

RECOMMENDED EMPLOYMENT DISCIPLINARY PROCESS IN KENYA

A SIMPLIFIED EMPLOYER'S LEGAL HANDBOOK



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1. Common Instigates of Employment Disputes against Employers

i) Summary Dismissal

Statistics at the Employment and Labour Relations Court (ELRC) show that this is by far the most common cause of employment disputes in Kenya. Disputes in this area arise from 2 fundamental aspects, namely,

- a) validity of the underlying circumstances and
- b) procedural irregularity/unfairness.

Summary dismissal arises where the employee has committed an act of gross misconduct and is literally fired without notice but subject of course to a disciplinary hearing. In that case his only entitlement is salary up to the date of dismissal and pay for any accrued leave. Generally, no other benefits are payable.

ii) Breach of Employment Contract Terms

Even where termination has been properly done or the contract is still in force, a party can still maintain a claim based on the breach of a material term of the contract by the other party e.g. failure to pay/ increase salary or bonuses as required under the contract.

iii) Conflicts with Trade Unions

Generally, unionized employees are represented by their unions in labour disputes. These disputes normally continue in court concurrently with the employment relationship e.g. teachers, doctors, etc.

The disputes usually relate to the refusal by the employer to negotiate/renew Collective Bargaining Agreements (CBAs) or to implement some of its terms e.g. increase of salary.

iv) Work Injury

The Occupational Safety and Health Act, 2007 (the “OSHA”), imposes a duty on the employer to protect the health, safety and welfare of his employees and other people who might be affected by their business. Breach of this statutory duty may lead to labour disputes. The OSHA confers upon employees the right to proper protection in terms of health and safety at work and also imposes a corresponding duty on the employer to protect employees from risks and injury.

Disputes of this nature are usually filed as the employment relationship subsists. An employer who terminates the services of an employee on account of such employee having filed a claim against the employer would be held liable for unfair termination.

v) Discrimination

Both Article 27 of the Constitution and Section 5 of the Employment Act prohibit discrimination on the basis of race, colour, sex, language, religion, political or other

opinion, nationality, ethnic or social origin, disability, pregnancy, marital status or HIV status.

Section 5(7) of the Act provides that when discrimination has been alleged by an employee, the burden of proof shifts to the employer who must show that it did not take place. This is a peculiar provision because it runs counter to the well known principle in the law of evidence that 'he who asserts proves'.

Where the law is tilted in favour of the employee in this manner what chance does the employer have to convince the court that in fact the alleged discrimination did not take place? While possible, it is a tall order for most employers.

vi) Sexual Harassment

An employee (of either gender) who has been subjected to sexual harassment may maintain a claim against the employer.



Under Section 6 (2) of the Employment Act, every employer is required to have sexual harassment policy setting out the procedure that an employee who has been subjected to sexual should follow in filing the complaint and pursuing a remedy.

Most employers are found liable not because the act of sexual harassment occurred but because they did not have such a policy.

Sexual harassment claims are common against co-workers during the course of the employment. However, the same claims are primarily made against **employers** alongside a claim for unfair termination. Rarely do employees make such claims against employers while still in employment.

vii) Service Pay

This term 'service' pay is not to be confused with 'severance' pay:

-  Service pay is given at the end of employment as a gratuity in commemoration of long service (ironically which could be anywhere above a year).
-  Severance pay on the other hand is payable on account of a redundancy.

Section 35 (5) of the Act provides that an employee whose contract of employment is terminated upon the issuance of a termination notice is entitled to service pay for every year worked "at such rate as shall be fixed".

Funny enough the law doesn't say who or how the service pay should be fixed thereby causing a great deal of confusion in the interpretation of the provisions relating to service pay.

Prior to 2007, the concept of 'service pay' was only found in collective bargaining agreements and applied only to unionised staff. The idea was to provide employees who had served for a substantial amount of time something akin to a gratuity or pension.

The provision did not fix the rate or provide a formula of how it is to be fixed.

Further, the Employment and Labour Relations Court has taken the view that in the absence of a defined rate in the contract of employment, the rate applicable to severance pay on account of redundancy also applies to service pay.

Fortunately, Section 35 (6) of the Employment Act attempts to water down the adverse implications of the requirement for service pay by listing down some exceptions to the

rule, namely, that service pay would not be applicable where the employee is a member of a:

- ⚖ registered pension scheme or provident fund;
- ⚖ gratuity or service pay scheme;
- ⚖ any other scheme established by the employer whose terms are more favourable than the scheme established under the Employment Act (ironically, none is established!); or
- ⚖ National Social Security Fund.

The above exceptions, taken together, render the requirement for service pay almost meaningless. For instance, since NSSF is a mandatory registration which applies to all employees, it follows that no employee would qualify for service pay so long as the NSSF membership (and up-to-date contributions) subsists.

viii) Termination for Cause: Reasons or No Reasons?

Is the employer required to give reasons for any kind of termination?

In order to justify the veracity and legitimacy of the reasons/grounds for termination, the law prescribes that an employer must give reasons for termination whether for Summary Dismissal or Termination by Notice.

The reasons should **never** be given after the termination has taken effect. This would be an outright negation of the purpose, intent and validity of any reason or reasons an employer may have against the affected employee.

ix) Suspension

This is a much misunderstood concept in Kenya.

The law does not provide for suspension of employees. It can, however, be sanctioned by either the Employment Contract or HR Manual (provided the terms of the HR Manual are incorporated by reference into the Employment Contract and made readily available).

Suspension is only lawful if:

- ⚖ it is allowed under the contract or HR policies of the employer;
- ⚖ it is for a relatively short period sufficient for completion of investigations;
- ⚖ employee is paid his full pay for the duration of the suspension irrespective of the outcome of the investigation; and
- ⚖ suspension is not an end in itself and should not be used as punishment.

Section 19 of the Employment Act outlines **only** nine occasions when the Employer may deduct from the wages of an Employee. No provision under this law allows the employer to deny a suspended employee his monthly salary (or any part thereof) as a warning of the effect of losing his job and as a reminder to the Employee that he would lose his job if he continued being indisciplined.

Withholding of an Employee's salary cannot be a disciplinary sanction.



The salary remains protected under Part IV of the Employment Act. Even during suspension, the contract of employment is still in force and thus the Employer would be in breach if they interfere with salary. The suspension without pay, offends the principles of Fair Labour Practices and Protection of Wages.

x) Waiver of Claims

In the context of a mutual separation it is not uncommon for employers to require the employees to sign a waiver or discharge confirming that subject only to the payment of the agreed terminal dues, they have no other or further claims against the employer.

This waiver/discharge is normally the consideration on the part of the employee for a more generous separation package than the statutory and contractual entitlement.

While a waiver/discharge is legally enforceable provided it is not achieved through intimidation, coercion, inducement or other factor that would vitiate an ordinary contract, it is important to note that it cannot be used by an employer to avoid the liability of paying the employee's statutory and contractual dues. The court would not hesitate to trash such waiver/discharge upon evidence that it was intended to deprive the employee of his lawful dues.



Whether your company has 5 or 500 employees, it's important to conduct a regular review of your HR and benefits-related notices, records and procedures to ensure compliance with the law and prevent potential liabilities and employee lawsuits.

Compliance
IS KEY

1. Disciplinary Process

Employees who engage in misconduct and violate the disciplinary code are liable for disciplinary action. These actions may range from verbal reprimand to dismissal, depending on the seriousness or recurrence of the misconduct or violation. However, the said actions cannot be arbitrarily applied as they may be challenged by the affected employee(s) in court with adverse consequences.

It is important to note that lawful, fair and successful disciplinary action is measured on two benchmarks; all of which must be legitimate and proper:



 **The offence committed (also referred to as the reasons or grounds for disciplinary action).**










 **The Procedure used to arrive at the disciplinary action imposed.**

The disciplinary process must therefore be governed by the principles of natural justice which require that, any employee charged with any HR offence is given an opportunity to defend himself or herself before an impartial adjudicator.

An impartial adjudicator in this case can be the an individual but most advisably, it should be a committee composed of HR, Administration, Legal Department (if any) and the direct Supervisor/Superior of the employee.

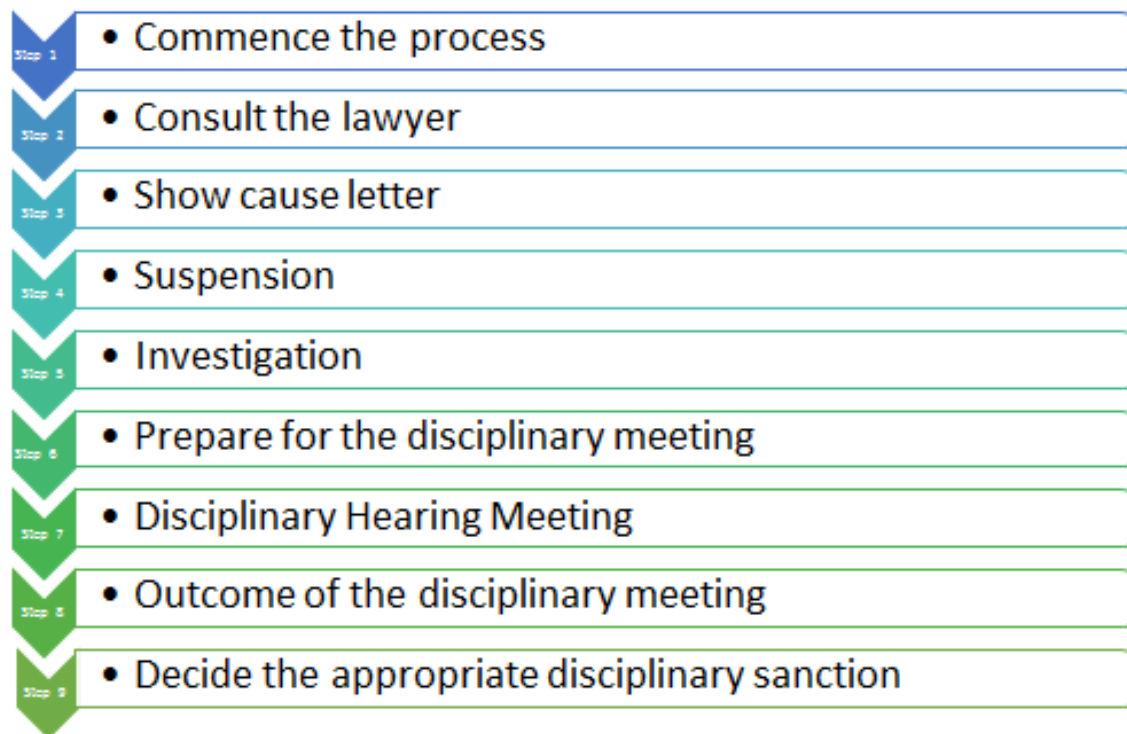
Further, discipline cases shall be dealt with as soon as possible after the occurrence. These principles are provided for in the Acts of Parliament and service regulations.

The following principles ought to be followed when handling disciplinary matters:

-  Good reason and clear adherence to the disciplinary procedures.
-  Actions should be commensurate to the nature of the transgression.
-  Disciplinary action should be demonstrably fair and should be consistent with procedures laid down in the law.
-  The employees should be made to understand the actions that warrant disciplinary action. However, ignorance of the required work standards and regulations should not be considered as credible defense. **All employers are advised to have a well drafted Human Resource Manual which should be made available to all employees at the start of employment.**
-  The employee should be notified in writing the particulars of the misconduct and be given reasonable opportunity to respond.
-  The employee should have a right of appeal against any disciplinary action that may be taken against them and shall be informed of the same.
-  An investigation will be carried out including granting the employee a chance to defend himself/herself.
-  An employee facing disciplinary proceedings shall appear in person and be allowed to have a co-employee (or internal union representative or labour officer) present.
-  The person investigating or adjudicating the case should not have been directly or indirectly involved in the case as a witness, complainant or otherwise as an interested party. This applies primarily to direct Superiors/Supervisors who, despite being the complainants/witnesses, still insist on investigating or being part of the disciplinary committee.







The recommended **9-step** disciplinary procedure is thus as follows:



1. Commence the process



This starts with how the complaint is made, received and handled. Complaints can be categorized into 4:

-  **Vertical (Up to down)**, i.e. complaints initiated by a superior against a junior.
-  **Vertical (down to up)**, i.e. complaints made by juniors against a Superior.
-  **Horizontal**, i.e. complaints made by one employee against another of the same rank.
-  **External**, i.e. complaints made by a person who isn't a part of the organization, e.g. a Client, a Contractor, a Supplier or a Service Provider.

Each employer must have a confidential and efficient HR complaint management strategy which will win the trust of the complainant while at the same time not being prejudicial towards the alleged offender.

Where concerns arise about an employee's conduct it is the duty of the relevant office to assess the preliminary veracity, seriousness and legitimacy of the complaint. In some instances, it would be very easy to weed out malevolent claims from legitimate concerns.

It is important to note that we have 2 broad categories of HR offenses:

-  **Professional misconduct** – These are usually written down in HR Manuals and the law and usually constitute the serious offenses, e.g. absenteeism, sexual harassment, theft, etc.
-  **Unprofessional conduct** – These are generally not written anywhere and are in many cases lightly considered to constitute “bad manners”. They vary from place to place and can be addressed informally by the immediate supervisor, e.g. Chewing gum while in class is frowned upon for teachers, while dressing up casually may be in violation of a Law Firm's code.

Once all preliminary assessments are made and where the use of informal measures to resolve the behaviour is considered inappropriate or has proven unsuccessful, the relevant office will commence the disciplinary procedure by informing the HR Department, which will either act directly or constitute a Disciplinary Committee.

2. Consult your Legal Team (whether internal or external)

After gathering all relevant facts, the HR Department/ the Disciplinary Committee should seek legal counsel which will assist in the framing of the relevant charges and also advise on the best course of action.

3. Show Cause Letter

The Human Resource Department/Disciplinary Committee in consultation with the direct supervisor will issue a Show Cause Letter to the employee.

A Show Cause Letter is a written notice asking the employee to defend themselves or explain/justify their conduct that is the subject of the disciplinary case. This **letter** assists employers in the disciplinary process to inform an employee that they have the opportunity to **show cause** as to why they acted in the manner that they did and why action should not be taken against them.

If an employee refuses, fails or ignores to do the same, then action can be taken against them. Also, if the employee is unable to give genuine or satisfactory reason then action can be taken against them.

The general procedure is that the employee submits a written explanation.

While the format may vary, the general contents of a Show Cause Letter include:

- The charges, i.e. Brief explanation of the misconduct
- Period, i.e. Date by which the employee should respond to the show cause letter
- Give details on the effective date of suspension (if any) and when the employee should appear for a disciplinary hearing
- Invitation to a disciplinary meeting/hearing (but this can be done separately at a later stage).

4. Suspension

If envisioned in the HR Policies or the Contract of Employment, then Suspension should be levied. Some cases that can lead to suspension include (but are not limited to), sexual harassment, fraud and theft. Remember that NO PAY CUT is permissible. Refer to the instigate number (ix) above.

5. Investigation

The nature of any investigation and the competence/expertise of the appropriate investigator, will depend on the complexity and seriousness of the issue and will be a matter for the Employer to determine. An employer reserves the right to engage experts, e.g. Auditors, Private Investigators, Lawyers, etc.

General principles that apply to investigation:

All employees must be treated in a fair and equitable manner in accordance with appropriate fair procedures and the rules of natural justice, which will normally include:

- ⚖️ the right of an employee to be informed of any concern about his or her conduct and to be provided with appropriate detail to allow them reply in respect of that concern;

- ⚖ the right to be provided with copies of all relevant documentary evidence that is being considered by the investigator, or relevant manager, except where it is inappropriate to disclose certain information
- ⚖ taking into account all the circumstances of the case and any legal requirements
- ⚖ the right of reply to any such concern;
- ⚖ the right to be represented by a co employee of the accused employee, or his shop floor trade union representative may be present at the forum where the employee is heard.
- ⚖ the right to a fair and impartial determination of the matter after all relevant facts have been considered.

6. Prepare for the Disciplinary Meeting/Hearing

The HR Department/ Disciplinary Committee should prepare for the disciplinary meeting and invite the relevant stakeholders. It is advisable to have an internal sitting to discuss the misconduct before the date of the hearing.

The purpose of the disciplinary meeting will be to put across to the affected employee any concerns (including, where appropriate, any investigation report).

- ⚖ The employee is entitled to receive reasonable notice prior to a disciplinary meeting (normally about 5 working days' notice in advance of the meeting).
- ⚖ A copy of the disciplinary code should be sent to the employee along with the notice of the disciplinary meeting. (It is however important for this to be made available alongside the HR Manual during employment).

The notice of the disciplinary meeting should state:

- ⚖ the purpose of the disciplinary meeting with a clear statement of the matter(s) which is/are the subject of the disciplinary meeting;
- ⚖ that it is necessary to comply with this Code and attend the meeting;
- ⚖ that the employee has a right to be represented by a serving employee, an employee who doubles as the union representative or by an official from the labour office. Many employers (for good cause) prohibit legal representation at this stage unless the lawyer is also a current employee.
- ⚖ that the HR Department/Disciplinary Committee may make a decision on the basis of the evidence available in the event that the employee fails or refuses (without reasonable cause) to attend the disciplinary hearing meeting.
- ⚖ that the outcome of the disciplinary meeting may be disciplinary action.

7. Disciplinary Hearing Meeting






The disciplinary meeting should be conducted by the HR Department/Disciplinary Committee and the relevant managers/supervisors.

The employee will be given an opportunity to respond to any concerns raised at the meeting (including, where appropriate, the opportunity to respond to any investigation report) and to answer appropriate questions.

Appropriate notes/ minutes will be taken at all disciplinary meetings and copies of the minutes will be provided to the employee in good time (normally 3 - 5 days) after each meeting. Where an employee fails to answer questions or otherwise cooperate with the conduct of the meeting (without reasonable cause) then a decision may be taken on the basis of the evidence available.

8. Decide on the Appropriate Disciplinary Sanction

The following should be taken into account when reaching a decision on what disciplinary action is appropriate:

-  the nature and seriousness of the misconduct;
-  any active or past disciplinary warnings issued to the employee before;
-  the explanation provided by the employee during the disciplinary hearing and written response to Show-Cause Letter;
-  any mitigating circumstances presented by the employee; and
-  any other matters which, in the circumstances, are relevant.

The decision on the disciplinary sanction made should be communicated to the employee not later than seven days after the disciplinary hearing. The disciplinary actions that can be taken (up to and including dismissal), are set out in the table below.

Disclaimer!

This table is **NOT** a permanent depiction of the law but only serves as a sample guide for employers. It **MUST** be amended to reflect the true status, interests and code of conduct of each employer.



NO.	OFFENCE	1 ST BREACH	2 ND BREACH	3 RD BREACH	4 TH BREACH
1	Absenteeism (without communicating) not exceeding 3 days (incl. reporting back late from leave without notifying supervisor)	Final written warning + 3 days' suspension without pay + non-payment of absent day(s)	Dismissal		
	Absenteeism exceeding 3 days (incl. reporting back late from leave without notifying supervisor)	Dismissal without notice + non-payment of absent days			
3	Being rude, discourteous, impolite, or disrespectful to fellow	First written warning	Final written warning	Dismissal	

	employees or clients				
4	Negligence of duty	Final written warning	Dismissal		
5	Insubordination to superiors	Final written warning + 5 days' suspension without pay	Dismissal		
6	Misconduct incl.: Forgery, malicious damage to Company property, refusal to obey instructions according to procedures and job description, inciting violence, sleeping on duty, working under the influence of alcohol or narcotic drugs, assault, fighting on duty, corruption, mis use of position, money-laundering, accepting or offering bribes, rebellious behavior, illegal strike action,	Suspension during investigation- Dismissal			

	incitement to strike				
7	Using abusive language	Final written warning	Dismissal		
8	Being convicted of a criminal offence and jailed for more than 14 days	Dismissal without notice			
9	Willful loss or abuse and damage of EMPLOYER's property (incl. phones, computers, etc.)	First written warning plus replacement of item at full cost.	Second written warning and replacement of item at full cost	Dismissal and replacement of item at full cost	
10	Using Company's time for personal or monetary gain (conflict of interest)	Dismissal			
11	Sexual Harassment and/or immoral conduct	Summary Dismissal			
12	Failure to follow safety & security regulations	Verbal warning	Written warning	Final written warning	Dismissal

13	Giving false information or spreading rumours with intent to deceive or mislead the management or employees or calculated to cause injury to EMPLOYER or any of its employees	Dismissal			
14	Unauthorized disclosure of contractually confidential information (incl. contents of individual employment contracts, or suppliers contracts)	Dismissal			
15	Issuing unauthorized publication and press statements to the public or mass media on Company business without the Employer's approval	Final written warning but can even lead to direct dismissal depending on the type of publication.	Dismissal		
16	Fraudulent activities	Dismissal			



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