

What is Termination of Employment?

Termination of employment as defined by section 36 Employment Labour Relations Act No. 6 of 2004 and Rule (ELRA) may mean;

- i. A lawful termination under the Common law
- ii. Termination by an employee because the employer made continued employment intolerable
- iii. A failure by the employer to renew a fixed term contract on the same terms while there was reasonable expectation of renewal by the employee
- iv. A failure to allow an employee to resume work after taking maternity leave granted by the Act or any agreed maternity leave
- v. A failure to re-employ an employee if the employer had terminated a number of them over the same reasons but has offered to re-employ one or more of them

It should be noted that pursuant to section 37 of ELRA for termination of employment to be fair it should be for a valid reason and follow fair legal procedure i.e. procedurally and substantively fair.

Pursuant Reasons that may justify the employer to validly terminate an employee's employment may include;

- i. Conduct of the employee
- ii. Capacity of the employee
- iii. Compatibility of the employee
- iv. Operational Requirements of the employer

For the purpose of this Article we shall look mainly at termination based on conduct of the employee.

What is

Misconduct?

Misconduct may generally mean unacceptable or improper behavior in a work place. However the standard of conduct for employees may vary depending on the size and nature of the employer's business and the disciplinary policy available at the place of employment.

An employer is duty bound in the course of managing conduct at the workplace to implement disciplinary policies and procedures that establish the standard of conduct required of their employees.



FAIRNESS OF THE REASON FOR TERMINATION

The first offence of an employee may not necessarily justify termination unless it is so serious so as to render continuation of the employment relationship intolerable. However there are certain acts that may justify termination such as;

- Gross dishonesty
- Willful damage of property
- Willfully endangering the safety of others
- Gross negligence
- Assault on a co-worker, supplier, customer or any person associated with the employer and
- Gross insubordination.

Before an employer decides to terminate an employee from employment, he should first consider whether or not the employee contravened **any rule regulating conduct** of employment, and whether the rule was **clear, reasonable, consistently used by him and the employee was aware of it.**



FAIRNESS OF THE PROCEDURE FOR TERMINATION.

What to before the hearing:

In the even of misconduct, the supervisor or manager may issue a written warning to the employee if his conduct has not improved after verbal warnings or if stronger action than a verbal warning is required.

Before issuing a written warning, the manager should inform the employee of the reason for the action and give him a chance to be heard. At this this time, the employee may be represented. This process, however, should not be taken to constitute a formal hearing.

Upon considering the employee's explanations, the Manager should decide on whether or not to give the employee a written warning.

If the decision is to the affirmative, then the written warning should be given to the employee personally and in accordance with the prescribed form.

This letter will be kept in the employee's personal file and a copy given to the employee.

In case of alleged further misconduct despite warnings previously given, then the employer will have to conduct an investigation so as to ascertain whether or not there are grounds for a disciplinary hearing to be held. If the result of the investigation is in the affirmative, the employer will notify the employee of the allegations in a manner that is easily understood by the employee usually referred to as a "show cause letter".

The show cause letter is a platform that invites the employee to explain his side of the story or show cause why the employer should not take disciplinary measures against him/her.

Upon receipt of the show cause letter, the employee is given reasonable time to respond to the same giving his detailed explanation regarding the allegations.

The employer will then notify the alleged employee about the intended disciplinary hearing through a written notice, which should be served upon the employee. It is recommended that the employee who is served with a notice to sign an acceptance as to confirm the receipt of the said notice. The notice must contain the following information;

- All the allegations against the employee. New allegations cannot be raised during the hearing;
- Time, date and place of the proposed hearing. Giving the employee a reasonable opportunity to prepare for the hearing. It should not be less than 48 hours before the expected date of the hearing. If the employee cannot attend due to circumstances beyond his or her control, the employer should arrange another hearing date; and
- Employee's rights of being represented by either a colleague or a trade union.

What to do During the Hearing:

The hearing should be chaired by a senior management representative who was not in any way involved in the circumstances giving rise to the hearing. In his absence, a senior manager from a different office may suffice to serve as a chairperson.

The chairperson will present his case in support of the allegations against the employee, and the employee should be given an opportunity to respond to the allegations. Both parties have a right to call witnesses to the hearing to substantiate their case and to question any witness called by the other party.

Upon hearing the evidence produced by either party, the chairperson will make his decision based on a balance of probabilities.

In the event the employee is found guilty of the charges against him, the employee or his representative should be given an opportunity to present any mitigating factors before a sanction is imposed upon him.

The mitigating or aggravating factors that should be considered include, the **seriousness of the offence and the likelihood of repetition, the circumstances of its occurrence, the employee's employment record and his length of service, previous disciplinary record, the nature of the job such as health and safety conditions and the circumstances of the infringement itself.**

What to do After the Hearing:

The employer has a duty to communicate to the employee the decision of the hearing together with brief reasons of the outcome through a disciplinary form. The chairperson should sign it and a copy delivered to the employee in not later than 5 working days after the hearing. The employee may appeal against the decision arrived within 5 working days of being disciplined by filling Part II of the disciplinary form delivered to him.

The form is then to be submitted to the chairperson who will refer the matter to a more senior level of management within 5 working days.

A written report summarizing the reasons for the disciplinary action imposed will also accompany the form submitted to the senior management. The employee is to be given a copy of the report.



During The Appeal:

The appeal is not to constitute a re-hearing of the entire case, but rather it should only focus on the grounds of appeal and be decided based on the documents submitted and the submissions provided by either party.

In the event the Chairperson of the appeal arranges for a further hearing, then evidence may be adduced relating to the appeal and a representative may assist the employee.

At the end of the Appeal, the chairperson should record the outcome in Part III of the original disciplinary form and give a copy to the employee.

How to Challenge the Appeal:

Where the employee is dissatisfied with the outcome of the appeal, he may refer the matter to the Commission for Mediation and Arbitration (CMA). The time period for referral will commence from the date the employee was informed of the outcome of the appeal.

It should not go unmentioned that, all disputes concerning fairness of termination of employment must be referred to the CMA within 30 days from the date of termination or the date the employer decided to terminate or uphold the decision to terminate.

All other disputes must be referred to the CMA within 60 days from the date when the dispute arose.

CONCLUSION

In the midst of misconduct, the employer should refrain from terminating without following the proper procedure.

Gabriel and Co. offers a variety of advisory services related to labour relations and employment matters. Should you need any assistance at any stage of a matter please feel free to contact Ms Oliva Mkula Mkanzabi at oliva.mkanzabi@gabrielco.legal.



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