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EMPLOYMENT LAW ALERT

IN THIS ISSUE

SOUTH AFRICA

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In the recent judgment of *South African Commercial Catering and Allied Workers Union (SACCAWU) obo Members v Southern Sun Hotel Interests (Pty) Ltd* [2021] ZALCJHB 259 (26 August 2021), the Labour Court handed down a judgment regarding an employer's institution of a lock-out against employees for their refusal to reach an agreement indemnifying the employer against its failure to implement a wage increase mandated by a collective agreement.

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Termination of employees on probation

An employment relationship is guided by clauses of an employment contract. One of its provisions is a clause mandating a probationary period which requires an employee to work for a definite period before being offered permanent employment. Within the probation period, both the employer and the employee can assess whether they are each other's *"perfect fit"*, more so for the employer.

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SOUTH AFRICA

Embarking on a lock-out action while subject to a collective agreement: The do's and don'ts

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In the recent judgment of *South African Commercial Catering and Allied Workers Union (SACCAWU) obo Members v Southern Sun Hotel Interests (Pty) Ltd* [2021] ZALCJHB 259 (26 August 2021), the Labour Court handed down a judgment regarding an employer's institution of a lock-out against employees for their refusal to reach an agreement indemnifying the employer against its failure to implement a wage increase mandated by a collective agreement.

The South African Commercial Catering and Allied Workers Union (SACCAWU), acting on behalf of its members, approached the Labour Court on an urgent basis seeking an order to declare the lock-out instituted by Southern Sun unprotected and unlawful in terms of section 68(1)(a)(ii) of the Labour Relations Act 66 of 1995 (LRA), and to interdict Southern Sun from further locking out any of its members going forward.

Southern Sun commenced the lock-out action against its employees for reasons stemming from the employees' refusal to agree to the non-implementation of a collective agreement signed on 13 March 2020. This collective agreement required Southern Sun to implement a 5,5% wage increase for its employees for the period of 1 April 2020 to 31 March 2021.

The hospitality industry has been particularly impacted by the COVID-19 pandemic. As a result, Southern Sun failed to implement the agreed upon 5,5% increase throughout the course of 2020, eventually providing SACCAWU with a notice of termination of the recognition agreement between itself and SACCAWU. In doing so, Southern Sun indicated by implication that no further collective agreements would be negotiated or re-negotiated come 31 March 2021.

Dispute and lock-out notice

Southern Sun then issued its employees with a demand in the form of a "*non-implementation*" agreement. The employees were required to sign the agreement and thereby consent to Southern Sun's non-implementation of the 5,5% increase to their wage rate agreed upon in the original collective agreement.

SOUTH AFRICA

Embarking on a lock-out action while subject to a collective agreement: The do's and don'ts*...continued*

Southern Sun may have been in a better position had it taken steps to legally terminate the collective agreement before instituting the lock-out notice.

The employees were to accept the demand by 21 May 2021. SACCAWU rejected this demand and Southern Sun referred the matter to the Commission for Conciliation, Mediation and Arbitration as a dispute of mutual interest on 27 May 2021. As the dispute remained unresolved after 30 days, Southern Sun issued a 48-hour notice of a lock-out on 27 July 2021, effective 30 July 2021.

It was these steps that resulted in SACCAWU successfully challenging the protected status of the lock-out on the grounds that the issue in dispute was regulated by a collective agreement, which resulted in the interdict being granted against the employer. The lock-out was found to be unprotected.

Baloyi AJ pointed out in his judgment that:

> *"the respondent [Southern Sun] has indeed complied with the requisite process set out in section 64 [of the LRA]. This should ordinarily form the basis for a lock-out to be protected. With the collective agreement in place for the period of the increase forming [the] subject matter of the lock-out, the very lock-out certainly lost protection in view of section 65(3)(a)(i) limitations."*

Section 65(3)(a)(i) states that *"[s]ubject to a collective agreement, no person may take part in a strike or a lock-out or in any conduct in contemplation or furtherance of a strike or lockout if that person is bound by any arbitration award or collective agreement that regulates the issue in dispute."*

The issue in dispute was clearly based on the increase in wages of Southern Sun's employees as agreed to in the prevailing collective agreement.

Southern Sun may have been in a better position had it taken steps to legally terminate the collective agreement before instituting the lock-out notice. This may have prevented section 65(3)(a)(i) coming into play. As pointed out in the judgment, the employees would still have had recourse to claim the unpaid increase under section 77 of the Basic Conditions of Employment Act 75 of 1997 as the terms and conditions of employment in the collective agreement had a bearing on the individual employees' contracts of employment.

Employers should be mindful of the reach of collective agreements which they conclude. If they have entered into collective agreements that are later found not to be affordable, it is important to ensure that such an agreement includes requisite escape clauses to meet unforeseen changing events. This way an unprotected lock-out can be avoided.

Fiona Leppan, Kgodisho Phashe and Reece Westcott

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Termination of employees on probation

What has been up for debate for some time is whether the employer needs to give reasons or whether, in accordance with the wording of the Employment Act, no notice need be given when terminating a probationary employment contract.

An employment relationship is guided by clauses of an employment contract. One of its provisions is a clause mandating a probationary period which requires an employee to work for a definite period before being offered permanent employment. Within the probation period, both the employer and the employee can assess whether they are each other's "*perfect fit*", more so for the employer. In the words of Justice Nzioki Wa Makau in *John Muthomi Mathiu v Mastermind Tobacco (K) Ltd* [2018] eKLR, "*The probationary part of a contract of employment is the period where an employee is tested*". Therefore, employees on probation are expected to display their best skills, knowledge, and expertise during this period for the employer to consider them for permanent employment.

The essence of a probationary period is that it allows an employer to terminate a probationary contract, by giving less notice than would be required for a permanent contract. However, what has been up for debate for some time is whether the employer needs to give reasons or whether, in accordance with the wording of the Employment Act, no notice need be given when terminating a probationary employment contract.

Section 41 of the Employment Act provides that an employer shall, before terminating an employee, inform them of the reason for the intended termination and to give the employee an opportunity to be heard before terminating them. However, section 42(1) of the act excludes employees on probation from the fair termination requirements of section 41. Section 42(1) provides that, "*The provisions of section 41 shall not apply where a termination of employment terminates a probationary contract.*" The effect of section 42(1) is that an employer could terminate an employee on probation without giving them an opportunity to respond to the grounds of termination.

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Termination of employees on probation...*continued*

In its judgment, the court declared section 42(1) of the Employment Act unconstitutional, although it did not compensate the petitioners for unfair termination.

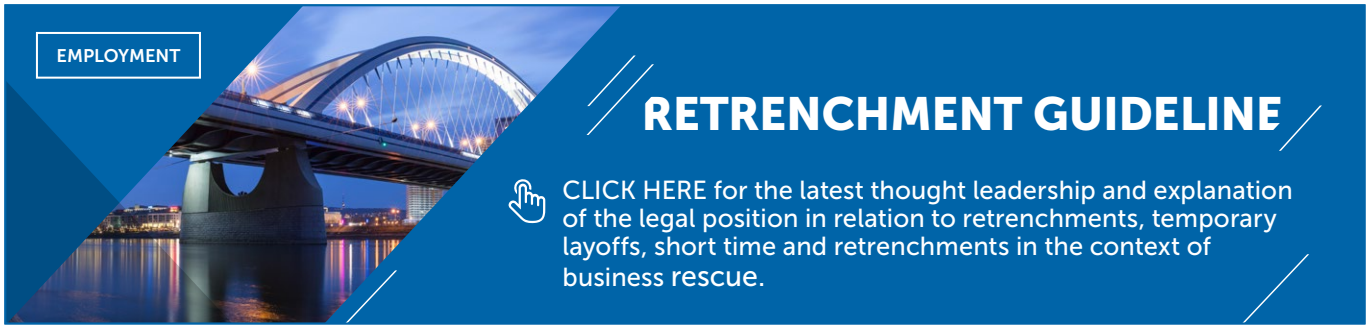
Case law

Various judges have commented on the meaning and implication of section 42(1) of the Employment Act. In *Mercy Njoki Karingithi v Emrald Hotels Resorts & Lodges Ltd* [2014] eKLR, Justice Radido stated that, "*The only right as far as termination is concerned, which has been abrogated during the probationary period is the right to procedural fairness in section 41 of the [Employment] Act. That is the import of section 42 of the Employment Act.*" In that case, the court opined that although an employer is not obliged to offer an employee on probation an opportunity for a fair hearing before terminating them, employers are obliged to provide fair and valid grounds for termination.

In the same year, Justice Rika while disagreeing with Justice Radido's sentiments stated that, "*The termination of probationary contracts is strictly regulated by the terms of the contract.*" In this pronouncement, perhaps unhelpfully, Justice Rika seemed to suggest that whenever there is a conflict regarding the termination of a probationary contract, the remedies available to an employer and an employee are contained in the employment contract.

In 2016, in the matter of *Evans Kiage Onchwari v Hotel Ambassadeur Nairobi* [2016] eKLR, the Employment and Labour Relations Court held that section 42(1) of the Employment Act is unconstitutional since it contravenes Article 41 of the Constitution of Kenya that guarantees labour rights. The court stated that, "*Parties to an employment contract in whatever form are no longer allowed to walk out at will.*" In addition, the court stated that a probationary period should be specially provided for in an employment contract and not to be left to the discretion of an employer. This of course is already required pursuant to the Employment Act.

Although these judges expressed differing views on the meaning, implication, and constitutionality of section 42(1) of the Employment Act, none of their decisions have bound the others. The varying interpretations of this section have provided an opportunity for employers and employees to "*opinion-shop*" for a judge whose interpretation and application of sections 41 as read with 42(1) favoured their case. This created confusion on the applicability of the sections contrary to the general legal principle that laws in any legal system should be predictable and uniform.



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Termination of employees on probation...*continued*

Employers should review their employment contracts and amend any provision which allows them to terminate an employee without giving them an opportunity to be heard and for justifiable reasons in accordance with the Employment Act.

In 2021, the Chief Justice constituted a bench of three judges to address the constitutionality of section 42(1) in ELRC Petition 94 of 2016 in *Monica Munira Kibuchi and Others v Mount Kenya University and Attorney General (as interested party)* [2021]. In this case, the petitioners had been terminated during their probation without being taken through a fair hearing process. The court noted that section 2 of the Employment Act does not define an employee to distinguish those on probation from permanent employees. As such, section 42(1) is discriminatory. In its judgment, the court declared section 42(1) of the Employment Act unconstitutional, although it did not compensate the petitioners for unfair termination. In the court's view, the employer had terminated the petitioners according to the provisions of the law. The effect of declaring section 42(1) unconstitutional is that an employer cannot justify their action to terminate an employee on probation based on this section. Although this does not resolve the issue entirely, and leaves questions unanswered as to the way forward, employers should be aware that this is not a straightforward issue and that until the Employment Act is amended, the procedure they follow in terminating probationary contracts, may be challenged.

In conclusion, an employer (in the absence of an employment handbook) could prevent a challenge for unfairly terminating a probationary contract by observing the following rough steps:

- The employer should have a fair and valid reason as the basis for terminating the employee.
- The employer should issue a letter to the concerned employee stating the cause of the termination, and invite the employee to a disciplinary meeting. The letter should set out the grounds for the contemplated termination.
- The third step is to hold a disciplinary hearing so that the employee may be heard.
- After the meeting, if the grounds still hold, the employer should issue a termination notice of not less than seven days to the concerned employee.
- After the seven days, the employee's employment is terminated, and the employer should pay all terminal dues and provide the employee with a certificate of service.

Notice to employers

As a secondary step, employers should review their employment contracts and amend any provision which allows them to terminate an employee without giving them an opportunity to be heard and for justifiable reasons in accordance with the Employment Act.

Njeri Wagacha and Johnstone Odeya

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