

HR PRACTITIONER AS A COURT WITNESS AND THE MITIGATION OF LIABILITY RISKS.

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INTRODUCTION

- The Law
- A) Constitution of Kenya
- Article 41 on the right to Fair Labour Practices.
- Article 47 on the right to fair Administrative action.
- Article 43 on the right to Access to Justice for all persons.

- B) The Employment Act, 2007
- Bar against wrongful dismissal.
- No employer shall terminate the employment of an employee unfairly.

- C) The Labour Institutions Act, 2004 establishes the Industrial Court [Employment and Labour Relations Court with exclusive Jurisdiction].
- D) Case Law –Evolving Jurisprudence from the Courts applying the Constitution ,2010 and protecting the rights enshrined therein.

A. Pre-termination Considerations

- To be forewarned is to be forearmed.
- Sound understanding of the Legal provisions relating to wrongful dismissal and unfair termination .
- Enhancing knowledge through training and attending conferences.
- Regular renewals of HR Policies, Manuals, codes, handbooks as well as Employment Contracts.

- Pre-termination legal advice/opinions.
- Proper record keeping and archiving of documents e.g. warnings before termination.
- Case Digest – Evelyne Kagendo vs StatPack Industries Ltd ICN 2081/2011
- - Regulations of Wages (General Order)
- 1st & 2nd warnings to be entered in employees records and 2nd copied to the Union for unionisable employees. 3rd misconduct leads to summary dismissal.
- Warning to be cancelled if 292 working days lapse from 2nd warning and no further misconduct by employee.

B). Process of Termination

- Purpose of disciplining process is to inquire into allegations relating to breach of obligations as between the employer and employee, with a view to terminating the employment contract. [Ismail Hassan Abdullahi vs KPA ICN 40/12 per Radido J.
- Warning letters even where validly issued do not take away the employers duty to give the employee a hearing before decision to terminate is received. *[Anne Atieno Sadieda vs Lavage Laundrette Drycleaners ICN 481/2009*

- Employee to be expressly and unambiguously informed of the contemplated action of imminent termination regardless of previous warnings.
- Employer required to have internal systems and processes of undertaking investigations and verifying the occurrence of misconduct before a decision to terminate is arrived at.

- In *Nicholas Muasya Kyula vs Farmchem Limited* ICN 1992/2001 Justice Ongaya envisage the process to entail following steps:-
 1. A report to the relevant authority that the misconduct has been committed.
 2. Preliminary investigation to gather information on the alleged misconduct.

3. If evidence is obvious and misconduct is gross, the employer can summarily dismiss.
 4. If not, a Show Cause Letter must clearly spell out the intended ground for termination being misconduct, poor performance or physical incapacity.
- Particulars must be clear enough for the employee to be able to effectively defend himself.

- The notice must give the employee reasonable time within which to respond.
5. Upon responding or time allowed lapsing, the employee should be called to a hearing where all the relevant information should be recorded in a fair process.

- The employee should be given a chance to exculpate himself.
- A 3rd party of the employees choice should be permitted to attend.
- A report of the hearing proceedings should be drawn and formally maintained by the employer as evidence of the due process and fairness.

6. The decision must be communicated to the employee.

- An investigation conducted by the employer no matter how thorough cannot replace an employees right to a hearing and to present his case.

- Kenya Engineering Workers Union vs Spring Manufacturers Ltd ICN 1169/2011
- - once an employee refuses to subject himself to the investigating and disciplinary procedure, he forfeits the right to claim he was not properly investigated or heard.

- Kiliopa Omukuba Okutuyi vs Telkom (K) Ltd
ICN 341/2010
- - hearing by written submissions by the Claimant to the employer does not meet the threshold envisaged by the Employment Act, 2007.

- John Kirui Torongel vs NCPB ICN6/2013; while considering a disciplinary case, the employer is not at liberty at the hearing stage to deviate from the allegations of misconduct or poor performance or ill health as may have been alleged in the notice delivered to the employee before the hearing stage. (Only address matters captured in the Notice.)

Post Termination

- You can never stop an employee hell bent to sue from doing so no matter how fair the process leading to termination was. To mitigate liability you should:-
 - Guard against suits for wrongful dismissal by making all due payments at a point of termination including salary arrears, overtime and leave days.

- Ensure a Certificate of service is issued.
- Do not ignore a letter of demand from an ex-employee or his Advocate.
- Timeously seek legal advise as it may yield an expedited out of court negotiation.
- Avail documentary and any other evidence to your advocates to prepare a good defence if suit is filed.

- Preserve the evidence in an orderly fashion by preparing a Witness Statement, List and Bundle of documents.
- A good witness is prepared, knowledgeable, respectful to the Court and Lawyers.