



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

AT NAIROBI

CAUSE NO. 984 OF 2012

KENYA UNION OF COMMERCIAL FOOD & ALLIED WORKERS.....CLAIMANT

AND

NATIONAL SOCIAL SECURITY FUND RESPONDENT

Mr. John Owiyo for applicant.

Mr. Okechetu for Respondent.

JUDGMENT

The suit is premised on a Memorandum of Claim dated 5th June, 2012. Three prayers are sought in the main suit:

- a. *A declaratory order that the behavior of the Respondent in this matter amounts to unfair labour practice;*
- b. *An order directing that a new clause (VERS) as per the Respondent's circular dated 2nd November, 2010 be part of the provisions in the Collective Bargaining Agreement for the period 1st July, 2011 to 30th June, 2013; and*
- c. *An order directing that Clause No. 17 Redundancy Part F Severance Pay read:*
 - i) *An employee declared redundant shall be entitled to severance pay at the rate of four (4) months basic salary and house allowance for every year worked as at the date of cessation of employment.*

ii) *Golden handshake:*

An employee declared redundant shall be entitled to a golden handshake of Kshs.2.5 million.

iii) *Rebate:*

An employee declared redundant shall be entitled to 30% rebate on Outstanding Loans i.e Tenant Purchase Scheme (TPS) Mortgage Loans and motor vehicle loans notwithstanding the existing fund practices governing the same.

iv) Any other or further work that the Hon. Court may deem necessary to meet the ends of justice.

The costs of the claim to the claimant.

The nub of this dispute is that on 2nd November, 2010 the Respondent voluntarily issued a circular to all staff floating an exit package to employees of the Respondent for Voluntary Early Retirement Scheme (VERS).

It is not in dispute that the VERS had been approved by the board pursuant to a re-organisation of the structure of the Respondent.

In terms thereof, the Respondent made the following offer:

i)Exit package: three (3) months basic salary and house allowance for every year worked.

ii)Golden handshake:

SF 2 - 5 Kshs.2,200,000/=.

SF 6 -10 Kshs.1,700,000/=.

SF 11- Kshs.900,000/=.

iii)T.P.S/Mortgage Rebate

30% rebate on remaining Tenant Purchase Scheme. TPS/Mortgage balance if the employee settled the loan upon exiting the fund.

On 10th May, 2011 the Claimant Union made its proposals for the review of the Collective Bargaining Agreement 1st July, 2009 and registered under the following entry – RCA No. 2 of 2010 and in particular proposed that at Clause No. 17 Redundancy (F) Severance pay be amended to read:

i)An employee declared redundant shall be entitled to severance pay at the rate of four (4) months consolidated pay (basic and house allowance) for each completed year of service as at the date of cessation of employment.

ii)Golden handshake: an employee be entitled to a golden handshake of Kshs.2,500,000/=.

iii)Rebate loans:

An employee who is declared redundant shall be entitled to 30% rebate on outstanding loan i.e TPS Mortgage Loans notwithstanding the existing fund policy governing the same.

On 31st May, 2011, the Respondent made a counter offer to Clause No. 17 Redundancy (F) as follows:

0. Retain the current wording.
0. Relocation/baggage allowance at Kshs.25,000/=.
0. Exclude new insertion.
0. Exclude new insertion.
0. Voluntary Early Retirement Scheme (VERS). An employee who opts to take VERS shall be entitled to:
 - i. Three (3) months pay (basic and house allowance).

ii. *Golden handshake of 900,000/=.*

iii. *30% rebate on outstanding TPS loans.*

The offer and counter offer above are attached to the Memorandum of Claim and marked Appendix 4 and 5 respectively.

Collective Bargaining negotiations therefore began in earnest. It is the Claimant's case that during these negotiations the parties deliberated on the issue of VERS and agreed in principle that the VERS be removed from the Claimant's proposal and instead the provisions of the redundancy clause be enhanced stressing that the most important factor was the take home package for exiting employees.

It is the Claimant's case that, this deceit was used by the Respondent as a ruse for removing the already agreed VERS terms and as soon as that happened, the Respondent reneged on the agreement.

Following that impasse, the parties agreed to go ahead and conclude the CBA for the period 1st July, 2011 to 30th June, 2013, leaving the contentious three items to be settled separately and a certificate of disagreement on the outstanding items was signed on 9th January, 2012.

A trade dispute was reported by the Claimant on 18th January, 2012 as per Appendix 7 of the Statement of Claim specifically on Clause 17 of the CBA – Redundancy (F) (ii) Severance pay. (iii) Golden handshake and (vi) Rebate on loans. Efforts by the Minister to settle the dispute through reconciliation failed and a certificate of unresolved dispute was issued by the conciliator accordingly. The same is Appendix 8 (ii) to the Memorandum of Claim.

The Respondent filed a Memorandum of defence dated 14th March, 2013 on 18th March, 2013 wherein it prays the court to dismiss the claim for lack of merit for various reasons outlined below:

The Respondent admits that the proposals and counter proposals referred to in the Memorandum of Claim were exchanged between the parties and the CBA negotiations commenced.

The Respondent however states that there was disagreement on the provisions of Clause 17 (F) on redundancy. The parties agreed to disagree in terms of the Certificate of disagreement attached to the Memorandum of Claim as Appendix 6.

That whereas the Claimant wished the provisions of the circular dated 2nd November, 2010 to the CBA under the Severance Pay Clause 17 (f) be applied, the Respondent proposed to retain the entitlement under Clause 17 of the outgoing CBA.

The Respondent had informed the Claimant that the Government had not yet approved the terms of the circular dated 2nd November, 2011 on VERS and the same had been withdrawn on the basis that that the same was expensive and unsustainable. A copy of the circular withdrawing the package is attached to the Statement of defence and marked Appendix 4.

The Respondent further submits that this was an entirely new item that had not been part of the outgoing CBA. Furthermore the process of Voluntary Early Retirement and the package thereof is determined by the Government and the Respondent was not in a position to make any final determination on the same nor include it in the CBA without Government's approval.

The Respondent further submits that following the disagreement between the Respondent and the Claimant over non inclusion of the Voluntary Early Retirement Scheme provisions in the CBA the claimant issued a strike notice to the Respondent without following due procedure. This according to the Respondent was done to unduly influence the Respondent into admitting the proposed terms of the Voluntary Early Retirement Scheme into the CBA. These issues were raised in a circular dated 6th October, 2011 annexed to the Statement of defence and marked Appendix 5.

The Respondent's final submission is that the Claimant's proposals are not sustainable for the reason that the objective of Voluntary Early Retirement Scheme is normally to rationalize staff complement and if it is made very expensive and prohibitive it will negate its object.

That inspite disagreement over Clause 17 (F) the CBA was successfully concluded and registered and the same will come to an end in June, 2013.

That the Respondent declined the proposals by the Claimant on good grounds and in good faith because the Government did not approve the same and the Respondent had no ability to pay.

The Respondent submits further that the court has no jurisdiction to impose terms on the parties who have disagreed especially because such provision does not exist in any CBA of comparative institutions such as **National Hospital Insurance Fund (NHIF)** whose CBA is annexed to the Statement of defence as annex 6.

That the Respondent has better redundancy terms than comparable institutions such as **East African Portland Cement** whose CBA is Appendix 7 to the Statement of defence wherein, severance pay of one month's salary per each completed year of service is provided.

That of **Mumias Sugar Company Limited**, attached as Appendix 8 also provides for payment of severance pay at the rate of 30 days pay to each completed year of service plus three months notice of pay in lieu.

The Respondent urges the court to note the superior and enhanced provisions of the Respondents CBA with the Claimant and reject the demand by the union for being unsustainable, prohibitive and impractical

Upon a careful reading of the pleadings by the parties, the annexures thereto and after hearing the various submissions by the parties the court has noted the following issues for determination:

1. Was there a binding Agreement on the contents of Clause 17 (F) of the CBA for the period 2011 – 2013?
2. If so, what is the appropriate relief by the court on Clause 17 (F) of the CBA for the period 2011 – 2013?
3. If not, what is the appropriate award if any on this clause of the CBA?

Firstly, the court is in total agreement with the observations by the Court of Appeal in the case of **William Barasa Obutiti vs. Mumias Sugar Company Limited (2006) eKLR** 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 contracts by the original contract itself.”

This is but a restatement of the freedom by parties to contract within the confines of the applicable national and international labour law especially where the new terms are better than those in the original contract itself.

The terms in the VER cannot be lesser than those provided on minimum standards by the Employment Act, but may only serve to enhance the same.

Having said that, the court has to determine whether the proposal by the union to the Respondent on 10th May, 2011 was one in law capable of acceptance and if the same was actually accepted by the Respondent through the response dated 31st May, 2011 and received by the union on 2nd June, 2011.

A quick comparison on the offer made by the Claimant union under Clause 17 compared to the response by the Respondent employer indicates that the Respondent's response was a counter offer and did not amount to acceptance of the terms contained in the proposal under Clause 17.

Whereas the Claimant had proposed the following changes in Clause 17 (F).

- i) Severance pay – 4months consolidated pay for each completed year of service.*
- ii) Kshs.100,000/= relocation/baggage allowance.*
- iii) No change.*
- iv) Kshs.2,500,000/= golden handshake.*
- v) 30% rebate on outstanding mortgage loans and motor vehicle loans.*
- vi) Voluntary Early Retirement.*

An employee who opts to take VER (Voluntary Early Retirement) shall be entitled to: -

- i. 4 months consolidated pay for each completed year of service.*
- ii. 30% rebate on outstanding loans (Mortgage loan and motor vehicles).*
- iii. 2.5 m golden handshake.*

The response by the Respondent was as follows:-

- i) Severance pay: retain current wording.*
- ii) Relocation/baggage allowance at 25,000/=.*
- ii) Exclude new insertion.*
- iv) Voluntary Early Retirement Scheme (VERS).*

An employee who opts to take VERS shall be entitled to: -

- i) 3 months pay (basic and house allowance).*
- ii) Golden handshake of Kshs.900,000/=.*
- iii) 30% rebate on outstanding TPS loans.*

In effect this did not constitute an acceptance of the offer made by the Claimant union by the Respondent but was a counter offer in material respects discernible on the face of the documents. There was no closure of the deal with respect to this item Clause 17(F) of the CBA for 2011 – 2013.

It is common cause that the CBA negotiations progressed to finality resulting in the registration of the new CBA. However, a certificate of disagreement was signed by the parties in respect of this item.

The Claimant has submitted that the parties had agreed to do away with the VERS clause in favour of enhancing the redundancy clause.

The outgoing CBA under Clause 17 (F) provides for two (2) months consolidated pay (Basic salary and House allowance) for each completed year of service as severance pay. The respondent made

comparisons with similar entities all of whom provide lesser severance pay than that provided in the outgoing CBA.

The Claimant did not provide comparative data on this matter only urging that the court holds the Respondent to be bound by the VERS it had made to its employees.

The Respondent provided tangible reasons why that offer was initially made and later withdrawn. The Claimant has not produced evidence to the contrary.

It was also further submitted that subsequently, a large number of employees have accepted the Voluntary Early Retirement package after it was approved by the Government. That this is only meant to cater for the present dynamics in the organization and is only a one-off based on willing employee willing employer.

The court agrees with the submissions by the Respondent that the offer by the Respondent is lawful and does not amount to an unfair labour practice. Indeed Voluntary Early Retirement is recognized as an alternative to retrenchment – see a **Guide to South African Labour Laws** by **Alan Rycott** and **Barney Jordaan** at 234 and **De Beer Industrial Diamond Division (pty) Ltd (1995) 11 BLLR 12 01 (IC)**.

This is also in line with the **International Labour Organization Recommendation 166** which requires parties to seek alternatives to possible termination of employment for economic, technological, structural or similar reasons.

The court has in the circumstances not been persuaded that there is enough evidence before it to make an award to alter the terms of the CBA for the period 2011 to 2013.

The suit by the Claimant is dismissed with no order as to costs in the spirit of industrial labour relations.

It is so ordered.

Dated and delivered at Nairobi this 27th day of August, 2013.

MATHEWS N. NDUMA

PRINCIPAL JUDGE