

Types of Remedies Issued by the Employment and Labour Relations Court in Kenya

Employment in Kenya is regulated by the Constitution, the Employment Act, 2007, the Labour Relations Act, 2007, the Labour Institutions Act, 2007, the Work Injury Benefits Act, and the Employment and Labour Relations Court Act; which is the statute establishing the Employment and Labour Relations Court (hereinafter referred to as 'the Court').

The Court has both original and appellate jurisdiction to hear and determine employment disputes. These include disputes between employers and employees, employers and trade unions, employers' organisations and trade unions, disputes between trade unions, disputes between employer organisations, employers' organisations and trade unions, trade unions and their members and employers' organisations and their members. It also determines disputes concerning the registration and election of trade union officials and disputes relating to the registration and enforcement of collective agreements.

The Court has the power to issue a variety of remedies as set out below:

1. Interim preservation orders including injunctions in cases of urgency

These are orders meant to preserve the status quo pending the determination of an employment dispute by the Court i.e. to preserve the rights and obligations of the parties before the final determination of the dispute. Such orders include orders to have

an employee continue working and orders to have employees postpone industrial action, before the Court's final determination. The purpose of such orders is to ensure that the final court decision is not invalidated by a change in the prevailing circumstances.

2. Prohibitory orders

The purpose of prohibitory orders is to stop a party to a dispute from acting in a particular manner. Prohibitory orders can be granted in the course of the proceedings and at the final determination of the dispute. Such orders include orders to stop an employer from terminating the employment of an employee and orders to stop an employer from carrying out a fresh recruitment process.

3. An order for specific performance

Orders for specific performance are generally granted where monetary compensation is not sufficient. Such orders can be applied to compel an employer to improve working conditions and to compel an employer to pay an employee in accordance with the employment contract. This order is however given under very limited circumstances in employment suits, since court cases often cause strained employer-employee relations, creating a hostile working environment.

4. An order for reinstatement

An order for reinstatement requires that an employee whose employment has been terminated returns to work. It has to take place within three years of dismissal. The Court can also impose conditions for reinstatement on a case by case basis. Similarly, due to the likelihood of a strained employer-employee relationship, courts are usually reluctant to issue such orders unless the dispute arose within the public sector.

5. Declaratory orders

Declaratory orders are proclamations made by the court, stating whether an action is legal or illegal, procedural or unprocedural or whether a party to a suit acted lawfully and within its powers. Once a court makes a declaratory order, it follows that it should make an order as to the next course of action for the parties. For instance, an aggrieved employee can ask the court to declare his termination from employment unfair. Consequently, if the court makes such a declaration, it should state whether the employee ought to be compensated or reinstated.

6. Compensatory order

There are various forms of compensation that the court can award. When determining the amount of compensation an employee is entitled to, the Court considers factors such as the length of employment, the wishes of the employee and the circumstances under which the termination took place.

a. *Payment in lieu of notice*

Section 49 of the Employment Act sets out the remedies that one is entitled to if they are wrongfully dismissed or terminated from employment unfairly. An employee is entitled to wages which he/ she would have earned, had he been given the notice period required by law. The notice required by law is usually dependent on the provisions of the Employment Act or the contract of employment. For instance, where an employment contract requires that employee be given a month's notice, the court can order that such an employee be awarded a month's pay if no notice is given to the employee. This is what is commonly known as 'payment in lieu of notice'.

b. *Severance pay*

Severance pay is given to an employee who has been deemed redundant by his/ her employer. It is usually calculated at a rate of not less than fifteen (15) days' pay for each completed year of service. For example where an employee has been declared redundant after working for ten years, his her severance pay will be 15 days' pay, ten times.

c. *Payment for accrued leave days*

Employees are entitled to take an annual leave of up to twenty one (21) days after 12 months of continuous employment. Where an employee continues to work without leave, such an employee is entitled to payment.

d. *Overtime*

Each employment contract should set out an employee's working hours. Where an employee exceeds the number of hours under his contract, he is entitled to seek the court's enforcement for overtime payment. This includes payment for work done on public holidays.

e. *Compensation for unfair termination*

Where it is established that an employee was unfairly terminated or wrongfully dismissed, such an employee is also entitled to twelve months pay as compensation for the unfair termination or wrongful dismissal.

f. *Payment of wages relating to days worked*

Where an employee's services are terminated before the end of the month, then an employer is required to pay him/ her

for the days he/ she has worked, in addition to payment in lieu of notice.

7. Order awarding various types of damages

The Employment and Labour Relations Court can award damages, which is monetary payment made to a party for loss or injury incurred as a result of employment. The circumstances under which an employee can be awarded damages include:

- i. Where an employee brings a successful claim for sexual harassment or discrimination.
- ii. Where an employee is injured in the course of his/ her work.
- iii. Where an employee incurs expenses to the benefit of the employer, e.g. when getting transferred from one station to another.
- iv. Where an employee's reputation is damaged and his employability reduced due to the employer's actions.
- v. Where an employee destroys property belonging to the Employer.

Conclusion

The orders or amount of compensation granted by a court vary from case to case. In addition to the remedies listed above, the court is at liberty to grant any other orders it deems fit, depending on the circumstances of the case. It is also important to note that court may make orders regarding the cost of the suit. In this regard, the losing party may be ordered to bear the cost of the suit or the court could order that each party pays for the cost of its own suit. In some cases the court may make no order regarding costs leaving each party to bear the cost of its own suit.