
REDUCING ADVERSE LEGAL EXPOSURE WHEN TERMINATING EMPLOYMENT CONTRACTS IN KENYA

A contract of employment like any other relationship governed by a contract will normally provide for a procedure to be followed by a party to the contract that desires to cease from being bound by the terms of the contract. This article highlights legal provisions and other salient matters that the employer should consider when terminating a contract of employment in order to manage exposure that may arise should an aggrieved employee seek recourse against termination.

There are numerous legally recognized reasons that an employer may have for terminating an employee's contract of employment. The law provides for procedures to be adhered to in each circumstance. Such procedure generally depends on whether the conduct giving rise to the decision to terminate is gross misconduct or other lesser misconduct. Gross misconduct can be defined as conduct that fatally undermines the relationship of trust and confidence that exists between the employer and employee hence constituting a fundamental breach of the contract of employment justifying summary dismissal of an employee. The Employment Act at Section 44(4) gives examples of gross misconduct. It is also prudent for an employer that has a manual setting out disciplinary procedures to clearly indicate other examples of the types of conduct that would normally warrant summary dismissal. In instances of misconduct that is not classified as gross misconduct a fair dismissal will normally involve a series of warnings.

TERMINATION PROCEDURE TO BE ADHERED TO BY AN EMPLOYER

The Employment Act provides for a mandatory procedure to be followed by the employer with regard to all forms of termination to ensure fairness.

Procedure to be adhered to on Termination other than summary dismissal

Section 41(1) provides for termination on the grounds of misconduct (other than gross misconduct), poor performance and physical incapacity. The law provides for the following procedure:-

- a) The complaint that the employer considers to be the reason for the termination must be explained to the employee in a language the employee understands before a decision to terminate is reached.
- b) The employee should be given an opportunity to explain his performance/conduct.
- c) The employee should be informed of the improvement required, the time-scale for improvement and the consequences of failure to improve.
- d) The employer should consider further training/ supervision or alternatively the giving of a warning.
- e) The employer should assess performance during the duration of the warning.

Adherence to the above procedure is important as in the event of litigation following the termination the court will consider matters such as whether the employee knew what was expected of him or her, whether the employee was given time to improve his or her performance, whether the employee was warned of the consequences of a failure to improve, whether there was a proper appraisal of the employee, whether the employer provide training and/or supervision, whether the employer considered alternative employment for the employee.

Termination as a result of Summary Dismissal

The Employment act at Section 44(4) sets out matters that may give rise to summary dismissal of an employee. These include instances where the employee engages in the following conduct:-

- a) Without leave or other lawful cause absents himself from the place appointed for the performance of his work;
- b) During working hours, by becoming or being intoxicated, renders himself unwilling or incapable to perform his work properly;



- c) Willfully neglects to perform any work which it was his duty to perform, or if he carelessly and improperly performs any work which from its nature it was his duty, under his contract to have performed carefully and properly;
- d) Uses abusive or insulting language, or behaves in a manner insulting, to his employer or to a person placed in authority over him by the employer;
- e) Knowingly fails, or refuses to obey a lawful and proper command issued by his employer or a person placed in authority over him by his employer which it was within his scope of his duty to obey;
- f) In the lawful exercise of any power of arrest given by or under any written law, an employee is arrested for a recognizable offence punishable by imprisonment and is not within fourteen days either released on bail or on bond or otherwise lawfully set at liberty; or
- g) Commits, or on reasonable and sufficient grounds is suspected of having committed, a criminal offence against or to the substantial detriment of his employer or his employer's property.

Procedure to be adhered to by the Employer in exercising summary dismissal

Note that although an employer can dismiss an employee for a first offence relating to gross misconduct the employer must still follow a fair procedure set out in the Employment Act. Section 41(2) of the Act provides the procedure to be adhered to for termination on the grounds of gross misconduct. This requires that before such termination the employer must explain to the employee the reason why the employer is considering terminating the employee's services. Thereafter the employer must hear and consider any representations which the employee may make regarding the misconduct. The employee is entitled to have another employee or a union representative of his choice present during the explanation and such person is also allowed to make representations on behalf of the employee.

LEGALLY RECOGNISED MODES OF TERMINATION OF CONTRACT OF EMPLOYMENT

Termination by Notice

As part of the terms of a contract of Employment the contract may expressly provide that either of the parties to it may by giving to the other a specified period of notice terminate the contract of service. The Employment Act at Section 35 (1) provides for such termination of contracts. It states that where salary is paid at intervals of or exceeding one month such contract is terminable by either party at the end of a period of twenty eight days after the giving of a written notice. The Employment Act further provides that parties to an employment contract are at liberty to enter into a contract providing for a greater (but not lesser) period of notice than that provided for in the statute which will then be binding upon them. Either party to a contract of employment may also terminate the contract without notice as provided by Section 36 of the Employment Act upon payment to the other party of the remuneration which would have been earned by that other party, or paid by him as the case may be in respect of the period of notice required to be given under the contract.

However, it is important to note that even where the employer terminates a contract of employment by giving the requisite notice period provided above an employee whose services have been terminated retains the right to dispute the lawfulness or fairness of such termination in accordance under Section 46 of the Employment Act. In this regard, the notice of termination is open to challenge by an employee where it is issued as a result of:-

- a) Any reason connected with pregnancy of an employee.
- b) The going on leave of an employee or his proposal to take leave that he is entitled to under the law or under his contract.
- c) An employee's membership or proposed membership of a trade union.
- d) The participation of an employee in the activities of a trade union outside working hours or, with the consent of the employer, within working hours.



- e) An employee's seeking of office or acting as an officer of a trade union or a workers representative or his refusal to withdraw from a trade union.
- f) An employee's race, colour, tribe, sex, religion, political opinion or affiliation, national extraction, nationality, social origin, marital status, HIV status or disability.
- g) An employee's initiation or proposed initiation of a complaint or other legal proceedings against his employer, except where the complaint is shown to be irresponsible and without foundation.
- h) An employee's participation in a lawful strike.

Termination on account of Redundancy

Redundancy is defined by the Employment Act at section 2 as the loss of employment by involuntary means through no fault of an employee. This involves termination of employment at the initiative of the employer where the services of an employee are superfluous. Redundancy includes termination in instances where an employer needs to reduce its work force as a result of

- a) New technology or a new system having made an employee's job unnecessary.
- b) The job for which an employee was hired ceasing to exist.
- c) A need by the employer to cut costs by means of a reduction in staff numbers.
- d) The closing down or moving of an employer's business.

The Employment Act at Section 40(1) imposes certain conditions on an employer seeking to terminate employment on account of redundancy. These are:-

- a) Where an employee is a member of a trade union, the employer notifies the union to which the employee is a member and the labour officer in charge of the area where the employee is employed of the reasons for, and the extent of, the intended redundancy. Such notification must be done not less than a month prior to the date of the intended termination on account of redundancy;
- b) Where an employee is not a member of a trade union, the employer makes written notification to the employee and to the labour officer.

Following such notification the employee and employer may engage in consultation where the employer informs the employee on why it is they have been selected while the employee can suggest ways by which he may influence the redundancy process. Parties may discuss alternatives to the process such as giving up benefits, requesting a reduction in working hours, a job share, or even offering to take a pay freeze or cut.;

- c) The employer must in the selection of the employees to be declared redundant have regard to a specified criteria taking into account seniority in time, the skill, ability and reliability of each employee of the particular class of employees affected by the redundancy;
- d) Where there is in existence a collective agreement between an employer and a trade union setting out terminal benefits payable upon redundancy, the employer must not place the employee at a disadvantage for being or not being a member of the trade union;
- e) The employer has where leave is due to an employee who is declared redundant, paid off the leave in cash;
- f) The employer has paid the employee declared redundant not less than one month's notice or one month' wages in lieu notice; and
- g) The employer has paid an employee declared redundant severance pay at the rate of not less than fifteen days' pay for each completed year of service.

CONCLUSION

It is imperative to note that a dismissal will be held to be unfair if the employer fails to follow a fair procedure, even if that failure has made no difference to the outcome and the employer would still have dismissed had it followed a fair procedure. The employer must also ensure that the reason for the termination is related to the employees conduct, capacity or compatibility. In addition a reason for termination must be based on the operational requirements of the employer.