

CLIFFE DEKKER HOFMEYR

WEBINAR

Avoiding common employment law
mistakes in workplace disputes





Jean Ewang
Counsel
CDH





Njeri Wagacha
Partner
CDH



Recruitment



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Introduction

Recruitment and Early Employment Documentation



Failure to provide written contracts

- Sections 9 and 10 of the Employment Act require written contracts and employment particulars for all employees with service exceeding three (3) months. These particulars must include:
 - Employee and employer details (name, age, address, sex, etc.);
 - Job description;
 - Commencement date, contract type, and duration;
 - Place of work, working hours;
 - Remuneration, benefits, and intervals of payment;
 - Continuous employment period;
 - Leave entitlements, sick pay, pensions; and
 - Collective agreements and overseas assignment details.



Common employer mistakes

- Failure to have employment contracts for more than three (3) months in writing. This leaves room for courts to presume the existence of an employment relationship between an employer and employee;
- Reliance on short offer letters or outdated templates.
- Failure to attach job descriptions in employment contracts.
- Drafting incomplete or ambiguous contracts.

Litigation risk

- Employment laws are employment friendly, and courts often resolve ambiguities in favor of the employee.
- Employers who cannot produce clear written particulars face challenges proving terms of employment.
- Practical Guidance:
 - Issue comprehensive contracts before or immediately upon commencement of employment.
 - Include detailed job descriptions, either attached or incorporated by reference.
 - Maintain employment records for five (5) years after termination.

Redundancy

Legal Framework



Redundancy is defined under the Employment Act as “the loss of employment, occupation, job or career by involuntary means through no fault of an employee, involving termination of employment at the initiative of the employer, where the services of an employee are superfluous and the practices commonly known as abolition of office, job or occupation and loss of employment.”

Redundancy relates to the role, not the individual. The position is being eliminated, not the employee being targeted.

Selection criteria

- Pursuant to section 40(1)(c), an employer must satisfy certain minimum conditions before terminating an employee on account of redundancy. The conditions are as follows:

In selecting the employees to be declared redundant, the employer must have had due regard to (i) seniority in time and to the (ii) skill, (iii) ability and (iv) reliability of each employee of the particular class of employees affected by the redundancy.





Key statutory requirements

- **Where the employee is a member of a trade union:**
 - The employer must notify the trade union and the labour officer of:
 - The reasons for the redundancy, and
 - The extent of the intended redundancy.

This must be done not less than one (1) month prior to the intended date of termination.

- **Where the employee is not a member of a trade union:**
 - The employer must notify the employee personally in writing and the labour officer.

- **Protection in relation to trade union membership**

Where a collective agreement exists setting out terminal benefits payable upon redundancy, the employer must not place an employee at a disadvantage for:

- Being a member of a trade union; or
- Not being a member of a trade union.

Redundancy process



- Hold a town-hall meeting
- Notification of Intended Redundancy to the affected employees Notification to the labour officer and/or trade union
- Consultation phase
- Notice to employees who are to be declared redundant
- Notice to employees who are being retained or transferred to a new position
- Notification to the labour office and the trade union
- Issue a certificate of service

Judicial Interpretation

Key points to note

- Redundancy under the Employment Act, particularly Section 40, is not treated by the courts as a purely managerial prerogative.
- The courts consistently interrogate whether the employer has strictly complied with the statutory procedure, and failure to do so will render the redundancy procedurally unfair.

Practical compliance framework

To minimise litigation risk, employers should:

- Document the business rationale for restructuring.
- Clearly define affected positions, not individuals.
- Apply objective and consistent selection criteria and maintain documentation to demonstrate that it considered the selection criteria.
- Conduct meaningful consultations with employees and unions.
- Issue statutory notices and termination letters.
- Pay all statutory entitlements accurately.
- Maintain a clear paper trail



Daniel Kiragu
Senior Associate
CDH



Avoiding Common Employment Law Mistakes in Disciplinary and Termination Processes

Kenya employment law | Sections 41, 43 & 45 of the Employment Act

Central message: employers often lose not because they lacked a reason, but because they mishandled the process.



Agenda

- 01 — The legal test: reason, process and outcome
- 02 — 10 common mistakes that repeatedly trigger ELRC claims
- 03 — Section 41 hearings, evidence disclosure and documentation
- 04 — Managing poor performance without procedural shortcuts
- 05 — Commercial judgment: settlement, exit basics and risk control

Practical focus for HR, management and in-house counsel

Why employers lose: the court tests two limbs

Under sections 41, 43 and 45, the employer must prove both a valid reason and a fair process.

1. VALID AND FAIR REASON

- Identify the allegation or ground clearly
- Prove what management believed
- Show why that belief was grounded in evidence
- Demonstrate the decision sat within the “band of reasonable responses”

Sections 43 & 45

2. FAIR PROCESS

- Explain the charge in a language the employee understands
- Give notice, evidence and time to prepare
- Allow accompaniment
- Hold a real hearing and genuinely consider the response

Sections 41 & 45

THE PRACTICAL CONSEQUENCE

If either limb fails, the termination becomes unfair and unlawful.

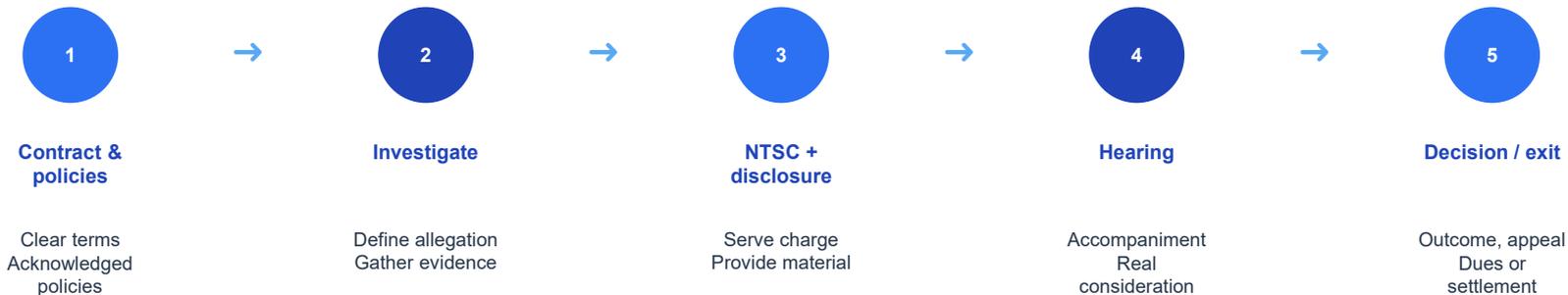
Courts will not only ask whether the employee was wrong. They will ask whether the employer did everything right.

Process failures often decide the case



Litigation-prevention sequence

The safest files usually follow the same disciplined sequence from onboarding through exit.



Most disputes are first lost in weak documentation, rushed process and poor records — not in court.



Process failures

Where defensible employee issues become expensive litigation

Section 41, 43 and 45 focus



Mistake 1: weak documents and careless fixed-term contracting

The dispute often becomes hard to defend long before the disciplinary hearing begins.

WEAK CONTRACT / POLICY FRAMEWORK

- No proper written contracts
- Outdated templates and unclear job descriptions
- Inconsistent terms and benefits in practice
- No disciplinary, grievance, performance or sexual harassment policy
- Policies exist, but were never issued, explained or acknowledged

Paper trail = defence file

What to do: issue clear contracts, update policies regularly, align them to actual practice, circulate them properly and obtain signed acknowledgement.

MISUSING FIXED-TERM / ROLLING CONTRACTS

Risk indicators:

- years of uninterrupted renewals
- automatic or routine renewals
- assurances that renewal is expected
- no break between contracts
- a role that is permanent in substance

Courts may look past the label and examine the real employment relationship.

Audit every fixed-term role

Ask why the role is fixed-term, whether the business need is genuinely temporary, and whether renewals have created a legitimate expectation of continuity.



Mistake 2: acting on rumours, suspicion or office gossip

Suspicion alone rarely satisfies sections 43 and 45. The employer must be able to show what it believed, why it believed it, and what evidence it relied upon.



If it is not documented on the file, it does not exist in court.

Mistakes 3 and 4: legal is involved too late and the hearing is not real

A disciplinary meeting is unsafe if the outcome is effectively decided before the employee is heard.

LEGAL INPUT MUST COME AT THE RISK STAGE

By the time counsel is called in, the employer may already have:

- issued a defective show-cause letter
- used the wrong legal ground
- mixed up misconduct and poor performance
- ignored protected-right or reputational issues
- created harmful internal emails and documents

Escalate early

Sensitive exits, fraud, harassment, discrimination, incapacity, unionised employees, whistleblowing and mutual separation discussions should not be improvised.

SECTION 41 REQUIRES A REAL HEARING

Minimum elements:

- clear allegations, not generalisations
- notice of the right to be accompanied
- enough time to prepare (and extensions if justified)
- disclosure of the material relied upon
- an actual hearing before a properly constituted panel
- minutes and a decision reached after deliberation

Notification is not a hearing

Key question: did the employee have a real chance to influence the outcome?



Mistakes 5 and 6: ambush hearings and confusing performance with misconduct

ADVANCE DISCLOSURE OF EVIDENCE

A fair hearing is not the right merely to sit in a room and speak. It is the right to know the case against you and prepare for it.

The invitation should include:

- the exact allegations
- the supporting documents and particulars
- the possible outcomes
- the date, time and venue
- the right to be accompanied and adequate support to prepare

Do not blindside the employee

POOR PERFORMANCE IS NOT MISCONDUCT

Misconduct

- breach of rules
- fact-finding
- culpability focus
- disciplinary sanction

Poor performance

- clear KPIs and expectations
- appraisal trail
- coaching / support
- realistic improvement period
- PIP and final performance hearing

Poor performance must be managed before it is terminated



Mistakes 7 and 8: HR does not push back, and internal teams are not trained

Once management decides “just regularise the file”, the procedure often becomes artificial.

HR AS A RISK-CONTROL FUNCTION

HR should:

- challenge predetermination
- insist on evidence and a defensible file
- document objections where necessary
- slow down rushed exits
- advise management when the process is legally unsafe

HR is not a rubber stamp

Its role is to protect the organisation from unlawful decisions, not to package them.



Practical capability gaps usually show up in poor show-cause letters, bad investigations, inconsistent outcomes, weak appeal handling and damaging evidence in court.

Mistakes 9 to 11: lack of records, bad settlement calls and fresh exit claims

Even a defensible case can be lost by poor documents, poor witness preparation or a chaotic offboarding process.

Records & witnesses

- signed contracts and policy acknowledgements
- signed warnings and hearing minutes (or refusal recorded)
- proof of service of notices
- witness statements where used
- witnesses prepared to explain the file under cross-examination

Commercial judgment

Where the concern is real but the process is already flawed, ask:

- is the file defensible?
- did section 41 happen properly?
- would mediation or a negotiated exit reduce cost and exposure?

Not every weak process should be fought to judgment.

Exit basics

- At exit, confirm:
- salary to last day worked
 - leave reconciliation
 - notice or pay in lieu
 - statutory deductions
 - return of company property
 - systems access closure
 - certificate of service





What employers should do differently

A litigation-prevention checklist for HR and management

[Practical checklist](#)

Pre-termination checklist

Before any disciplinary termination, HR or management should be able to answer each question below.

- 1 Is the contract and policy framework in order?

- 2 What exactly is the allegation or reason?

- 3 What evidence supports it?

- 4 Has there been a fair investigation?

- 5 Do we need legal input now rather than later?

- 6 Has the employee received an NTSC and the supporting evidence?

- 7 Has the employee been invited to a hearing and informed of the right to be accompanied?

- 8 Has there been a real section 41 hearing?

- 9 Is the outcome proportionate and consistent?

- 10 Has the termination letter been issued with a right of appeal?

- 11 Is the file properly documented and signed where necessary?

- 12 Is the process strong enough to defend, or should settlement be considered?

- 13 Are final dues and exit documents ready?



Additional questions for poor-performance cases

Poor performance requires a management record.

Were expectations clear?

Current job description, KPIs, targets, timelines and reporting lines should all be clear and documented.

Was support given?

Show coaching, feedback meetings, tools, supervision and any reasonable support required for the role.

Was improvement measured?

Use a realistic PIP period, record progress, and hold a final performance hearing before termination.

Poor performance must be managed before it is terminated.



Closing thought

Courts don't ask "Was the employee wrong?" but "Did the employer do everything right?"

Thank you

Disciplined documentation. Real hearings. Early legal input. Commercial judgment.





Desmond Odhiambo
Partner
CDH



Managing Exits of c-suite employees



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Who are c-suite employees.
Duality of their roles

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Loss of confidence.

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Performance issues vis a vis
misconduct.

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Mutual Separation Agreement

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Key elements of a valid MSA
When to present an MSA

05

Court considerations to enforce an MSA

Timing
Independent legal advice

06

Proactive strategies

Short term contracts
Mutual Separation Agreements



Who are c-suite employees

Introduction

Duality of roles



Introduction



Who are c-suite executives

Senior company employees (Mostly hold position at the pleasure of Board of Directors).

Dual Role of C-suite employees

As employees - entitled to protections under the Employment Act – fair termination process

As appointed directors - governed by the provisions of the Companies Act 2015.

Termination process of c-suite employees

- Dismissal from employment – section 41, 43 and 45 of the Employment Act requirements (fair and valid substantive reason and fair procedure).
- If registered, removal/ resignation from directorship in tandem with the employment termination – following Companies Act procedures



Common reasons for exit

Substantive reason

- Loss of confidence/ trust in their leadership by the Board.
- New direction where the c-suite employee's role/ leadership no longer fits.
- Personality clashes or power struggles at the Board level
- Soft performance issues like negative attitude.
- Whistleblower complaints that cast doubt on the executive

Dede Esi Annie Amanor-Wilks v Action Aid International [2014] KEELRC 439 (KLR) – Negative attitude

Gaps in Kenyan jurisprudence

The Employment Act does not recognize loss of confidence as a standalone valid reason for termination.



Common mistakes



Blurred lines

The line between performance and misconduct can blur due to broad duties and discretion.



Recommendations

If performance-related, records of evaluations.
If misconduct, records of evidence from investigations.



Cause-based termination

Courts require substantive justification (e.g. specific misconduct or demonstrable poor performance).

Key terms of a valid contract

Mutual Separation Agreements (MSAs)

Court
considerations



Mutual Separation Agreements



Terms of an MSA for C-suite exits

- Agreed Separation date (last date of employment).
- Ex-gratia package exceeding statutory minimums (notice pay and accrued leave) - negotiated exit package.
- Independent Legal Consultation Clause: Some jurisdictions may offer a stipend for legal advice to pre-empt arguments of duress or ignorance.
- Confidentiality and Non-Disparagement: Keeps the terms of the separation (and often the events leading up to it) confidential.
- Mutual Release from any claims.
- Reasonable post-termination restrictive covenants (non-compete, non-solicit, restraint of trade)



Mutual Separation Agreements



Key elements of a valid contract.

- Voluntary consent – time to consider
- Consideration above their statutory entitlement
- Independent Legal Advice
- Documentation & Formality: Verbal discussions are not a guarantee.

Benefits of an MSA

- Avoids uncertainty on risks of legal action.
- Confidentiality and non-disparagement clauses, allowing both parties control the narrative.
- Flexibility: such as staggered exit announcements

When to present an MSA

When should an employer introduce the idea of a mutual separation in a potential termination process

01.

Timing considerations

Not standard.

Best approach with lower risks

02.

After finding a reason

A defensible reason should the MSA fail

03.

After start of disciplinary process

Having afforded the employee the opportunity to be heard



Court considerations on enforcement

Timing

Context of the MSA.

When to present the offer (after hearing but before the decision is formally delivered).

Evidence

Opportunity to seek independent legal advice.

Voluntary.

Additional package above statutory minimum.



Proactive strategies in managing exit of c-suite employees

Short-term contracts

E.G 3 years. Option of non-renewal



Documentary evidence

Appraisals – performance oversights



Formal contractual terms

Alignment with the duality role (resignation from directorship) if need be



Mutual Separation Agreements

Mutual release of claims. Time value of money. Staggered exit





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