Newsletter

ELA MEA REGION

EMPLOYMENT LAW ALLIANCE®
Helping Employers Worldwide®

Preface

The Employment Law Alliance (ELA) is proud to present its first newsletter from the ELA MEA (Middle East and Africa) Region. We are very proud of this significant development which signals a continued entrenchment of our unique efforts at strengthening cross-border and multi-jurisdictional collaboration and conversations and furthering the ELA network worldwide. This newsletter is intended to be of interest to both practitioners and clients.

In this issue we explore the following employment areas:

The employer-employee relationship: including circumstances where this relationship will be stretched to include other parties including the employer's/ employee's organisation or union as well as the country-specific rules surrounding work permits. This is specifically explored by Lusanda Raphulu, Partner, Bowmans, South Africa and Ben Brown, Senior Associate, Clyde & Co., UAE.

Pre- and post-contractual obligations: including the type of contractual agreements entered into depending on the type of worker being employed, the distinction between a probationary period and a probationary contract as well as end-of service benefits. This is specifically explored by Lusanda Raphulu, Partner, Bowmans, South Africa and Ernest Sembatya, Partner, MMAKS Advocates, ALN Uganda.

The requirements surrounding an employer's duty in relation to sexual harassment rumours from an alleged offender's perspective: including the existence of a duty to investigate a rumour where no formal complaint had been filed. This is exclusively explored by Pnina Broder, Partner, Naschitz Brandes Amir, Israel.

The tension wrought by judicial hierarchy and contradictory judicial decisions: including the extension of the right of appeal from a limited to an unlimited one through judicial discretion. This is exclusively explored by Mary Ekemezie and Akoh Ocheni, Senior Associates, Udo-Udoma & Belo-Osagie.

Termination circumstances and the attitudes adopted by employment tribunals: including circumstances of lawful termination, the applicability of electronic means of communication to serve notice of termination and the options availed to companies/employers facing financial difficulties. This is explored predominantly by Lusanda Raphulu, Partner, Bowmans, South Africa, Ben Brown, Senior Associate, Clyde & Co., UAE, Mesfin Tafesse, Principal Attorney, Mesfin Tafesse & Associates, ALN Ethiopia, and Sonal Sejpal, Director, Anjarwalla & Khanna, ALN Kenya. Sonal is the Chair of the MEA region of the ELA.

A breakdown of the differing laws and regulations governing employment law in the eight countries: This is explored by all the contributors to this newsletter.

Employment Law is increasingly pervasive in the business world and as such, in this issue, we cover a wide array of topical issues affecting our continent. We would like to thank our colleagues in Clyde & Co., MMAKS Advocates, Bowmans, Udo Udoma & Belo-Osagie, Mesfin Tafesse & Associates, Naschitz Brandes Amir and Anjarwalla & Khanna, for their contributions and hope that you enjoy this issue.

For feedback and any questions, please either contact the authors directly, or contact: Sonal Sejpal (ss@africalegalnetwork.com) and/or Njeri Wagacha (nww@africalegalnetwork.com) who will direct your queries.

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Employment Arrangements In the Islamic Republic of Iran

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Following the lifting of certain sanctions against the Islamic Republic of Iran, global companies in a variety of sectors are looking to identify opportunities for foreign direct investment into an exciting but challenging market. One of the key considerations for any company looking to do business in Iran is how to appropriately resource their operations on the ground. In this article we highlight some of the key issues to consider when recruiting (or assigning) employees to work in Iran.

Legislative Framework

Employment relationships in the public and private sectors in Iran are governed by the Labour Code of 20 November 1990 which has been supplemented over the years by by-laws and various regulations.

The Labour Code does not apply to employees working in Iran's free trade zones, which are governed by the Regulations on Employment of Workforce, Insurance and Social Security 1994. For the purposes of this article we have focused on an employer's obligations under the Labour Code.

Immigration

Non-Iranians cannot lawfully work in Iran unless they obtain a work permit and work visa, save for the following exceptions:

a. individuals travelling to Iran under diplomatic relations;

b. approved journalists working for foreign news agencies; and
c. persons working for the United Nations or organisations associated with the United Nations.

In order to obtain a work permit, the expatriate's proposed Iranian employer will be required to show that:

a. there is a lack of relevant expertise for the particular role among Iranian nationals;
b. the expatriate is suitably qualified to fulfil the role; and
c. the expatriate will use their expertise to train an Iranian national to eventually assume their role.

These conditions are applied strictly, reflecting the Iranian government's desire to reduce unemployment rates among Iranian nationals.

If an employer in Iran employs an expatriate without obtaining the requisite approvals, fines and/or imprisonment of 91 to 180 days can be imposed on a representative of the employer and/or the expatriate.

Employment Contracts

Employment contracts may be for a fixed term or unlimited (i.e. permanent). The Labour Code requires copies of written employment contracts to be retained by the employer and the employee and given to the Ministry of Cooperatives, Labour and Social Welfare (the Ministry of Labour) and the relevant Islamic Labour Council (or the employee's representative).

Employment contracts are required to be written in Farsi (or both Farsi and English) and must contain the following information:

- Name of employer and employee;
- Date of the employment contract;
- Job title;
- Duties;
- Remuneration;
- Working hours and annual leave;
- Place of work;
- Duration of the contract (if fixed);
- Other matters required by custom and practice in relation to the specific job and/or area of employment; and
- Termination provisions (permanent contracts only).

Specific terms of employment

- **Probationary period** – probationary periods must not exceed 3 months. Either party may terminate employment without notice during the probationary period. If the employer terminates the employee's employment during the probationary period, the employee is entitled to receive their remuneration for the whole period of the probationary period.

- **Minimum wage** - the minimum daily wage in Iran is set by the Supreme Labour Council and was recently increased to approximately 309,977 Rials (approximately USD 9.56). Employees are also entitled to an additional minimum monthly household allowance and, provided they have a year's service, a mandatory end of year payment.

- **Working hours** - employees in Tehran typically work from Saturday to Wednesday, with Thursday and Friday off for the weekend. In more rural areas of Iran, it is common for employees to work from Saturday to Wednesday (8 hours per day) and a half day on Thursday (4 hours). Total normal working hours must not exceed 44 hours in a week.

- **Overtime** - employees are entitled to overtime pay of up to 140% of their hourly wage provided that any overtime must not exceed 4 hours per day.

- **Annual leave** – employees are entitled to a minimum of 1 calendar month's paid annual leave.

- **Maternity leave** – female employees working in the private sector in Iran are entitled to 180 calendar days' paid maternity leave.

- **Haj** – employees are entitled to take 1 month's unpaid leave to perform the Haj pilgrimage once during the course of their employment.

Social Security and Income Tax

Iranian nationals, expatriates and their employers are required to make contributions to the Iran Social Security Organisation (**SSO**) which operates a state pension scheme and provides unemployment, sickness, maternity and disability benefits. Currently, private sector employers must contribute 23% of an employee's salary to the SSO, with employees contributing a further 7% of their salary. Some expatriates may be exempt from these social security obligations if their Governments has entered into bilateral or multilateral treaties with the Government of Iran.

Employers in Iran are also required to deduct income tax at source for all employees (subject to certain limited exceptions) at the following rates:

Annual Salary (Rials)	Tax rate
Less than 240 million Rials (approximately USD 7,500)	Exempt
Between 240 million Rials and 1.2 billion Rials (approximately USD 37,000)	10% of the difference between this amount and the exemption threshold
More than 1.2 billion Rials	20% of the amount earned in excess of 1.2 billion Rials

Termination of Employment

The Labour Code permits termination of employment in the following circumstances:

- upon the employee's death, total disability or retirement;
- upon expiry of the employee's fixed term contract;
- where the employment contract relates to a specific project and the project comes to an end;
- upon the employee's resignation;
- where the employer restructures its business to remedy a decline in production due to economic, social and political conditions in accordance with Article 21(h) of the Labour Code (in the case of permanent contracts only); and in accordance with the termination provisions in the employment contract (in the case of permanent contracts only).
- in accordance with the termination provisions in the employment contract (in the case of permanent contracts only).

Notwithstanding the circumstances listed above, employment tribunals in Iran are particularly employee-friendly and we recommend that employers seek legal advice before proceeding with dismissing an employee.

End of Service Benefit

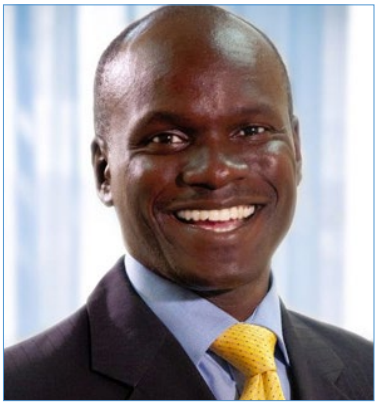
On the termination of their employment (for any reason whatsoever), employees are entitled to receive an end of service benefit calculated according to a statutory formula based on the employee's salary and length of service.

Dual Employment Arrangements

Many international companies who send expatriates to work in Iran will do so under a dual employment arrangement. In other words, during the expatriate's assignment in Iran they will continue to be employed under an employment contract in the company's host country.

Companies should be aware of the implications of dual employment arrangements and should ensure that such arrangements are documented carefully to reduce the risk of an employee double-recovering contractual and statutory entitlements in multiple jurisdictions.

Maudah Atuzarirwe vs Uganda Registration Services Bureau and 3 Others (Miscellaneous Cause No. 249 of 2013)



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The High Court passed a ground breaking judgement on the meaning of probationary contracts and the distinction between a probationary contract and a probation period.

Brief Facts

The Applicant was employed by the Uganda Registration Services Bureau ("**URSB**") as the Director of Business Registration and Liquidation for a period of 3 years effective from the 2nd July 2012 subject to a probation period of 6 months extendable for up to 3 more months where the Applicant has not successfully completed the designated probationary period.

By an internal memo dated 26th February 2013 from the head of URSB's Internal Audit Department, the Applicant was notified of her involvement in acts of financial impropriety.

On 5th March 2013, the Applicant wrote to the 4th Respondent contesting the findings of the audit report and requesting for a forensic inquiry into the financial impropriety. Later on the same day, the Applicant was notified of an extension of her probation period for 3 months effective from the 3rd of January 2013 and the termination of her employment with URSB.

The Applicant filed an application for Judicial Review seeking an Order of Certiorari quashing the decision of the 1st, 2nd, 3rd and 4th Respondents terminating her contract of service. She contended that what was terminated was her full contract entered into on 28th

June 2012, and effective 2nd July 2012 for a period of 3 years.

The Applicant also stated that she successfully completed her maximum probation period of 6 months on 2nd January 2013, and her performance was assessed at 85%.

Communication to the Applicant of an extension of her probation was done on 5th March 2013 in the same letter communicating her termination. The URSB Human Resource Manual (**HRM**) provided that an employee who had satisfactorily completed her probation would be confirmed as soon as possible and such confirmation had to be communicated in writing. It was the Applicant's submission that a probationary period could not be extended and communicated to an employee retrospectively, without the employee agreeing or consenting to the extension.

The Applicant also argued that she was terminated without being heard. The HRM required that an employee who is suspected of misconduct or having committed an offence has a right to be heard. The Applicant questioned the contents of the internal audit report relied on by the Respondents to terminate her and requested that the signatures be referred to a handwriting expert which wasn't done.

The Court considered the evidence laid before it and found that the termination of the Applicant had been unlawful for the reasons we discuss below.

Termination of Contract

The Court referred to section 2 of the Employment Act, No. 6 of 2006 (the ''Act'') which defines a probationary contract as a written contract of employment valid for a maximum period of 6 months duration, which expressly states that it is for a probationary period. The Court laid down the following as requirements for a probationary contract:

a. exclusively for probation; and
b. strictly for a period of 6 months renewable up to not more than another six months.

The Judge found that the Applicant's employment contract was for a period of 3 years which clearly put it outside the precincts of a probationary contract envisaged in the Act, even if it provided for a probationary period.

The Court held that what was terminated was the Applicant's full contract and not her probationary contract and that the termination by the Respondents of the Applicant's contract based on section 67 of the Act was wrong.

A distinction was made between an employee who is subject to a probationary contract and an employee whose contract has a probationary period. The Judge was of the view that drafters of the Act must have seen a need to have a definition of a probationary contract. The Applicant's contract was for a period of 3 years, not exclusively for probation, and therefore, it was a full employment contract with a probationary period of 6 months.

It should also be remembered that under the Act, an employee on probation cannot sue on grounds of unfair termination. The judge therefore stated that since what was terminated was the Applicant's full contract, she was entitled to sue for unfair termination.

Fair Hearing

The Court re-affirmed the position that before an employer reaches a decision to dismiss an employee summarily, the employer must conduct a hearing and explain to an employee the reason(s) for which the employer is considering dismissal in a language the employee reasonably understands. The employee is entitled to have a person of his or her choice present during this hearing.

However, the right to be heard does not apply to an employee on a probationary contract. The Court found that what was terminated was the Applicant's full contract and therefore she was entitled to a hearing.

The High Court also held that merely asking the Applicant a few questions during the audit which she responded to did not constitute the right to be heard under the Act. The Court observed that whatever the employment contract and HRM provide on termination, the provisions of the Constitution of the Republic of Uganda and the Act are paramount. The law and rules of natural justice require that a reasonable opportunity

to be heard must be afforded in clear terms. The Respondent also breached its own procedures when it denied the Applicant a right to a fair hearing.

The HRM of URSB and the employment contract laid down procedures to be followed in all disciplinary matters. These procedures were not followed when dismissing the Applicant. The 1st Respondent breached its own procedures when it denied the Applicant a right to a fair hearing hence the decision to dismiss her was not only irregular but also improper and illegal.

Remedies

The Applicant was awarded a sum of Ug. Shs. 100,000,000/= as both general and aggravated damages. In awarding the aggravated damages, the Court considered the Applicant's position as a Director who was portrayed as a fraudster, a criminal and a person unfit to serve the public which caused her humiliation and regret.

Criticism

This Application was brought by Judicial Review for prerogative orders. Prerogative orders can only issue where there is no alternative remedy. The Applicant in the instant matter could have sued by ordinary suit for unlawful dismissal/termination. This matter did not fall under the ambit of Judicial Review.

The confusion as to whether section 67 of the Act applies to contracts with probationary periods is brought about by the use of the words "probationary Contract" and "probationary period" interchangeably in section 67 of the Act. Our understanding is that the existence of a probation clause in an employment contract is sufficient for purposes of section 67 of the Act to apply. Furthermore, the probation clause is an agreement in itself.

For completeness, section 67 of the Employment Act provides that;

1. Section 66 does not apply where a dismissal brings to an end a probationary contract.
2. The maximum length of a probationary period is six months, but it may be extended for a further period of not more than six months with agreement of the employee.
3. An employer shall not employ an employee under a probationary contract on more than one occasion.
4. A contract for a probationary period may be terminated by either party by giving not less than fourteen days' notice of termination, or by payment, by the employer to the employee of seven days wages in lieu of notice."

It was improper for the Court to make an omnibus award for general and aggravated damages instead of awarding separate sums for each claim of damages. This principle was re-echoed in the Supreme Court case of **Omunyokol Akol vs Attorney General S.C.C.A No. 5 of 2012**. The Judge in the instant case awarded a sum of Ug. Shs. 100,000,000/= as both general and aggravated damages which, it is submitted here, is an erroneous approach.

The Top 10 Employment Law Considerations for Doing Business In South Africa

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This article sets out the top 10 employment law considerations for doing business in South Africa:

1. **Engaging employees**– The way in which workers should be engaged in South Africa will depend on the needs of the company, the limitations of South African legislation, and the ensuing legal consequences. People can be employed on fixed term contracts or permanent contracts. Workers can also be engaged through third party employment agencies/temporary employment service providers. If the person is to do work for other organizations and not restricted in terms of how and when they do the required work, they can be engaged as an independent contractor/consultant, in which case they are not an employee. Employers are required to comply with the Employment Equity Act which is aimed at promoting equal employment opportunities by requiring implementation of affirmative action measure(s).

2. **An employment contract may not be required** – Whilst there is no legal obligation to have a contract of employment, the Basic Conditions of Employment Act (**BCEA**) requires that certain information be given to employees in writing. Importantly, a foreign company will be regarded as conducting a business within South Africa and be required to register as an external company in terms of the Companies Act if, *inter alia*, it is a party to one or more employment contracts within

South Africa. Even if the relationship is termed as one of an independent contractor/consultant, the determining factor is the factual nature of the relationship.

3. **Comply with the Immigration Act** - There are four main applicable work permits: General work permits, issued to foreign nationals whose work position falls outside that of the quota work permit; quota work permits, applicable to foreign nationals who have skills that fall within those for which there is a shortage in South Africa; exceptional/critical skills work permits, issued to foreigners who possess exceptional qualifications and/or skills; and intra-company work permits, issued to a foreign national who is transferred from a foreign company to its South African member.

4. **Deduct and Contribute** - Employers are required to deduct income tax from employee remuneration and to pay that amount over to the tax authorities within 7 days after the end of the month during which the amount was deducted or withheld. Employers are also required to make contributions to the unemployment insurance fund, which provides for the payment from the fund of unemployment benefits to certain employees, and for the payment of illness, maternity, adoption and dependants benefits. Employers are also required to contribute to the Compensation for Occupational Injuries and Diseases Act. Pursuant to the Skills Development Act employers are required to pay 1% of its total remuneration costs as a levy towards skills development and training of employees to ensure uniform standards of training amongst employees.

5. **Employee benefits are optional** – It is not mandatory under South African law for an employer to provide benefits to its employees. The obligation to provide medical insurance or any other risk benefit such as ill-health, disability, severe illnesses and retirement benefits, will stem from the employment contract. The employment contract will stipulate whether it is a condition of service that the employee be a member of a medical aid scheme and/or a retirement fund and whether there is any employer contribution. It is however typical that employers in medium to larger companies make it a condition of employment that an employee be a member of a medical aid scheme and a retirement fund and that the employer contributes towards this.

6. **Collective bargaining** –The right for collective bargaining is derived mainly from the South African constitution which sought to give employees the power to bargain with their employers who generally will have the economic power against a single employee. Every employee has a right to join a union of their choice but a union has to acquire organisational rights from the employer, which is determined by the representation of its members employed by that employer.

7. **Selling the company's business** – the transfer of employees where there is a sale or transfer of a business or part of a business as a going concern is permissible. Transferring employees must be employed by the new employer on terms and conditions that are on the whole no less favourable than those that they enjoyed with the old employer. The terms of the apportionment of emoluments agreed between old and new employer must be shared with the transferring employees.

8. **Restraints of trade** –Restraints of trade is only be applicable to key employees where the employee has been privy to proprietary interests that justify protection. The main interests that South African courts have been willing to accept as justifying protection by restraint are customer connections, confidential information and that the restraint is not contrary to public policy. Payment of consideration for a restraint of trade clause is also acceptable.

9. **Terminating employment** - In South Africa, the acceptable grounds for terminating employment are misconduct, incapacity on the basis of ill health, incapacity on the basis of poor work performance and the operational requirements of the employer. Each of the grounds have their own processes that must be followed. Irrespective of the ground, there must be substantive fairness (fair reason), and procedural fairness (fair procedure). In terms of the BCEA, any party to an employment contract must give the other party termination notice of:

1 week, if the employee has been employed for 6 months or less; 2 weeks, if the employee has been employed for more than 6 months but not more than one year; or 4 weeks, if the employee has been employed for more than 6 months. The contract of employment can contain a longer notice period. The employer can elect to pay the employee notice pay instead of the employee working the notice period.

10. **Employee recourse** - An employee who believes that they have been unfairly dismissed has 30 days from the date of dismissal to refer an unfair dismissal dispute. The primary remedy for an unfair dismissal is reinstatement. In cases where the ground for dismissal is a discriminatory ground, the compensation maximum goes up to 24 months' remuneration.

Unlimited Right Of Appeal From Decisions Of The National Industrial Court Of Nigeria

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On the 30th of June 2017, the Nigerian Supreme Court handed down its judgment in the case of Skye Bank Plc vs. Victor Anaemem Iwu and held that parties could appeal any decision of the National Industrial Court ("NIC"). Although the relevant statutory provisions seem to support the limited right of appeal against the decisions of the NIC, the Supreme Court based its decision on what it described as an applicant's "right to resort to a higher court to review the decision of a lower court with a view to determining whether, on the facts placed before it, and applying the relevant and applicable law, the lower court came to a right or wrong decision."

This is an interesting and a ground-breaking decision because prior to this decision, the position of the law in this regard was somewhat unsettled. This was because the prevailing view, based on a number of decisions of

the Court of Appeal, (Nigeria's second highest court) maintained that there was only a limited right of appeal from decisions of the NIC, there was also a conflicting decision of another division of the same Court of Appeal, stating that appeal could lie against a decision of the NIC with the leave of the Court in respect of other matters.

For employers in particular and practitioners in general, the fact that there was no general right of appeal against decisions of the NIC was a matter of serious concern especially because the NIC, through its judgments, was changing the landscape of Nigerian labour, employment and industrial relations law. For instance, it used to be the case that an employer could hire and fire at will, without a risk of significant damages award beyond the amount of any unpaid entitlements of the employee. Additionally, and based on the common law principles, it was thought to be a settled principle that the courts would not foist a willing employee on an unwilling employer or order the re-instatement of employees in a purely master-servant arrangement or award damages for constructive dismissal or wrongful termination of employment. Similarly, it was unheard of, and it was unlikely, that a party who enjoyed the services of employees who were seconded to such party by a labour contractor would be held to be the employer. However, the NIC, relying on its jurisdiction to apply international best practices in labour or industrial relations, introduced legal principles that changed these long settled rules.

Employers were, therefore, rightfully concerned that they could not appeal these decisions. With the right of appeal now expanded, it will be interesting to see whether the Court of Appeal will uphold the NIC's novel decisions in this respect or if it will revert to the common law principles.

Ethiopian Labor Law and Termination of Employment Contract Using Electronic Means of Communication

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Formation of Employment Contracts

Pursuant to the Ethiopian Labour Proclamation No. 377/2003 (**the "Proclamation"**), a contract of employment is entered into "when a person agrees directly or indirectly to perform work for and under the authority of an employer for a definite or indefinite period or in return for a wage". The law sets forth 3 requirements for the formation of a contract of employment: first, the consent of the contracting parties to the conditions of the contract; second, the specification of the object of the contract setting out what work the employee will be required to undertake; and third, the employer's obligation to regulate the activities of the employee in delivering his/her duties and responsibilities. The period of employment and the amount of the salary are additional elements that the Proclamation requires contracts of employment to contain.

Termination of Employment Contracts

Employment contracts may be terminated by either of the parties at any time and for various reasons. Depending on who initiates the termination, the Proclamation outlines certain conditions to be met by the contracting parties. An employee wanting to terminate an employment contract is obliged to provide the employer a minimum of 30 days' prior notice. An employer who fails to comply with this

notice requirement, must pay an equivalent amount of compensation i.e. up to 30 days' salary.

On the other hand, the period of notice given by the employer depends on the employee's years of service and is calculated at a rate of 1 months' notice for every year of service. For example, an employee who has completed his/her probation period and has served a period of service not exceeding 2 years is entitled to 2 months' notice on termination. An employee whose right of proper notice is breached has the right to claim payment of their salary corresponding to the period of notice due to him/her.

Legal Requirements in Terminating Employment Contracts

While methods of terminating an employment contract differ from jurisdiction to jurisdiction, the Proclamation makes written notice mandatory for the party considering terminating the contract. The Proclamation states that "Notice of termination by the employer or his representative shall be handed to the worker in person. Where it is not possible to find the worker or he refuses to receive the notice, it shall be affixed on the notice board in the work place of the worker for 10 consecutive days".

In the case of the employer serving the notice, the employer is required to hand the notice to the employee, its representative or to its office. Though terminating a contract of employment must be made in written form as per the Proclamation, the latter does not define the term 'written form'. In particular, it is not clear if it is inclusive of electronic communication.

The question as to whether an email purporting to terminate a contract constitutes sufficient written notice, has prompted various judgments from the Federal First Instance Court (the court of first instance for employment matters) and the High Court (the appeal court with regard to employment matters) but seems to have been finally resolved in the case of **Mr. Leule Solomon Vs Ethiopian Airlines (File No.127079, Megabit 26/2009 (April 4/2017 G.C)**. In this case, the Ethiopian Federal Supreme Court affirmed that electronic methods of communication are sufficient to provide the notice required under the Proclamation. The Court justified its position by arguing that the specified article of the Proclamation does not expressly exclude these mechanisms of electronic communication and that in this case there was neither a specific work rule nor a clause in the parties' collective agreement or contract of employment stipulating the contrary.

This decision is in line with global standards but also reflects changes currently being proposed in the draft updated Commercial Code of Ethiopia (the previous code was enacted in 1960), which recognizes electronic communications and allows companies to call a shareholders meeting via email and mandates companies to develop their own website.

Employer's Duty to Investigate Rumours of Sexual Harassment Applies Also to Employees Whose Good Name May Be Injured

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Recently a question came before the labour court on the interpretation of Section 6 (i) of the Prevention of Sexual Harassment (Employer's Obligations) Regulations, 5758-1998 of Israel, which provides as follows:

'If an incident of sexual harassment or harassment within the employment relationship is known to the employer, and no complaint is filed or the complainant withdrew the complaint, the incident will be handed over to the Person Responsible (i.e. – the person responsible for the prevention of sexual harassment, as prescribed by the law) to be inquired into; where the said incident is handed over to be inquired into by the Person Responsible or the said incident becomes known to the Person Responsible, the Person Responsible shall conduct, insofar as it is possible, an inquiry into the incident according to this Regulation, *mutatis mutandis*, and if the complainant withdrew the complaint, the reason for the withdrawal of the complaint shall also be checked.'

The question was whether this Regulation should be interpreted so as to impose an obligation on the employer to conduct an inquiry into rumors of sexual harassment, which had been circulating about one of its employees.

Unlike the majority of claims that come before the labour courts with respect to the breach of the employer's duties under the Prevention of Sexual Harassment Law and Regulations, in this instance the claim was filed by an employee in respect of whom

allegations had been raised that he was the offender, rather than by an employee who claimed to have been harassed.

The plaintiff was employed as an inspector of bus services for about 1.5 years until he was dismissed over disputes with his manager and issues concerning his conduct towards employees and customers. After he was fired, he learned that a co-worker had spread rumors about him concerning sexual harassment of 2 female employees at the workplace. In light of this, the former employee (plaintiff) sued the company for monetary compensation.

The plaintiff claimed that the fact that his manager did not disclose the rumors of sexual harassment to the Person Responsible and an inquiry was not conducted constituted a breach of the enhanced duty of trust applicable in the employer-employee relationship. The plaintiff claimed that this was the reason that he had not been successful in obtaining new employment.

The labour court decided that in any case where the employer is made aware of an alleged incident of sexual harassment it must disclose it to the Person Responsible for verification. The judge added that the manager is not meant to, and should not, exercise his discretion in such an incident to assess whether this information is founded or not. It was also decided that a manager who hears rumors that one of his employees sexually harassed an employee, must report this immediately to the Person Responsible and this is the case even if no complaint was filed with him or with anyone else by the party that was allegedly harassed.

The court mentioned in its judgment that the obligations imposed on every manager to bring to the knowledge of the Person Responsible all information coming to his attention – whether by complaint or by information which is not at the level of a complaint – are aimed to protect not only women or men who are suspected of having been victims of sexual harassment, but also men or women whose good name may be injured as a result of any rumor alleging sexual harassment. Accordingly, if the employer had breached this obligation towards its employees – whether female or male – then it is reasonable to oblige the employer to compensate the employee who has been so injured.

With respect to the case itself, the court found that indeed a rumor had been circulating amongst the company employees alleging that the plaintiff was a sexual harasser. This rumor had reached the plaintiff's manager but no investigation had been carried out into the matter even though the rumor had been known to the management for approximately 1 year. The court rejected the employer's legal argument that since no official complaint had been filed it was under no duty to inquire into rumors. The court awarded the plaintiff compensation of NIS 25,000 (approximately USD 7,145).

Employers: Managing Through Economic Hardship

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Economic hardships affect most businesses at some point of their lifecycle and brings about increased pressure to reduce operating costs in order to maintain profits and mitigate losses. For employees, this often results in fears over job security as employers look for casualties in the cost-cutting process.

In Kenya, employment laws including the Employment Act (Chapter 226, Laws of Kenya) (the "**Employment Act**") and case law have ensured that employee rights are well protected. In times of economic hardship, it is advisable for employers to navigate the employment law landscape carefully to avoid repercussions that can lead to the financial crippling of their companies.

Redundancy Is Not An Option

Redundancy is a method that is often used by employers looking to downsize their companies, but it is not a "get-out-of-jail-free" card. When an employer initiates the process of redundancy, the employer is making the position and not the employee redundant. It is not a short-term measure but a long term one signifying that the employer has either amalgamated two roles into one or is no longer in need of that particular position. It is not to be used where the employer considers that in 2-3 months, when the economy improves, they will re-hire.

Genuine redundancy is a process that must be followed strictly and can take at least 3 months to complete. In addition, in Kenya, a notice must be sent to the Labour Officer, who is then able to monitor the process and if

need be evaluate the way in which it has been carried out.

One of the most significant decisions confirming the need to ensure strict observance of the provisions of section 40 of the Employment Act is **Industrial Cause No. 1661 of 2013 Aviation Allied Workers Union Kenya & 3 others v Kenya Airways Limited** which concerned the decision reached by Kenya Airways (the "**Airline**") to declare more than 400 employees redundant. The High Court overturned the Airline's decision and held that the procedure they had adopted was flawed. It ordered reinstatement or failing that an alternative payment for pecuniary loss and maximum compensation of 12 months for loss of employment to each employee. The Airline successfully appealed this decision. In overturning the High Court decision for reinstatement, the Court of Appeal held that even though the procedure adopted was flawed they confirmed the award of damages to the affected employees and revoked the High Court's order for reinstatement.

One example of a successfully operated process of redundancy was explained in the case of **Thomas De La Rue (K) Ltd v David Opondo Omutelema**[1]. In this case, the High Court quashed the decision of the appellant, Thomas De La Rue (K) Ltd, declaring the respondent redundant. It found that the appellant did not follow the procedure prescribed in the Employment Act and the Collective Bargaining Agreement and therefore the termination of the respondent's employment was an unfair termination. However, the Court of Appeal in reversing the decision of the High Court stated that the provisions of section 40 of the Employment Act were adhered to and the redundancy was in accordance with the law.

Act Alone At Your Peril

Economic hardships can often lead employers to make ill-informed decisions. The temptation to make unilateral decisions should be resisted at all costs. In the case of **Oshwal Academy (Nairobi) & another v Indu Vishwanath [2015] eKLR**, the Court of Appeal upheld the decision of the trial court that found a unilateral substantial reduction of salaries by the employer to be a fundamental breach of an employee's employment contract. The trial court held that the appellants had terminated the employment of the respondent under a disguised redundancy and the respondent had a legitimate expectation of continuity of the contract construed from the conduct of the parties in the course of their employment relationship. The damages awarded to the employee for unfair termination of his employment contract were upheld. This decision supports the contention that before an employer can vary the terms of an employment contract, the consent of the employee must be obtained.

Employees May Leave Voluntarily

Financial difficulties can bring perspective to employers already thinking of the future of their businesses and for employees', of their future endeavours. Voluntary Early Retirement (**VER**) gives employees the opportunity to retire from active employment earlier than would be standard, collect their retirement benefits sooner and thereby avoid undergoing redundancy. In the recent past, Kenya has seen various examples of this. In October 2016, Family Bank announced[2] a voluntary early retirement program for its staff that were on permanent and pensionable terms. In early 2017, Toyota Kenya announced[3] plans to lay off more than 100 of its nearly 600 employees through an early retirement scheme. In June 2017, Barclays Bank Kenya announced a voluntary retirement programme targeting 130 employees which ran for a period of one month.

The Employment Act does not govern the manner in which VER should be carried out. However, Kenyan case law provides that VER should be carried out in a manner that is consistent with fair labour practice. In the case of **Harrison Ndungu Mwai & 500 others v Attorney General [2014] eKLR**, employees opted for VER without knowing what the payment package would be. It consequently emerged that the all-inclusive figure of Kshs. 240,000 package that they had signed up for was too little and not what they had expected. The court held that the defendant followed the right procedure and therefore dismissed the plaintiff's claim.

VER must also be exactly that, voluntary, it should not

1 *[2013] eKLR*

2 *http://www.capitalfm.co.ke/business/2016/10/family-bank-offers-staff-early-retirement-option/*

3 *http://www.businessdailyafrica.com/corporate/Toyota-cuts-workforce--under-early-retirement/539550-3892302-154ok4b/index.html*

be as a result of coercion or force. In **Benson N Irungu v Total Kenya Limited [2015] eKLR**, the court found that the claimant was unlawfully and unfairly retired at the age of 55 years and as a result lost (5) years of service and had suffered loss and damage for which he must be compensated.

Best Practice

Employers considering restructuring their organisations should seek legal advice on the process they propose to use, prior to initiating it. The following is a useful set of guidelines for any business seeking to restructure:

1. **Identify the targeted pool** – an employer should undertake the redundancy process in phases and by selecting specific categories of their workforce rather than taking a wholesale approach. Each category, for example, senior employees versus contracted employees, will have a unique set of circumstances that apply to them and should be treated accordingly;

2. **Gather feedback** – gather feedback from affected staff on the restructuring proposal and genuinely consider feedback received. The employer may adjust the proposal to accommodate the feedback received from the employees. This often yields better results and maintains a good image of the company. If the employer still prefers their original proposal, they may proceed with it and explain why the employees' feedback could not be taken into account;

3. **Decide on the selection criteria** – employees in the redundancy pool must be scored against an objective and non-discriminatory criteria to enable the employer to decide which employees should be selected for the redundancy. If possible, try and get more than one person involved to make the process as objective as possible. Make sure to keep written records of the individual employee assessments in the event any of the employees files a suit against the employer. In Protective Service (Contract) Ltd v Livingstone 1991) EAT 269/91, the appeals tribunal upheld the employment's tribunal decision that an employee was unfairly selected because the employer failed to show how the selection criterion was applied;

4. **Communicate early and often** – once the way forward has been agreed upon, employers should inform the employees of their proposal and should be able to explain the circumstances that have led to the decision. From then, the lines of communication should be open to employees to ask questions and to better understand the process being undertaken;

5. **Document everything** – Records of all meetings either with members of staff or one-on-one meetings with individual staff should be maintained and signed or acknowledged by both the employer and each of the employees. Any new agreements for example, an agreement on the transfer of an employee to another entity should be documented and signed so that there is evidence of mutual agreement; and

6. **Follow the correct procedure** - where an employer declares redundancy without observing the conditions set out above, it could be considered an unfair termination and courts may award damages to the affected employees . The awards payable to aggrieved employees[4] may outweigh the cost of carrying out the correct procedure in the first place and may include:

   i. damages[5];
   ii. reinstatement[6];
   iii. unpaid allowance;
   iv. reengagement;
   v. compensation for any loss incurred; and
   vi. legal costs of the case.

4 *Mary Chemweno Kiptui V Kenya Pipeline Company LTD [2014] eKLR*
5 *Civil Appeal No. 46 of 2013 Kenya Airways v Aviation Allied Workers Union Kenya & 3 others*
6 *Mary Chemweno Kiptui V Kenya Pipeline Company LTD [2014] eKLR*

It is important to note that the court may order a combination of any of the awards.

It is therefore advisable for employers facing financial difficulties and are contemplating making redundancies to ensure strict adherence to the provisions of the law and acquaint themselves with the 'do's' and 'don'ts' prior to initiating any restructuring process.

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