



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KIHARA KARIUKI, PCA, M'INOTI & J. MOHAMMED, JJA)

CIVIL APPEAL NO. 207 OF 2012

BETWEEN

TELKOM KENYA LIMITED APPELLANT

AND

JOHN O. OCHANDA (*Suing on his behalf and on behalf of 996*

***Former employees of Telkom Kenya Limited*)RESPONDENTS**

(An appeal from the Judgment and Decree of the High Court of Kenya at Nairobi (Mwera, J) dated 28th September, 2011

in

H. C. C. C. No. 216 of 2007 Consolidated with 219 & 255 of 2007)

JUDGMENT OF THE COURT

A. Background and Procedural History

(1) This is an appeal by ***Telkom Kenya Limited (the appellant)***, a limited liability company registered under the Companies Act (Cap 486) against the judgment and decree of the High Court (Mwera J, as he then was, delivered on 28th September 2011 in Nairobi HCCC Nos. 216, 219, 255 of 2007 as consolidated), whereby it was ordered that the respondents be paid a severance sum and a further payment (“Golden handshake”) in an action challenging the legality of the appellant’s staff rationalization scheme initiated in the first half of 2006.

(2) The procedural history of this appeal and its antecedents are as follows. Telkom Kenya Limited, itself the progeny of a restructuring process following the winding up of the Kenya Posts and Telecommunications Corporation in 1999, announced its restructuring and staff rationalization programme in March 2006 pending its ensuing privatization. According to the record before the Court of

Appeal, the rationalization programme was justified on the challenges faced by the appellant in the liberalized communications sector, high levels of indebtedness, declining revenues, aging network and high staff costs.

(3) The said staff rationalization programme was to be effected in two (2) phases: the first phase included staff over 50 years of age and the second phase included staff below 50 years of age. The appellant's Human Resources Policy Manual, which was stated to apply to all its employees stated the voluntary and compulsory retirement age as 50 and 55 years respectively. According to the appellant's pension scheme, pension benefits became only payable upon attainment of 50 years.

(4) The appellant offered different packages for the two phases. Under phase one, the package included three months basic salary in lieu of notice, severance payment of one month for every year remaining and transport allowance of Kshs.40,000.00. On the other hand, the package for phase two included two months basic salary in lieu of notice, severance payment of two and a half months basic salary for every year worked, golden handshake of Kshs.150,000.00 and transport allowance of Kshs.40,000.00. According to their claim, the respondents asserted that they were part of phase one of the programme.

(5) The appellant notified its members of staff that it had held meetings with the employees' trade union, that is, the Communication Workers Union and the employees to communicate the details of the exit packages. The said meetings combined discussion over packages which affected both unionisable and non- unionisable members. These discussions affected all employees who were to be affected by the retrenchment based on the phases and categories stated above. In a meeting held on 4th April, 2006, the payment of severance and golden handshake for employees aged 50 years and above were identified as outstanding. Subsequently, the appellant paid the affected members of staff their dues, thus precipitating a suit before the High Court claiming that the appellant had acted unlawfully in paying different packages to its members of staff in the two phases.

(6) This appeal arose from a suit consolidated from three suits, being **John Ochanda vs Telkom Kenya Limited HCCC No. 216 of 2007** (suing on his own behalf and on behalf of 38 former employees of Telkom Kenya Limited); **Michael Akeyo & 2 Others vs Telkom Kenya Limited HCCC No. 255 of 2007** (suing on their own behalf and on behalf of 65 former employees of Telkom Kenya Limited) and **Naphutaly Kibutu Kanyoro & 2 Others vs Telkom Kenya Limited HCCC No. 219 of 2007** (suing on his own behalf and on behalf of 300 former employees of Telkom Kenya Limited) whereby it was ordered that the respondents be paid a severance sum based on 2½ months salary for each year of service and golden handshake based on the scale paid under phase 2 of the appellant's staff rationalization scheme. In view of the commonality of parties, pleadings, issues, and prayers, these suits were consolidated, and heard together. In the course of the suit, many other parties were added pursuant to an order of the court. According to the record, a total of 996 plaintiffs became claimants in the consolidated suit in the end.

(7) The core of the respondents' claim in the High Court may be restated as follows. In view of the decision to privatize the appellant, a restructuring of its staff followed. This restructuring entailed termination of the respondents' services. In pursuance of that goal, the appellant issued a schedule by which the exercise could be carried out: phase 1 involved staff aged 50 years and above, while phase 2 covered staff whose age was below 50 years. It was pleaded that the appellant 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 respondents saw that the payment of severance pay to phase 2 based on 2½ months' salary for every completed year of service while they were paid one month's salary for every year remaining before retirement was discriminatory, unfair and a violation of the Employment Act (Cap 226), now repealed, Wages & Conditions of Employment Act (Cap 229), the Kenya Communications Act 1998 and Government of Kenya policy on rationalization, as expressed in the Civil Service Regulations.

(8) It was the claim of the respondents further 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. Further, the respondents maintained 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. In paying the group in phase 2 a golden handshake of Kshs.150,000/= while the respondents were paid nothing, it was their claim that the appellant discriminated between one group from the other in the exit packages. The respondents further averred that they were not paid some allowances due to them, for example, pertaining to medical and housing. To this, the respondents added a claim that the appellant failed to observe a government gazette notice issued on 23rd June, 2006, which exempted the retrenched's payment in lump sums from tax.

(9) Accordingly, the respondents 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 Kshs.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 Ksh.150,000/=.

(10) Further, the respondents urged the High Court to grant the following prayers:

(i) a declaration that the benefits paid to them were grossly undervalued in the light of the terms of retrenchment circulars and regulations;

(ii) a mandatory injunction directed to the defendant to calculate the claimed payments correctly and pay the same as regards severance pay, terminal benefits;

iii. a mandatory injunction to ensure that the "golden handshake" was paid to all retrenched equally and without discrimination together with long service bonuses, unpaid leave etc.;

iv. a permanent injunction against the defendant not to privatise its services so as to affect its assets to the detriment of the plaintiffs;

v. General damages;

vi. Costs and interest.

(11) In its defence, the appellant argued that its staff rationalization programme had been undertaken on account of economic necessity. The appellant averred that the notice that it had published on 16th March, 2006 spelt out clearly the approved terminal benefits to be paid to the affected employees in the two phases. The appellant further stated that the respondents were not civil servants and as such the terms of retrenchment for civil servants did not apply to them. To this, the appellant added that the respondents who fell in phase 1 of retrenchment were entitled to payments as per the notice published on 16th March,

2006.

(12) It was the appellant's case 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 50 years. The appellant's posited further that the Treasury did exempt income tax not to be paid on the lump sums. It was the appellant's averment that payment of pension was based 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 three separate corporations the former employees of Kenya Posts and Telecommunications Corporation were transferred to those corporations, whereupon the Telposta Pension Scheme was established, with trustees vested with assets for the purposes of discharging accrued and accruing pension liabilities. It was the appellant's defence further that Kenya Posts and Telecommunications Corporation had a non-contributory pension scheme under which the respondents could not claim rights.

(13) Following the pleadings, twenty (20) issues were agreed upon by the parties for consideration. In pursuance of these issues, the evidence before the High Court comprised copies of letters of the respondents' appointment, promotion and retrenchment/retirement, salary or terminal benefits payment slips, official circulars, reports, guidelines, rules, special communications, gazette notices, affidavits, human resource policies, agreements and other related documents adduced by prosecution and defence witnesses. Apart from the generic evidence to support the general claim, the respondents adduced evidence to demonstrate specific claims of discrimination or disparity as regards payment of severance allowance, golden handshake, leave allowances, and terms of recovery of loans. The appellant sought to controvert these claims on grounds among others that the agreement relied upon by the respondents had identified as outstanding the issues raised. The appellant relied on the collective bargaining agreement, concluded on 4th April, 2006 on the structure of staff rationalization. However, according to the record, it was the appellants' testimony that there was no agreement reached about the retrenchment package because once the Cabinet approved the terms, the appellant could not undo the said decision.

(14) In considering the respondents' claims, the list of agreed issues, the appellant's defence and supporting evidence adduced through examination-in-chief, cross examination and re-examination, the High Court dismissed two out of the respondents' four claims, that is, payment of the severance sum, leave allowances, loan deductions and general damages. First, it was the court's view that administrative action taken by the appellant was admissible to enable it to recover the sums due to it from the loans it had advanced to the respondents. The court further noted that retrenchees in both phases had been treated the same in recovering both secured and unsecured loans at once, and as such the respondents could not sustain a claim of discrimination. Second, in relation to outstanding leave allowances, it was the court's conclusion that the claims of leave allowance were not sufficiently put before it neither had there been evidence that the respondents who had such days of leave were treated differently from their colleagues in phase 2.

(15) The High Court, having disposed of the above issues, settled on the payment of severance pay and golden handshake, damages, and costs and interest as the issues for determination. In respect of the first two issues, the High Court reduced the inquiry to the question: Was there discrimination in the payment of severance allowance and golden handshake between the retrenchees in phase 1 and 2?

(16) In relation to severance payment, it was the High Court's finding that the entire agreements had not stated that the staff affected would be paid severance based on age. In its view, the same circumstances had led to staff exit in both phases, and as such all staff were therefore entitled to equal or fair treatment as regards their exit packages. It followed then, that the payment of the respondents a month's salary for every year before retirement while their colleagues in phase 2 were paid severance pay computed at 2½ months basic salary for each year completed in the service without a justifiable reason was discriminatory, not proper and uneven.

(17) Turning to the question of payment of golden handshake, it was the High Court's view that a practice had emerged in which its payment had become a government policy. Accordingly, the court stated that it became payable and could not be dispensed with at a whim or caprice. While those

retrenched in phase 2 got it, the respondents in phase 1 were denied. In the court's conclusion, it followed that the failure to pay the respondents golden handshake while their colleagues in phase 2 were paid the same without a justifiable reason was discriminatory.

(18) In its judgment, the High Court held that:

“In sum it is concluded that:

- a. ***the plaintiffs be paid severance pay based on 2½ months' salary for each year of completed service,***
- b. ***the plaintiffs be paid golden handshake on the same scale as what was paid the retrenched in phase 2,***
- c. ***the plaintiffs get costs and interest.”***

B. Grounds of Appeal and Orders Sought

(19) Having been aggrieved by the High Court's decision above, the appellant filed a notice of appeal dated 10th October, 2011. In the memorandum of appeal filed at the Court of Appeal on 28th August, 2012, the appellant stated 22 grounds of appeal. This Court has narrowed these down to the issue of discrimination, the payment of golden handshake, the reliefs granted in the judgment and other general issues as follows:

[1] The Learned Trial Judge erred in law and in fact in holding that the Appellant had treated the Respondents unfairly and discriminatorily, in the retrenchment exercise by categorising them on the basis of age for the reasons that:

- a. ***Employment law by its very nature envisages differential treatment of people of the same age and qualification, which is not at all discriminatory or unfair treatment.***
- b. ***The categorisation of the Respondents for the purpose of the retrenchment exercise was not discriminatory and in violation of the law particularly the applicable law.***
- c. ***The law provided that in cases of redundancy of employees, the age of the employees to be retrenched is a factor that had to be taken into account hence categorisation based on age cannot in any way be discriminatory or unfair.***

[2] The Learned Trial Judge erred in law and in fact by holding that the Respondents were entitled to equal treatment or fair treatment as regards their exit packages for the reason that:

- a. ***Each of the Respondents had a separate employment contract with the Appellant.***
- b. ***The exit packages paid to the Respondents were not in any way in violation of the law and the law does not demand equal or fair treatment of persons to be retrenched.***
- c. ***The varied payments for different age categories were not discriminatory as it is not discrimination to classify employees in various categories, which is a common practice in labour law.***
- d. ***Based on the fact that Respondents had worked for the Appellant for disparate times, and were of varying age differentiation in terms of age was imperative, and in any event was neither discriminatory nor could it amount to unequal treatment.***

[3,4,5]...

[6] The Learned Trial Judge contradicted himself substantially and materially with regard to the Collective Bargaining Agreements (CBAs) by holding on the one hand that the CBAs did not conclude the positions and levels of paying severance and golden handshakes and proceeding to hold and find that the Respondents were entitled to golden handshakes as it was negotiated in the CBAs.

[7] The Learned Trial Judge erred in law and in fact by holding that payment of golden handshake had been decreed by the government and bodies engaged in retrenching staff, which was not backed by any evidence placed before the trial court.

[8,9]...

[10] The Learned Trial Judge erred in law and in fact in holding that no reason was given for paying golden handshake to the Respondents in Phase 2, whilst those in Phase 1 were denied yet the Appellant gave the reasons for the differential treatment, which was not at all challenged by the Respondents and no finding on the validity of the reason was given by the Judge.

[11]...

[12] The Learned Trial Judge erred in law and in fact in holding that the two CBAs were inconclusive on the issue of severance pay and golden handshake and thereby substituting his findings with the parties' negotiated position.

[13,14]...

[15] The Learned Trial Judge erred in law and in fact in imposing a figure of Kshs.150,000.00 for each employee retrenched during Phase 1 as golden handshake on the Appellant, which was not based on any legal requirement and/or obligation on the part of the Appellant.

[16] The Learned Trial Judge erred in law and in fact in failing to take cognizance of the fact that the exit packages were negotiated based on what the Appellant could afford thereby imposing additional, unwarranted impossible financial burden on it capable of crippling it.

[17]...

[18] The Learned Trial Judge erred in law and in fact in assuming that all the Respondents were in category 11 whose issues of severance pay and golden handshake were not concluded.

[19] The Learned Trial Judge erred in law and in fact by proceeding with the consolidated trial in which the pleadings were muddled up and hence could not arrive at a just and reasonable finding in view of the confusion inherent in the trial process.

[20] The Learned Trial Judge erred in law and fact by failing to settle the issue of the parties to the case, the Plaintiffs in the matter, as the numbers and particulars were never settled by the Judge, which is bound to occasion great hardship to the Appellant.

[...]

(20) In the appeal, the appellant seeks orders among others that:

(a) The appeal filed herein be allowed.

(b) *The orders of the superior court in the judgment dated 28th September, 2011 on severance pay and golden handshake be set aside and the respondents' suit be dismissed with costs.*

(c) *The costs of this appeal be borne by the respondents.*

C. Summary of the Appellant's Case

(21) This Court heard submissions from the appellant and the respondents as follows. Lead counsel for the appellant, Mr. George Oraro submitted that the applicable regime for the staff restructuring was the Employment Act (Cap 226) or by mutual negotiation and agreement. It was the appellant's submission that in furtherance of agreement, the parties entered into mutual negotiations with the union on the terms of the staff rationalization. Among the issues concluded included agreement on unsecured loans, selection criteria and a further agreement to undertake further consultations on the outstanding issues. However, in the absence of agreement on severance payment and golden handshake under the Collective Bargaining Agreement, **section 16 A** of the repealed Employment Act became the default applicable rule.

(22) Mr. George Oraro urged that the appellant's status as a government controlled corporation did not transform it into a civil service establishment, or subject to civil service rules. He averred that the circular on civil service reform was not addressed to parastatals or Telkom in particular. It was Mr. Oraro's submission further that the claim for payment of golden handshake was not enforceable as it had no legal or contractual basis, having been made on an *ex gratia* basis to one group following negotiations. He averred that eligibility for severance payment and retirement benefits was further based on the terms of the pension scheme as per the trust deed and rules of the Telposta Provident Fund. Accordingly, the superior court's order for severance payment and payment of golden handshake in the quantum prescribed amounted to an imposition of terms on the appellant. It was the appellant's averment that in the present case, the parties had reached agreement and there was no basis for interference with that agreement. He cited ***National Bank of Kenya vs Pipeplastics Samkolit (K) Ltd & Anor, Civil Appeal No. 95 of 1999*** where this Court stated that a court may not substitute its own terms for what the parties had agreed or intend to agree upon. He said that in the case at bar, there was a valid Collective Bargaining Agreement, albeit with outstanding issues on a specific category of employees. He said that the non-registration of the CBA did not make it any less an agreement, evidenced by the reliance by the superior court upon it rather than the Employment Act.

(23) Mr. Oraro argued that whereas the High Court had concluded that there had been discrimination in the treatment of the appellant's employees, it had not considered the relevant legal provisions on discrimination nor explicated what constitutes discrimination. Mr. Oraro contended that contrary to the finding of the High Court, the appellant had advanced reasons and evidence to support why it had paid its workers differently. Mr. Oraro referred to ***Johnstone Muthama vs Minister for Justice and Constitutional Affairs & Another (2012) eKLR*** and ***Federation of Women Lawyers Kenya (FIDA-K) & 5 Others vs Attorney General & Another (2011) eKLR***, where the High Court held differentiation is allowed if it bears a rational connection to a legitimate government policy. In explaining the appellant's case, he argued that the very law of retirement and redundancy is discriminatory if it is taken in an abstract sense, as all employees are not treated equally on grounds of age. He stated that employees eligible for retirement and those who were not were always treated differently. He cited the pension fund whose provisions make a distinction based on age by stipulating that employees aged 50 years could get pension, whereas those below the threshold could not. He stated that if the formula of the High Court were applied, it would be even more discriminatory as those aged over 50 years would be entitled to pension and those below the threshold would not.

(24) Finally, this Court was urged that the issue before the High Court related to a declaration of rights, not an enforcement action. Mr. Oraro pointed out that the plaintiff particularly sought declaratory rights and an order directed to the appellant to calculate the claimed payments correctly and pay the same to the respondents. There had been no prayer for payment, but only injunctions. Mr. Oraro further averred that the High Court had stated in an earlier ruling in the matter that it would deliver a judgment *in rem*, not *in personam*, which implied that the suit was purely a declaratory suit, limited in scope. However, when

the final decision was delivered, the court pronounced judgment *in personam* rather than *in rem*, notwithstanding the general evidence led by three witnesses and the superior court's omission to undertake verification of individual claims. In the absence of a cross-appeal or grounds for re-affirming the decision, only the High Court could correct that. Mr. Oraro argued, furthermore, that it was not possible to determine the category of the employees who were respondents in the suit. He urged the Court to send back the case to the High Court for retrial should it not make a finding in the appellant's favour.

D. Summary of the Respondents' Case

(25) The respondents opposed the appeal. In his submissions, counsel for the respondents, Mr. Pherozee Nowrojee submitted that the appellant's defence had no foundation in industrial practice. Mr. Pherozee Nowrojee argued that the suit involved 996 plaintiffs out of approximately 2000 employees who had been retrenched under the appellant's staff rationalization scheme. It was his contention further that the agreement under which the exit packages for the appellant's employees had been retrenched or retired had not been registered as required by **section 11 (1)** of the Trade Disputes Act.

(26) This Court was further told that the restructuring of the appellant was not an isolated event; it was part of the rationalization of civil service by the Government of Kenya. Mr. Nowrojee submitted that apart from the Government's ownership of the appellant, the approval of the restructuring process by the Government implicated the application of its policies in the retrenchment and retirement of workers by the appellant. The Court was further told that the question of funds did not arise as the Government had approved the rationalization programme, well aware of the financial implications.

(27) It was the respondents' case that the basis of the decision of the High Court was the disparity in the exit packages of employees in Phase 1 and those in Phase 2. In stating that the appellant bore the burden to adduce justifications for its differential treatment of its employees, Mr. Nowrojee further submitted that the appellant had not adduced reasons to rationalize why its employees in phase 2 had been paid a golden handshake of Kshs.150,000/= while the respondents were not paid the same. He averred that that having been the case at the High Court, no reasons could be advanced at the appellate court. He stated further that during the negotiations of the Collective Bargaining Agreements, the appellant did not communicate to the respondents that they had no right to payment of golden handshake. In view of the status of Telkom as a Government controlled corporation, it was therefore a legitimate expectation of the respondents that there would be payment of golden handshake. Similarly, it was Mr. Nowrojee's averment that the respondents had a right to their pension, and that the payment of a higher severance package to phase 2 than phase 1 was discriminatory. In the absence of a valid or conclusive Collective Bargaining Agreement, the statutory formula under **section 16 A** of the Employment Act which requires payment on the basis of days worked would apply. The respondents argued that the appellant's decision to calculate the severance pay on the basis of every year remaining before attainment of the retirement age was inconsistent with and violated the Employment Act. Moreover, Mr. Nowrojee submitted that there had been irregularities as there were people who were aged 50 and above who received the golden handshake in phase 2 while those in phase 1 did not.

(28) These submissions were supported by Mr. Anthony Oluoch, counsel appearing for the respondents in HCCC Nos. 216 and 219. On the issue of the number of plaintiffs, learned counsel stated that the High Court's ruling in 2011 had settled the matter. Counsel further reiterated that the differential treatment by the appellant was not based on any law or past practice. He stated that the appellant's request for Cabinet approval and the Government's control made it amenable to the civil service rules. He also argued that the Collective Bargaining Agreement, even if applicable could not override the statute. Finally, Mr. Oluoch argued that the appellant's conduct did not meet the requirements for rational connection between means and ends as explicated by the High Court in ***Johnstone Muthama (cited above)*** and ***Community Advocacy and Awareness Trust and Others vs The Attorney General and Others (2012) eKLR***.

(29) Finally, it was the respondents' contention that the suit was not only a declaratory claim, but also a suit seeking enforcement of rights. Mr. Nowrojee posited that liability had to be established first, by way of a declaration, followed by enforcement of rights. Such a declaration bound the appellant *in rem*

whereas the other prayers bound it in respect of the employees.

E. Issues for Determination, Findings and Conclusion

(30) As we see it, there are only two issues in this appeal. First, whether the differential payment of severance allowance to employees in phase 1 and 2 amounted to discrimination. And secondly, whether non-payment of golden handshake to the retrenched in phase 1 also constituted discrimination.

(31) The decision to retrench employees and restructure the business of the appellant was taken by the management of the appellant. As the major stakeholder in the appellant's enterprise the Government of Kenya took a direct interest in the exercise and issued appropriate guidance which the appellant complied with. The problem arose when in making the payments, the appellant decided to treat those over 50 years of age in one way, and those under 50 years of age in a different way. Those over 50 years were paid less severance allowance compared to those who left before reaching 50 years. The appellant sought to justify this discrimination on the basis that those over 50 years would access their pensions right away while those in the latter group would only do so upon attaining their retirement age. A witness called by the appellant (DW 1) asserted that that was a directive from the Government. As the learned Judge correctly observed, from the reading of the entire agreements there was nothing agreed that the staff affected would be paid severance allowance based on age and particularly that the group in phase 1 would be paid one month's salary for each year remaining before retirement, and those in phase 2 who would have to wait until age 55 would be paid severance pay 2½ months basic salary for every year worked.

(32) The problem with this ingenious argument is that it had no legal basis and appears to have been imposed arbitrarily by the appellant. The law is very clear regarding the mechanism to be applied once a decision has been reached by an employer to retrench, restructure, downsize or declare redundancy. An employer after securing the necessary agreement is obliged to pay all the normal terminal benefits and severance pay at a given rate for each year the employee has already served. The formula is statutory and the rate cannot be tied to pension. Pension is a benefit to be enjoyed in retirement and is usually managed by Trustees separate from the Employer.

(33) Payment of severance pay relates to the number of years the affected employee has already served. That is what the law says. It does not relate to the years the employee has yet to serve before reaching retirement age. The moment it is manipulated to cover the future, it ceases to be severance pay. Obviously, those employees who have served longer than others and whose grades are higher and in receipt of higher basic pay will in the final analysis, receive more money as severance pay. The right to work is a basic human right where as here, the employer decides to retrench its employees, it is under a duty to do so fairly and equitably. In such a situation, equality of treatment is key. The application of the correct formula cannot amount to discrimination. But where as in this case, the appellant deliberately decided to use a formula which resulted in preferential treatment of employees, that action amounted to blatant discrimination. The learned Judge's finding on the issue of severance pay cannot therefore be faulted and we uphold it.

(34) That brings us to the issue of golden handshake. On this issue, the learned Judge had this to say:

“Much about this item has been noted above when dealing with severance. Golden handshake is a rather new word in the lexicon of industrial 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 CBA. Therefore, it became payable and could not be dispensed with at a whim or caprice.”

What the appellant did was that it paid those retrenched in phase 2 golden handshake but did not

pay any golden handshake to the employees retrenched in phase 1. The appellant gave no reason for this discriminatory treatment. Since the appellant chose to give no reason, the only inference we can make is that it had no reason for doing so.

(35) Golden handshake is defined in *The Concise Oxford Dictionary (9th Edition)* as a payment given on redundancy or early retirement. Once the appellant decided to pay golden handshake, it could not arbitrarily decide who to pay and who not to pay. It had to be paid across the board. The age of an employee for the purposes of eligibility did not arise. Once it had decided to pay phase 2 Kshs.150,000/= as golden handshake, the appellant had no reason to refuse to pay employees in phase 1. In these circumstances, we cannot detect any misdirection in the way the learned Judge dealt with the issue of golden handshake.

(36) We conclude by observing that this was a very difficult case and the learned Judge determined all the issues without undue regard to procedural technicalities – **Article 159 (2) (d)** of the Constitution of Kenya. There is no substance in the complaint by the appellant that the learned Judge attempted to rewrite a contract for the parties. The learned Judge did no such thing. After very careful consideration of the evidence, issues and submissions, we have come to the

conclusion that there is no reason to upset the decision of the High Court. That being our view, the appeal fails and is hereby dismissed.

F. Costs

(37) We make no order as to costs.

Dated and delivered at Nairobi this 25th day of October, 2013.

P. KIHARA KARIUKI

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PRESIDENT,

COURT OF APPEAL

K. M'INOTI

.....

JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

I certify that this is

A true copy of the original

DEPUTY REGISTRAR