

RADAR SCREEN BY WILLIAM MAEMA

LABOUR Employment Act, 2007 requires procedural fairness and consultation in termination of cases

When the newly elected governor of Tharaka Nithi took office, his first order of business was to fire all county staff employed by his predecessor.

This must have sent shivers down the spines of hundreds of county government workers across Kenya as a number of other governors indicated their determination to follow suit.

Fortunately, a majority of the governors appear to have listened to wise counsel and refrained from what would have been a mass lay-off of county staff hired by their predecessors and an almost instant replacement by supporters of the incumbent.

There is, however, no telling whether this is merely a lull before the storm, making it imperative to set the record straight – using labour laws that govern this important segment of contractual relationships.

While the public service has its own internal procedures and processes, there is clearly a misconception among some county officials that the Employment Act, 2007 only applies to the private sector. Nothing could be further from the truth.

The Act expressly states that it applies to all contracts of employment in Kenya and binds the government (which, of course, includes county governments).

The only employment contracts excluded from the application of the Act are persons employed in the armed forces, Kenya Police, Prisons, the National Youth Service and dependants

employed in a family undertaking. Public servants are therefore protected by the safeguards provided under the Employment Act concerning arbitrary and unfair termination.

The law prescribes various remedies for unfair termination, including reinstatement or payment of a maximum of 12 months' salary. It should, however, be noted that the maximum remedy is rarely awarded except in extreme cases of aggravated unfairness and flagrant disregard of procedure.

In deciding the appropriate award, courts would normally be guided by the length of the contractual notice, seniority of the employee and the probability of the employee getting alternative employment.

The law prescribes two minimum conditions for a lawful termination. First, the employer must have a valid reason for the termination and, secondly, he must adopt a fair process in the termination.

Kenyan courts have ruled that the

How to navigate the legal minefield of dismissing workers



doctrine of 'termination at will' was abolished following the enactment of the Employment Act in 2007. This means that while parties are free to enter into an employment contract at will, the employer cannot terminate it at will!

The reasons for termination must be given before and not after the termination has already taken place. The law does not require that the employee must accept the reasons given but if he disputes their validity, he may be able to challenge the termination on grounds of unfairness in which case the court will interrogate the validity of the reasons given.

At any rate, it is unrealistic to expect an employee facing dismissal to accept the reason given, however plausible.

Procedural fairness as an element of lawful termination means that every termination must be preceded by a consultation process with the employee where the employee is informed of the impending termination, the reasons for it and his response considered objectively.

Parliament should probably have another look at the requirement for giving reasons as a pre-condition for termination of employment.

Granted that employment is not an ordinary commercial contract, the hallowed doctrine of freedom of contract should be respected. Parties enter into contracts freely and should be able to exit them in the same manner. This is the essence of having

a termination clause which is found in every well drafted employment contract.

The requirement for giving reasons negates the purpose and value of this clause to the extent that an employer who terminates the contract in strict conformity with the termination clause may still be found liable for unfair termination.

Oddly enough, no such liability attaches to the employee for exercising the same rights conferred by the clause. He can walk out at any time as soon as he finds a better-paying job irrespective of the inconvenience and financial loss to be suffered by the employer following the abrupt resignation of a key member of staff.

To the new governors, it is worth remembering that county employees are not the personal staff of the governor as such but the county government, a juridical body corporate that continues to subsist regardless of any change in the occupant of the governor's mansion. Unless such contracts were for a fixed five-year term ending with the reign of the previous governor, they remain in full force and effect and can only be terminated in accordance with the law and laid-down procedures. They can, however, be converted into fixed-term contracts but only with the written consent of the employee.

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HANDS OFF Actress Lupita Nyong'o. -FILE

Lupita upset UK magazine removed her hair on cover

Lupita Nyong'o has accused *Grazia* magazine of removing part of her hair for the front cover of its November edition.

She said she was "disappointed" it changed her hairstyle to "fit their notion of what beautiful hair looks like". The actress posted the original image on Instagram alongside the published version – which appears to show some of her hair missing.

The UK-based magazine has apologised. In a lengthy Instagram post, the Oscar-winning actress said: "I embrace my natural heritage and despite having grown up thinking light skin and straight, silky hair were the standards of beauty, I now know that my dark skin and kinky, coily hair are beautiful too."

The *12 Years a Slave* star went on to say if she had been consulted she wouldn't have supported the "omission of what is my native heritage".

Lupita, who's from Kenya, added there was "still a very long way to go to combat the unconscious prejudice against black women's complexion, hair style and texture".

In a statement, *Grazia* said it was "committed to representing diversity" and apologised to the actress.

It also said it also wanted to make clear that it did not ask the photographer to alter the image or make the edit itself.

Lupita is the latest star to tell a UK magazine not to touch her hair. Solange Knowles hit out at the *London Evening Standard* magazine last month for digitally removing some of her braids on its front cover.

Image Row

BBC

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