FIDEL MWAKI
& COMPANY ADVOCATES

A LEGAL TAKE ON THE EMPLOYMENT RELATIONSHIP

LETTER FROM EDITOR

It is probably cliché to say that Covid-19 has had a significant impact on employment in our beautiful country and around the world. Employers and employees have been affected in different ways as opportunities for business expansion and professional growth within the economy remain unstable even as we continue to focus on our health. Job security in Kenya has always been shaky for a vast majority of workers and the current pandemic has laid bare how fragile even the most secure careers can be, especially where an organisation lacks sufficient or effective structures that protect the rights of its owners, managers and workers.

Like many legal and HR firms, we at FMC have over the past year advised clients on employment law, contracts and procedures. Many of our clients happen to be small or medium-size businesses that are now scaling up or downsizing due to the pandemic and this has lead to a variety of employment issues. Significant matters that have kept our clients busy over the past 12 months include recruitment, contract formation, HR policies, probation, termination procedures, redundancy and terminal benefits. What has been interesting to note is that every business appears to have its own unique set of circumstances that do not lend to template solutions and, as a result, it has been a steep learning curve for practitioners and businesses alike to find the right balance that ensure businesses and employers adopt good governance structures when it comes to human resources.

It is with this in mind that we present our latest Edition of Legal Take focusing on the employment relationship.

This Edition looks at such relationships from three different angles, namely:

- *Establishing the Employment Relationship*
- *Ending the Employment Relationship*
- *Human Resources in Employment*

I hope you enjoy our latest Edition and would be happy to receive your comments and queries on any of these articles. I would also like to thank all the brilliant young lawyers who have contributed to this Edition, all of whom I believe have great careers ahead of them in the legal profession.

Finally, we are happy to support Weka Wide Smiles Foundation, a non-profit organisation run by a talented and committed group of young lawyers and professionals that is making a real impact in supporting young children and putting smiles on their faces. Please get in touch with them if you would wish to support their activities. You can find more details at the end of this Edition.

With kind regards,

Fidel Mwaki
Editor, Legal Take

April 2021

PART A
Establishing the Employment Relationship

LEWIS NDONGA
FORMALITIES OF A STANDARD EMPLOYMENT CONTRACT

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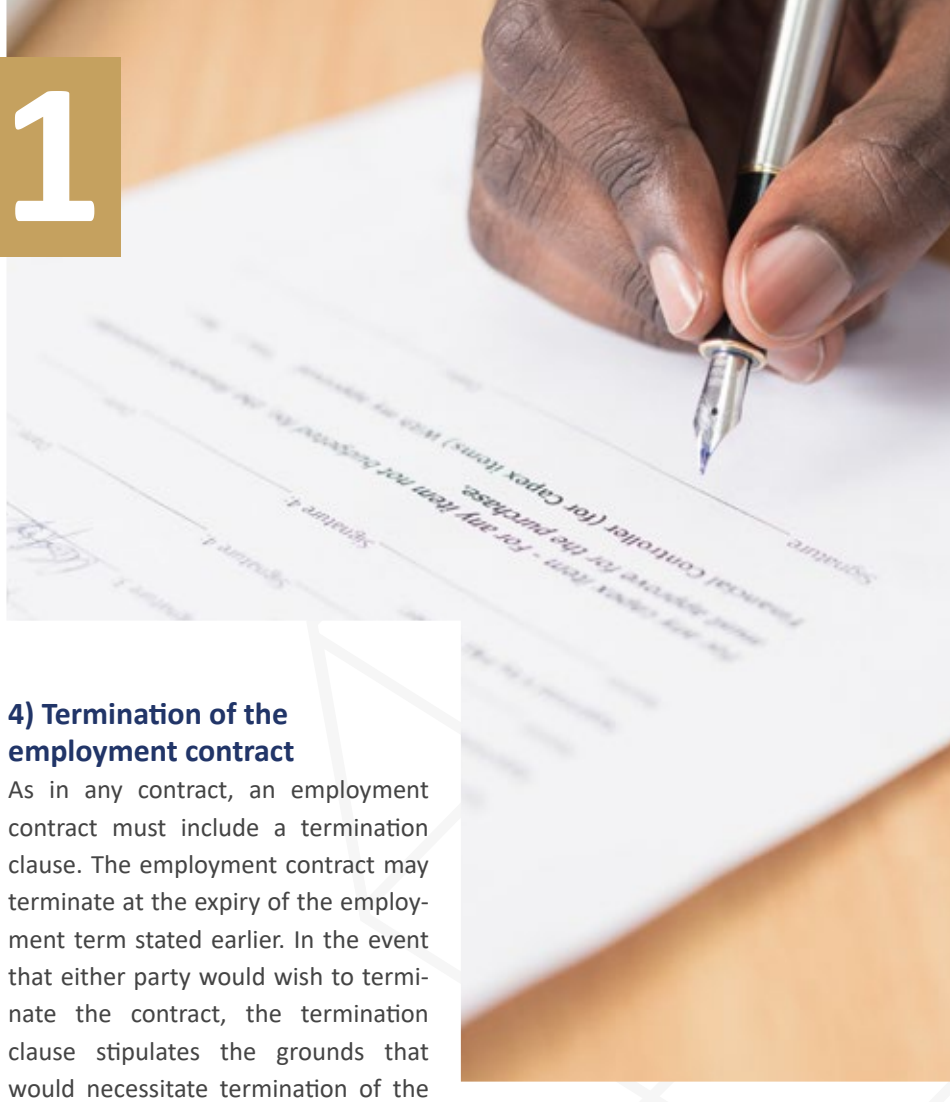

How organizations choose to run their business differs from one organization to another. It goes without saying that each organization will draft employment contracts considering their business models and objectives. Organizations will more often than not include these standard clauses and add any other clauses that best suit the operation of their business, however, there are basic elements that must be present in a standard employment contract and this article highlights the key clauses that should be included.

1) The term of employment

A standard employment contract must provide for the employment term of the prospective employee. Employment could be on a permanent basis, meaning that the term only ends at the termination of the contract. The employment could be on a periodic basis, either annually or monthly. The term of employment could also be subject to a probationary period, with an employee being placed in probation for a particular amount of time. Once the probation period lapses, the employer could renew the employment contract or terminate it, based on the results of the probation.

2) Duties of the employee

An employment contract must clearly specify the expected duties and obligations of the employee. Inclusion of this clause binds the employee to perform duties and obligations as stipulated under the employment contract. Standard practice shows that majority of employment contracts include a general provision under this clause, usually highlighting that that the employee will perform any and all duties provided to him/her by the organization, over and above the stipulated duties.

3) Remuneration of the employee

A standard employment contract must provide the salary or wages due to the employee for fulfilling their duties and obligations under the employment contract. An important specification under this clause is whether the pay is either net, meaning the stipulated salary has already been subjected to all statutory deductions, or the pay is gross, meaning the stipulated salary has not been subjected to statutory deductions. Statutory deductions under this clause include Pay As You Earn (PAYE), NHIF deductions, NSSF deductions or trade union membership deductions if any.

4) Termination of the employment contract

As in any contract, an employment contract must include a termination clause. The employment contract may terminate at the expiry of the employment term stated earlier. In the event that either party would wish to terminate the contract, the termination clause stipulates the grounds that would necessitate termination of the employment contract. Depending on each organization, standard grounds for terminating employment contracts include:

a. Misconduct;
b. Poor performance;
c. Physical incapacity;
d. Absenteeism from work without leave;
e. Failure to observe instructions given by the employer;
f. The employee is charged with a criminal offence; and
g.Disclosing trade secrets or confidential information of the employer.

The termination clause also stipulates the procedural requirements for termination of the contract. These procedures include providing notice of termination, internal disciplinary procedures of the organization in instance of termination and handing over organization's property. These could all be included in one umbrella termination clause or may be separated under distinct clauses.

5) Leave

Despite the fact that leave is statutorily guaranteed, standard practice dictates that the employment contracts specify the terms of all forms of leave that the employee is granted. These include the terms for maternity leave, sick leave and annual leave. The clause cannot contradict the provisions under Kenyan law, and can only supplement legislation. Consequently, the clause cannot deny pay during leave, neither can the clause provide for leave period that is less than what is provided under statute.

Conclusion

In conclusion, it is key to note that all the above clauses must conform to the provisions of the Employment Act 2007, the Fair Administrative Actions Act 2015, the NHIF Act 1998 and the NSSF Act 2013. The clauses can only provide further protections and guarantees over and above what is prescribed under the various applicable legislation.

FAITH WAMBUI

NON-COMPETE CLAUSES – THE REASONABILITY TEST

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A non-compete clause is an example of a restrictive covenant that is aimed at protecting an employer's legitimate interests. It can sometimes be included in employment contracts and outlines the period an employee should refrain from working with an employer's competitor after the termination of their employment. Depending on how they are drafted, non-compete clauses can restrict former employees from working with rival firms or in specific geographical locations or industries.

The legality of non-compete clauses varies across of the world.

In Kenya, for instance, their validity is regulated by the Contract in Restraint of Trade Act which provides that a non-compete clause is valid only if it is deemed to be reasonable and for the best interest of both its' relevant parties and the public. This means that the validity of a non-compete clause is not absolute and can easily be rendered void in a court of law if it does not meet the stipulations provided under that Act.

Reasonability is one of the critical conditions under the law, which forces one to wonder how they can tell if a non-compete clause falls within the ambit of reason. The Kenyan courts have interpreted this term through various case laws. For instance, in the case of **Lg Electronics Africa Logistics Fze v Charles Kimari [2012] eKLR** the High Court deemed a non-complete clause inhibiting a person's right to earn a living to be unreasonable. The judge averred that it was unreasonable to subject a former employee to a period of unemployment without any guarantee of futuristic employment opportunities. The latter act was against the public interest, especially given the soaring rates of unemployment in Kenya. In **Credit Reference Bureau Holdings Limited v Steven Kunyiha [2017] eKLR** the Court asserted that it would be unreasonable to restraint a former employee from using the expertise garnered from his working experience to gain employment in a competing firm. The judge averred that such restraint would only serve the purpose of stunting the growth of the employee's career. The judge, in this case asserted that an employer only has the right to restrain the use of knowledge that relates to his or her trade secrets or confidential information. Any general skill acquired during an employee's work experience is not for an employer to restrain.

The other condition that mandates a non-compete clause to benefit both its parties was emphasized in the case of **Bridge International Academies Limited v Robert Kimani Kiarie [2015] eKLR.** In this case, the judge was unwilling to execute a non-compete clause as he deemed it only beneficial to the employer and detrimental to the employee. He averred that for a non-compete clause to be executed, a claimant must demonstrate that it is beneficial to all the relevant parties.

From the above, one can conclude two main things. Firstly, non-compete cases do not hold much water in Court unless an employer proves that a former employee is using confidential information or trade secrets gathered from his previous employment for the benefit of the employer's competition. For this claim to be upheld, an employer must not only assert such facts, he or she must also present hard evidence to support such allegations. The execution of non-compete clauses is highly dependent on the breach of confidentiality principles.

The second conclusion that one can draw from the above is that Kenyan courts go the extra mile to protect the rights of the employees when it comes to the execution of non-compete clauses. They do this because of the apparent difference in bargaining powers between employers and employees. The precedents set by the courts show that proof of the existence of a non-compete clause between an employer and his employee is not enough to successfully inhibit a former employee from gaining employment with a competing firm. The threshold to limit a former employee's labour practices is set relatively high. It can only be questioned if the employee's conduct violates the intellectual property rights or confidential information of his former employer.

The key take away for employees; therefore, is that the law is on their side. Besides the provisions in the Contract of Restraint Act, Article 41 of the Constitution firmly asserts that every employee has the right to fair labour practices. Knowing this will help them not to be bullied into signing unreasonable non-compete clauses. Employees should, however, remember that the protection accorded to them by the law diminishes the moment they begin to use any confidential information or intellectual property rights of their former employer to advantage themselves whether in a competing firm or competing side hustle.

Employers, on the other hand, should refrain from imposing unreasonable non-compete clauses on their employees. The more unreasonable it is, the more its chances of being rendered void in a Court of law. Employers should also digitize their operations in a way that would reduce the number of employees privy to confidential information and trade secrets. If ever they decide to sue a former employee for breach of a non-compete clause, they should ensure that they are armed with evidence that shows the former employee using confidential information and trade secrets to the detriment of the employer. Lastly, but most importantly, employers should always be willing to let go of their employees; after all, employment is not a marriage and therefore may not last a lifetime.

DIANA WARIARA
GENERALLY SPEAKING...

3

More often than not, the phrase "and any other duties that may be assigned to you" is listed in an Employees contract as part of their duties in the course of their employment. The rationale behind this is that whereas it may be impractical to provide an exhaustive list of all the employees duties, it is important for the employee to understand they are responsible for all duties that are incidental to their work and are assigned to them in the course of their employment.

However, this phrase poses a challenge with Employers and Employees as to its scope and extent of application. For instance, can an accountant be re-designated to undertake social media/marketing duties in the course of their employment? To determine this issue, the principle of ejusdem generis would be applied, which when loosely translated means "of a similar kind".

According to Black's Law Dictionary (8th edition, 2004), the principle of the Ejusdem Generis rule is that where general words follow a list of persons or things, by words of a particular and specific meaning, such general words are not to be construed in their widest extent, but are to be held as applying only to persons or things of the same general kind or class as those specifically mentioned.

Using the above rationale to the earlier example, the duties of an accountant should be limited to those of accounting such as preparing financial documents and reports. Therefore, re-designating the accountant to undertake social media/marketing duties would be a complete departure from their employment contract and may be construed as an unfair and unjustified termination. This matter was delved into in the case of **Elizabeth Kwamboka Khaemba v the BOG Cardinal Otunga High School Mosocho & 2 others [2014] eKLR.** The Claimant was employed as a cateress at the Respondent's school. Subsequently, the Board issued her with a letter that altered the terms of her employment to a supervisory role on cleanliness of the boarding area. The court sought to clarify the scope of the clause "any other duties assigned". In determining this, the court applied the ejusdem generis rule of interpretation and held that the general words were not to be constructed to their widest extent but were to be held to applying only to persons or things of the same general kind or class. The claimant was confined to the kitchen and the kitchen area. Consequently, she should only have been assigned duties related to the kitchen. Lastly, it was held that changing the Claimant's contract without consulting her was tantamount to terminating the existing contract, therefore resulting to an unfair and unjustified termination.

While we are alive to the dynamic business environment that may require altering or re-aligning of an Employee's duties to meet business needs and demands, it is imperative when altering such a contract that the duties assigned should be of the same or similar class as those listed in the Employee's employment contract. Where this is not feasible, the Employer should consult the Employee before altering their employment contract as required under Section 15 of the Employment Act, 2007.

NELLY NDOTI
HOW BUSINESS OWNERS CAN STAY WITHIN THE LAW WHEN MANAGING EMPLOYEES OUTSIDE THEIR USUAL PLACE OF WORK

4

The rise and spread of Covid-19 has brought forth previously unforeseen changes in many aspects of our daily lives especially in the workplace with more and more people opting to work from home. While this change of the workplace has been a necessary measure to try and contain the spread of the virus, there have been a number of challenges for employees, for example:

1. Employers overstepping and infringing the rights of the employees in regard to the stipulated working hours which can result in employees being over worked or even exploited due to the absence of a supervised environment that can lead employers to assign tasks past the agreed on working hours.

2. The lack of resources to facilitate the work from home process. This include issues like lack of internet connection services and gadgets like laptops to the work might be a hindrance to the work process.

3. The employees are lacking time to do other activities like chores or interacting with their families because they are ever required to be working. Working from home has resulted to a lack of separation between work life and home life.

How business owners can manage employees in a lawful manner with the change in the working environment

Section 10 of the Employment Act states that working hours are essential particulars that should be stipulated within the employment contract. As such, employees should not be required to work past the stipulated working hours unless it is a matter of urgency. In the event where the employee is required to work overtime frequently, an overtime fee should be stated in the work contract. Section 10(5) of the Employment Act states that in the event of any change in the work contact, the employer shall consult with the employee to incorporate the change. This will be necessary in the event the working hours are bound to change hence avoiding breaching the work contract.

Under Section 27(2) of the Employment Act, it is specified that the employee is entitled to at least one rest day within the seven days of the week and this helps to prevent overworking of employees. With the current change of the working environment this has not been the case with many employees as there has been a nonexistent separation of work and home life as we find the employees are demanded to be online and working beyond the agreed working hours.

Looking at the Employment Act we find that by assigning employees tasks past working hours and not adhering to the agreed on working hours or paying them for working overtime where necessary, employers are in violation of the employees' rights. Many employers might argue that the lack of physical contact with the employees might result to a lot of back and forth hence lengthening the feedback process resulting to prolonged working hours. However, it is still necessary for the employees' rights to be protected.

Employers can consider the following measures to ensure a healthy and conducive working from home environment:

a) Improving on technology and productivity tools, now that work is mostly done through online platforms, it is encouraged that the companies should ensure that their employees have access to internet connection as well upgrading their systems and software to easily facilitate their day-to-day work like scheduling work meetings. This will ensure the smooth operation of work while out of office.

b) Holding meetings every day to plan schedules and assign tasks. With different working conditions, the same set of rules cannot be used to stipulate how work should be done. It is advisable that companies should conduct surveys with their employees as well as hold online meetings. This will help to identify the challenges they might be facing and also ensure that each employee has an organized to do list for the day.

c) Developing a surveillance software for the business. It is important for the company to track the employees' productivity given that people aren't physically going to the office. It is difficult to be aware of every staff member's whereabouts and if they are facing any challenges in regard to work. This way in case of a mishap the other employees can be notified to avoid a backlog of work and someone else might take on the task without much inconvenience.

d) Providing regular feedbacks to your employees. A survey conducted by Monster.com shows that employees who feel burned out might result to unprofessional means like leaving colleagues out of the decision making process in order to get work done faster. In an office setting it is easier to get progress reports and discuss issues, employers must be efficient when it comes to communicating with their employees about tasks. This helps to avoid last minute rushes and in conveniences, which results to the employee working past their stipulated working hours.

e) Providing room for flexibility since everyone's working environment is not similar. The employer should encourage workers to take time for themselves by allowing them to log off during break hours in the day or take a leave day. We find that some workers are still given work during their leave days and they will still feel the pressure to attend to the matter even if they should not have to. The employers should also schedule for emails to be delivered during the stipulated working hours instead of sending them after working hours unless it is an urgent matter. In the case, the above suggested measures can help the business owners can manage the employees lawfully without being in their usual place of work.

In this "new normal", it is clear that adjustments need to be made to fit in with the current situation. However, it is crucial that business owners manage their employees lawfully even when working remotely. The suggestions provided in this article may provide a guideline to approach management in a productive but lawful manner.

TERESA KEHONJI

THE COVID-19 PANDEMIC AND EMPLOYMENT CONTRACTS: WHAT ARE THE OPTIONS FOR EMPLOYERS AND EMPLOYEES

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The Covid -19 pandemic, which has been classified by the World Health Organization as a 'novel' virus, has brought about unprecedented issues globally. The pandemic, which can be considered as a force majeure, has affected the performance of obligations in a variety of contracts including employment contracts.

Since employment contracts are not commercial contracts, adherence to the binding terms of the contract is the only way to ensure the sustenance of a good employer-employee relationship between the parties. The pandemic has however affected the manner in which things are done in the employment space and could therefore be termed as frustrating the terms agreed upon by the parties to the employment contracts.

How have employment contracts been frustrated?

1. Employees have been recommended to work in shifts or from home, where possible, in order to uphold government safety standards currently in place. This affects the place of work as was previously negotiated in the employment contract.

2. Due to the curfew in place and the changes in the manner of conducting business, working hours, as stipulated in most employment contracts, have had to be altered or completely changed.

3. In turn, most employers have had to alter their business models or methods of work; hence either adding or reducing the work load on employees, in order to effectively produce results in the wake of the pandemic.

4. It is undoubted that the economy has dwindled by virtue of the pandemic affecting it negatively. Subsequently, employers are currently struggling to meet the payment of salaries to employees, affecting the remuneration clauses in already negotiated employment contracts.

This notwithstanding, whether or not parties can still perform their obligations highly depends on the scope of the effect of the pandemic on the specific job or business, and whether the parties can make reasonable adjustments to ensure continued performance of the said contract. These two considerations are vital especially now that the country is trying to revive the economy.

What options are hence available to the parties in the employment contacts?

The parties to the employment contracts have to consider both short-term and long-term options, since the span of the effects of the pandemic is uncertain.

Firstly, employers can opt to **reduce salaries** for their employees. This will be a win-win situation since employees will retain employment while employers manage the available resources until things get back to normal, or until they find alternatives of meeting their initial salaries. Nevertheless, employers have to ensure they have discussions with the employees on the intention to reduce their salaries, and in turn get consent from the employees on the same, in order to prevent unfair labour practices. The consent given by the employees could be preferably in writing, for evidentiary purposes, in case of future adverse claims against employers.

Secondly, businesses could **defer bonuses** given their employees. Most employers include bonus determination and application in employment contracts, hence binding them to give their employees bonuses annually or as agreed in the contracts. Due to the principle of legitimate expectation – where the employer creates a situation that gives an employee a legitimate and reasonable expectation, the employer is obligated to meet the expectation – the employee has the right of recovery against the employer. The employers can hence opt to stop these bonuses for a specified time, until the situation becomes favorable to resume normal activities in the business.

Thirdly, **restructuring of the business** can salvage the situation created by the pandemic. In order to prevent compulsory redundancies in the employment space, the employers could opt to restructure the business model, and hence redeploy existing employees to different spaces in the new business model. The employees would have retained their work, the business will be maintained as an ongoing concern, and there would be less or no layoffs. This option could include altering the place of work to include working from home (remote working), utilizing more technology usage in the business space, and altering of working hours to ensure effective performance.

Lastly, employers could opt for **declaration of redundancy** due to financial constraints or restructuring. The provisions of section 40 of the Employment Act 2007 would have to be specifically adhered to, for the process to be fair to the employees and acceptable in law. The employer has to be transparent with the redundancy procedure and follow all terms of relief in the contract signed with the employee.

In conclusion, it is imperative to note that the employers have to discuss their intentions with the employees first before making any decision. This will ensure that the employees are fully aware of the issues faced by the employer, and also ensure that the employees give their consent with regards any of the options discussed above. Further, parties to the contracts should consider renegotiation of the existing employment contracts in the long term, to ensure inclusion of force majeure clauses and options available to both parties in those instances.

PART B
Ending the Employment Relationship

According to Fair Administrative Act of 2015, the term "administrative action" includes:

• The powers, functions and duties exercised by authorities or quasi-judicial authorities, tribunal; or
• any act, omission or decision of any person, body or authority that affect the legal rights or interest or of any person whom such actions relate.

The Constitution of Kenya acknowledges administrative actions and provides minimum standards on substance and procedure on how the administrative actions should be carried out. Fair administration action has a role in ensuring that relevant bodies' actions, omission or decisions that may affect legal rights of an individual are done fairly and in accordance with the relevant legal requirements.

Fair Administration Action

The Constitution of Kenya 2010 and the Fair Administration Act 2015 provide for fair administrative action as a fundamental right for all Kenyans. Specifically, every person has the right for fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. This includes employees whose rights and fundamental freedom are likely to be affected by such administrative action.

Fair administrative action is a legal duty to both public and private administrative bodies. Any authority that exercise quasi-judicial authority be it a private entity or public entry is obligated to perform fair administrative action. Fair administrative action applies to all state and non-state agencies including person(s) whose action, omission or decision affects the legal rights or interests of any person to whom such action, omission or decision relates.

Previously before the promulgation of the constitution 2010, administrative action was only applicable to public bodies, inhibiting people, especially private employees whose rights had been affected by unfair administrative actions. With the new constitution, fair administrative action applies to both state actors and non-state actors. It does not regard public-private dichotomy. Even corporations have human rights responsibilities for violations initiated by them.

Scope and Application of Administrative Action within Private Entities

Public and private entities that offer employment have legal rights to enact their respective internal policies. These policies guide the relationships of employers and employees in their daily internal affairs. In employment relationships, employers assume roles which are administrative in nature, which may include settling disputes between the employer and the employee and commencing a disciplinary action against the employee. Such actions may require administrative decision making that have judicial characteristics. Key elements of administrative actions involve the presentation of the case, ascertainment of the evidence and submission by the parties to the dispute.

Administrative actions in employment set up vary in different dimensions. However, the concern will primarily be on disciplinary proceedings that have manifold consequences such as termination of the employee's contract of service, compulsory leave, suspension, dismissal among others that affect the employee's individual rights. Administrative actions are based on the discretion of the concerned authority and its subjective satisfaction in implementing their internal policies.

The tenets of justice, however, require that whenever any administration proceeding is levied against the employee in this case, rules of natural justice must prevail. This is an underlying canon on any authority that exercises judicial, quasi-judicial and administrative authority. Natural justice principles were espoused in the English landmark case in House of Lords, **Case Ridge v. Balwin (1964) AC 40**. The element of natural justice includes right to be heard by the unbiased tribunal, right to be given notice, and right to be duly informed of the charges levied against, among others.

Natural justice is not only a common-law requirement in administrative actions but also a constitutional requirement for bodies exercising such actions. In the wording of the constitution, it provides for the bare minimum of what should constitute a fair administrative action. The administration action against an individual should be expeditious, efficient, lawful, reasonable and procedurally fair. Fair Administrative Act 2015 echoes the same provisions under the constitution.

Procedural rights of an employee who is facing administrative action

For an employee, there are inherent rights which should be accorded in administrative actions. Procedural rights are fundamental in any administrative action that is likely to affect the rights of an employee adversely. The procedure which is undertaken in administrative action must conform to both common law principles of natural justice and statutory requirement. According to the Act, procedural rights of the employee who is facing administrative action including but not limited to adequate notice of the nature and reasons for the proposed administrative action, information, materials and evidence to be relied upon in making the decision, notice of a right to a review or internal appeal against an administrative decision, a statement of reasons pursuant and an opportunity to be heard and to make representations in that regard.

Procedures and substance of administrative action ostensibly influence the decision of the administrative authority. The current trend in court where such decisions are appealed in of judicial review, seek to appraise the procedures taken before such decisions were arrived more than the substance of the case at hand. Procedural rights ensure fairness and justice is reached in the impugned case. The Employment Act 2007 also provides for these procedural rights before termination of the employee. It provides for the service of notice, reason for termination or dismissal and procedures adopted for such actions by the employer. The body exercising administrative action also should not act beyond its powers under the doctrine of ultra-vires.

Conclusion

On the foregoing, it is an obligation of an employer to ensure that any administrative action that is likely to affect the legal right of an employee is exercised in a manner that promotes the rule of law and democratic governance. Fair administrative action is in place to avert malicious against employees. In corporate governance, let us embrace fair administrative action.

SHEILA RONO

FREQUENTLY ASKED QUESTIONS: HOW TO CONDUCT A FAIR DISCIPLINARY HEARING

7

1. What are the common cases in disciplinary hearings?

Disciplinary hearings are held on account of misconduct of an employee. The term 'misconduct' may be as defined under the Employment Act or the internal laws of an organization. Acts of misconduct that are subject to a disciplinary hearing include absenteeism, insubordination, intoxication during work and misuse of company property.

2. What amounts to unfair termination?

Termination is the ceasing of a contract of employment. Therefore, unfair termination occurs when a contract of employment is concluded without regard to justice and fairness. A common form of unfair termination is constructive dismissal. Constructive dismissal occurs when the employer makes hostile the work environment, presumably in a bid to frustrate the employee, prompting their resignation.

3. What is summary dismissal?

Essentially, employers are prohibited from terminating contracts of employment without notice. However, summary dismissal allows them to do so. Hence, summary dismissal occurs when a contract of employment is terminated without notice or with less notice than prescribed by the law. Acts that may result in summary dismissal are absenteeism from work, intoxication during work hours and use of abusive language.

4. Is a disciplinary hearing necessary in a case of summary dismissal?

Owing to the instantaneous nature of summary dismissal, one may wonder whether they are entitled to a disciplinary hearing. The answer is yes.

5. Are all cases of misconduct subject to disciplinary hearings, and if not, what are the alternatives to a disciplinary hearing?

The law provides for gross misconduct as the prerequisite for a disciplinary hearing. This implies that there are degrees to misconduct. Essentially, there are offences that may be considered minor such as continued lateness to work or causing unnecessary commotion. Major offences may be absentia from work for a continued period of time or inefficiency in execution of duties. Acts of gross misconduct include insubordination, conviction for a crime, sexual harassment or solicitation of bribes. Consequently, minor and major cases may take a different form of disciplinary such as warning letters and verbal warnings.

6. What is the process of conducting a fair disciplinary hearing?

a) Receipt of complaint against the employee
b) Investigations into the alleged offence
c) Issuance of a notice to show cause letter. The contents of the letter included properly framed charges with provision of the law that has been breached. The letter also acts as an invite to the disciplinary hearing.
d) The commencement of the disciplinary hearing
e) Execution of the cause of action

7. What are the rights of an employee during the disciplinary process?

a) An employee enjoys the right to be heard
b) An employee enjoys the right to be presumed innocent until proven guilty
c) The right to be supplied with all evidence against him prior to the disciplinary hearing
d) The right to appeal
e) The right to be legally represented does not apply in disciplinary hearings as stated in **Dennis Nyagaka Ratemo v Kenya Film Commission & another [2014] eKLR.**

8. What would be the consequence of failing to follow the procedure for a disciplinary hearing? Does it render the process invalid?

Despite the general rules of justice and fairness, the rule and procedures of disciplinary hearings are set internally. In Joshua Rodney Marimba v KRA (2019) eKLR, the court pronounced itself on this issue by asserting that failing to follow procedural issues such as the composition of the disciplinary committee renders the process unfair.

9. What are the possible outcomes of a disciplinary hearing?

A disciplinary hearing may result in the termination of a contract of employment. Conversely, it may result in restitution of the employee into the organization, a warning letter or reduction in rank (demotion). In some cases, such as intoxication, guidance and counselling may be recommended.

10. In the event of termination of the contract after a disciplinary hearing, is the employee entitled to any dues?

Generally, upon termination, an employee is entitled to certain dues such as annual leave pay for leave days not taken. However, in the event of termination on grounds of misconduct, an employee forfeits certain benefits such as gratuity. Moreover, the court may order compensation for unfair termination.

Recently, at our clinical externship stations, we came across a particularly interesting case. There were these guys, each working at the finance department of the organisation where some alleged amount of cash went missing. They were all suspended to allow for further investigations. Upon suspension, as per the rules of the organisation, internal disciplinary proceedings began with the issue of show-cause letters. Concurrently the matter had already been reported to the police and a criminal trial had begun in the Magistrates' courts. Being young minds we tried to argue with our supervisor on the possibilities of either double-jeopardy or the breach of the natural principle of 'A man must not be put twice in peril for the same offence.' You would also probably think along those lines too. The debate was too hot and believe it or not an employer has the right to continue with internal disciplinary hearing even with an on-going criminal trial, as we intend to show below with evidence of common law and case laws.

Internal disciplinary proceedings are usually undertaken by organisations upon suspension of employees. An employee has the right to fair administrative action which includes the right to be heard at a disciplinary hearing before termination. Under the Employment Act, 2007 a friend or a union representative can be present during the internal disciplinary hearing but not an advocate. Evidence is presented and the employee has the right to defend themselves. On the issue of the burden of proof in disciplinary hearings, it is not as harsh as in the criminal trial. In order for one to undergo a disciplinary process, there must be reasonable cause and that there would be serious damage if not taken to consideration. Usually the burden of proof in such cases is on a balance of probabilities. In criminal trials, the burden of proof is beyond reasonable doubt.

What can an employer do if an employee is charged with a criminal offence?

An employer has the right to conduct internal disciplinary hearings against the conduct of an employee should they be charged with a criminal offence. The fact that an employee has been charged with a criminal offence does not bar an employer from conducting such proceedings against the employee. It is important to note that not all criminal investigations are related to work while not all criminal cases result to internal disciplinary action as it may not in any way affect the conduct of the employee at their workplace.

So then, should an employer wait for criminal proceedings to conclude before undertaking an internal disciplinary process?

The answer to the above question is no. Employers can continue with internal disciplinary proceedings alongside concurrent criminal trials without the fear of either double-jeopardy or breach of principles of natural justice. Double-jeopardy applies only in criminal cases where the burden of proof is beyond reasonable doubt which thus rules out internal disciplinary proceedings as it burden of proof is lower. There is usually a substantial difference between internal disciplinary proceedings and criminal trials with respect to the procedures, the laws applicable and burden of proof. Also, in a criminal trial the remedy is against the state whereas in a disciplinary hearing, the wrong against an employment term is remedied. As it was ably stated in **R V Wigglesworth (1984)**, a single act may have more than one aspect, and it may give rise to more than one legal consequence. That is, a single act may give legal consequences for damages against the injured party, a criminal conviction and to an order of discipline on the motion of the governing council of their profession.

So if an employer is wondering whether the concurrent disciplinary proceedings will result in breach of Constitutional rights of the employee or of any implied trust, then they should not worry because as per the law it is okay for the two to run simultaneously. The only exception that exists is where the employee can prove that the criminal trial will result in the miscarriage of justice, as was the holding in the Court of Appeal case of **North West Anglia NHS Foundation Trust V Gregg [2019] EWCA Civ 387**. There should be arguments beyond reasonable doubt from the employee in order to establish that proceeding with an internal disciplinary process could cause breach of confidence and trust to other ongoing process.

It is also important to remember that the employer has the right to make a fair decision upon the presentation of evidence in the disciplinary hearing even in cases where the employee under investigation does not show cause. There have been instances where employees have received legal advice not to participate in disciplinary hearings for the fear of prejudicing the criminal trial. It is not good advice because the failure to participate in disciplinary might result in the employer making a decision to terminate the employee which would be detrimental to him/her.

The Kenyan case of **Regent Management Ltd V Wilberforce Ojiambo [2018] eKLR** states clearly that there is a distinction between the two and as was held in the case they can run simultaneously. On the issue of double-jeopardy, the learned judge in the case of **Michael Aoko Mbero V Kenya Revenue Authority [2018]** eKLR held that there was no evidence of double-jeopardy because the charges against the petitioner in the disciplinary hearing were not the same as those in the criminal trial.

In conclusion, it is not against the law for an employer to conduct disciplinary proceedings before a criminal trial against an employee concludes as long as there is no miscarriage of justice. The position is affirmed in Kenya through the already decided cases and also by relying on foreign cases.

RYAN BOSIRE

A BRIEF LOOK AT REDUNDANCY: SCOPE AND APPLICATION

9

Redundancy occurs when the role played by an employee or the position occupied is no longer required by the employer. This is to say the job itself becomes non-existent.

Importantly, a redundancy must be genuine for it to be legal.

Triggers of redundancy

The commonplace cause for redundancy in most companies is the need to cut down on costs especially where losses precede the profits. Other triggers include technological innovations, amalgamation, insolvency, re-arrangement, downsizing or restructuring of the business.

Legal procedure

The Employment Act, section 40 (1) specifies out the substantive and procedural legal requirements that must be fulfilled by an employer in order to effect a termination of employment on account of redundancy. Specifically:

• where an employee is a member of a trade union, the employer must notify such a union on the intended redundancy not less than a month prior to the date of actualization;
• where an employee is not a member of a trade union, the employer notifies the employee personally in writing and the labour officer.

Note: The length of notice period depends on the type of contract, but it may also be set by mutual consent of the employer and worker. Notice should be written in language easily comprehended by the worker and the reasons for redundancy clearly highlighted.

Considerations to be taken into account by an employer planning a redundancy:

The law specifies that an employer must give due regard to:
• seniority, skill, ability and reliability of each employee that stands to be affected by the redundancy. By all accounts, an employee that makes the cut to be more productive to the business ought to be out of danger of being made redundant; and
• the employer should also take into account the past services and accumulated benefits, if any, of each employee.

Payments to be effected to employees' facing redundancy

Workers affected by redundancy are entitled to be paid by the employer prior to the expulsion. The payments approved by the Employment Act are as follows:

• all the accrued leave days due to a redundant employee should be paid off in cash;
• not less than one month's notice or one month's wages in lieu of notice, and payment of severance pay.

Establishing the terms and conditions of redundancy payment (consultations):

Normally, such terms and conditions are exclusively carried out through discussions as between the employer or their representative on one hand and the affected employee or their trade union on the other. Such consultations are **paramount** as they are the cornerstone of fair labour practices which affords an employee a right to be heard as confined in Article 41 of the Constitution of Kenya (Case law - **Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others [2014] eKLR**). Employees affected by the redundancy must be consulted individually and informed that their positions are at risk of redundancy and also allowed the opportunity to challenge the process and highlight the errors in it where necessary.

Solving redundancy pay disputes

In the event that a dispute emerges regarding the impending redundancy or the ensuing terms and conditions of payment between the parties, a complaint can be lodged to the labour officer within three months from the date of unfair termination or the industrial court through a legal suit. The considerations the court will take into account include – the procedure adopted by the employer, the conduct and capability of the worker, compliance with statutory requirements and the existence of any previous letters of caution to an employee.

Workers exempted from redundancy

Fundamentally, redundancy pay is meant to cushion workers that are employed by an entity for long term basis. To this end, workers that fall under the following category are not covered under redundancy:

• workers engaged on a casual basis;
• workers engaged under a contract of employment for a specified period of time or for specified work; and
• workers under a probationary contract. The contract should not be more than six months.

The redundancy process can be summarized as below:

• **Notice** – in writing and giving clear reasons for redundancy
• **Selection** – check the abilities, skills, seniority and productivity of each employee (process must be fair)
• **Give a 30 day notification** to the labour office, union and employee
• **Consultations** ¬– must be open and fair to the employee
• **Payments** – pending leave days paid in cash, one month's wages in lieu of notice and severance pay.

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CATHY MWANGI

SEVERANCE PAY: WHAT YOU NEED TO KNOW?

For various reasons, through no fault of their own, an employee may be declared redundant.

An employer is mandated under the Employment Act to pay a redundant employee terminal dues under statutory or contractual terms. One of the key terminal dues in redundancy is severance pay.

Obligation or Optional?

Under section 40 of the Employment Act, it is an obligation, of an employer to pay their employee severance pay on termination of a contract of service on account of redundancy. This means that the employee need not demand severance pay from the employer and it is not an option for the employer whether to pay severance pay or not.

Computation of Severance Pay

The Employment Act provides that a worker who has been declared redundant ought to be paid fifteen (15) days of pay for each total year of service. To figure the severance pay due, courts partition the employee's regular monthly pay by thirty (30) days to get the compensation due for each day then multiply the daily compensation due by fifteen days and lastly by the number of years of service.

Where better terms of severance pay computation have been provided by the contract of service, then the employer must pay that amount.

Should the rates under the Employment Act be applied on gross salary (i.e. basic salary and allowances) or on basic salary?

Kenyan courts have been confronted with this question and have determined that it is the latter. Allowances are therefore not factored in.

Where an employee has been receiving varying amounts as monthly pay during his term of employment, the amount paid as the last monthly salary is the one to be used in calculating severance pay.

Conclusion

Severance pay is not optional; it is an obligation which every employer must fulfill if they declare a redundancy. The rate to apply is fifteen days' pay for every complete year of service unless a higher pay is provided under the contract of employment. The basic salary is the one used to calculate the pay and allowances are not included. Anything short of these may lead to legal action by the employee resulting in additional costs for the employer.

When aggrieved employees file claims at the Employment and Labour Relations Court, they tend to focus primarily on monetary remedies. This also applies to accused employers, at the point of receiving summons. The first thing that comes into mind is how much money has been tabulated at the last page of the claim and the financial exposure brought by the claim.

Well, there are times in which monetary remedies are not sufficient reliefs for an aggrieved employee. This is particularly common when the aggrieved employee held a lucrative position. It could be a management position with good benefits or position of public service, with permanent and pensionable terms, maybe a commissioner in an independent commission, a director in a state owned entity or a director in a non-profit organization. In such cases, an aggrieved employee may include monetary remedies but focus on the question of reinstatement as a remedy for unfair and unlawful dismissal.

Now to answer the question, what is an order of reinstatement?

The Employment and Labour Relations Court made a comprehensive definition in the case of **Aggrey Lukorito Wasike v Kenya Power And Lighting Company Limited [2016] eKLR**. The Court stated that an order of reinstatement means that the employee is restored to the position held, or a position substantially similar to the one held, prior to the removal, or dismissal, or otherwise separation with the employer with full prevailing pay and other benefits.

Additionally, the order of reinstatement is provided for in section 49 (3) (a) of the Employment Act and Section 12 (3) (vii) of the Employment and Labour Relations Court Act.

Before I highlight the judicial considerations that ought to be interrogated before making an order for reinstatement, it is important to note the below facts about reinstatement orders.

1)A reinstatement order is a substantive remedy

What is a substantive remedy? Well, a substantive remedy is one that is issued after the hearing and determination of the main case. This is after both parties have been heard by the court, evidence has been adduced by the witnesses of the parties and the veracity of the witnesses' testimony and evidence has been tested through cross examination. Additionally, a substantive remedy is distinguishable from an interlocutory remedy, which is usually temporary as it is issued after the hearing of an application or motion.

In the case of **Gladys Boss Shollei v Judicial Service commission [2013] eKLR**, the Employment Court pronounced that an order of reinstatement is a substantive remedy and not a temporary relief that can be granted at the interlocutory stage of the suit. The reasoning behind this decision was further explained in the case of Evans Kaiga Inyangala & 2 Others v County Government of Vihiga &2 Others [2014] eKLR, where the court held that it is difficult to order reinstatement at an interlocutory stage as the Court is not seized of all facts pertaining to the termination.

2) A reinstatement order is not automatically issued by Courts

In the case of **Judicial Service Commission v Beatrice Nyambune Mosiria [2020] eKLR** the Court of Appeal at Nairobi stated that the reinstatement of an employee, though provided as a remedy is not automatic but one that should be granted in exceptional circumstances. I shall highlight these circumstances and the repercussions of disregarding them.

3)A reinstatement order to be made within 3 years from the date of dismissal

As lawyers say, the law is very clear on this issue. The Employment and Labour Relations Court Act expressly provides for the the reinstatement of any employee within 3 years from the date of dismissal, subject to such conditions as the Court thinks fit to impose under circumstances contemplated under any written law.

Since employment claims should be filed within 3 years from the date of dismissal, for a reinstatement order to be issued, it is imperative for an aggrieved employee to file his/her suit timely, to take advantage of this order. If for instance, one files the case on the second year after the cause of action, there is a likelihood that the judgment may be delivered after the expiry of the third year thus making the prayer for reinstatement untenable. Additionally, Claimants may take advantage of the Employment and Labour Relations Court (Procedure) Rules 2016 and opt to tender affidavit evidence instead of oral evidence in order to have their Claims adjudicated quickly, without the need of oral testimonies by their witnesses.

This fact also underscores the importance of being time conscious for both the lawyer and the litigant. Lawyers should take charge of the proceedings and object to attempts to delay the proceedings.

4) A reinstatement order is self-executory hence it is not amenable to the conventional stay of execution proceedings.

In a comprehensive ruling on an application for stay of execution pending appeal, the Employment and Labour Relations Court in **Aggrey Lukorito Wasike v Kenya Power And Lighting Company Limited [2016] eKLR** stated that an order of reinstatement takes effect immediately and is self-executory, only subject to such terms as may be imposed in the order itself. Further the Court stated that an order of reinstatement is not a positive order that requires the employer to do anything other than comply as ordered. Therefore, once the court finds that the termination or dismissal or other removal was illegal or unfair or unjustified, the employer is obligated to immediately comply by allowing the employee to resume work and if the employer fails to do so, the employer is nevertheless liable to pay the salary of the employee.

Considering the immediate and self-executory nature of reinstatement orders, the Court held that reinstatement orders are not amenable to stay of execution proceedings pending appeal.It is important to note that once a judgment has been delivered, the aggrieved party usually requests the court for an order of stay execution, in case he/she is proceeding to appeal against the court's decision. In the case of reinstatement orders, stay of execution pending appeal does not apply since a reinstatement order is self-executory and incapable of being stayed.

In the *Aggrey Lukorito* case, the Court found considered the dissenting judgment of Hon. Mwilu J (As she was then) in Co-operative Bank of Kenya Limited-Versus-Banking Insurance & Finance Union (Kenya) [2015]eKLR where the Superior Court highlighted the various factors to be considered before staying the reinstatement of an employee. They are as follows:

a)where the reinstatement has not been effected following the judgment of the superior court, despite any execution process having been instituted and not concluded;
b) whether the employee is a public officer, and the applicant is a public institution;
c) whether the applicant is a large institution with large station coverage where the applicant can be deployed to another location away from where the employee was previously serving;
d) the potential intensity of interaction between the employee reinstated and the officers involved in the termination the basis upon which the reinstatement has been ordered;
e) the applicant's demonstration of the obstacles against the reinstatement; and
f) the employee's willingness to be reinstated.

It is important to note that the above considerations are very distinct from the principles of stay of execution pending appeal.

Circumstances to be considered by the court before making an order to reinstate an employee.

When considering whether or not to reinstate an employee, courts are guided by Section 49(4) of the Employment Act. This position was affirmed by the case of **Kenya Airways Limited vs. Aviation & Allied Workers Union Kenya & 3 Others [2014] eKLR** where the Court of Appeal stated that Courts are mandated to take into consideration the following before making an order of reinstatement: -

a) The wishes of the employee;
b) The circumstances in which the termination took place, including the extent, if any, to which the employee caused or contributed to the termination; and
c) The practicability of recommending reinstatement or re-engagement;
d) The common law principle that there should be no order for specific performance in a contract for service except in very exceptional circumstances;
e) The employee's length of service with the employer;
f) The reasonable expectation of the employee as to the length of time for which his employment with that employer might have continued but for the termination;
g) The opportunities available to the employee for securing comparable or suitable employment with another employer;
h) The value of any severance payable by law;
i) The right to press claims or any unpaid wages, expenses or other claims owing to the employee;
j) Any expenses reasonably incurred by the employee as a consequence of the termination;
k) Any conduct of the employee which to any extent caused or contributed to the termination;
l) Any failure by the employee to reasonably mitigate the losses attributable to the unjustified termination; and
m) Any compensation, including ex gratia payment, in respect of termination of employment paid by the employer and received by the employee.

The above 13 considerations are not only important to the court, but also the parties.

Lastly, Courts are mandated to interrogate the above considerations when making an order for reinstatement, failure to which, the order may be set aside by the Court of Appeal. In the Beatrice Mosiria Case, the Court of Appeal noted that the trial judge did not interrogate the 13 considerations provided for in the Employment Act, when arriving at the decision to reinstate the Claimant. The Court of Appeal partly allowed the appeal by setting aside the reinstatement order that was earlier issued by the Employment and Labour Relations Court.

Conclusion

Claimants must take note of the strict timelines that must be met for the grant of a reinstatement order and the 13 considerations that are provided in the Employment Act. As for employers, they must be vigilant in urging their cases against reinstatement by considering the facts of the case together with the 13 considerations. In addition, employers should take note of the self-executory nature of a reinstatement order and the fact that reinstated employees are entitled to their salaries even if they have not been admitted to their workplace after the order has been issued. Lastly, employers can challenge the reinstatement of an employee, through an appeal, if the reinstatement order was made without considering the 13 judicial considerations provided for in the Employment Act.

PART C
HUMAN RESOURCES IN EMPLOYMENT

ANNE MUMBI

THE HUMAN RESOURCE POLICY TO THE RESCUE

12

We are living in a period where the employment scene is a little complicated due to the Covid-19 pandemic. Many companies have had to terminate the employment of some employees which has led to the employees filing lawsuits especially if the right procedures were not followed during the termination.

Human resource policies are formal guidelines that businesses put in place to hire, train, assess and reward employees. In a business environment, the human resources department deals with all aspects of employee relations. It is tempting to small business owners to focus on the growth of the business and completely neglect writing up a human resource policy. Therefore, every employer regardless of the number of employees they have should consider having a human resource policy from the conception of the business idea or plan. This is because human resource policies are important as they help keep employees on the same page with the employer and streamline the day-to-day operation of the business.

The following are some of the advantages of a company having human resource polices:

1. An introduction to the human resource policy explains the organizational structure of the company, what departments fulfil which expectations and company leadership. Some employers also explain the company philosophy as it is related to customer service, co-workers, leadership and business ethics.

2. Policies pertaining to the recruitment and selection process are the foundation of building any workforce as they inform employees of the company's expectations and procedures. This is particularly useful if an employee wants to refer a job applicant to the company.

3. Human resources policies explain the company's stand on rehires and promotions. This includes the grounds for rehiring a terminated worker and the process for moving up in the company.

4. Human resources managers use a combination of job analysis techniques and market surveys to determine the amount to compensate an employee while remaining competitive within the workforce. The policies address the evaluation and management of employee performance. The policies also state that employees are compensated according to their skills, efforts and scope of responsibilities.

5. Provisions for employee training and development are included in a human resource policy document because it informs employees of the kind of professional development available to them. In addition, policies related to training and development assist in the formulation of employee performance improvement plans. Training and development policies serve as an outline of educational benefits available to current employees.

6. A benefit of a human resource policy is that it informs employees about how to handle problems at work. Whether the issue involves co-workers, management or the work itself. The policy outlines the chain of command in handling problems.

7. The policy outline internal policies and the company's code of ethics. This includes items such as dress code, professionalism, leave days, sick leave, holidays, workplace safety, discrimination, and how to interact with co-workers and customers.

8. Labour laws are vast and complex. Human resources policies breakdown the laws so that employees understand how the laws apply to them. Policies dealing with minimum wage, overtime, record-keeping, employee benefits and leaves clarify what employees are entitled to and how to do their part.

9. Human resource policies state the grounds for which an employee can be terminated. Explaining grounds for termination helps protect the company if from retribution if an employee was fired for violating policies clearly stated in the company manual.

It is paramount for a company to have a human resource policy because without these policies, employees might get confused about the company's culture and expectations, resulting in a chaotic work environment. Two employees may be disciplined significantly differently for doing the same thing, which is unfair and may create a hostile working environment. Managers can make poor termination decisions if they do not consult the policies, resulting in potential lawsuits.

ELSIE MUHONJA

13 COVID-19 AND ITS RAMIFICATIONS ON THE FUTURE OF WORK FOR HUMAN RESOURCES

Messy house, messy hair, Zoom calls and background noise; life as we have come to know it. Isn't it funny that we all thought that quarantine was going to take two weeks and we would all go back to normal? This year has definitely brought its own share of challenges but one thing we must commend the human race for, is the sheer resilience to keep afloat amidst uncertainties. This article is a little digression from the conventional understanding of future of work as regards Artificial Intelligence, automation and robotics. It takes a dive into how businesses and organizations must envision the workforce in days to come and what must be done to attract and retain best talent.

People adapt differently to situations and the same can be said about organizations. Different organizations and sectors have had to change their tact in a myriad of ways despite facing the same pandemic. One of the key things that employers can never overlook is the human resource. The cost of inaction here would be too costly seeing how dynamic the current workforce is as compared to how it was a few years back. The following pointers breakdown a few scenarios on the consequences of the pandemic as employers and employees move to a different way of doing work while at the same time maintaining expected quality and standards.

Need to revolutionize how we see the office space: If you ever told me at the beginning of March this year that I would go for as long as nine months without stepping into the office and still be expected to deliver my tasks, I would most definitely dismiss you at what would be termed as the craziest idea ever. Working virtually has accelerated adaptability as well as increased people's creativity to use available tools to perform optimally. It has also forced, especially small to medium sized company owners to appreciate that it is possible to cut costs on office space with most of them opting to pay for co-shared spaces as opposed to paying full monthly rent while maintain workable shifts for their employees.

When we think of office space, it is paramount to be acutely aware of stipulated working periods too. I recently had a chat with a friend of mine on how she was coping with working virtually and realized that she was experiencing the same challenges I was. She is, for instance, working longer hours than she would if she were working from the office, having a full day packed with meetings with different clients and occasionally sending urgent emails past the official working hours. These are of course well-meaning activities and both employers and employees must agree on what works to avoid a possible burn-out especially when the boundary between home and office is a bit blurred.

Re-jig working hours and affirm flexi-time: Revolutionizing the office space also means being intentional about flexi-time. For a long time, the idea of allowing workers to alter workday start and finish times has been abstract, an issue only mentioned in passing but not formally adopted for most organizations. Certain situations such as one working from home and having to take care of a child who is not going to school but needs to keep up with school work, or another living alone which means that at some point during their day-to-day job they will need to fix a quick meal and get back to work. These are just but some of the examples that point toward the need to redefine work hours and be empathetic about people's needs aside from work. This, however, does not negate the fact that employees still ought to be truthful and disciplined about how much time and effort they put into work and meet the set targets and deadlines.

Re-define productivity to align with the new realities: Presenteeism has often been misconstrued to be high performance in the traditional work settings and with the new reality of working from home, this continues to largely manifest itself. The fact that one is present and responsive to emails is not necessarily an indication that productivity has been achieved. While this gives a false perception of progress being made, realistic measures have to be put in place that measure work against time and have both supervisors and their team mates fully committed and accountable to one another. This will save the parties involved from mistrust, incompetence, broken commitments, and bad decision making while working away from each other.

Delegation and Role sharing: Purpose, potential and perspective when delegating tasks are virtues that all workers, whether senior or junior, must practice to enhance efficiency and smooth-running of processes at the workplace. Before delegating a task, it is important for one to ask themselves, what is my role in this task? Have I communicated what is needed to be done clearly to the receiving party? What else is needed to achieve this? These may be seen as obvious questions, but they help address unforeseen situations and help colleagues work effectively together, especially when working remotely. If the pandemic has taught us anything, it is that we are all balancing a huge cognitive load that demands us to appeal to our humanity when collaborating at the workspace.

In general, how organizations adapt and work today will determine how resilient they stay in the future. COVID-19 has not only forced us to change how we view life and work, but it has most importantly taught us that we canachieve more with much less. You have probably heard your colleagues say 'this meeting should have been an email' every time you find yourselves in several meetings that not only take up time meant for actual work, but also make the whole process mundane. Organizations ought to consider having structured, calendarized meetings for routine work updates as well as for general gatherings. No worker appreciates attending meetings every morning of their week especially if the agenda is constant.

CLIFFTON OUKO

14 HUMAN RESOURCE FOR HEALTH

In 2013, the Medical Practitioners through their union officials signed a Collective Bargaining Agreement which among other allowances, provided for a pay hike of about 300%, review of job groups, promotions, deployments and annual recruitments of over 1200 doctors to reduce the doctor-patient ratio. This agreement has been the subject of continued stalemate between Medical Practitioners and their employers, which has led to several strikes and boycott of work from the Practitioners.

A collective bargaining agreement is provided for by the Constitution as a right. Under Section 2 of the Labor Relations Act it's defined as a written agreement concerning terms and conditions of employment that is made between a trade union and an employer. The Labor Relations Act requires that such an agreement be registered with the court by the employer and beforehand, a negotiation process must have ensued between both the parties and necessary information disclosed. The arising issue in this process is the confusion that has been witnessed with regards who is and should be the employer for Medical Practitioners to be able to substantially deal with their employment related matters and also to be able to engage in a collective bargaining agreement as the employer.

The Decentralization of Human Resource for Health

The Constitution of Kenya, 2010 introduced the concept of devolution of resources and power from the National government to the 47 semi-autonomous county governments. The Fourth Schedule of the constitution devolved health service delivery, focusing on two key elements; Health Resources for Health and Essential Medicines and Medical Supplies Management.

Decentralization of Human Resource for Health is like the devolution process that Kenya undertook when the 2010 Constitution was promulgated. It has been argued that the devolution of health service delivery has been able to promote community participation, accountability and equity in the management of resources. That it has increased county-level decisions space for Human Resources.

However, in 2013, the functions were rapidly transferred by the National government before county-level structures and adequate capacity to undertake these functions were put in place. This led to major disruptions in staff salary payments as key management structures, payment of staff salaries was delayed, and numerous payroll inconsistencies and discrepancies were experienced. The 7 year experience with devolution, however, clearly demonstrates the complexities that are inherent in the implementation process, as outcomes often are unpredictable and rather than leading to a reduction in disparities, they have been widening. Equally, evidence has suggested that decentralization has been negligible in the improvement of quantity, quality or equity of public service and even the management of human resource.

Duplication of roles between the levels of government

Further, there has been a lack of clarity on the specific roles and obligations of both the national and county government in the management of the human resource. The county government has the constitutional mandate to manage the human resource for health and thus health workers are employees of their respective county governments. The national government though has usurped some of these obligations by the virtue of Section 30 of the Health Act which establishes the Kenya Human Resource Advisory Council, which has been mandated to review policy and establish uniform norms and standards for health professionals. This Council comprises a Chairperson appointed by the Cabinet Secretary for Health, the Principal Secretary Ministry of Health and the Council of Governors also nominates a member, among others. It is clear from its composition that this council is more of a national government council.

In the case of **Kenya Medical Practitioners, Pharmacists and Dentists Union V Principal Secretary, Ministry of Health & 3 others [2016] eKLR** the court was faced with a situation where a Collective bargaining agreement was made between the union officials and the Ministry of Health without the input of the County government, which is their employer. The court was of the idea that conflating issues and making it appear that the agreement signed between the union officials and the Ministry was impractical and could not be completed until and unless other stakeholders were involved negated the recognition agreement that was already in force and could violate the right of the employers enshrined in Article 41 of the Constitution. The court, however, stated that, it would not help the claimant to have an empty collective bargaining agreement as the Ministry of Health do not have the legal obligation to implement the contents of the agreement. Thus, it will aid justice, fair labor practices and effective administration of the agreement to include the major stakeholders, the county governments.

This has caused a lot of confusion in the health fraternity with regards the employer-employee relationship as the union officials have 47 semi-autonomous employers, but still, the national government engages as if it's still the employer of health professionals. The constitution limits the role of the national government as an employer for national referral hospitals' employees. Like in the case discussed above, the national government engaged union officials over a collective bargaining agreement then push them over to the County governments to implement, yet they were not substantially engaged in the first instance.

A case for the creation of a centralized Human Resource for Health

These challenges have led union officials to demand for the creation of the Health Service Commission to deal with the human resources for health. This was the epitome of their demand in their 2015 strike for the failure of the employers to perform the requirements of the 2013 agreement and was a proposal that was made to the Building Bridges Initiative Steering Committee. The proposal was to have an institutionalized constitutional commission, called the Health Service Commission to deal with their human resource matters. The Constitution of Kenya, 2010 provides for the Teachers Service Commission, the Parliamentary Service Commission, the Public Service Commission and the National Police Service Commission which are all commissions that deal with the human resource management of the particular employees under them.

Centralization of human resource management is based on the following objects: to protect the sovereignty of the people, secure observance by all state organs of democratic values and principles and promote constitutionalism. The Constitution provides for the right to the highest attainable standards of health, which can only be achieved by health professionals, who have been left in a lot of confusion as to who manages their human resource. To deal with these challenges accordingly, a centralization of the Human resource for Health is very vital as the management of the human resource will be done from a main office, hiring and firing processes, training and orientation, pay and benefits and general motivational strategies to be conducted from a central Human resource office and above all, be able to engage through the collective bargaining agreement with the trade unions as the Teachers Service Commission has been engaging the Teacher's Unions. A Constitutional Health Service Commission will come in handy.

BRIAN OURE ONDERI

THE RISE OF THE GIG ECONOMY: IS IT TIME WE REVIEWED OUR EMPLOYMENT AND LABOUR LAWS? 15

Introduction

Jobs are an important factor in the social and economic well-being of a society. The traditional concept of a job, where there is an employer and employee in a physical space called an office is becoming less prevalent in this big data era. Technology has not only brought global competition but also automation, artificial intelligence and a great digital evolution. It has created a "gig economy" workforce which is reshaping the employment and labour market largely displacing the applicability of traditional employment and labour laws.

The gig economy can be classified as a free labour market where workers mostly using online platforms engage in temporary jobs or short-term work arrangements or doing separate pieces of work each paid separately. This workforce includes freelancers, consultants, independent contractors, temporary contract workers and app-based ride hailing drivers such as uber drivers. The pandemic has acted as a catalyst to the surge of the gig economy following the massive layoffs, retrenchments and terminations making most people seek online work to eke a living.

Pros and cons of the gig economy

The gig economy presents advantages and disadvantages to both the gig worker and the 'employer', be it an individual, business or company.

In this model, the 'employer' enjoys reduced training and onboarding costs unlike in the tradition model whereby the employer has to advertise for vacant positions, receive applications, shortlist the candidates, conduct interviews to select qualified candidates and induct the qualified employees.

As such, the gig economy creates a flood of available workforce and the 'employer' is able to pick a candidate without having to spend on the normal talent acquisition procedure.

The 'employer' also avoids various taxes related to the employer-employee relationship such as retirement benefits and medical insurance. Whereas this benefits the employer, it highly impacts on the income of the gig worker who has to bear all the affiliated taxes.

Gig workers also have the luxury of avoiding the 9-5 routine and can work whenever and wherever they wish without direct control from their 'employer'.

The advantages and disadvantages associated with work in the gig economy can be circled in the famous saying, 'one man's meat is another man's poison.' Where the 'employer' is actually benefiting, the gig worker counts their losses and the opposite is true, a situation compounded by the uncertainty as to the legal status of gig workers vis-à-vis their employer.

1. Legal problems associated with the statutory and regulatory gaps

These legal lacuna gives rise to several legal issues such as:

Misclassification
The gig workers employment status is largely ambiguous and this affects their benefits, safety procedures and liability concerns. Since gig workers cannot be termed as employees under the existing laws, rights guaranteed to employees are violated with no clear protocols for redress. They include:

• Income instability and minimum wages. High competition caused by the continued increase of gig workers makes them lower standards resulting to earning of indecent wages.
• Poor housing and medical care. Whether the pay given to gig workers is inclusive of housing and Medicare expenses ought to be legislated upon to avoid ambiguity and the exploitation of gig workers who have less or no control over the contract terms.
• Formation of trade unions. Gig workers who do not fairly fall in the employee definition cannot form unions leading to poor working conditions for gig workers.

• Difficulty in enforcing of pension and other employment related rights such as sick leave that are pegged on a minimum length of service. In the gig economy working hours are largely unregulated and flexible, enjoyment of time related rights becomes difficult.

Termination and dismissal
In the gig economy, reputation and ratings play a key role in securing one's job continuation and the subsequent access to better pay and jobs. A good example is the taxi hailing service provider, uber, which gives the passenger a chance to rate the driver after the trip. Some of the ratings provided despite being untrue, act as a means for deactivating workers profile or penalising them for non-performance. The digital economy presents a self-regulatory framework where the employer enjoys the power to fire once they no longer need the services of a worker.

Child labour
The invincible work force doing tasks and jobs on laptops all over the world makes it easier to evade national and international laws that prohibit against child labour and hard for enforcement agencies to protect children from being part of this labour force.

2. Solutions

Progressive and pragmatic enforcement of the existing laws
When courts are faced with disputes involving gig workers, they can interpret the existing laws in a progressive manner taking into account the digital changes to the work environment.

Recent cases such as the famous Uber cases have shown how progressive interpretation of the existing laws has helped solve disputes by enlarging the already existing definition of employee to cover gig workers. By fully recognising jobs in the gig economy as work, it will help combat dehumanisation of workers in the gig economy and the risk of creating invincible workers who are not legally protected.

Expansion of employment, employer and employee definition
By expanding the definition of employment, employer and employee to cater for gig workers, the legislature will help reduce the possibility of over regulation and ensure that there is adequate protection for all workers regardless of their type of work.

Creating rights for workers (Tailor-made gig economy rights)
It is undeniable that not all rights in traditional regulations such as fixed salary can be rightfully enforced in the gig economy. In order to successfully regulate the gig economy, there is need to create a new category of worker with specific tailor-made rights.

Having rights tailor-made for gig workers will take care of specific gig economy related issues where ratings and reputations play a major role in the continuation of work such as setting clear guidelines guaranteeing transparency in ratings, and fairness in business decisions relating to termination of gig worker status among others.

3. Conclusion

The gig economy has largely been left to self-regulation where contracts are at the centre of regulating the work environment. There is need to restructure existing laws and regulations or form new ones to address todays continued shift from full time employment to a transient, casualized and precarious gig economy. Having a spot-on legislation to look into the gig economy needs will be a more prudent response to the gaps created by the traditional laws. Gig workers and those wishing to engage the services of a gig worker will need to consult an advocate so as to mitigate the damage caused by such issues and to overcome them.

CONTRIBUTORS

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WEKA WIDE SMILES FOUNDATION

Weka Wide Smiles Foundation was founded, as a non-profit charity organization, in 2016. The founders, most of who met at Kenyatta University School of Law, had a common empathetic nature and came together to create the foundation.

The Foundation has a vision to inspire the broken, nourish the hungry and offer support of life in all its fullness, with a mission to put a smile of hope on every child's face. Aside from their charity activities, the foundation conducts civic education and mentorship to the different places they visit, as well as tree planting activities to improve environment care.

The organization has a total of fifteen (15) registered members, ten (10) of them being directors and the other five (5) being guarantor members. The organization is registered in accordance with the provisions of the Companies Act (2015), as a Company Limited by Guarantee, with its offices located along Makina Road in Kibera, Nairobi.

Weka Wide Smiles Foundation had its first event on 18th March, 2017 at Maji Mazuri Children's Home for Special Needs, with more subsequent visits to various children's homes around Nairobi and its environs; all in its own capacity. The Foundation also organizes Christmas Carols in a convenient hospital ward for children in love, joy, kindness and spirit of Christmas; being one of our major accomplishments.

Weka Wide Smiles Foundation uses their merchandise sales to fund their activities. They also get funding from members, friends and well-wishers of the foundation.

If you need to get in touch with Weka Wide Smiles Foundation to find out more about them or how you can support their projects, please reach out to the team who include:

a.) Chairperson – Kubai Derrick
b.) Vice chairperson – Mukami Victoria Muriithi
c.) Secretary – Kelvin Robert Mwendwa
d.)Treasurer – Kehonji Teresa Mmbayi
e.) Patron – Hon. Jane Kamau

A few of Weka Wide Smiles Foundation's directors and patron, Hon. Jane Kamau, at Sarepta Rescue Centre, Kahawa.

Weka Wide Smiles members and children from Hephzibah Children's Home, Kahawa.

Weka Wide Smiles Foundation members and friends at Kenyatta National Hospital.

Weka Wide Smiles Foundation at Terry's Child Support Centre, Machakos.

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