off right away concerns what was called **outstanding leave allowances**. While PW1 claimed that he, and quite probably his co-plaintiffs, had accumulated leave days and communication from the defendant was that all these days could be paid for on exit, DW1 told the court, and PW1 knew it, that leave was granted on the discretion of the employer who could also permit one to carry leave days forward if exigencies of duty warranted it. It was not sufficiently put before this court that the plaintiffs who had such days of leave were treated differently from their mates in phase 2.

PW1 told the court that of the 122 days of leave to his credit; he was only paid for 45 days. But he did not have evidence to the effect that he was permitted by the defendant to carry forward the 77 days that he was not paid for. Now if there be any of the plaintiffs laying a claim to unpaid days of leave which had been carried forward with the authority from the HR division of the defendant, this court would have been inclined to order that they be paid. So on two grounds, this claim should be dropped. There was no evidence that it was a common factor in phase 1 and 2 namely that the 2nd phase group was paid or paid better for leave days than was phase 1 (the plaintiffs) group, when the two groups are put side by side.

Having said that, the court reverts to the remaining issues or claims raised by the plaintiffs. These are (i) Severance Pay (ii) Golden Handshake. Then, of course the issues of damages, costs and interest

(i) Severance Pay: The plaintiffs' case is that while there were 2 agreements and government

guidelines, plus the general labour law and practice on how this had to be paid, the defendant paid phase 2 retrenchees (Kuria PW3) salary of 2 ½ months for every year worked while the plaintiffs were paid one month's salary for every year remaining before retirement. That that formula was faulty, if not discriminatory in the light of the fact that the 2 CBAs on which retrenchment exercise was based had not concluded the mode/factor of making this payment. Both had said at the end that parties were to consult and report back on that. That there were no more meetings and yet payments went ahead on different bases.

On the defendant's part, it maintained that retrenchment packages were in accord with the 2 CBAs as DW1 testified. That the plaintiffs were not discriminated against in making this payment, which was premised on the age of retirement. They would access pension right away, being over 50 years of age while those in phase 2 would have to wait until they attained the retirement age of 55 years.

The court must acknowledge that each side had lengthier submissions than what it has condensed them into. But at the end of the day the question to be answered is that: Was there discrimination in the payment of severance allowance between the retrenchees in phase 1 and 2?

The Oxford Advanced Learner's Dictionary (8th Edition) defines "severance" as

"2. The act of ending somebody's work contract."

In common labour relations regime the act to sever one's work contract is on the part of the employer. The employer for one reason or another feels that one's services should be ended with and so issues a **severance** notice. In the present case it was pleaded in the defence that the process to retrench the plaintiffs and others, was a matter of economic necessity. So discussions were held, circulars, guidelines etc were issued, read, understood or expectations clarified and the exercise took off. And because the employer is ending the employee's work contract before the natural end, here retirement at age 55, the employer pays a severance package. The retrenchees in phase 1 or 2 got in that because of:

"4. the staff rationalization scheme is part of its on-going restructuring initiative of the Defendant in prelude to its partial privatization as a matter of economic necessity" (Para 4, defence).

The exercise was not being undertaken and exit payments made on the premises of the age of retirement. The age factor only came in beginning with the older (first in, first out) and then moving onto the younger group. It was an economic necessity that if getting out the older lot (phase 1), the plaintiffs, did not suffice then the younger lot (phase 2, PW3) had also to exit. All had worked diligently and it can be assumed, faithfully for the defendant until this economic necessity appeared on the horizon. Then there were circulars, letters, guidelines, CBAs to assist in the retrenchment. The CBAs particularly stated at the end, first in the agreement of 4.4.2006 (Exh P1 – 151 to 154).

"9. OUTSTANDING ISSUES

The following items of discussions on package were not concluded as follows:-

9.1 FIFTY YEARS AND ABOVE

(a) **Severance** – The management offered one (1) month's basic salary for every year remaining while the union demanded two (2) months.

Agreed Position : It was agreed that the management consults further and report to the next CJC meeting.

(b) **Golden Handshake** : The union demanded payment of Golden Handshake of Kshs. 300,000/= for non-pensionable staff (sale 11)

Agreed Position : It was agreed that the management consults further and report to the next CJC meeting.

9.2 BELOW FIFTY (50) YEARS

(a) **Notice** : The Management offered payment of two (2) month's basic salary in lieu of notice while the Union demanded (3) months

Agreed Position: Both parties to make further consultations

(b) **Golden Handshake** – The Union demanded a Golden Handshake of Ksh. 300,000/= while Management maintained their offer of Ksh. 150,000/=.

Agreed Position : Both parties to make further consultations.

(c) **Severance** : The Management offered a severance pay of two and a half (2.5) months basic salary for every year worked while the union demanded three (3) months.

Agreed Position : Both parties to make further consultations.”

Then we move to the CBA signed on 12.4.06 (Exh. D1 – 55 to 58):

“9. OUTSTANDING ISSUES

The following items of discussion on package were not concluded as follows:-

9.1. FIFTY YEARS AND ABOVE

- The Management undertook to seek the necessary approval for a golden handshake of Ksh. 150,000/= for staff of scale 11 who are 50 years and above on condition that the union undertakes to accept a severance pay of one month for every year remaining to age 55.
- The Union in response undertook to lower their demand of the golden handshake from Ksh. 300,000/= to Kshs. 150,000/= and further reduce the severance pay from two (2) months to one (1) month if approval by the management of Telkom Kenya is secured.”

DW1 told the court that the 2 CBAs bound the defendant and its staff across the board, unionisable or in the management, who were being retrenched and they were applied in the working out the exit packages. From the reading of the entire agreements it is nowhere stated and agreed that the staff affected would be paid severance based on age and particularly that the group in phase 1 would access pension benefits right away and so would be paid one month's salary for each year remaining to retire and those in phase 2 who would not access pension right away but wait until age 55, would be paid 2 1/2 months basic salary for every year worked. Both sets of staff had not reached retirement age yet. Then the defendant decided to treat one group this way and the other that way – all on its own. Severance pay is to mollify, if it can be so termed, the employees whom the employer desires to leave before time, by giving him/her this pay, besides other benefits e.g. salary in lieu of notice, transport allowance etc because it was not the wish of the employee to leave at the time he/she is being asked or is being forced to go. They were the same circumstances which led to the staff exit in both phases. They had all worked well. They were therefore entitled to equal or fair treatment as regards their exit packages. There was no reason and none has been placed before this court why the plaintiffs were paid one month's salary for every year before retirement while in phase 2 their colleagues collected severance pay computed at 2 1/2 months basic salary for each year completed in the service.

The 2 CBAs did not so state and besides and most ***importantly***, the signatories to those agreements did not conclude the positions and levels of paying severance and golden handshake items. They clearly stated so and expected future meetings and consultations, with reports tabled, to conclude what was to be paid either as severance allowance or golden handshake.

Yet the defendant proceeded in a unilateral and perhaps random and seemingly hurried manner, to pay or

not to pay the two benefits. Here focus is on payment of severance package and this court therefore concludes that the same was not paid in a proper and even – handed manner to retrenchees in phase 1 (the plaintiffs) and phase 32. There is no reason or cogent reason advanced to back that package differential and this court so finds.

ii) **Golden Handshake** : Much about this item has been noted above when dealing with severance. Golden handshake is a rather new word in the lexicon of industrial and labour relations. It does not appear to be old in use or application. But when it found its place in Kenya, it connoted something akin to a “*thank you*” token from the employer when one leaves employment. Perhaps a gift about which one cannot lay on a verbal demand on or commence court litigation. But here it looks like its payment was decreed by the government and bodies engaged in retrenching staff were directed to pay it. It became an item to be demanded. It was in the circulars, guidelines and parties negotiated it in the CBAs. Therefore it became payable and could not be dispensed with at a whim or caprice. While those retrenched in phase 2 got it, the plaintiffs in phase 1 were denied. There is no reason, given the staff in the 2 phases having no different features one from the other. In fact here the defendant does not claim that it did not pay the plaintiffs due to age factor, or any other factor. This court finds that they were entitled to sh. 150,000/= each that their mates in phase 2 enjoyed.

As regards general damages there was no tenable pleading or evidence to warrant this.

In sum it is concluded that:

- a) the plaintiffs be paid severance pay base on 2 ½ months’ salary for each year of completed service.
- b) the plaintiffs be paid **golden handshake** on the same scale as what was paid the retrenchees in phase 2
- c) the plaintiffs get costs and interest.

Judgement accordingly.

Delivered on 28.9.11.

J. W. MWERA
JUDGE