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HUMAN RESOURCE LABOR RELATIONS – EMPLOYEE TERMINATION PROCESS 2020

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(Organizational Leadership - **Ongoing**)





Agenda

01- Legal Framework

02 – Probationary Termination

03- Gross misconduct

04- Poor Performance

05- Redundancy

06- Sexual Harassment

Human resource management functions

- a. Labor management relations
- b. Compensation and benefits
- c. Employment practices and placement
- d. Workplace diversity
- e. Health, safety and security
- f. Human resources information systems
- g. Human resource research
- h. Training and development

It is important that each of the above areas have policy guidelines at the organizational level.

Human Resource Policies

- a. Human resource policies are continuous guidelines which an organization adopt in managing its people.
- b. They serve as a reference point when developing human resources management practices or during decision making regarding an organization's workforce.





Labor Relations – Legal Framework

In Kenya, employment and labor related disputes are handled by the Employment and Labor Relations Court established pursuant to Article 162(2) of the Constitution of Kenya 2010, for the purpose of settling employment and industrial relations.

How do I fire a staff within the law?





General provision of Proof for termination

In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair.

Termination during probationary period

- a. Probationary contract” means a contract of employment, which is of not more than twelve months duration or part thereof, is in writing and expressly states that it is for a probationary period
- b. Termination of probationary contracts
 - (1) A probationary period shall not be more than six months but it may be extended for a further period of not more than six months with the agreement of the employee.
 - (2) No employer shall employ an employee under a probationary contract for more than the aggregate period provided under subsection (2).
 - (3) A party to a contract for a probationary **period may terminate the contract by giving not less than seven days’ notice**, or by payment, by the employer to the employee, of seven days’ wages in lieu of notice.

Proof for termination - Probationary

The probationary part of a contract of employment is the period where an employee is tested and he cannot therefore anticipate the same safeguards to be available for him/or her like for an employee already confirmed to position.

Section 42 of the Employment Act makes provision that permits the dismissal of an employee without ascribing reasons but entitled to seven days' notice.

Case law: Nation Media Group Limited v Omasums Kilonzo (supra)

Termination due to Gross misconduct

Any of the following matters may amount to gross misconduct, may attract summary dismissal:

- (a) Without leave or other lawful cause, an employee absents himself from the place appointed for the performance of his work
- (b) During working hours, by becoming or being intoxicated, an employee renders himself unwilling or incapable to perform his work properly
- (c) An employee willfully neglects to perform any work which it was his duty to perform, or if he carelessly and improperly performs any work which from its nature it was his duty, under his contract
- (d) An employee uses abusive or insulting language, or behaves in a manner insulting, to his employer or to a person placed in authority over him by his employer
- (e) An employee knowingly fails, or refuses, to obey a lawful and proper command which it was within the scope of his duty to obey, issued by his employer or a person placed in authority over him by his employer
- (f) An employee is arrested for a cognizable offence punishable by imprisonment and is not within fourteen days either released on bail or on bond or otherwise lawfully set at liberty
- (g) An employee commits, or on reasonable and sufficient grounds is suspected of having committed, a criminal offence against or to the substantial detriment of his employer or his employer's property.

Employee has the right to file a dispute if they believe that the facts do not justifiably attract summary dismissal action.

Proof for termination – Gross Misconduct

Both the employee and employer under **section 35(3)** and **(4)** have specific rights regarding termination of employment. An employer or an employee has a right to terminate a contract of employment without notice so long as it is done in accordance with the law and procedure. Nothing stops an employer from summarily dismissing an employee, except that **section 44** requires an employer to demonstrate that the employee has by his conduct indicated that he has fundamentally breached his obligations arising under the contract of service by doing or not doing series of things listed in that section and any other related things. **Section 41** provides the procedure for notification and hearing before termination on grounds of misconduct.

Case law: Civil Appeal 159 of 2012- Kenya Law



Termination Considerations

An employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

Termination due to Unsatisfactory/under performance

Poor performance can be deemed as a gap between the employees actual performance and the level of performance required by the employer. In brief ensure existence of:

1. Existence of Job description
2. Existence of performance contract
3. Periodical feedback on employee's performance and areas of improvement
4. Employer must have provided the employee the necessary support / tools of trade
5. An opportunity for Performance improvement program (PIP)

Proof for termination – In detail (Poor performance)

In cases of discipline on grounds of poor performance, all an employer has to prove is that the employee is aware of the applicable standards of performance and efforts are put in place to support the employee with time to allow for improvements.

There is also a need to inform the employee of a specific time frame within which to improve with an express warning that should he/she not achieve the set targets his/her employment would be terminated.

Case law: Cause No: 951 of 2015- Kenya Law



Termination due to desertion

Desertion of duty or unlawful termination;

Desertion implies an intention on the part of an employee not to resume work which amounts to gross misconduct and renders an employee liable to summary dismissal.

Proof for termination – Desertion

It is however not enough for an employer to simply state that an employee has deserted duty. The law is that an employer alleging desertion against an employee must show efforts made towards reaching out to the employee and putting them on notice that termination of employment on this ground is under consideration

Case law: Cause No236 of 2016 -Kenya Law

Employees rights during disciplinary process

- a. Be informed about an investigation if he/she is the subject thereof and that the results may be issued in the disciplinary enquiry.
- b. Access to documents produced in evidence
- c. A fair hearing
- d. Be represented
- e. Call and cross- examine witnesses
- f. Cross- examine witnesses
- g. An interpreter, if necessary
- h. Written reasons for decisions
- i. Plead in mitigation
- j. Appeal in terms of the internal remedies.



Employers rights during disciplinary process

- a. Discipline employees.
- b. Suspend employees.
- c. Appoint a Chairperson and Initiator.
- d. Lead evidence.
- e. Call witnesses.
- f. Cross-examine witnesses.
- g. Argue aggravating circumstances.
- h. Consider and impose an appropriate sanction.
- i. Access to document produced in evidence



Employee Termination under Redundancy

Redundancy means loss of employment, occupation, job or career by involuntary means through no fault of an employee at the initiative of the employer .

Circumstances in which redundancy may include;

- a. When a company is downsizing so as to cut costs
- b. When a company is restructuring
- c. Reduction in staff requirements due to inefficiency gains or deteriorating demand.

Employee Termination under Redundancy

An employer shall not terminate a contract of service on account of redundancy unless the following conditions are complied with;

- a. Where the employee is a member of a trade union, the employer should inform the trades union official representing the area where the employee works of the intended retrenchment and its extent by issuing a **not less than 30 days notice prior** to the intended date of termination .
- b. Where an employee is not a member of a trade union, the employer notifies the employee personally in writing and the labor officer
- c. The selection of employees to be declared redundant is to be done in regard to the seniority in time and to the skill, ability and reliability of each employee of the particular class of employees affected by the redundancy
- d. Where there is in existence a collective agreement between an employer and a trade union setting out terminal benefits payable upon redundancy
- e. The employer has where leave is due to an employee who is declared redundant will pay off the leave in cash
- f. The employer has paid an employee declared redundant not less than one month's notice or one month's wages in lieu of notice
- g. The employer has paid to an employee declared redundant severance pay at the rate of **not less than fifteen days pay for each completed year of service.**

Proof for termination – Redundancy

A redundancy must therefore be justified before an employer can commence recruitment of new officers to replace existing employees who have on-going contracts of employment and hold substantive offices in similar capacity as the advertised position.

A restructuring or abolition of office require serious considerations by the employer and based on the positions held by various officers, all efforts must be shown to have been made to retain or redeploy such officers as to abolish office and then advertise for recruitment of persons with similar skills or abilities without giving a consideration internally, would be to abuse the very essence of a restructuring and purpose of abolition of office

Case law: Cause 403 of 2016 -Kenya Law



Employee Termination under Sexual harassment

The harasser can be the victim's supervisor, a supervisor in another area, a co-worker, or someone who is not an employee of the employer, i.e. client or customer. A victim of sexual harassment does not necessarily have to be the person directly being harassed; the victim could be an employee who is indirectly but negatively affected by the offensive conduct.

What constitutes Sexual harassment

What constitutes of sexual harassment can vary depending on the situation and people involved. It might include;

- a. Unwelcome sexual advances or requests for sexual favors.
- b. Direct or indirect threats or bribes for sexual activity
- c. Sexual hints and comments
- d. Sexually suggestive jokes
- e. Unwelcome touching or brushing against a person
- f. Displays of explicit material
- g. Attempted or completed sexual assault

Policy statements for Sexual harassment

An employer who employs twenty or more employees shall after consulting with the employees or their representatives issue a policy statement on sexual harassment containing a statement—

- a. That every employee is entitled to employment that is free of sexual harassment
- b. That the employer shall take steps to ensure that no employee is subjected to sexual harassment
- c. That the employer shall take such disciplinary measures as the employer deems appropriate against any person under the employer's direction, who subjects any employee to sexual harassment;
- d. Explaining how complaints of sexual harassment may be brought to the attention of the employer
- e. That the employer will not disclose the name of a complainant or the circumstances related to the complaint to any person except where disclosure is necessary for the purpose of investigating the complaint or taking disciplinary measures in relation thereto.

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