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Labor & Employment

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Kenyan labour laws

Kenyan labour laws

The Constitution

Contains provisions on fundamental rights and freedoms of the individual

- Freedom from discrimination (Art. 27)
- Freedom of association (Art. 36)
- Right to fair labour practices (Art. 41)
- Protection from slavery, servitude and forced labour (Art. 30).
- Provides for Employment and Labour Relations Court (Art.162 (2) (a))

Kenyan labour laws

The Employment Act, 2007

- Contains general principles of employment (forced labour, discrimination and sexual harassment)
- Contains the legal provisions that relate to the rights and duties of employers and employees
- Provides the basic conditions of employment
- Includes provisions relating to employment contracts
- Termination of employment

The Employment and Labour Relations Court Act, 2011

- Establishes the Employment and Labour Relations Court (“ELRC”)
- ELRC is given exclusive original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2).
- ELRC is also given the power to make orders in exercise of its jurisdiction.

Kenyan labour laws

The Labour Relations Act, 2007

An Act that consolidates the law relating to trade unions and trade disputes

The Labour Institutions Act, 2007

Establishes the various labour institutions which include

- The National Labour Board (advise the Minister on all matters concerning employment and labour,
- Committee of Inquiry (appointed by the minister to inquire into any matter connected with or relevant to any trade dispute(s) in general,
- Labour Administration and Inspection (Labour Officers, Employment Officers and Medical Officers)
- Wages Council (to advice the minister on the remuneration and other conditions of employment of any category of employees in any sector).

Kenyan labour laws

Occupational Safety and Health Act, 2007

This statute provides for the safety and welfare of employees and all persons lawfully present at workplaces.

Common law

These are developed judicial decisions and considerations on the interpretation of contractual provisions and statutory provisions.

Employment and labour

Bodies and Institutions

Employment and Labour Relations Court (“ELRC”)

- Established by Article 162 (2) of the Constitution and the Employment and Labour Relations Court Act,
- Equivalent to the High Court.
- High Court has no jurisdiction to deal with any of the matters under the exclusive jurisdiction of the ELRC – disputes between employer and employee
- Has the jurisdiction to enforce labour rights in Article 41 and jurisdiction to interpret the Constitution and fundamental rights and freedoms.

Trade Unions

What are they?

An association of employees that regulate relations between employees and employers.

Employer Obligation

An employer is under an obligation to recognise a trade union for the purposes of collective bargaining.

Collective Bargaining

Collective bargaining - where representatives of management and the unions meet and negotiate terms and conditions of employment in good faith.

The employment contract

Rights & Obligations

Contracts of service Versus contracts for service

What is the difference?

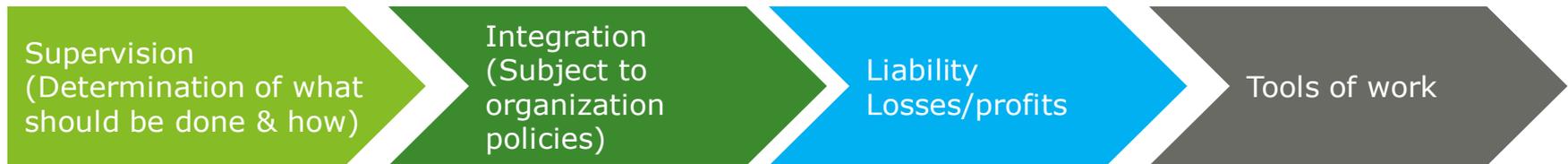
A **contract of service** is an agreement between an employer and an employee.

A **contract for service** –where an independent contractor, is engaged for a fee to carry out an assignment or project.

Only employees are entitled to the statutory rights of employees.

How to know the difference?

4 tests.



Contents of the employment contract

Statutory minimum

- The name, age, permanent address and sex of the employee;
- the name of the employer;
- the job description of the employment;
- the date of commencement of the employment;
- the form and duration of the contract;
- the place of work;
- the hours of work;
- the remuneration; and
- the intervals at which remuneration is paid;

Additional Terms?



Terms of employment

Employer duties

- Duty to pay wages
- Duty to indemnify employee
- Duty to take care of the employee's safety and working conditions



Terms of employment

Employee duties

Duty to give personal service

Duty to obey reasonable orders

Duty of reasonable care and indemnity

Secret profits

Duty to confidentiality



Terms of employment

Employee Rights

- Basic minimum conditions of employment (subject to any other written law, court order, CBA, or written contract that provides better conditions)
- Hours of work (1 rest day in a week).
- Annual leave (21 day with full pay).
- Maternity leave.
- Sick leave (7 days with full pay thereafter 7 days with ½ pay per year subject to notification).
- Housing.
- Water.
- Food (where agreed in the contract).
- Medical attention.

Employer must display a statement on the employee's rights under the Act in a conspicuous place, which is accessible to all the employees

Termination & dismissal

Forms of termination

- Effluxion of time
- Termination by notice
- Mutual separation
- Summary Dismissal (Section 44 of the Employment Act) -When an employer terminates the employment of an employee without notice or with less notice than that to which the employee is entitled. Basis for summary dismissal is that the employee has fundamentally breached their obligations arising under the contract of service.
- Redundancy (Section 40 of the Employment Act)
- Constructive Dismissal

Forms of termination

Process of Dismissal (Section 41 of the Employment Act -Notification and hearing before termination on grounds of misconduct)

Grounds (General)

Gross Misconduct

Physical incapacity

Poor performance

- Employer must explain the reason for which he is considering termination and give the employee the right of representation during this explanation.
- Employer must hear and consider any representations made by the employee on the grounds of misconduct or poor performance together with those of the Employee's representative



Forms of termination

Redundancy (Section 40 Employment Act)

What constitutes a redundancy
Loss of employment,
occupation, job or career

- By involuntary means
- No fault of the employee
- Termination at the initiative of the employer

Employer must demonstrate that Services of an employee are superfluous
Not a result of an employee's performance, conduct or actions

There are key aspects to consider in the redundancy of roles:

- The substance or rationale for the redundancies and
- The process in effecting the decision.

Redundancy

Common reasons for redundancy



Economic downturn –

Factors beyond the control of an employer



Commercial judgment

Employer considers that there are too many employees employed in a particular area or overall



Ceasing of work

Requirements of a business for employees to carry out work of a particular kind ceasing or diminishing



Mechanisation of modes of production & reorganisation of the business or adoption of a new business strategy

Procedural Steps of a Redundancy Exercise

Page subtitle



Notice (intended redundancy)

Oral communication of the intention does not amount to notice under the law



Issuance of 1 month written notice to the labour officer.

Each labour officer in charge of the area where the employees are employed must be served with a notice

For unionized employee, Union must be notified of the intended redundancy



Each employee affected by the redundancy to be served personally with 1-month written notice



Mandatory contents of the notice:

the reasons for and extent of the redundancy

Procedural Steps of a Redundancy Exercise

Page subtitle



Consultation

Explaining the reasons for the redundancy and the planned redundancy programme

Explaining the criteria to be used in selection

Invite employees to share their concerns and address them

Discussing any possible alternative to minimize terminations

Explain the package to be offered to employees who are selected

Union representatives entitled to represent the employee in consultations



Selection

Involves determination of the employees to be declared redundant

Selection criteria provided for in law – seniority in time, skill, ability, and reliability

The rationale for selection must ultimately be defensible

The exact considerations made and full results of the selection process are not for publication



Termination

Must only take place after expiry of the 1 month notice period issued after the initial notice of intention to carry out a redundancy.

Issuance of termination letters and certificates of service to employees selected for redundancy

Employees will be advised of their final dues in the termination letters

Termination may be by notice or by payment in lieu of notice.

Procedural steps of a redundancy exercise

Redundancy Package

- Salary for the period worked up to date of termination
- Notice pay
- Accrued leave paid in cash
- Severance pay – paid for every completed year of service
- Pension as applicable under the applicable pension rules

Unfair dismissal

What amounts to unfair dismissal?

Validity

employer fails to prove that the reason for the termination is valid

For a fair reason

lack of capacity, incompatibility, bad conduct, based on operational requirements of the employer

Fair procedure

where the employer fails to prove that he has employed fair procedure in effecting the termination

Justice and equity

Employer fails to prove that it acted in accordance with justice and equity in terminating the employee (how was the decision arrived at? How was the decision communicated? How was appeal dealt with? Consistency, any warning letters etc)

Possible consequences of unfair dismissal

Damages/Remedies

- 1) Payment in lieu of 1 months' notice;
- 2) The wages due for the period of time for which the employee has worked
- 3) The equivalent of a number of month's wages or salary not exceeding 12 months

Any payments made for unfair termination are subject to statutory deductions.

Very rear cases,
Reinstatement of the
employee

ELRC Judgement on employment and labour

Case law

Judicial considerations on employment and Labour

On Voluntary Early Retirement (“VER”) agreements

Civil Appeal No. 72 of 2017 - National Bank of Kenya Limited v Hamida Bana & 103 others [2017] eKLR

The terms of the VER ought to be fully captured and strictly adhered to

The Court’s mandate is only to interpret the terms provided under the scheme in issue and enforce the same.

Mutual separation: 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 will be effective and shall override other restrictions placed on the termination of the contract by the original contract.

Application of constitution on Employment Disputes

Section 45 (3) was rendered unconstitutional in Samuel G. Momanyi v. The Hon. Attorney General and SDV Transami Kenya Limited, Petition No. 341 of 2011 (2012) eKLR

Section 45 (3) “An employee who has been continuously employed by his employer for a period not less than thirteen months immediately before the date of termination shall have the right to complain that he has been unfairly terminated”

NB Certain ELRC judges have refused to uphold the above decision.

Civil Appeal No. 50 of 2014 Judicial Service Commission v Gladys Boss Shollei & another [2014] eKLR

Where termination of employment breaches the fundamental rights and freedoms of an employee, the applicable Constitutional provisions apply.

Judicial considerations on employment and Labour

Fair Procedure (sec 41)

Mary Chemweno Kiptui v Kenya Pipeline Company Limited [2014] eKLR

Court held that:

Section 41 of Employment Act is couched in mandatory terms.

Where an employer fails to follow these mandatory provisions, whatever outcome of the process is bound to be unfair as the affected **employee has not been accorded a hearing in the presence of their union representative or in the presence of a fellow employee of their own choice.**

The employee must be informed through a notice as to the charges and given a chance to submit a defence followed by a hearing in due cognizance of the fair hearing principles as well as natural justice tenets

Fair Procedure (sec 41)

Samuel Uche Ajaegbu v Eagle Vet Kenya Limited [2018] eKLR

The court held that the summary dismissal was unfair for non-compliance with section 41 of the Act. In this case, **the summary dismissal came without notice and there was no disciplinary hearing at all.**

Without such notice and hearing, it is difficult to show how the employer ascertained the allegations prior to summarily dismissing the claimant.

The Court's also held that the purported **reasons** for termination as set out in the letter of termination remained **mere allegations** and as at the time of termination, it cannot be said that the employer had valid or genuine reasons for termination.

Judicial considerations on employment and Labour

Doctrine of Constructive Dismissal

Not defined in the Employment Act

Maria Kagai Ligaga v. Coca Cola East and Central Africa Limited [unreported].

Court held that:

Constructive dismissal occurs where an **employee is forced to leave his job against his will, because of his employer's conduct**. Although there is no actual dismissal, the treatment is sufficiently bad, that the employee regards himself as having been unfairly dismissed.

The basic ingredients in constructive dismissal are:-

- a) The employer must be in breach of the contract of employment;
- b) The breach must be fundamental as to be considered a repudiatory breach;
- c) The employee must resign in response to that breach; and
- d) The employee must not delay in resigning after the breach has taken place, otherwise the Court may find the breach waived.

Facts of the case:

The Claimant was transferred from Kenya to Uganda, retransferred to Kenya then to Mozambique, all within a very short notice.

She was never allowed to settle in any position or market and was finally repatriated to Kenya and moved from one town to the other at considerable disruption to her family life.

She resigned, and the Court found resignation was involuntary and amounted to constructive dismissal. The Claimant was granted monetary compensation.

Judicial considerations on employment and Labour

Doctrine of Constructive Dismissal

Kenneth Kimani Mburu & another v Kibe Muigai Holdings Limited [2014]

The doctrine of constructive dismissal was explained by Justice Rika at the Industrial Court in this case as follows

*“The conduct by the employer must be shown to be so **intolerable that it made it considerably difficult for the employee to continue working.***

*At the heart of constructive dismissal is **breach of the duty of trust and confidence.** The employer’s behaviour must be shown to have destroyed or seriously undermined trust and confidence.*

Recognition of trade unions

Industrial Court Cause No. 122 of 2013 – Kenya Hotels & Allied Workers Union v New Victoria Hotel [2013] eKLR

- The Court ordered the respondents to recognize the new union on the basis that it represented a simple majority of the unionisable employees .
- Respondent ordered to start negotiations leading to the signing of a Collective Bargaining Agreement and immediately start paying the union dues to the claimants in respect of employees who had given their indication to join the union.

Judicial considerations on employment and Labour

Coca Cola East & Central Africa Limited v Maria Kagai Ligaga [2015] eKLR

The legal principles relevant to determining constructive dismissal were determined as follows:

- a) There must be a repudiatory breach of the fundamental terms of the contract through conduct of the employer.
- b) The conduct of the employer must be a fundamental breach going to the root of the contract of employment or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract.
- c) There must be a causal link between the employer's conduct and the reason for employee terminating the contract.
- d) An employee may leave with or without notice so long as the employer's conduct is the effective reason for termination.
- e) The employee must not have accepted, waived, or conducted himself to be estopped from asserting the repudiatory breach; the employee must within a reasonable time terminate the employment relationship pursuant to the breach.

Application of arbitration clauses in employment contracts

Industrial Court Cause No. 626 of 2013 James Heather – Hayes v African Medical and Research Foundation (AMREF) [2014] eKLR

- It would be unnatural to oust arbitration, an internationally recognized practice of Alternative Dispute Resolution or any pretensions where this was clearly the intention of the parties .
- The Employment Act and other laws do not bar arbitration in employment contracts

Judicial considerations on employment and labour

Redundancy

Civil Appeal 236 of 2015 - Africa Nazarene University v David Mutevu & 103 others [2017] eKLR

- There no requirement to issue two notices under the Employment Act for redundancy
- The requirement to issue a separate notice to the Labour Officer, simultaneously with the termination notice, is mandatory.
- Procedure and rules on redundancy should be adhered to.
- Failure to observe the same would be a complete misapprehension of the law and practice.

On discrimination

Civil Appeal No. 42 Of 2015 OI Pejeta Ranching Limited v David Wanjau Muhoro [2017] eKLR

- Trial Court had found the respondent was discriminated against on **basis of race, as he was paid less than his colleagues doing the same work.**
- Trial Court ordered the respondent to pay the appellant 12 months' gross pay in compensation for unfair termination.
- The appeal held that the trial Judge was correct in finding that there was evidence of discrimination based on race.
- The Court of appeal however held that quantum of damages was erroneous

Judicial considerations on employment and labour

Sexual Harassment

C A S v C S Limited [2016] eKLR

The employer was found to be in breach of the Employment Act for failure to have a sexual harassment policy.

Protection of Wages

Peterson Ndung'u & 5 Others v. KP&L Company Limited [2014]

An employee's salary remains protected under the Employment Act, even during suspension.

A suspension without pay, offends the principles of fair labour practices and Protection of Wages.

Taxation of decrees

Cause No. 379N of 2009 - D K Njagi Marete v Teachers Service Commission [2017] eKLR

An award made by the court for payment of compensation for unfair dismissal is subject to statutory deductions

Sec 49(2) of the Employment Act provides that "any payments made by the employer under this section shall be subject to statutory deductions"

The legislature uses the word "**shall**" under subsection 49 (2) which is indicative of a mandatory directive to the employer who pays any money pursuant to a recommendation of a Labour Officer or order of the court to make statutory deductions from a gross monthly payment made pursuant to subsection 49 (1) (c).

Employment Act (Amendment) Bill 2019

Highlights



Employment Act (Amendment) Bill 2019

Key Highlights

Casual employee excludes a piece rate wor

Foreign employees must be regularised with the Kenya Citizenship and Immigration Act before engagement

Grounds for discrimination expanded to include belief, culture, dress or birth

Sexual harassment policy is mandatory for employer of more than '5' staff (currently 20)

Non-compete clauses in employment contracts will be void – Post termination

Non-disclosure clause will be allowed for a 'reasonable period

Introducing Rights of employees in transfer of undertakings- Novation of employee contracts

The penalty for wrongfully withholding or deducting employee's salary will be Ksh 1,000,000/ (up from 100,000/)



Employment Act (Amendment) Bill 2019

Key Highlights

Introducing payment details on overtime, night work & flexible working time.

Maternity leave limited to 1 month in case of a stillbirth

Paternity leave should be preceded by a birth notification in accordance with the law

Adoption leave for children below 2 yrs will be 1 month.

Sick leave will be at a maximum of 30 days with full pay and 15 days with half pay for ALL employees in a year

Surrogate motherhood entitles commissioning parent to 2 months parental leave

Introduction of education leave of 10 days per calendar year

Employers to provide an employee with written statement of reasons for dismissal



Employment Act (Amendment) Bill 2019

Key Highlights

Certificate of retirement to be issued to retirees

Advocates will be able to represent parties in proceedings at the Labour Office

Introducing Investigative suspension of 14 days with FULL pay pending inquiry.

Legislation of Constructive dismissal

Protection of employees personal data - Collection and processing lawfully

Q&A





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