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REDUNDANCY Section 45 of the Employment Act and Article 41 of the Constitution demand fair labour practices

How employers can avoid pitfalls of laying off staff

In many ways, the Kenyan Employment Act, 2007 is a progressive statute.

It incorporates not only the principles of International Labour Organisation (ILO) but also other international treaties concerning best practices in employment.

The law also comes with positive provisions such as fair labour practices, prohibition of discrimination and sexual harassment at the work place.

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

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. This could occur as a result of abolition of office, closure of business or down-sizing.

For years now, there has been some uncertainty over what the law requires in terms of the procedure for declaring a lawful redundancy in Kenya.

Not only is this particular section "inelegantly drafted" as the Court of Appeal noted, its meaning and intent are plainly confusing. Not surprisingly, litigants have called upon the ELRC to clarify what constitutes a lawful redundancy in Kenya.

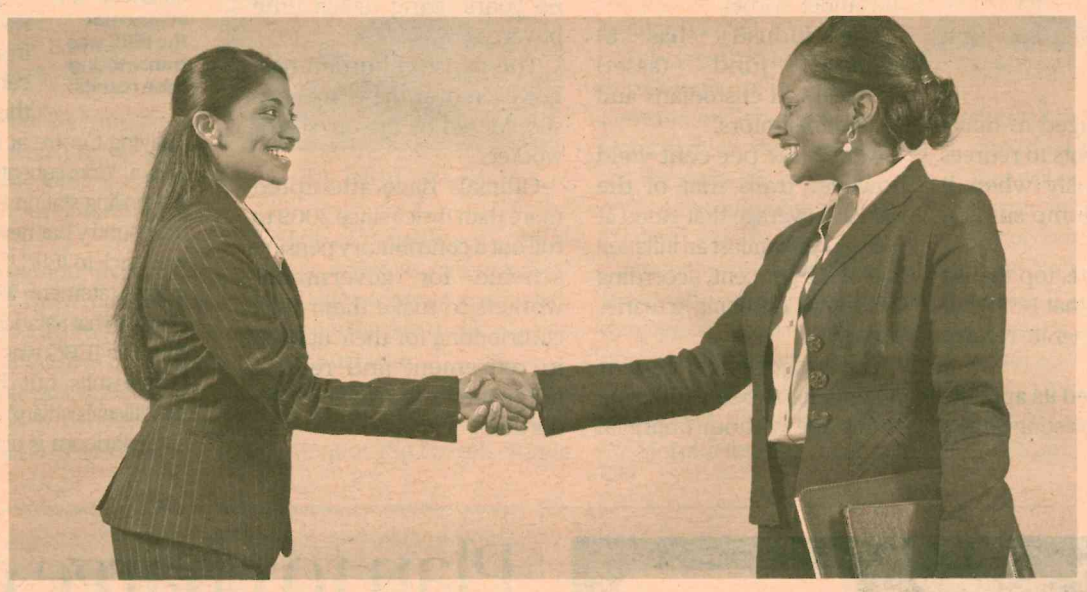
Going by the recent decision of the Court of Appeal in the case of Africa Nazarene University versus David Mutevu & Others, it would appear that the ELRC had all along misinterpreted the law on the number of notices required to be served upon an employee in the process of a redundancy.

Redundancy is normally necessitated by shortage of funds to meet the monthly wage bill

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. The first notice is issued upon the conclusion of 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 pegged 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."



EXIT TALK Holding genuine and transparent talks ahead of leaving will work. -FILE

... a redundancy is termination of employment on account of services of the employee being superfluous

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.

First, 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 60 days means extra cost to the employer.

Secondly, since the requirement for the 'second notice' is not mentioned 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.

Unfortunately, this 'innocent' misstep renders the whole process unlawful and automatically converts the intended redundancy into a case of unfair termination.

Such an 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). Which is more expensive.

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 in my view, correctly), stated the legal position by clarifying that there is indeed no requirement for a second notice.

Section 40(1) (f) therefore relates to payment rather than issuance of notice. In summary, only one notice must be issued to the affected employee or his trade union.

This constitutes the notice of termination without the necessity of issuing another notice 30 days later as the ELRC required. If the contract requires a longer notice, that 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 of 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 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 formula 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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