

The Redundancy Procedure in Kenya



Redundancy is one of the ways of terminating employment. The legal basis of redundancy is laid down in statute together with general rules of international law and treaties and conventions ratified by Kenya.

The Kenyan Employment Act, 2007 and the Labour Relations Act state that redundancy means the loss of employment, occupation, job or career by involuntary means, through no fault of an employee, involving termination of employment at the initiative of the employer where the services of an employee are superfluous and the practices commonly known as abolition of office or job or occupation and loss of employment.

In the case of *Jane I Khalechi V Oxford University Press E.A. Ltd [2013] EKLK* after referring to the definition of redundancy stated at page 3, the Court stated that employers have the prerogative to determine the structure of their businesses and therefore make positions redundant. It went on at page 4 and stated:

“The terms redundancy, reorganization and restructuring are related but can be separable. There are other terms used in different jurisdictions, to denote this form of employment termination. These include downsizing, lay-off, and rightsizing.”

Statutory Prerequisites

a) Requirement of a notice

The mandatory conditions precedent imposed on an employer before terminating the services of an employee on account of redundancy are contained in Section 40 of the Employment Act 2007. First, the employer has to give written notification to the employees targeted for redundancy together with the labour officer at least one month before the commencement of the intended redundancy. For employees who are members of trade unions, the employer has to notify the trade union in addition to the labour officer in charge of the area where the employee is employed.

b) Reasons for the termination of the redundancy

The notice should have the reasons for the redundancy, information on the extent of the intended redundancy and the date on which the services of the employee will be terminated on account of the redundancy. A reason is required so that the employer does not arbitrarily terminate. The employer has the burden of proving that the redundancy was indeed necessitated by genuine reasons. The reason(s) given by an employer for declaring a position redundant are open to judicial interpretation and in some instances courts that are not convinced by the reasons given by the employer have declared the termination of the employment on account of redundancy unfair.

c) Selection of the employees to be declared redundant

Even where an employer has a good reason for declaring a position redundant, the employees affected have to be chosen through a fair process. The statutory basis of this process is Section 40 of the Employment Act which requires an employer to consider the seniority in time and the skill, ability and reliability of each employee of the particular class affected by the redundancy.

The Court of Appeal in *Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others [2014] eKLK*, found that airline did not apply a fair

selection procedure and had as a consequence unlawfully terminated the employment of 447 employees. The reason for this finding was that the airline did not give evidence to demonstrate how the procedure was followed to identify the employee's declared redundant. Justice Murgor stated:

On the question of seniority in time, also known as the LIFO principle (Last in first out), the Court stated that the sole application of this principle would be detrimental to the employer as continuity and succession planning within the organization could be jeopardized.

In **Doris Kairuthi Kaaria & 59 others v Kenya Methodist University [2017] eKLR** in which the only issue for determination was the selection criteria, the Court stated that the LIFO principle satisfied the seniority criterion. On the remaining criteria of skill, ability, and reliability the Court stated that the employer ought to have, prior to the redundancy, instituted an objective qualifications for skill, reliability and ability attached to the office held by the workers against which the skills, ability and reliability possessed by the individual workers targeted in the redundancy will be scored or measured against.

d) Consultation between the employer and the employee targeted for redundancy

This requirement is not expressly stated in the Employment Act. However, by virtue of the fact that Kenya is state party to the International Labour Organization and is

bound by the ILO convention of 1982, Justice Maraga (as he was then) in the above mentioned Kenya Airways suit found that the requirement for consultation was implicit in the Kenyan Employment Act.

Conclusion

From the foregoing, where termination of employment is on grounds of redundancy, the employer has to:

- i. Give a notice to all employees of the impending termination of employment on account of redundancy.
- ii. Select the employees to be declared redundant after checking their seniority, skills, ability and reliability through a structured and comparative selection criterion. The criteria should be applied uniformly to all employees.
- iii. Give a 30 day notice in writing to the employees targeted in the redundancy exercise and the labour office. For employees who are members of a trade union, the notice should be directed to the union.
- iv. Consult with the employees targeted for redundancy.
- v. Pay the employees declared redundant one month's wages if the notice period is shorter than a month.
- vi. Pay all pending leave days in cash to the redundant employees.
- vii. Pay the employees declared redundant a severance pay of not less than 15 days' pay for each year of completed year of service.

