



**REPUBLIC OF KENYA**

**Industrial Court of Kenya**

**Cause 984 of 2012**

**KENYA UNION OF COMMERCIAL FOOD AND ALLIED WORKERS  
UNION.....CLAIMANT**

**VS**

**NATIONAL SOCIAL SECURITY FUND.....RESPONDENT**

**RULING**

1. On 11th June 2012, the Claimant filed a Memorandum of Claim vide which it sued the Respondent for inclusion of a new Clause on Voluntary Early Retirement (VER) in the Collective Bargaining Agreement for 2011-2013. The Respondent filed its Memorandum of Defence on 18th March 2013 and the dispute is pending in Court.

2. On 1st March 2013, the Managing Trustee of the Respondent issued an all staff circular under reference number SF/EST/1/25(S) Vol. VI/(88) setting out the following terms of a VER Scheme approved by the Government of Kenya:

**a) Exit Package**

**i) Unionisable Staff:**

2 months' severance pay (basic salary and house allowance) for every year worked but capped at 10 years.

**ii) Management Staff:**

2 months' severance pay (consolidated pay) for every year worked but capped at 10 years.

**b) Ex-Gratia Payment**

Kshs. 1,000,000 for all staff regardless of their Job Grades .

**c) TPS/Mortgage Rebate**

30% rebate on all outstanding TPS/Mortgage loans for employees who opt to pay their balances in full upon exit.

**d) Payment in Lieu of Notice**

1 month's basic salary in lieu of notice.

3. The circular gave 22nd March 2013 as the deadline for staff interested in the VER to submit their applications to the Managing Trustee.

4. Following this development the Claimant came to Court on 18th March 2013 under Certificate of Urgency seeking the following orders:

a) That the Respondent be ordered to negotiate with the Claimant in good

faith and come to a consensus before 22nd March 2012 being the

deadline given in the Respondent's circular dated 1st March 2013;

b) That in the alternative, the Respondent awaits the outcome of this matter

before implementing the VER Scheme.

5. The application was heard on 19th March 2013 with Mr. Owiyo appearing for the Claimant and Mr. Okeche for the Respondent.

6. Mr. Owiyo told the Court that the VER Scheme was a product of a Job Evaluation exercise undertaken by the Respondent without any involvement of the Claimant whose members would be affected by the outcome.

7. Apparently, in anticipation of the outcome of the Job Evaluation exercise, the Claimant sought and was granted the following interim orders in an application under Cause No 1796 between the same parties:

a) That an interlocutory injunction do issue against the Respondent restraining them from implementing new job grading structure until the matter is heard and determined;

b) That an interlocutory injunction do issue against the Respondent restraining them from effecting unfair and/or arbitrary transfers of unionisable employees until the matter is heard and determined.

8. The Claimant argued that these orders acted as an injunction against the Job Evaluation exercise and its by products, among them the VER Scheme.

9. The Claimant further submitted that the offer for VER carried a veiled threat of redundancy for employees opting not to take the VER offer.

10. The Claimant also took issue with the terms of the VER offer which were inferior to those contained in an all staff update dated 2nd November 2010 under reference number SF/EST/1/159 Vol 1. The Claimant even intimated that the VER terms communicated to staff vide the circular dated 1st March 2013 were different from those approved by the Government of Kenya since the approval letter from the Government referred to a letter from the Managing Trustee with a reference number close to the one appearing on the update dated 2nd November 2010.

11. The Claimant referred the Court to the case of one Albert Odera, a former employee who had been offered more favourable separation terms.

12. In reply, Mr. Okeche submitted that the VER offer was purely voluntary and that no staff was being coerced to take it. He added that following approval of the VER Scheme by the Government, 148 of the Respondent's employees, both unionisable and management had submitted their applications for voluntary early retirement.

13. Mr. Okeche further submitted that the Respondent had kept its employees updated on the entire restructuring process, with the last bulletin having been issued on 15th March 2013.

14. In response to the Claimant's contention that the terms of the VER inferior to those applied by the Respondent in the past, Mr. Okeche submitted that Albert Odero had left employment under different circumstances. Additionally, his letter of termination was dated 29th October 2010 before the update dated 2nd November 2010. There was therefore no connection between Mr. Odero's separation terms with the update aforementioned.

15. With regard to the similarity in reference numbers on the update dated 2nd November 2010 and the letter from the Managing Trustee referred to in the approval by the Government, Mr. Okeche took the view that reference numbers are merely for filing purposes and the fact that documents carry similar reference numbers does not in itself indicate any relationship. He asked the Court to dismiss the Claimant's application.

16. Mr. Okeche referred the Court to case law on VER. In the case of **William Barasa Obutiti Vs Mumias Sugar Company Limited [2006] eKLR** the Court of Appeal stated that:

***It is open to an employer and employee at any time during the currency of a contract of employment to terminate the contract by agreement. The agreement of mutual release may be subject to terms as in the VERS (Voluntary Early Retirement Scheme). In such circumstances, the agreement will be effective to override formal or substantial restrictions placed on the termination of the contract by the original contract itself.***

17. The gist of this decision was that VER is a voluntary venture between a willing employer and a willing employee.

18. Similarly, in **Joseph Kipkorir Vs Telkom Kenya Limited (Industrial Court Cause No. 254 of 2010)** Justice Rika held that:

***As the term suggests, VER is a voluntary scheme. It is offered and taken voluntarily....The employee has the discretion to take it if sure, or leave it if in doubt. An employee should not be heard to argue on the unfair terms of retirement for the simple reason that this is not a forced exit.***

19. Before making my substantive finding in this matter, I need to deal with an allegation made by the Claimant on the integrity of the staff circular issued by the Respondent's Managing Trustee on 1st March 2013. The Claimant intimated that the terms approved by the Government may have been superior to those communicated by the Managing Trustee. No evidence was rendered in support of this allegation which the Court found unfortunate and unwarranted. I have therefore disregarded the said allegation in reaching my decision.

20. The Claimant's issue with the VER terms offered by the Respondent in this case is that the terms are inferior to those contained in an update to staff issued on 2nd November 2010 as well as those offered to Albert Odero. For this reason, the Claimant wants the Court to halt implementation of the VER Scheme to allow negotiation of fresh terms. The Court has taken note that this is the major issue in the main cause on which this application hangs. To accede to the Claimant's request would therefore effectively dispose of the main cause.

21. VER Schemes are by nature and design specific and time bound. The terms of any specific VER scheme are determined by several factors, the major one being affordability. The fortunes and circumstances of employers are a moving target and it is therefore not always possible to guarantee standard VER terms for all staff for all time. It is not possible to establish an immutable precedent in VER. Applicable terms may vary depending on the circumstances in which the employer finds itself.

22. In view of the foregoing, the Claimant's application for suspension of the VER Scheme pending

negotiation with the Respondent is disallowed. I however found the time given to staff to submit their applications inadequate and extend the deadline to close of business on Tuesday, 2nd April 2013.

- 23. Each party will bear their own costs.  
It is so ordered.

**DELIVERED IN OPEN COURT AT NAIROBI THIS 21ST DAY OF MARCH 2013**

**LINNET NDOLO  
JUDGE**

**In the Presence of:**

.....**Claimant**

.....**Respondent**