IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI.

(Coram: Charles P. Chemmuttut, J.,

J.M. Kilonzo & M.M. Jahazi, Members.)

CAUSE NO. 78 OF 2004.

DIRECTORATE OF PERSONNEL MANAGEMENT (GOK).....Claimants.

v

UNION OF KENYA CIVIL SERVANTS .....Respondents.

Issues in Dispute:-

"(a) Implementation of the salary award announced by the Government on 29th July, 2004.
(b) The Intended Voluntary Early Retirement Scheme.

(c) Review of Terms and conditions of service of civil servants."

Ms. M. Kimani, Deputy Solicitor-Genera/W.Mbiyu, Senior Principal Litigation Counsel, for the Claimants(hereinafter called the Government).

Otiende Amollo, Advocate, of M/s. Rachier & Amollo, Advocates, for the Respondents (hereinafter called the Union).

A W A R D.

The Notification of Dispute, Form 'A', dated 26th August, 2004, together with the statutory certificate from the Labour Commissioner under Section 14(7) and (9)(e) of the Trade Disputes Act, Cap. 234, Laws of Kenya (which is hereinafter referred to as the Act), and duly signed by Mr. Simon P. Njau, Permanent Secretary/Director of Personnel Management, on behalf of the Government, and Mr. Alphayo M. Nyakundi , Secretary General, on behalf of the Union, were received by the Court on 30th August, 2004, for adjudication and determination of the dispute. It is important to note at the outset that this matter was urgently referred to this Court because the Union had threatened to mobilize its members in the civil service to down their tools unless the Government agreed to meet their demand of 600% salary increase; and in view of its sensitivity, the case was listed for mention on 31st August, 2004 when the Court made the following order:-

"The Court notes that both parties have submitted to the jurisdiction of the Court **AND IT IS HEREBY ORDERED:-**

(i) **THAT** all public or civil servants who are members of the Union and who intend to go on strike or withdraw their services and good will and/or to proceed on go-slow are restrained from such strike or withdrawal of services and goodwill, and are also ordered to maintain the *status quo* pending the adjudication and determination of this dispute.

(ii) That the parties do appear in Court on 27th September, 2004 at 10.00 a.m. to fix a suitable date for the hearing of this dispute."

The Government submitted its main memorandum on 30th September, 2004 and the Union filed its reply statement on 7th October, 2004. Consequently, the dispute, which concerns unionisable employees or civil servants in Job Groups "A" to "L", was heard on diverse dates between 13th October, 2004 and 3rd February, 2005.

Before dealing with the three issues in dispute or controversy, it would, perhaps, be helpful or necessary for a better appreciation and understanding of the case at hand if we set out in very brief outline the history of the Union, the relationship between the parties and the steps which let to the dispute. The Union was registered as such in 1959 and accorded recognition and collective bargaining rights to negotiate terms and conditions of service on behalf of all the unionisable employees in the civil service. On 20th July, 1980 the Union was banned and in 1983 it was deregistered. However, on 1st May 1992, the then President, Hon. Daniel T. arap Moi, allowed the Union to resume its operations and functions as before the ban; and according to *Kenya Gazette Notice No. 1654*, a Presidential Committee, (which is hereinafter referred to as the Committee) headed by Hon. Justice S.R. Cockar, was appointed on 8th May 1992 to consider and make recommendations, *inter alia*, on the following matters:-

"(a) The establishment of a trade union or similar organization for civil servants, its constitution, structure and objectives;

(b) The level of Union Representation among Civil Servants;

(c) Collective Bargaining rights in respect to salaries and other terms and conditions of service and the scope of such Collective Bargaining rights;

(d) ……

(e) …… ."

Subsequently, the Committee recommended, *inter alia*, as hereunder:-

"4.3.1 That a new trade union for civil service employees should be formed and named Kenya Union of Civil Service Employees (K.U.C.S.E.).

4.3.2 That the Union should adopt the Constitution and the Recognition Agreement which is attached as Appendices "B" and "C" respectively.

4.3.3 That the membership of the Union should be open to all employees who derive their emoluments directly from the Government of Kenya except non-civilian employees of the Police, Prison, Armed Forces, Administration Police, National Youth Service, Teachers under Teachers Service Commission and the following categories and grades:

(i) Persons who are formulating, administering co-ordinating and or controlling any aspects of Government Policy.

(ii) Persons who perform work of a confidential nature or are training for such positions.

(iii) Those responsible for making recommendations and those who take decisions on appointments, promotions, terminations and other disciplinary actions affecting other officers.

In the Committee's view, existing Civil Service employees' grades from Job Group A to K should be allowed to join the Union. Further, the Government and the Union shall be at liberty to vary the above provision or to exclude from Union representation any other Civil Service employee by mutual agreement.

4.3.4 That the Union should have the right to make
recommendations to the Salaries Review Committee that may be set up by the Government from time to time ……

4.3.5 ……

4.3.6 ……

4.3.7 ……

4.3.8 ……

4.3.9 That all Civil Servants who shall not be eligible to become Union members should have a separate consultative machinery in which their grievances and interests could be taken into account."

The parties accepted the recommendations of the Committee, and on 14th May, 2004 they signed a Recognition Agreement. This is, therefore, the first and foremost step in establishing the relationship between a trade union and an employer or a group of employers. The Act defines "recognition agreement" as follows:-

"recognition agreement" means an agreement in writing made between a trade union and an employer or organization of employers which provides (subject to such terms and conditions as may be contained therein) for the recognition of the trade union as the body entitled to represent the interests of those of its members who are specified in the agreement and who are or have been employed by the employer or any of the employers comprising that organization.'

The importance of a "recognition agreement" is even contained in the Industrial Relations Charter, and it is an extremely important document because it formally establishes the relationship between a trade union and the employer relating to recognition and negotiating procedure. It sets out matters on which the employer concedes, the right of negotiation to the trade union and affords full recognition to the union as the sole labour organization representing the interests of employees in the employment of that particular employer or group of employers, concerning rates of pay and overtime, hours of work, method of wage payment, paid leave, termination of employment, collection of union dues, retirement benefits, medical benefits, principles of promotion and redundancy, e.t.c e.t.c. The next important matter in the recognition agreement is that it sets out the negotiating procedure in great detail in respect of individual and collective grievances, collective agreements and the steps to be taken in the event of failure to reach agreement. The parties also stipulate how the recognition agreement may be modified and terminated.

Once the relationship between a trade union and an employer or a group of employers is formally established by the signing of the recognition agreement, then the trade union follows it up by submitting its demands or proposals on behalf of all the unionisable employees in the undertaking, whether they are trade union members or not, regarding wages and salaries and other terms and conditions of employment with a view to concluding a collective agreement on their behalf with the employer or a group of employers. The demands or proposals of a first ever collective agreement between the parties, or its modification or amendment where one already exists, is considered by the employer who makes his or its counter -proposals on the various demands or proposals.

In the Act, collective agreement is defined as follows:-

' "collective agreement" means an agreement made between a trade union and an employer or organization of employers which relates to terms and conditions of employment, whether or not enforceable in law and whether or not concluded under machinery for collective negotiation.'

The machinery for interaction between employees and employers is a collective bargaining process; and "collective bargaining" has been defined as:-

"negotiations about working conditions and terms of employment between an employer, a group of employers, or one or more employers' organisations……..

with a view to reaching agreement. In the absence of a representative workers' organisation, representative of the workers, duly elected and authorised by them in accordance with national laws and regulations, may be parties to collective bargaining" (see ILO *Collective Bargaining* (Geneva, 1960)p.3).

This definition, sound as it appears, seems to be too restrictive as it lays emphasis on institutions of job regulation (see A. Flanders, *Industrial Relations* : *What is Wrong with the System?* (London, Faber, 1965)). Today collective bargaining is not just concerned with working conditions and terms of employment but includes other issues of equity and fairness and the social obligation of the employer. Therefore, in addition to the above, collective bargaining is concerned with the total relationship between the employed and the employer. It is a process of decision-making; and its overriding purpose is the negotiation of an agreed set of rules to govern the substantive and procedural terms of the employment relationship, as well as the relationship between the bargaining parties themselves.

In the present case, a good deal of material is beyond dispute and is not contested. The parties signed their recognition agreement as stated hereinabove, but the Union neglected or refused or failed to formally submit its demands or proposals for counter-proposals by the Government on terms and other conditions of service, including wages and salaries, with a view to concluding a collective agreement on behalf of all the unionisable employees in the civil service. Instead, the Union issued a notice to the Government that it would launch a strike unless its demand of 600% salary increase, which it had raised prior to the signing of the recognition agreement, was met. Unfortunately, when the Union was contemplating so severe an action as the commencement of the strike, it is not too much to expect that before taking the irrevocable step, it should have kept itself informed up to the last moment as to the true facts concerning the grievances which it had put forward to the Government before the signing of the recognition agreement. The calling of a strike is deemed to be a highly responsible act, carrying legal sanctions and obligations imposed by the law which grants the right to strike as an instrumentality for the resolution of disputes between organised labour, i.e. trade unions, and the employers. It is eminently reasonable, therefore, to require that the calling of a strike, up to the point of commencement of the strike, should be accompanied by the most careful enquiry and satisfaction that a *bona fide* cause of dispute actually exists.

With the foregoing observations in view, we now proceed to discuss the three issues in dispute in reverse order.

(c) Review of Terms and conditions of service of civil servants.

During the process and proceedings of this dispute, the parties mutually agreed to withdraw this issue for negotiations between them.

This being the case, the same is dismissed as withdrawn.

(b) (i) **The Intended Voluntary Early Retirement Scheme**.

(ii) **Union's version:" Targeted Voluntary Early Retirement Scheme**."

The Government is currently intending to implement this scheme as part of the Public Service Reform Programme which started in 1990. In accordance with the Government Circular of the intended voluntary early retirement scheme, dated 27th May 2004, the retirement packages, free from tax, to both permanent non-pensionable and pensionable employees are as follows:-

"A. Permanent Non-pensionable Employees

(i) Severance payment of three (3) months basic salary for every completed year of service;

(ii) Three (3) months salary in lieu of notice;

(iii) A golden handshake payment of Kshs.80,000; and

B. Pensionable Employees

(i) Severance payment of fifteen (15) days basic salary for every completed year of service;

(ii) Three (3) months basic salary in lieu of notice;

(iii) Normal and additional pension; and

(iv) A golden handshake payment of Kshs.80,000."

The learned counsel for the Government, Ms Mbiyu, averred that the scheme, whose aim is to improve performance in the civil service in line with certain guidelines already in place, is distinct from retrenchment and does not target any particular group or individual members of the Union. The process would be implemented over a period of three years with effect from 2004.

In the circumstances, the learned counsel prayed that the demand to voluntarily retire a certain number, i.e., 21,000, of the employees be allowed.

In a nutshell, the learned counsel for the Union, Mr. Amollo, strenuously opposed the demand on the ground that the retirement scheme was not voluntary but targeted, mandatory and coercive in that specific cadres were targeted within a set period. He said that the retirement raised the real possibility that if not embraced the targeted groups risked termination of their services without any benefits under the scheme and to that extent it was not voluntary. Furthermore, and most importantly, Mr Amollo submitted that it was only fair that the Union should be consulted in matters affecting its members, especially on matters as fundamental as those in dispute in this case.
Accordingly, the learned counsel urged the Court to halt and discontinue the proposed targeted voluntary early retirement scheme until full consultation and agreement was arrived at *inter parties*.

On a serious consideration of the facts, voluminous documentary evidence on the record, the legal provisions of the law and the Economic Planning Division (hereinafter referred to as the EPD), report, it is unnecessary to dilate upon this issue in detail. A voluntary retirement is an act of the employee, just as dismissal or removal from service is an act of the employer. "Voluntary" means free choice, or something with free will without any compulsion, obligation or valuable consideration (*see A-G. v. Ellis(1895) 2 Q.B 466).* The word voluntary is constantly used in two different senses: it is used as the antithesis of something done under compulsion; but it is also used commonly among lawyers, and not uncommonly among other people, as denoting the obtaining or giving of something without anything being obtained in return.
In this case, the Intended Voluntary Early Retirement Scheme was voluntary, i.e; the employees were at liberty to voluntarily opt to retire or remain in employment. (see *Cause No. 34 of 1996: Kenya Reinsurance Corporation v. Kenya Union of Commercial, Food & Allied Workers)*. The Union has been unable to show how refusal by the Government to discuss this scheme could be termed a "trade dispute", which according to the Act, means:-

"a dispute or difference between employers and employees, or between employees and employees, or between employers and trade unions, or between trade unions and trade unions, connected with the employment or non-employment, or with the terms of employment, or with the conditions of labour, of any person and includes disputes regarding the dismissal or suspension of employees, the redundancy of employees, allocation of work or recognition agreements; and it also includes an apprehended trade dispute."

But even if the scheme targeted certain category or categories of the employees or civil servants or members of the Union without consultation with it (Union) as alleged by the Union, would the Court be justified in halting and discontinuing the said scheme? The bone of contention here is whether the reduction or retrenchment of the employees can be disposed of administratively by the Government alone or whether they are under an obligation to consult the Union or to take its consent on the matter. In support of their rival contentions, the counsel for the parties placed reliance on numerous documents, authorities, citations, e.t.c., but they failed to appreciate the meanings and principles of the words "redundancy" and "retrenchment". Redundancy is defined under Section 2 of the Act as follows:-

' "redundancy" means the loss of employment, occupation, job or career by involuntary means through no fault of an employee involving termination of employment at the initiative of the employer where the services of an employee are superfluous, and the practices commonly known as abolition of office, job or occupation and loss of employment due to the Kenyanization of a business; but it does not include any such loss of employment by a domestic servant." '

The word "retrenchment" means discharge of surplus labour by the employer in a continuing or running industry or concern for any reason whatsoever, otherwise than punishment inflicted by way of disciplinary action. It denotes only the discharge of surplus labour or staff and does not mean that termination of the contract of employment for other causes. The word "retrenchment" should, therefore, be understood in the ordinary sense. It is not every termination of service that can be retrenchment, but only termination of service of surplus labour in a continuing or running industry or concern.

Thus, redundancy and retrenchment mean the same thing, i.e; an involuntary and permanent loss of employment caused by an excess of labour or manpower; and when it occurs, the Court has to consider its two aspects, namely, (i) is the employer justified in coming to the conclusion in exercise of his management function that a certain number of employees have to be declared redundant or retrenched? (ii) if yes, has the redundancy or retrenchment been properly carried out? Even if it is found that the redundancy or retrenchment is necessary and justified, the question whether the employer has followed or complied with the golden rule, now statutorily recognized, of "first in, last out" or "last in, first out", would have to be considered, but this rule is not intended to deny freedom to the employer to depart from it for sufficient and valid reasons. The employer may take into consideration efficiency and trustworthy character of the employee, and, if he is satisfied that a person of a long service is inefficient, unreliable or habitually irregular in the discharge of his duties, e.t.c., then it would be open to him (employer) to declare him redundant or retrench his services while retaining in employment an employee who is more efficient, reliable and regular, though he may be junior in service to the redundant or retrenched employee. Normally, where the rule is departed from there should be reliable evidence preferably in the recorded history of the employees concerned, showing their inefficiency, unreliability or habitual irregularity. However, the Court does not insist inexorably upon compliance with this rule of redundancy or retrenchment, but what it insists on is on its being satisfied that whenever the rule is departed from, the departure is justified by sound and valid reasons; and if the departure from the said rule does not appear to the Court as valid and satisfactory, then the action of the employer can be treated by the Court as being *mala fide* or as amounting to unfair labour practice.

Therefore, redundancy or retrenchment is an involuntary and permanent loss of employment caused by an excess manpower. This can be brought about by many factors, e.g. change in the method of working, reorganization or restructuring and technological changes due to economic conditions. In our opinion, the question whether redundancy or retrenchment is necessary or not is exclusively and purely an administrative matter; and the Government is not under an obligation to consult the Union or take its consent. It is a normal and necessary incident of work; and so long as it is undertaken for better management and to cut costs and increase efficiency and productivity, and is not prompted by unfair labour practice or instituted in bad faith, then the Court cannot interfere with it. So far as the objection by the Union is concerned, an answer to it, in all respects complete and categorical, is found in the decisions of the Supreme Court of Pakistan in (I) *Pakistan Petroleum Workers' Federation v. Burmah –Shell Oil Storage & Distribution Co. of Pakistan Ltd.'s, P.L.D. 1961 S.C. 479 and (2) Zeal Pak Cement Factory Ltd., Hyderabad v. The Chairman, West Pakistan Industrial Court, Lahore & 2 Others, P.L.D. 1965 S.C.420.* It was held in these cases that there was unconditional, more or less absolute power in the management to undertake *bona fide* re-organisation of its operations for better management, or to increase productivity. In the circumstances, the Government has the inherent, unfettered and fundamental right to effect *bona fide* reduction of surplus staff on the ground of economy and to determine the size of its workforce, and the Court cannot sit in judgement when it is honestly arrived at and is not vitiated by bad faith, discrimination or victimisation.

As regards the golden handshake, we feel that the package is not attractive enough. It is also a fact that any employee who loses his or her job will face a hard and an uncertain future; and for this reason and in order to attract them to embrace the package, we are persuaded to recommend that the amount of Kshs.80,000/- should be raised to Kshs.120,000/-.

With the foregoing discussion and observations in view, there is no manner of doubt in our minds that there has been reorganization and restructuring carried on by the Government since 1990 for a *bona fide* purpose and without any taint of victimisation or unfair labour practice. There is also nothing in the nature of punishment or vindictiveness involved (see

Causes Nos. 33 and 34 of 1998: Kenya Union of Commercial Food & Allied Workers v. Standard Chartered Bank Ltd. and *Unga Group Ltd.)*

In the circumstances, we consider the demands of the Union that the Government should have consulted it in the matter of reduction or redundancy or retrenchment of the employees and that the Court should halt and discontinue the same as untenable and onerous, and we reject them in toto. The Government is, therefore, at liberty to proceed or continue with the reduction or redundancy or retrenchment of the employees provided that no employee shall be retired unless he or she has been paid his or her terminal benefits in full, except normal pension which is disbursed periodically.

(a) Implementation of the salary award announced by the government on 29th July 2004.

The controversy in this issue relates to the following salary award for lower and middle level cadres in Job Groups "A" to "S", which was announced by Hon. William Ole Ntimama, EGH, MP., Minister of State for Public Service, Office of the President, on behalf of the Government, on 28th July, 2004:-

"PRESS RELEASE SALARY ADJUSTMENT FOR CIVIL SERVANTS, JUDICIAL STAFF, STATE LAW OFFICE AND TEACHERS' SERVICE COMMISSION (TSC) SECRETARIAT STAFF

The Government has approved salary adjustment for various categories of personnel in the Civil Service, the Judicial Staff, the State Law Office and the Teachers' Service Commission Secretariat Staff. The salary adjustment, which is effective from 1st July, 2004, will benefit the lower and middle level cadres in Job Groups "A" to "S". The other cadres, whose salary adjustment has already been effected, are not covered.

During the next three years (FY2004/05) – FY2006/07), the Government has provided Kshs.7.6 billion for salary adjustment. This amount is based on projected Government revenue receipts over the same period.
The cost of the salary adjustment during FY2004/05 is Ksh.3.4 billion. The balance, amounting to Ksh.4.2 billion, will be spread over the remaining two years.

The salary adjustment demonstrates the Government commitment to improve the terms and conditions of service for its workers. It takes cognizance of a pay structure that recognizes the need to address the rising cost of living; and the wide disparity in salary differentials between the public and private sectors; the need to attract, retain and motivate skilled and qualified personnel in the Service especially the professional, technical and managerial cadres; and Government's ability to pay within the current budgetary constraints.
It is the intention of the Government to adequately remunerate its workers to improve performance and service delivery to the citizenry. I, therefore, call upon all civil servants to be committed to their work, embrace work ethics and spearhead the process transforming Kenya into a working Nation as directed by His Excellency the President.

Thank you.

Hon. William Ole Ntimama, EGH., MP.,

Minister of State for Public Service,

Office of the President.

28th July, 2004."

The Union was dissatisfied and rejected the award, and agitated for 600% salary increase of pay-scales of all unionisable employees in Job Groups "A" to "L", but the Government maintained that it had no capacity to pay anything beyond what has been granted in the above salary award. The written arguments put in by the parties are voluminous, but most of them are absolutely irrelevant because, as this Court has repeatedly observed in dealing with industrial adjudication, it would be undesirable to reach conclusions purely on doctrinaire or academic considerations. Besides, the adoption of such a doctrinaire or academic approach has, in the context of to-day, lost some of its validity.

The main case of the Government was that it had set up various Commissions and Committees in the years 1971,1980,1985,1990,1997 and 1998 to review the terms and conditions of service of its employees and the said Commissions and Committees made recommendations, *inter alia*, on salaries, allowances and other terms and conditions of service, most of which have been accepted, approved and implemented. In 1998, the Government appointed Harmonization Commission on Terms and Conditions of Service, for Public Servants, commonly referred to as "Kipkulei Harmonization Commission", which made some recommendations on all matters concerning the terms and conditions of service for public servants. In July, 2000, the Government commenced the process of implementing the recommendations by introducing the unified housing allowance for public servants. In July, 2001, the Government implemented the new salary scales, based on "the banding system", which

placed officer, starting with Constitutional office holders, in four groups, based on levels of responsibility, followed by the second phase in January, 2002 for accounting officers. In October, 2003, the Government established the Permanent Public Service Remuneration Review Board (PPSRRB), whose mandate is to review terms and conditions of service for all public servants and give recommendations to it (Government) on a continuous basis. Consequently, the said Board submitted its recommendations on salaries adjustments for the Civil Service, Judiciary, State Law Office and the Teachers Service Commission Secretariat staff. The said recommendations were accepted and implemented by the Government in July 2004.

The learned counsel for the Government, Ms. Mbiyu, submitted that the said salary adjustments were reviewed against the country's economic background and the fact that the Government wage bill is 9.7% of the Gross Domestic Product (GDP). Therefore, in the light of the prevailing economic constraints, the Government, through Fiscal Strategy Paper (FSP) for the Financial years 2004/2005 and 2006/2007, projected revenue available for the salary adjustments to be a sum of Kshs.7.6 billion. In the circumstances, the Government has committed itself in the Economic Recovery Strategy for Wealth and Employment Creation to reduce the wage bill from the current 9.7% of the GPD to 8.5% during the financial years 2003/2004 and 2005/2006, declining to 7.2% by 2007/2008. She pointed out that the implementations were based upon the Government budgetary provisions for the financial year 2004/2005 in the sum of Kshs.3.4 billion.

The parties held several consultative meetings during which the Union's main concerns were intended Voluntary Early Retirement Scheme, targeting its members, new salaries for civil servants and withdrawal of allowances; and at no time did the parties discuss the terms and conditions of service in the Kenya Civil Service. The learned counsel averred further that the Union was under the mistaken belief that the Government had made provision of Kshs7.6 billion in its 2004/2005 budget for civil servants salary adjustments, whereas only Kshs.3.4 billion was provided for in the budget. The balance of Kshs.4.2billion will be implemented in two phases during the financial years 2005/2006 and 2006/2007.

For the foregoing reasons, the learned counsel for the Government urged the Court to uphold the implementation of the said salary award by the Government within the budgetary provisions, and reject the demand by the Union for salary increment of 600% as not economically viable and untenable.

The learned counsel for the Union Mr. Amollo, contended that the demand for 600% salary increase was reasonable and justified because civil servants have been neglected, and over the years they have not received regular salary review. In his view the above percentage is arrived at as follows:-

"(i) 308% increase in compensation for loss in purchasing power between 1980-2004, having taken full cognizance of 29% salary increase (9 in 1995 and 20% in 1997), general salary increases previously awarded by the government to its employees. This is CPI compensation.

(ii) 169% increase in salary to narrow the existing wage differentials.

(iii) 42.2% for productivity improvement realized.

(iv) 68% increase to enable the basic rates of pay in the civil service to conform to the statutory minimum, and

(v) All accumulated arrears of all periods that civil service staff were paid at rates below the statutory minimum."

The learned counsel asserted that prior to the re-registration of the Union, the Government adopted an *ad-hoc* and anecdotal approach with regard to review of the terms and conditions of employment of civil servants at will and without consultation with the Union, whose members are directly affected, thereby reviewing the same at will and without equity and justification. He pointed out that the parties initially met to discuss the terms and conditions of service as early as 2003, i.e; prior to the recognition agreement; and the Union has since taken issue with the manner of implementation of the allocated amounts - in particular with the adamant refusal by the Government to discuss the mode and percentages of implementation with the civil servants, who are represented by the Union. The learned counsel said that on request and direction by the Government, the Union submitted a new memorandum of demand in August 2004, in which it incorporated and legitimized the same as part of the matters covered by the agreement, but the Government did not offer any counter-proposals. He reiterated that the bone of contention was not the budgetary allocation, but the distribution and issuance of the same to civil servants by the Government without consultation with the Union, as their *bona fide* representative. This, he said, amounted to bad faith on the part of the Government and total disregard of the Union. The learned counsel stated further that the Union did not insist on the implementation of Kshs.4.2 billion, but the Government sought to use the same as bargaining chip or bait to coerce the Union to sign the contentious agreement, thus violating there own fiscal strategy.

The learned counsel went on to argue that the implementation of salary award by the Government was fraught with inequity because it contravened the Wages Guidelines basic principle of declining percentages, which states that in any salary increase greater percentages ought to be awarded to lower income earners and decreasing percentages should go to higher income earners. The said award was unfair in that lower income earners received between 14.22% and 51.51%, while the upper income earners got between 37.02% and 148.79%. In comparison, the learned counsel contended that on 18th August, 2004, the Government approved a different salary structure for staff of the Kenya National Audit Office, with the result that persons in similar job groups are earning unjustifiably different salaries, e.g., personnel in Job Group "L" at the Audit Office receive

Kshs.30,472/-, while those in other offices earn Kshs.17,234/-. He said this was discriminatory and a direct violation by the Government of Equal Remuneration Convention, No. 100, which it (Government) ratified on 7th May, 2001.

In the circumstances, the learned counsel for the Union prayed that the salary award by the Government of 28th July, 2004, be declared unilateral, skewed and insufficient, and that all the unionisable employees in the civil service be paid 600% salary increase each on their current salaries.

The role of the Government in industrial relations is two-fold: first as the regulator of the total social system of which industrial relations is a part, secondly as an employer of labour. The Government in this latter role is like every other private employer. A well-known fact is that the Government is the largest single employer in Kenya. But many people surprisingly do not seem to know the difference between the Government as an employer and the Government as the regulator of the total social system. Therefore, each time government functionaries make statements on behalf of the Government as employer, they give the impression that the statements are coming from the Government as a regulator of the total social system.

Wage and salary issues are the most complex and important of all items connected with the employment contracts because not only are they mentioned the most frequently but they also take more time to discuss and give rise to the greatest number of disputes. This situation arises from the fact that the standard of living of the employee depends on the wage or salary which he or she receives, while to the employer the wage bill is often a considerable item in the cost of production. Indeed in many of the large public companies, the wage bill constitutes about 70% of the total annual expenses. In the case of the public sector, particularly, salaries are such a significant factor that some state governments even find it difficult to pay salaries regularly. However, one important point which must be recognised in determining the salary policy is the fact that salary alone does not constitute pay but the combined value of the basic salary, plus fringe benefits. The monetary value of the employee's skill and contribution must necessarily be measured against this parameter.

The fixation of wage or salary structure is among the most difficult tasks that industrial adjudication has to tackle. On the one hand, not only the demands of social justice but the claims of national economy require that attempts should be made to secure to the employees a fair share of the national income which they help to produce; on the other hand, care has to be taken that the attempt at a fair distribution does not tend to dry up the source of the national income itself. On the one hand, better living conditions for the employees that can only be possible by giving them a living wage will tend to increase the nation's wealth and income; on the other hand, unreasonable inroads on the profits of the employer might have a tendency to drive capital away from fruitful employment and even to affect prejudicially capital formation itself. Thus, numerous complex factors, some of which are economic and some spring from social philosophy give rise to conflicting considerations that have to be borne in mind. In trying to keep true to the two points of social philosophy and economic necessities which vie for consideration, industrial adjudication has set for itself certain standards in the matter of wage or salary fixation. At the bottom there is the **minimum basic wage or salary** which the employer must pay; and above this is the **fair wage or salary** which may roughly approximate to the need-based minimum. Above the fair wage is a **living wage or salary-** a wage or salary which will maintain the employee in the highest state of industrial or work efficiency. Economic considerations have made the living wage or salary a dream for the future, confining the horizon of Industrial Courts or Tribunals in many countries all over the world to the target of fixing a fair wage or salary. The immediate objective is to give the employees a living wage or salary, but living wage or salary is a very elusive target. The most expressive definition of the living wage or salary is that of **Justice H.B. Higgins** in the Australian Commonwealth Court of Conciliation in the *Harvester case.* He defined the living wage as "the normal needs of the average employee, regarded as a human being living in a civilized community." **Mr. Justice Higgins** further explained what he meant by this and said that the living wage must provide not merely for absolute essentials such as food, shelter and clothing but for a condition of frugal comforts estimated by the current human standards. He explained himself further by saying that it was a wage "sufficient to insure the workman food, shelter, clothing, frugal comfort, provision for evil days e.t.c as well as regard for the special skill of an artisan if he is one." In a subsequent case he observed that "treating marriages as the usual fate of adult men, a wage which does not allow of matrimonial condition and the maintenance of about five persons in a home would not be treated as a living wage." We believe that what **Mr. Justice Higgins** meant is that one cannot conceive of industrial peace unless the employee has secured to himself wages or salary sufficient for the essentials of human existence.

As, here again, economic factors have to be seriously considered, careful attention should be given to the ability of the employer to pay. This is, perhaps, the most important point that determines the wage and salary levels of employees because if an award is made which an employer cannot meet and give effect to, then it is meaningless, and if the matter is pushed too far, it can quite easily lead to serious and adverse consequences. While increasing earnings may sound appealing to trade unions, they may spell doom to the entire economy in general. Wage and salary increases should, therefore, be driven by increases in productivity and adjustment to the cost of living.

Before considering the demand by the Union for a better pay, it is necessary to observe that the Court must resist the temptation of comparing pay of various functionaries in the Government. The Government is expected to act justly and fairly, having regard to the performance of duty by its employees, and the Court would not readily disturb the pay structure fixed by the Government, unless it appears on the face of it to be unfair and unjust. It is only in glaring cases when the fixation of pay by the Government is patently and obviously unjust and unfair that a plea for increase of further pay should be entertained. In such a case, the Court must take an overall practical and common sense view. Thus, it may be stated as a rule that, unless as a result of revision in pay of employees, a particular category of employees have been ignored or the increase in their pay is patently disproportionate to the increase of pay of similar employees, the Court will be reluctant to interfere with the order of

the Government in implementing it.

In this case, the intention of the Government in setting up various Commissions and Committees since 1971 to date was to improve the salaries and other fringe benefits of all its employees, and it cannot be denied that the employees have benefited from the recommendations of the said Commissions and Committees. However, it was open and legitimate for the Union or employees to agitate for further increase in their pay because they were dissatisfied with the concession made by the Government. But the case of the Government was that they had not the resources and capacity to meet the demand beyond what it has been provided for in the said financial years. The question, therefore, is whether the Court has sufficient material and facilities to measure the productivity and job content of the employees in the civil service to enable it award the 600% salary increase as demanded by the Union. In our view the quantum which would be available for the consideration of the Court would be determined by an expert body, e.g., Ministry of Finance (Treasury), which is entrusted with the duty of maintaining the credit-structure or credit-worthiness of the country.

It is true that the Government awarded lower earners, mostly union members, in Job Groups "A" to "L", salary increase of between 14.22% and 51.51%, while the upper income earners received salary hike of between 37.02% and 148.79%, contrary to Wages Guidelines basic principle of declining percentages. But we consider the award fair and justified, considering the large number, about 120,000, of the Union members in the civil service. As regards the demand of 600% salary increase by the Union, we note that the same is for the period 1980 to 2004. The demand is surprisingly supported by the Economic Planning Division (EPD) report. Between 20th July 1980 and 13th May, 2004, the parties did not have any relationship whatsoever because the Union was not in existence. The Government only re-established industrial relationship with the Union when it recognized it on 14th May 2004. Furthermore, the Union did not formally submit its demands or proposals, on behalf of its members, to enable the Government make its counter-proposals. In the circumstances, the demand of 600% which was raised by the Union prior to the date of recognition is economically untenable and unsustainable. In any case, the Commissions and Committees which were set up by the Government during the period before recognition of the Union on 14th May, 2004, took care of the interest of its employees. The EPD report is, therefore, of no value to the Court.

Accordingly, we are constrained to make a nil award for now, but we order that the parties must commence formal negotiations on better terms and conditions of service for unionisable civil servants immediately.

Before we part with this case, we wish to point out that the main reason why this matter prematurely reached the Court appears to rest with the inability of the national officials of the Union dealing with the negotiations to control the branch officials, shopstewards and other militants, and explain to them firmly the mechanics of the collective bargaining system. The Court, therefore, would wish to express the hope that the national officials would take steps to curb the tendency whereby the branch officials, shopstewards and other militants in their Union take complete control of the stewardship of the Union and bypass the functions of the national officials.

DATED and delivered at Nairobi this 27th day of May, 2005.

Charles P. Chemmuttut, MBS.,

JUDGE.

J.M. Kilonzo, M.M. Jahazi,

MEMBER. **MEMBER.**