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HAVE PROBATIONARY CONTRACTS BECOME REDUNDANT?

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Introduction

The Employment Act, 2007 (the **Act**) defines a probationary contract as a contract of employment that does not exceed 12 months, is in writing and expressly states that it is for a probationary period.

The probationary period is often considered as a 'trial phase' during which both the employer and the employee have the option of swiftly terminating the employment relationship without elaborate process and at short notice. The Act when enacted, contained several provisions that enabled this.

Kenyan Courts have, however, delivered decisions that have nullified some of those provisions thereby according employees on probationary contracts some of the rights enjoyed by those on non-probationary contracts. Based on developments in case law, it is advisable for an employer who intends to terminate a probationary contract to follow the same process required in the termination of a non-probationary contract.

Employees on probationary contracts can sue for unfair termination

Section 45 (3) of the Act limited the right to complain of unfair termination to persons who had been employed for a minimum of 13 months. Effectively, employees on probationary contracts were prevented from claiming unfair termination because a probationary contract by law can only be in place for a maximum of 12 months.

The High Court (Justice Lenaola (as he then was), in the case of **Samuel G Momanyi v the Attorney General & Another [2012] eKLR**, declared section 45(3) of the Act unconstitutional (the **Momanyi Decision**).

The correctness of the Momanyi Decision has been doubted by some Judges of the Employment and Labour Relations Court (the **Employment Court**), with the Court of Appeal in the case of **Nation Media Group Limited v Onesmus Kilonzo [2017] eKLR** holding that Judges of the Employment Court should not continue to apply the Momanyi Decision if they find that it does not apply the law correctly.

Despite the doubts raised on the correctness of the Momanyi Decision, several Judges of the Employment Court have relied upon it as good law. This means that an employee terminated while on probation may successfully sue for unfair termination.

Termination of probationary contracts is subject to fair process and fair reason

Section 42 (1) of the Act expressly disappplied the provisions of section 41 of the Act relating to the procedural fairness requirement in the termination of probationary contracts. This meant that employers could terminate probationary contracts without explaining the reason for the termination or conducting a hearing before the termination. By extension, this removed the need for an employer to prove or show a fair reason for termination.

A 3 Judge bench of the Employment Court in the case of **Monica Munira Kibuchi & 6 others v Mount Kenya University; Attorney General (Interested Party) [2021] eKLR** (the **MKU Decision**) held that section 42(1) of the Act was unconstitutional to the extent that it disappplied the provisions of section 41 to probationary contracts.

It is important to note that before the MKU Decision was delivered, some Judges of the Employment Court had already held that the procedural and substantive justification requirements for the termination of ordinary employment contracts applied to the termination of probationary contracts while other Judges of the Employment Court held that such requirements did not apply.

While we hope the MKU Decision brings more certainty to the issue, it is possible that there may be other conflicting decisions. Despite this, it is highly likely that an employer who terminates a probationary contract without a fair reason and without following a fair process may be successfully sued for unfair termination.

Conclusion

Court decisions have significantly bridged the gap in rights that appears to have been deliberately created by Parliament in its drafting of the Act. There is now a higher likelihood that employees on probationary contracts can successfully sue for unfair termination. There is also a greater possibility that an employer who terminates an employee on a probationary contract without having a fair reason and following a fair process will be successfully sued for unfair termination.

There are still a few provisions in the Act that offer employees on probationary contracts fewer safeguards than those on ordinary contracts. For example, a probationary contract, by law, can be terminated with 7 days' notice or pay in lieu of notice. While it remains to be seen whether this provision will also be successfully challenged, there is need for employers to re-assess the value of probationary contracts. Have they become redundant?

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