

VOLUNTARY EARLY RETIREMENT SCHEMES (VERS): COURT REAFFIRMS THEIR BINDING AND STANDALONE NATURE

On 9th August 2024, the Employment and Labour Relations Court (ELRC) delivered judgment in *Banking, Insurance and Finance Union (Kenya) v Access Bank PLC (Kenya) Limited* (Cause E679 of 2021; [2024] KEELRC 2124).

The dispute involved four long-serving employees who left employment under a Voluntary Early Retirement Scheme (VERS) in 2019. They later challenged the computation of their exit packages, claiming entitlement to more favourable terms under the Bank's Human Resource Policy.

WHAT IS VERS?

A Voluntary Early Retirement Scheme (VERS) is a structured, consensual arrangement where employees retire before the official retirement age in exchange for a negotiated benefits package. Unlike redundancy, which is involuntary and governed by Section 40 of the Employment Act, VERS is voluntary and contractual.

In practice:

- Employers design VERS as part of workforce restructuring or cost rationalization strategies.
- Employees voluntarily apply to exit on the offered terms.
- Once accepted, the exit terms form a standalone binding contract that supersedes CBAs, HR policies, or individual employment contracts.

VERS is thus neither redundancy, resignation, nor unfair termination;it is termination by mutual agreement. Courts treat it as enforceable, provided it is free of coercion, fraud, or undue influence.

KEY FINDINGS FROM THE COURT

- **VERS contracts are binding:** Once employees sign VERS letters, they create independent exit contracts overriding CBAs, HR manuals, or prior contracts, even where the terms of the VERS are less favourable than those under the employment contract, CBA, or HR Manual
- **HR Manuals are not automatically contractual:** The Bank's HR Policy was considered a guidebook only, not binding unless expressly incorporated into employment contracts.
- **Freedom to contract:** Echoing the Court of Appeal's decision in *National Bank of Kenya*

Ltd v Hamida Bana & 103 Others [2017] eKLR, the Court reaffirmed that parties can lawfully contract outside existing instruments, so long as agreements are voluntary and lawful.

Voluntariness is decisive: Since the employees applied for and signed the VERS terms, they were bound by them.

The claim for higher dues under the HR Policy failed as the Union did not establish that the HR Policy was a contractual instrument enforceable between the parties.

Outcome: The Union's claim of KShs. 15 million in underpayments was dismissed, with no order as to costs.

WHY THIS MATTERS

- **For Employers:**
  - VERS is a lawful and strategic workforce restructuring tool when properly structured and documented.
  - Employers should ensure VERS agreements are clear, transparent, and legally insulated from HR manuals or CBAs.
  - Well-drafted VERS programs minimize disputes, protect against claims of discrimination, and manage industrial action risks.
- **For Employees & Unions:**
  - Acceptance of a VERS agreement precludes later challenges, unless coercion or illegality is proven.
  - Employees should seek advice before signing, as VERS terms may be less favourable than statutory redundancy or HR policy benefits.
- **For HR & Corporate Governance:**
  - HR manuals should state expressly whether they are contractual or policy-only.
  - Employers should integrate transparent consultation and communication into VERS rollouts to maintain employee relations and mitigate reputational risks.

TAKEAWAY

This decision reinforces that VERS is a distinct legal instrument:

- Voluntary, binding, and contractual, independent of the statutory redundancy process or HR manuals.
- Courts will enforce VERS terms as agreed, even if less favourable than CBAs or HR provisions.
- Both employers and employees must treat VERS negotiations with the same seriousness as a new employment contract.

VERS VS. REDUNDANCY: WHEN SHOULD EMPLOYERS USE EACH?

Voluntary Early Retirement Scheme (VERS) is most suitable when:

- Employers want a cooperative, low-conflict approach to workforce restructuring.
- The goal is to encourage long-serving or senior employees to exit gracefully.
- The employer seeks to avoid litigation risk associated with redundancy claims.
- Industrial relations considerations make voluntary exits preferable to compulsory layoffs.
- Flexibility is needed to design tailored packages (e.g., tax incentives, medical cover, *ex-gratia* payments, etc).

Redundancy should be considered when:

- Workforce reduction is business-driven and unavoidable (e.g., technology changes, restructuring, closure of a department).
- Employees are not willing to leave voluntarily.
- The employer must comply strictly with Section 40 of the Employment Act, which provides:
  - At least one month's notice to employees, their union (if applicable), and the Labour Office;
  - Selection based on fairness and non-discrimination;
  - Payment of severance of not less than 15 days' pay per completed year of service;
  - Consideration of seniority, skills, ability, reliability, and length of service.

KEY INSIGHT:

- VERS offers flexibility and reduced industrial relations risk, but requires careful documentation.
- Redundancy is mandatory and statutory, but may expose employers to higher litigation and union challenges if not strictly followed.

- Often, employers use a hybrid approach: offering VERS first, then moving to redundancy if voluntary uptake is insufficient.

GLOBAL PERSPECTIVE

The Kenyan courts' approach is consistent with international best practice:

- **United Kingdom:** Employers often use *Voluntary Retirement Schemes* or *Mutual Termination Agreements*. Courts enforce them as binding settlements provided employees receive independent legal advice under the *Employment Rights Act* framework.

- **South Africa:** Under the *Labour Relations Act*, voluntary severance packages are permissible, but once accepted, employees cannot later pursue redundancy claims unless duress or misrepresentation is proven.

- **India:** *Voluntary Retirement Schemes (VRS)* are common in the public and banking sectors. Courts, including the Supreme Court of India, have consistently held that once employees opt for and accept VRS benefits, they are bound by the scheme, unless fraud or undue influence is established.

- **United States:** Voluntary separation programs are treated as contractual waivers under employment law, but employers must comply with strict disclosure and consent requirements, especially under age discrimination statutes.

Insight: Across jurisdictions, the principle is uniform: voluntariness, clarity, and absence of coercion are key. Where these elements exist, courts respect VERS/VRS agreements as binding, even if they diverge from normal statutory or contractual entitlements.

This positions Kenya's jurisprudence as aligned with global employment law standards, giving both local and multinational employers certainty when structuring exit programs.

HOW CM ADVOCATES LLP CAN HELP:

At **CM Advocates LLP**, our **Employment & Labour Solutions Unit** has deep expertise in:

- Designing and implementing VERS and redundancy programs that are compliant, commercially sound, and low-risk.
- Advising on collective bargaining, trade union negotiations, and industrial action prevention.
- Structuring executive benefits and retirement packages to align with tax and HR strategy.
- Conducting employment audits and HR policy reviews to prevent disputes over enforceability.
- Providing litigation and dispute resolution support when VERS, redundancy, or termination packages are challenged.

We combine local expertise with global standards, ensuring that clients restructure workforces effectively while protecting legal, tax, and reputational interests.

For more information or tailored advice on employment restructuring, redundancies, CBAs, and workforce exits, please contact us:

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