

# Navigating Dispute Resolution in the Workplace

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Event Start at **8:03 AM**

This event was the second in the Employment Contract series with our member **TripleOKLaw**.

The presentation primarily covered the disciplinary processes that a company should have, how they are structured by the law, and how to perform a dismissal without exposing the organization to legal action.

The presentation took us through the legal foundations necessary to arm oneself in a contract dispute, then discussed the reasons companies should implement a stringent and coherent disciplinary process, how to ensure that this process is fair, what actions a disciplinary committee can take, how employees can waive disciplinary action and how to legally handle disciplinary appeals.

## Legal Foundation

As an employer, one must always keep in mind the boundaries of the law when designing a disciplinary process. The Constitution of Kenya (Articles 10, 41 & 47) establishes a basic minimum of fairness necessary to any disciplinary action. Legally speaking, if the employer can demonstrate that the treatment of the employee was fair, then the three concerned articles of the Constitution facilitate any disciplinary action against that employee. However, the concept of fairness is a very wide principle, and is clearly left undefined by legal documents. Section 41 of the Employment Act is the best toolkit for any employer trying to determine a legal disciplinary process and has served as a guideline to most companies for disciplinary action.

Recall that Section 41 of the Employment Act of 2007 stipulates that:

*“(1) Subject to section 42, an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance, or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.*

*(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee (...) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make.”*

## Reasons for a Fair disciplinary process

In most legal cases, the employer is at fault in the process of disciplinary action, which is why there exists numerous precedents for former employees to pursue legal action. It is of **utmost importance that a coherent and fair disciplinary process** is implemented.

Having a fair disciplinary process is coherent with the Constitution and therefore shields the employer from unfair labor practices.

Fairness in the disciplinary process also helps promote a healthy working environment, also favorable in case of court proceedings.

There are several examples, such as the Alex Wainia Mbugua vs. Kenya Airways, where a former finance director who was sacked without due internal process, was awarded KES 144 million, the equivalent of three years' salary, which was slashed to KES 27 million after the initial compensation was deemed unjustified. This highlights an important fact, that companies have a right to appeal unfair labor decisions and can come out with a better deal.

Employment relationship is one based on mutual trust and confidence.

## Fair Disciplinary Process

A fair disciplinary process is the one outlined above, in the Section 41 of the Employment Act of 2007.

When conducting preliminary investigations, it is crucial to deal with the employee impartially, and search for facts, to prepare an eventual case against the said employee. When said employee is being investigated, make sure to remove them from that process, so suspension or compulsory leave are the recommended course of action.

These suspensions are usually within a reasonable figure of time (30-60) days, and certain companies alter the employee's benefits, such as his salary or the tools of trade (car, computer, etc.). To shield the company from legal retributions, always ensure to never paint a vindictive picture in the process of investigating said employee. There are examples where the courts have faulted the employer when their communications were unfair, and where notice periods were not properly observed.

Section 41 requires all employers to issue a notice after the disciplinary process, where you explain the action you might take. It serves more as a warning, to detail the allegations and allow the employee to detail themselves. Action can and should be taken dependent on the employee's response within a reasonable period.

Once you've issued the notice you have put yourself in a framework, where you are not allowed to process that employee on other allegations unless a notice is sent for

those allegations.

To ensure fairness, as detailed in Section 41, a union representative can be there at any time during the review of the notice, or the explanation given by the employee.

## **Disciplinary Committees or Panels**

In setting up the disciplinary panel, you need to show a panel that is without any conflict of interest, and that is fair and impartial.

The disciplinary process is not so much of a legal process because

1. It's an internal process, no unnecessary third parties
2. In most cases, the request for a lawyer throughout the disciplinary process is denied by the court

There are two types of internal disciplinary committees that can be set up:

1. Ad Hoc panels, made for the specific context
2. Formal panels, used across the board and usually detailed in the HR manual.

The disciplinary panel always recommends a course of action, and the employer follows that disciplinary action unless it sees justification not to. The courts value these committees very highly, and often bind the employers to that decision. The court is constantly looking to find reasonable punishment, which is why it is often in line with the decision of these committees, who provide reasonable action tailored to their investigation.

The Employee has an obligation to attend the disciplinary committee, therefore implying that the employer must set reasonable timeframes, deadlines and accessible avenues for the employee in question.

## **Waiver of Disciplinary Action**

It is important to note first that if an employee resigns, that terminates all internal disciplinary action against that employee. According to the courts, an employer has authority to discipline an employee if a contract exists, and if the employee resigns before the final verdict of the disciplinary panel, the contract is terminated.

It is for this reason that employers need to remain pragmatic during labor disputes, and never attempt to worsen the working conditions of the employee.

If the employee investigated is accused of larger crimes, a criminal case can be pursued by the employer.

Very often, the push and pull of employee resigning during disciplinary proceedings, the employer should make it clear that an employee resigning in those conditions is not entitled to any benefits, a provision outlined in the company's HR manual.

## Handling of Disciplinary Appeals

Section 12 of the Employment Act of 2007 outlines what must be included in the HR Manual. The disciplinary rules, as well as the people to whom employees can express their dissatisfaction, must be noticed for contracts that are written after the company has more than 50 employees.

The right to appeal is not considered as one of the statutory essentials of procedural fairness and should therefore be expressed in the contract signed.

Companies tend to appeal a decision they deem unfair, and, if they show sufficient proof of fairness and due process in the disciplinary proceedings surrounding the employee in question, then the appeal may help them remedy the defects, whether they be procedural or substantive.

## Q&A Session

**Common practice is that suspension is used to pave the way for the inspection of the employee. What are the terms of this suspension?**

The way the court mitigates allowances during suspensions is based on the results of the internal investigation conducted by the former employer.

**Can a resignation be rejected to wait for allegations to be revealed/ during an ongoing investigation?**

An employment contract works like any other contract, and if the employee investigated resigns, any disciplinary action against them immediately ceases.

**What if the employee investigated leaves the situation where third parties were harmed? What is the justice for them?**

Unfortunately, when an employee investigated resigns, then there is no legal incentive for him to be inspected. The employment contract can be broken by both parties, either resignation or firing.

**Are you allowed to take away tools of trade during the suspension period?**

In most of the cases, during the suspension there must be a reason why we should remove the tools of trade.

**How do we handle employees who change companies and disseminate the intellectual property of their former company?**

If there is an intellectual clause in the original contract, that delineates what constitutes as transferable knowledge, then legal action can be taken against the former employee that breaches that contract.

## **What is the process of revising the HR Manual?**

Changes to the HR Manual are perfectly legal, if all employees are updated about it. In bigger companies, said changes can be obstructed by unions. The changes, by and large, are at the employer's discretion when the company has less than 50 employees. However, it is always good to notify employees as best practice for legal purposes.

## **How do we handle disciplinary action regarding employees that fail at the basic skills they were recruited for? (ie. Accountant)**

If you can present the failure of the employee as gross misconduct, that is you are able to demonstrate the employee's carelessness, then disciplinary action is legal as read in Section 41 of the Employment Act.

