REDUNDANCIES-COURT OF APPEAL **STEPS IN TO CLARIFY THE LAW**

The Kenyan Employment Act, 2007 is in many ways a progressive statute. It incorporates not only the principles of International Labour Organisation (ILO) and other international treaties concerning best practices in employment but also some notions like fair labour practices, prohibition of discrimination and sexual harassment within the work place which came to be enshrined in the Constitution of Kenya three years after the enactment of the Act.

That said, the devil is usually in the detail. The interpretation of some of the provisions of this law by the Employment & Labour Relations Court (ELRC) has caused no mean confusion among employers, employees and labour law practitioners alike.

One such provision is the interpretation of Section 40 of the Act which deals with redundancies. In a nutshell, a redundancy is termination of employment on account of the services of the employee being superfluous to the requirements of the employer. This could occur as a result of abolition of office, closure of business, down-sizing, etc.

For a few years now there has been some uncertainty over what really the law requires in terms of the procedure for declaring a lawful redundancy in Kenya. Not only is this particular section "inelegantly drafted" as politely noted by the Court of Appeal, its meaning and intent are plainly confusing. Not surprisingly, the ELRC has on several occasions been called upon by litigants to clarify what constitutes a lawful redundancy in Kenya.

Going by the recent judgment of the Court of Appeal in the case of ***Africa Nazarene University Versus David Mutevu & Others*** (Civil Appeal No.236 of 2015) delivered on 28th July, 2017, it would appear that the ELRC had all along misinterpreted the law on the number of notices required to be given to an employee in the process of a redundancy.

As drafted, Section 40(1) of the Act seems to provide for only one notice to the affected employee(s) (or their trade union) and a simultaneous notice to the Labour Officer. It does not mention a second notice at all. This notwithstanding, the ELRC had previously ruled that two notices were required when carrying out a redundancy i.e. a first notice given after the conclusion of the consultations with the affected employees and a second notice (being the actual notice of termination) issued at least 30 days after the first notice. The ELRC based the requirement for the second notice on its interpretation of Section 40(1) f) which requires the employer to pay "*...not less than one month's notice or one month's wages in lieu of notice.*" According to the ELRC, this provision means that an employer must issue a second notice or pay in lieu of such notice.

The ELRC's interpretation implies that a period of at least 60 days is required from the date of the first notice to the end of the second notice. This period could be even longer where the employment contract provides for a longer notice of termination.

The ELRC's interpretation of the law has caused significant hardship to employers, not to mention the substantial financial burden arising from non compliance. Firstly, a redundancy, by definition is normally necessitated by lack/shortage of funds to meet the monthly wage bill. Prolonging the process to a minimum of sixty days entails an extra cost to the employer who is already struggling with the wage bill. Secondly, since the requirement for the 'second notice' is not mentioned anywhere in the law and is a matter of interpretation by the ELRC, an employer

who proceeds on the basis of his own reading and understanding of the law will obviously be unaware of this requirement. He will, therefore, proceed to declare the employee redundant by issuing the first notice only. Unfortunately, this 'innocent' misstep renders the whole process unlawful and automatically converts the intended redundancy into a case of unfair termination with far reaching legal and financial implications. Such employer could end up being condemned to pay the employee damages for unfair termination equivalent to 12 months' salary being the maximum compensation prescribed for unfair termination. Ironically, therefore, an employer who had intended to lay off staff due to his inability to pay wages ends up paying the employee 12 months' salary without the employee having to work. And this at no fault of his own since the so called 'second notice' is not provided for in the law!

Fortunately, the Court of Appeal has authoritatively (and, correctly, in my view), laid down the legal position by clarifying that there is indeed no requirement for the second notice. Section 40(1) (f) therefore relates to payment rather than the giving of notice. In summary, only one notice is required to be given to the affected employee (or his trade union if he is unionised). This constitutes the notice of termination without the necessity of issuing another notice 30 days later as earlier required by the ELRC. In practical terms what this means is that if the notice is issued on 1st September, the month of September will be deemed to be the notice period and the employment will stand terminated by 30th September. Of course, if the contract requires a longer notice, such longer notice should be given.

It should be noted, however, that the requirement to issue a separate notice to the Labour Officer, simultaneously with the termination notice, is mandatory. Failure to issue it will render the redundancy unlawful. It should be remembered that both Section 45 the Employment Act and Article 41 of the Constitution demand fair labour practices. As regards redundancy, this entails holding genuine and transparent consultations between the employer and the affected staff prior to the issuance of the termination notice. During the consultations, the employer should explain to the affected employee the reasons for and the extent of the intended redundancy.

Finally, in its characteristic inelegant drafting fashion, the law vaguely states without elaboration that in selecting the employees who are to be declared redundant, the employer shall have regard to the seniority, skill, ability and reliability of the employees. The courts appear to be in agreement that the correct criterion to be applied is the *last in first out* (LIFO) principle. Life would have been so much easier if the law had stated exactly that!

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