EFFECTIVE REDUNDANCY: HOW TO AVOID THE COMMON LEGAL PITFALLS

Introduction

In recent days, many employers have found themselves on the receiving end of Court Judgments after long and protracted legal battles with their former employees come to an end. The harsh reality of paying huge penalties in the form of damages for unfair termination would have otherwise been avoided had management opted to follow a few, but critical steps while carrying out termination on account of redundancy in the workplace.

Very recently, the Employment and Labour Relations Court in Nairobi awarded three former G4S Kenya employees a sum exceeding Kshs 10,000,000/= as both terminal dues and compensation for unfair dismissal. The trio had moved the Court in 2017 contesting their dismissal from employment on account of redundancy. In finding for the claimants, the Court observed that the employer had not only failed to give the statutory notice(s) of the intended redundancy but also failed to demonstrate that it held meaningful consultations with the affected employees about the intended redundancy.

Similarly, the Employment and Labour Relations Court in Nairobi also found in favour of thirteen former Kenya Power executives who were retrenched over six years ago. In its determination, the Court found that the ex-employees were targeted during the retrenchment exercise which amounted to unfair termination. Since both decisions are very recent, none has been overturned and such, their findings remain the law. And the list goes on and on.

So, the question that every employer begs to be answered is where management goes wrong whenever they wish to terminate an employee's services on account of redundancy. From a careful reading of these and many other judgments, the underlying theme is that to prove that any redundancy was carried out effectively, an employer not only needs to demonstrate that the redundancy was substantively justified but also, that the process of termination was procedurally fair. In this article, we shall look at the common mistakes that most employers replicate over time and hopefully, that analysis shall assist in avoiding these legal pitfalls.

The Legal Framework

In Kenya, employment law is primarily governed by the Employment Act of 2007 ("the Act"). Redundancy is defined in Section 2 of both the Employment Act and the Labour Relations Act as:

> **"redundancy" means the loss of employment, occupation, job or career by involuntary means through no fault of an employee, involving termination of employment at the initiative of the employer, where the services of an employee are superfluous and the practices commonly known as abolition of office, job or occupation and loss of employment;**

Section 40(1) of the Act provides for the procedure of termination of employment on account of redundancy as follows: -

> ***"40. Termination on account of redundancy***
>
> ***(1) An employer shall not terminate a contract of service on account of redundancy unless the employer complies with the following conditions—***
>
> ***(a) where the employee is a member of a trade union, the employer notifies the union to which the employee is a member and the labour officer in charge of the area where the employee is employed of the reasons for, and the extent of, the intended redundancy not less than a month prior to the date of the intended date of termination on account of redundancy;***
>
> ***(b) where an employee is not a member of a trade union, the employer notifies the employee personally in writing and the labour officer;***
>
> ***(c) the employer has, in the selection of employees to be declared redundant had due regard to 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; the employer has not placed the employee at a disadvantage for being or not being a member of the trade union;***
>
> ***(e) the employer has where leave is due to an employee who is declared redundant, paid 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; and***
>
> ***(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.***

We also find these other foregoing sections of the Employment Act purposeful as they have a significant bearing on the redundancy procedure in the event that the process is found to be invalid.

Section 43(1) provides that in any claim arising out of termination of a contract, the employer shall be required to prove the reasons or reasons for termination and where he fails to do so, the termination shall be deemed to be unfair termination within the meaning of sections 45.

Section 43(2) provides:

"43.(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee."

Section 45(1) prohibits an employer from terminating the employment unfairly and Section 45(2) stipulates what is unfair termination. It provides:

"(2) A termination of employment by an employer is unfair if the employer fails to prove—
(a) that the reason for the termination is valid;
(b) that the reason for the termination is a fair reason—
(i) related to the employee's conduct, capacity or compatibility; or
(ii) based on the operational requirements of the employer; and
(c) that the employment was terminated in accordance with fair procedure.

Substantive Justification

Conventionally, redundancy is a legitimate ground for terminating a contract of employment provided there is a valid and fair reason based on operational requirements of the employer and the termination is in accordance with a fair procedure. As section 43(2) of the Act provides, the test of what is a fair reason is subjective. The phrase ***"based on operational requirements of the employer"*** must be construed in the context of the statutory definition of redundancy. What the phrase means is that while there may be underlying causes leading to a true redundancy situation, such as reorganization, an employer must nevertheless show that the termination is attributable to the redundancy, that is, that the services of the employee have been rendered superfluous or that redundancy has resulted in abolition of office, job or loss of employment.

This is analogous to what Halsbury's Laws of England, Volume 3 refers to as termination of employment attributable wholly or mainly to the fact that:

"(i) the requirements of that business for employees to carry out work of a particular kind have ceased or diminished or are expected to cease or diminish,

(ii) the requirements of that business for employees to carry out work in the place where they were employed have ceased or diminished or are expected to cease or diminish."

This truism has been affirmed by the Court of Appeal's decision in ***Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others*** [2014] eKLR where Lady Justice Murgor expressed herself as follows:

"In the case of TOBIAS ONGAYA AUMA & 5 OTHERS VS KENYA AIRWAYS [2007] eKLR this Court stated,

<u>"Further, it is not the role of any tribunal to prevent an employer from restructuring or adopting modern technology so long as it observes all relevant regulations".</u>

In G.N. HALE & SONS LIMITED VS WELLINGTON CATERERS (supra) the Court of Appeal took the view that a worker does not have the right to continue employment if the business can run more efficiently without him. As long as the employer genuinely believed that there was a redundancy situation, any dismissal was justified, and it was not for the court or the union to substitute their business judgment."

<u>Procedural Fairness</u>

Accordingly, if an employer's operational requirements lead to him genuinely believing that there is a redundancy situation, then a dismissal on account of redundancy will be justified. This leads us to the next hurdle of carrying out the termination process through a fair procedure. To kickstart the process, an employer must strictly adhere to section 40 (1) (a) or (b) of the Act based on the obtaining circumstances, that is, whether the employee is a member of a trade union or not. Judging from the mood of the Court in all these judgments, any slight deviation from the said express provisions of the Act renders the entire process unfair.

The different notices to be issued and their importance was aptly explained in ***<u>Thomas De La Rue (K) Ltd v David Opondo Omutelema</u>*** **[2013] eKLR** where the Court of Appeal was emphatic thus:

"It is quite clear to us that **sections *40 (a) and 40 (b)*** *provide for two different kinds of redundancy notifications depending on whether the employee is or is not a member of a trade union. Where the employee is a member of a union, the notification is to the union and the local labour officer at least one month before the effective redundancy date.* ***<u>Where the employee is not a member of the union, the notification must be in writing and to the employee and the local labour officer. Section 40 (b) does not stipulate the notice period as is the case in 40 (a), but in our view, a purposive reading and interpretation of the statute would mean the same notice period is required in both situations. We do not see any rational reason why the employee who is not a member of a union should be entitled to a shorter notice."</u>*** **[**Emphasis ours]

The objective of issuing the notices is to enable the union and employees who may be affected to take early steps to inform themselves of the relevant facts, consider possible alternative solutions and, if necessary, find alternative employment in the undertaking or elsewhere."

After complying with the provisions relating to what we would term as the "statutory notices", an employer must invite the affected employees to negotiations that are real and meaningful. The importance of holding these consultations cannot be overemphasized. As a matter of fact, consultations are a mandatory process by dint of Convention No. 158 of the International Labour Organization (ILO). Article 13 of Recommendation No. 166 of the ILO Convention No. 158-Termination of Employment Convention, 1982, requires consultation between the

employers on the one hand and the employees or their representatives on the other before termination of employment under redundancy. The same reads, in part, as follows:

"1. When the employer contemplates terminations for reasons of an economic, technological, structural or similar nature, the employer shall: (a) provide the workers' representatives concerned in good time with relevant information including the reasons for the terminations contemplated, the number and categories of workers likely to be affected and the period over which the terminations are intended to be carried out; (b) give, in accordance with national law and practice, the workers' representatives concerned, as early as possible, an opportunity for consultation on measures to be taken to avert or to minimise the terminations and measures to mitigate the adverse effects of any terminations on the workers concerned such as finding alternative employment."

Our Courts have interpreted this to mean that consultations have to be real and not cosmetic. Discussions between the employer and employees on the scope of the redundancy and criteria to be used in selecting the affecting employees have to be meaningful and all parties have to demonstrate reasonableness. In ***Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others*** [2014] eKLR the Honourable Mr. Justice D. Maraga (as he then was) expressed himself as follows on the said issue of consultation:

"55. Unless the circumstances are such that it would be an utterly futile exercise to hold any meaningful negotiations, consultation has to be real and not cosmetic. The New Zealand Chief Judge succinctly expressed this point in the case of ***Cammish v. Parliamentary Service12:***

> ***"Consultation has to be a reality, not a charade. The party to be consulted must be told what is proposed and must be given sufficiently precise information to allow a reasonable opportunity to respond. A reasonable time in which to do so must be permitted. The person doing the consulting must keep an open mind and listen to suggestions, consider them properly, and then (and only then) decide what is to be done."***

Conclusion

If only employers can strictly adhere to the aforesaid procedure after justifying redundancy, then unfair termination on account of redundancy shall be a thing of the past. However, and until then, our courts will not shy away from handing down hefty awards to employees who claim and prove to have been unfairly terminated on account of redundancy, regardless of its legitimacy.