

Rights of an Employee during Disciplinary Procedures

Disciplinary processes are controlled by the employer. The **Employment Act, 2007** sets out the minimum standards that the employer should adhere to prior to terminating an employee's services on grounds of poor performance, misconduct or physical incapacity. Disciplinary procedures may take the form of verbal and written warnings, disciplinary hearings, suspension, termination, summary dismissal or any other lawful disciplinary measures provided for in the employer's disciplinary procedures.

Provision of Disciplinary Statement

Section 12 requires an employer to provide a Statement of Disciplinary Measures to the Employee, where at the time of his employment, the employer has employed more than fifty employees. The statement is supposed to specify the disciplinary rules applicable to the employee or refer the employee to the provisions of a document, which is reasonably accessible to the employee. The statement should also specify the person to whom the employee may apply if he is dissatisfied with any disciplinary decision relating to him and the manner in which an application for redress should be made. Where there are further steps to be taken following such an application, the statement

should also explain the steps or refer the employee to the provisions of a document, which is accessible to the employee. A statement of disciplinary procedures is not applicable to matters relating to health or safety at work.

Under Section 41 of the Employment Act, an employer is required to explain to the employee, in a language the employee understands, the reason for which the employer is considering termination. The employee is entitled to have another employee or a shop floor union representative of his choice present during this explanation.

Before termination or summary dismissal, the Employer is required to hear and consider any representations which the employee may make on the grounds of misconduct or poor performance as well as representations by the person, if any, chosen by the employee.

Employee rights during disciplinary procedure

The Employment Act does not provide for the specific rules of disciplinary procedures by employers. This is often left to the discretion of the employer. The rights set out below are derived from case law and best practice.

- 1. Right to be paid by the employer all the dues if the employee is exonerated at the end of the disciplinary process.** This was held in **Paul Ngeno Vs. Pyrethrum Board of Kenya Ltd [2013] eKLR** where the court was of the view that an employee on interdiction or suspension has a

legitimate expectation that he or she will be paid if they are exonerated after the disciplinary process.

2. **Right to thorough investigations where the reason for termination is poor performance of the employee.** This was held in **Kenny Kinako v Ringier Kenya Limited [2016] eKLR** where the court was of the view that the reason of poor performance negated the assurance that an employee was hired because of his competence and thus a decline in performance required to be investigated thoroughly.
3. **Where the cause of termination is poor performance, a right to be made aware of the applicable standards of performance and to have efforts put in place to support the employee and allowance of time for him to make improvements with constant reviews.** This was held in **Fredrick Owegi versus CIC Life Assurance, Cause no. 1001 of 2013.**
4. **Where an employee is to be given a hearing, a right to have internal disciplinary proceedings carried out in good faith.** This was also held in **Kenny Kinako v Ringier Kenya Limited [2016] eKLR** where the court stated that such a hearing should not be held with a predetermined decision as this would be a sham.

Court Involvement

Courts are usually reluctant to intervene in internal disciplinary procedures between an employee and an employer. This is because internal disciplinary measures and procedures are the

employer's right. Secondly, the employee often has a chance to sue for damages once they have exhausted all the internal disciplinary mechanisms. The following are exceptional circumstances when the courts may get involved in the disciplinary process:

1. Where a grave injustice would be occasioned to the employee if the court does not interfere with the disciplinary measures, for instance where the employer has made it impossible to address the employer's grievances using internal mechanisms.
2. Where it is apparent that the employee has no alternative means of attaining justice or remedies
3. Where the disciplinary process has been commenced or is continuing unfairly.
4. If it is established that the procedure relied on by the employer is not in accordance with the rules of natural justice
5. Where the disciplinary process is irregular, the court may intervene to cure the irregularity.
6. Where non-interference by the courts would cause the employee extreme hardship or irreparable harm or where the employer's actions have no legal basis. For instance withholding an employee's salary.
7. Where the disciplinary process is done with an ulterior motive or with the sole purpose of dismissing the employee.