

ARDEAN LAW CHAMBERS

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TERMINATION OF EMPLOYMENT CONTRACT UNDER THE LAWS OF TANZANIA

INTRODUCTION

We have been receiving inquiries from our clients on procedures for termination of employment contracts. Once it comes to termination of contract, you are advised to pray safe. Praying same means to act by complying to the requirements of the law.

Generally, the laws of Tanzania allow termination of employment. Either of the parties to the contract of employment may terminate such a contract provided she/he observes all duly stated reasons that justify termination and prescribed procedures. Termination may be regarded as fair (when it is done as per the law) or unfair when it is done without following what the law calls for.

This document serves as a guideline for our client so that they make decisions after having been aware of what is required to be done when one decides to terminate employment relationship.

The laws governing termination of employment contract are the **Employment and Labour Relations Act No. 6 of 2004** as amended from time to time and **Employment and Labour Relations (Code of Good Practice) Rules, 2007 (GN No. 42, 2007)**

It is unlawful for an employer to terminate the employment of the employee unfairly as per **section 37(1), Employment and Labour Relations Act, 2004**. The law describes the grounds (reasons) of termination and procedures to be followed for each ground.

GROUNDS FOR TERMINATION

There are several reasons by which a contract of employment may be terminated. The reasons which may justify termination by the employer are as misconduct, incapacity, incompatibility and operational requirement. These are as per **Rule 9(4) of the Employment and Labour Relations (Code of Good Practice) Rules, 2007 (GN No. 42, 2007)**

MISCONDUCT

Misconduct is doing something which is against the law or which is contrary to the Employer's policy and codes of conducts. Examples of misconducts include stealing, violence at the work place, absence from work without permission, negligence, insubordination etc. **(Ref. Rule 11(1)&12(3) Employment and Labour Relations (Code of Good Practice) Rules, 2007.**

Once an employee commits one of these acts, the employer has no legal right of outright dismissal. He must make sure that the required disciplinary procedure are followed step by step to the conclusion that termination is warranted.

The procedures required to be taken are as follows:

- (i) The Employer must conduct investigation for reason of establishing whether a disciplinary hearing is to be conducted or not.
- (ii) Once the Employer finds out that a disciplinary hearing is to be conducted, must draw a charge of offences and submit it to the Employee;
- (iii) The employee must be given time eg. 7 days to respond in writing about the charges;
- (iv) A hearing date must be ascertained and an employee should be informed to attend by himself together with his co employee or representative of the Union or his advocate.
- (v) During the hearing, the Employee will be allowed to bring witnesses and also to cross examine witnesses of the Employer.
- (vi) After the hearing, the Hearing (Disciplinary Committee) shall prepare a report and submit it to the employer for decision.
- (vii) Where the committee finds the employee guilty of the offence charges, the Employer will write to the Employee informing him/her about the outcome of the hearing and a decision thereof.

It is important to note that the hearing committee must be chaired by a person who is neutral. He might also be someone from outside the office.

POOR WORK PERFORMANCE (*Regulation 17 and 18 GN. No.42 of 2007*)

According to Regulation 17(1), an employer, arbitrator or judge who determines whether a termination for poor work performance is fair shall consider-

- a) whether or not the employee failed to meet a performance standard;
- b) whether the employee was aware, or could reasonably be expected to have been aware, of the required performance standard;
- c) the reasons why the employee failed to meet the standard; and
- d) Whether the employee was afforded a fair opportunity to meet the performance standard.

Although the employer has the managerial prerogative to set performance standards, the standards should not be unreasonable. Poor performance is a question of fact to be determined on the balance of probabilities against the set standards. If the standards are found to be unreasonable, the employer will miss justification of termination. Once the Employer is found not to have justification, the termination will be unlawful.

However, even if the reasons for termination are valid (justifiable), there are procedures that must be complied with by the Employer before terminating a non performing employee. These procedures are as follows:

- (i) The employer must investigate the reasons of unsatisfactory performance. This shall reveal the extent to which is caused by the employee.
- (ii) The employer must give appropriate guidance, instruction or training if necessary, to employee before terminating the employee for poor work performance;
- (iii) The employee must be given reasonable time to improve. The reasonable time depend on the nature of the job, extent of poor performance, status of employee, length of service and the employee past performance record.

- (iv) When the employee continues to perform unsatisfactorily, the employer must issue a warning to the employee that employment may be terminated if there is no improvement.
- (v) Before the employer makes a final decision to terminate a non performing employee, must call a meeting with the employee who must be allowed to attend with his fellow employee or trade union representative;
- (vi) At that meeting the employer must outline the reasons for action to be taken and allow the employee and/or the representative to make representation before finalizing a decision.
- (vii) The employer must consider any representation made and if does not accept them must explain why;
- (viii) The outcome of the meeting must communicated to the employee in writing with brief reasons.

All these procedure needs evidence of record that what is required to be done by the employer was actually done. Records such as job description, performance standards/targets, performance appraisals, warning letters and records of minutes for various meetings must be available for verification to support the action of the Employer.

INCAPACITY (Reg. 15, 16, 19)

The employer may also terminate the employee on ground of incapacity due to ill health, injury or poor work performance.

Incapacity may be defined as a situation where the employee becomes unfit or unable to perform and render his duties as ordinarily required or expected or be unable to produce expected services and results in the due course of the employment.

An employer who is considering to terminate an employee on grounds of ill health or injury must take into account the following factors to determine the fairness of the reasons:-

- (i) The cause of the incapacity;
- (ii) The degree of incapacity;
- (iii) The temporally or permanent nature of incapacity;

- (iv) The ability to accommodate the incapacity;
- (v) The existence of any compensation or pension

Where the employee is injured at work or is incapacitated by a work related illness the employer is required to do all what is possible to accommodate the employee. In so doing, the employer is required to be guided by an opinion of a registered medical practitioner in determining the degree and extent of incapacity.

Where the employee is just temporarily unable to work and is likely to be absent for a time that is unreasonably long in the circumstances, the employer is required to investigate possible ways to accommodate the employee or consider all possible alternatives short of termination. The possible short term alternatives include:

- (i) Temporally replacement;
- (ii) Alternative work;
- (iii) Early retirement; or
- (iv) Any other acceptable alternative.

Where an employee is permanently incapacitated, the employer is advised to secure alternative employment for the employee or adopting the duties or work circumstances of the employee to accommodate the employee's disability. Where the causes of incapacity is due to alcoholism or drug abuse, counseling and rehabilitation may be appropriate steps for an employer to consider.

Where it is established that the employee disability cannot be accommodated, the employer is required to consider the availability of alternative work.

In all these process, Rule 21(1) requires the employer to consult the employee. The employee is at liberty to suggest alternatives to the employer. If the employer does not accept the employee's alternatives, he must give reasons. The employee has a right to be represented by his fellow employee or trade union representative. The outcome of the meeting must be communicated to the employee in writing.

INCOMPATIBILITY (Rule 22 GN No.47 of 2007)

This also constitutes a fair reason for termination. Incompatibility means unsuitability of the employee to his work due to his character or disposition. Further, it includes incompatibility of the employee in his work environment in that he relates badly with fellow employees, clients, or other persons who are important to the business.

Incompatibility is treated in a similar way to incapacity for poor work performance. The steps required set in rule 18 of GN No.47 of 2007, are applicable read with changes required by the context. In particular, the employer is required to do the following:

- (i) Record the incidents of incompatibility that gave rise to concrete problems or disruption;
- (ii) Warn and counsel the employee before termination. This should include advising the employee of unacceptable conduct and what remedial action is proposed.
- (iii) Before terminating employment on this ground, the employer is required to give employee a fair opportunity to:
 - (a) Consider and reply to the allegation of incompatibility;
 - (b) Remove the cause for disharmony; or
 - (c) Propose an alternative to termination.

OPERATIONAL REQUIREMENTS (Retrenchment) (Rule 23 GN No. 47 of 2007)

This is a ground for termination arising from the operational requirement of the business. It is commonly based on the economic, technological, structural or similar needs of the employer.

As a general rule, the circumstances that might legitimately form the basis of a termination of employee based on operational requirements. These are:

- (i) Economic needs that relate to the financial management of the enterprises;
- (ii) Technological needs that refer to the introduction of new technology which affects work relationship either by making existing jobs redundant or by requiring employee to adapt to the new technology or a consequential restructuring of the workplace
- (iii) Structural needs that arise from restructuring of the business as a result of a number of business related causes such as the merger of businesses, a change in the nature of the

business, more effective ways of working, a transfer of the business or part of the business.

Procedures for Termination based on Operational Requirement

The obligations placed on an employer are both procedural and substantive. The requirement of Section 38(1) of the employment and Labour Relations Act No.6 of 2004, provides that in any termination for operational requirements, the employer must comply with the following principles:

- (i) Give notice of intention to retrench as soon as it is contemplated;
- (ii) Disclose all relevant information on the intended retrenchment for purpose of proper consultation;
- (iii) Consult prior to retrenchment or redundancy on:-
 - (a) The reasons for intended retrenchment;
 - (b) Any measures to avoid or minimize the intended retrenchment;
 - (c) The method of selection of employees to be retrenched;
 - (d) The timing of retrenchment; and severance pay in respect of retrenchment.

The purpose of the consultation required by section 38 is to permit the parties, in the form of a joint problem-solving exercise to reach agreement on:-

- (i) The reasons for intended retrenchment;
- (ii) Any measures to avoid or minimize the intended retrenchment;
- (iii) Criteria for selecting employees for termination;
- (iv) The time for retrenchment;
- (v) Severance pay and other conditions on which termination take place; and
- (vi) Steps to avoid the adverse effects of the terminations such as time off to seek work.

Where there is not agreement reached between the employer and employees must be referred the matter CMA for mediation

PROVISIONS OF THE CONTRACT OF EMPLOYMENT RELATING TO TERMINATION

Where a written agreement stipulates the procedure of its termination, the employer and the employee must comply with those provisions. Any termination which contravene with the provisions of the contract of employment on termination is rendered unfair hence illegal.

But if the contract of employment contains no provisions relating to termination of employment; the employer has to read and act according to legal provisions on termination provided under section 41 of the Employment and Labour Relations Act.

Notice of Termination

The employment may be terminated on notice, but the period of notice should not be less than seven days, if notice is given in the first month of employment. If the notice is given after the first month of employment then the notice should not be less than four days if the employee is employed on a daily weekly basis; or 28 days if the employee is employed on a monthly basis. The employer and the employee may agree for a notice period that is longer the stated one provided the agreed period is of equal duration for both the employer and the employee.

Further, the notice must be in writing stating the reasons for termination and the date on which the notice is given. **BUT** such notice should notice be given during any period of leave taken under the Act; or to run concurrently with any such period of leave.

The law allows the employer to pay the employee the remuneration that the employee would have received if the employee had worked during the notice period instead of giving an employee notice of termination.

However, if the employee refuses to work during the notice period, then the employer may deduct, from any money due to that employee on termination.

PAYMENT ON TERMINATION AND CERTIFICATE OF EMPLOYMENT (S.44)

On termination of employment for whichever reason, the employer is required to pay an employee the following:

- (a) Any remuneration for work done before termination;
- (b) Any annual leave pay due to an employee for that leave the employee has not taken;
- (c) Any notice due if termination is by notice;
- (d) Any severance due. Severance pay means an amount at least equal to 7 days basic wage for each year of continues service up to a maximum of 10 years. However severance pay does not apply if termination is due to misconduct of employee.
- (e) Transport allowance to the place of recruitment.

On top of payment, the employer is required to issue an employee with a prescribed Certificate of Service.

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