



Legal Alert | August 16, 2023

Employers reminded Constitution requires Substantive Fairness in Termination of Employment

Introduction

A recent judgment by the Employment Court has blurred the line between employment disputes and constitutional violations.¹

The aggrieved employee claimed unfair termination and violation of his rights to fair labour practices and fair administrative action under the Constitution. He claimed his employer had disregarded his explanations on the causes of his unsatisfactory performance when terminating his employment.

The Decision

The Employment Court held the employee's constitutional rights were violated. It therefore awarded him damages of KES 5 million. In doing so, it made the following key findings for employers to note:

- Employers are expected to consider and address any valid grievances raised by an employee as basis for unsatisfactory performance; and
- Employers bear the burden of demonstrating that, prior to terminating for poor performance, they adequately addressed valid grievances which contributed to poor performance.

This judgment raises the question where the line should be drawn between violations of employment rights under the Employment Act and violations of constitutional rights.

Implications of the decision?

This decision may mark a significant change in employment dispute litigation. We expect it will lead to an increase in double pronged employment cases alleging violations of both the Employment Act and the Constitution. Fundamentally, the Employment Act requires employers to ensure their termination processes observe substantive and procedural fairness.

The Employment Court is mandated by the Act to interrogate these issues when deciding whether termination was unfair. Therefore, the issues raised by the employee could and should have been interrogated by the Employment Court in an ordinary trial.

However, in the present case the court relied on Article 47 of the Constitution to find the employee's rights were infringed. The right to fair administrative action applies to private entities, and is not restricted to state actors and state bodies.

The implication of this decision is complying with the procedural fairness requirements under the Employment Act by itself is not sufficient. Employers must also comply with the requirement for substantive fairness which has constitutional backing.

Conclusion

It is important for Employers to document extensively how they have considered and addressed grievances raised by employees in response to allegations of poor performance. Where an employer is unable to demonstrate this, it will be challenging to show the employer did not act unreasonably.

Employers should seek legal advice before terminating employment. Particular care should be taken when terminating long serving employees on grounds relating to poor performance. Otherwise, employers risk being found in violation of constitutional rights which may give rise to liability for damages.

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¹ Namai v National Bank of Kenya Limited; Constitutional Petition E039 of 2023