EMPLOYMENT LAW ALERT

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On 10 April 2022, the *Daily Nation* wrote an article entitled "*Oppo imposes fines on its staff for lateness, unanswered calls*" after complaints were made about the apparent stringent policy with regard to the employees of Oppo Kenya Ltd (Oppo). According to the article, Oppo through a memorandum which took effect on 1 April 2022 introduced a policy (the Policy), in which several fines for lateness to work, leaving work early and not responding to calls when working from home, were introduced.

According to the article, employees who reported to work 15 minutes late from the start of the workday or left the workplace 15 minutes earlier than the end of the workday, were fined KES 200 for each occurrence (fines). Moreover, any employee reporting to the office later than 15 minutes from the start of the workday, would be considered to have worked a half day and therefore, half of their wages for the day would be deducted.

The Employment Act of 2007 (Act) requires an employer to pay an employee the entire amount of the wages earned by or payable to an employee in respect of work done at the expiry of every month for an employee. The Act generally does not allow an employer to deduct employee wages in the manner described in the Policy and so we have sought to question the legality of such an arrangement.

Although an employment contract is a contract and therefore able to be varied and amended, it is a special category of contract, in that employee rights are protected rights. In this respect, the Act requires that employee consent is sought prior to any amendment of their contract and in accordance with section 9 of the Act, that consent must be in writing. This is backed by case law in *James Ang'awa Atanda and 10 Others vs Judicial Service Commission* [2017] eKLR. In that case, the court found that the unilateral variation of the petitioner's employment contract to include changes such as: shifting from an open-ended contract to a fixed-term contract; undefined probationary period; and the reduction of the employee's wages as unlawful as it went against the right to fair labour practices protected under the Constitution.

In *Joyce Mukolwe v Mustek East Africa Limited* [2021] eKLR the claimant's contract was unilaterally amended to include a similar policy to the Policy. Subsequently, the claimant's salary was deducted on account of her late arrival to work in conjunction with other deductions. The court deemed this action to be unjustifiable and ordered the employer to refund the deducted amount. Yet the objection, in this case, was not to the policy but its unilateral implementation.

Even if consent is sought, it is worth bearing in mind that the Act sets out the minimum provisions applicable to an employment contract. In this respect, the Act states in section 19 that employers may only make deductions, in the following circumstances:

a) any amount due from the employee as a contribution to any provident fund or superannuation scheme or any other scheme approved by the Commissioner for Labour to which the employee has agreed to contribute;

b) a reasonable amount for any damage done to, or loss of, any property lawfully in the possession or custody of the employer occasioned by the wilful default of the employee;

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c) an amount not exceeding one day's wages in respect of each working day for the whole of which the employee, without leave or other lawful cause, absents himself from the premises of the employer or other place proper and appointed for the performance of his work;

d) an amount equal to the amount of any shortage of money arising through the negligence or dishonesty of the employee whose contract of service provides specifically or his being entrusted with the receipt, custody and payment of money;

e) any amount paid to the employee in error as wages in excess of the amount of wages due to him;

f) any amount the deduction of which is authorised by any written law for the time being in force, collective agreement, wage determination, or arbitration award;

g) any amount in which the employer has no direct or indirect beneficial interest, and which the employee has requested the employer in writing to deduct from his wages; and

h) an amount due and payable by the employee under and in accordance with the terms of an agreement in writing, by way of repayment or part repayment of a loan of money made to him by the employer, not exceeding 50% of the wages payable to that employee after the deduction of all such other amounts as may be due from him under this section.

If Oppo seeks to rely on c) above, it should ensure that the total deductions made in any given month, do not exceed a full day's wages. It will be interesting to see if this Policy or similar policies are challenged in the future and if the outcomes are different.

NJERI WAGACHA AND
SYLVIA KAMANGA

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A contract forms the basis of enforceable legal obligations and corresponding rights between two or more contracting parties. Contractual obligations are easier to enforce where a written contract exists.

Although such a contract is required to record all material terms, this often does not happen, especially in fixed-term contracts. This was the case in the matter of *Solidarity obo Swart v Kusile Civil Works Joint Venture (KCWJV) and Others* (JR1351/19) [2022] ZALCJHB 183 (7 July 2022). Mr Swart was employed on a fixed-term contract to work on a main civil works project which KCWJV was contracted for by Eskom. At the end of the project, the contract was terminated.

Aggrieved by his termination, Solidarity, acting on behalf of Swart, referred an unfair dismissal claim in terms of section 186(1)(e) of the Labour Relations Act 66 of 1996, as amended (LRA) to the bargaining council, which found that his employment contract terminated ex contractu and as such he was not dismissed as contemplated in terms of section 186(1)(a) of the LRA. Dissatisfied with the arbitration award, Swart brought a review application before the Labour Court on a number of grounds, one of which was that the bargaining council Commissioner misconstrued the applicable legal principles pertaining to contractual interpretation.

It is worth noting that Swart's contract was not drafted with clarity as to the date or event that would lead to its termination. In terms of clause 1.3.7 of the contract, the "*end date*" was defined as "*the date of automatic expiration of the appointment referred to in item 10 in Annexure A*". Item 10 of Annexure A of the contract referred to the end date as the "*KCWJV Completion*".

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The matter thus turned on the interpretation of these clauses, the role of the surrounding circumstances, and the nature of the evidence that could be considered in arriving at a decision. The court held that there was no merit in Solidarity's contention that the Commissioner misconstrued the applicable legal principles pertaining to contractual interpretation. The court relied on a number of cases in support of its decision, wherein it was held that the *parole evidence rule* does not prevent evidence on contractual context and purpose from being adduced.

The court further held that having considered the evidence that was before the Commissioner, it was clear that the terms of the main civil contract between Eskom and KCWJV did lend context to clause 1.3.7 of Swart's contract of employment, read with item 10 of Annexure A thereto, which was to link the end date with the completion of the main civil works. To hold otherwise would be inconsistent with the purpose to which Swart's contract was concluded; and, in turn, contrary to sound commercial notion.

Employers are cautioned to be explicitly clear about material terms of a fixed-term contract, especially when the contract is to terminate, in order to avoid leaving the interpretation to the court, which may fail to record the true intention of the contract by the parties.

HEDDA SCHENSEMA,
TSHEPISO RASETLOLA AND
KARABO NEMUDIBISA

OUR TEAM

For more information about our Employment Law practice and services in South Africa and Kenya, please contact:

Aadil Patel
Practice Head & Director:
Employment Law
Joint Sector Head:
Government & State-Owned Entities
T +27 (0)11 562 1107
E aadil.patel@cdhlegal.com

Anli Bezuidenhout
Director:
Employment Law
T +27 (0)21 481 6351
E anli.bezuidenhout@cdhlegal.com

Jose Jorge
Sector Head:
Consumer Goods, Services & Retail
Director: Employment Law
T +27 (0)21 481 6319
E jose.jorge@cdhlegal.com

Fiona Leppan
Joint Sector Head: Mining & Minerals
Director: Employment Law
T +27 (0)11 562 1152
E fiona.leppan@cdhlegal.com

Gillian Lumb
Director:
Employment Law
T +27 (0)21 481 6315
E gillian.lumb@cdhlegal.com

Imraan Mahomed
Director:
Employment Law
T +27 (0)11 562 1459
E imraan.mahomed@cdhlegal.com

Bongani Masuku
Director:
Employment Law
T +27 (0)11 562 1498
E bongani.masuku@cdhlegal.com

Phetheni Nkuna
Director:
Employment Law
T +27 (0)11 562 1478
E phetheni.nkuna@cdhlegal.com

Desmond Odhiambo
Partner | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E desmond.odhiambo@cdhlegal.com

Hugo Pienaar
Sector Head:
Infrastructure, Transport & Logistics
Director: Employment Law
T +27 (0)11 562 1350
E hugo.pienaar@cdhlegal.com

Thabang Rapuleng
Director:
Employment Law
T +27 (0)11 562 1759
E thabang.rapuleng@cdhlegal.com

Hedda Schensema
Director:
Employment Law
T +27 (0)11 562 1487
E hedda.schensema@cdhlegal.com

Njeri Wagacha
Partner | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E njeri.wagacha@cdhlegal.com

Mohsina Chenia
Executive Consultant:
Employment Law
T +27 (0)11 562 1299
E mohsina.chenia@cdhlegal.com

Faan Coetzee
Executive Consultant:
Employment Law
T +27 (0)11 562 1600
E faan.coetzee@cdhlegal.com

Jean Ewang
Consultant:
Employment Law
M +27 (0)73 909 1940
E jean.ewang@cdhlegal.com

Ebrahim Patelia
Legal Consultant:
Employment Law
T +27 (0)11 562 1000
E ebrahim.patelia@cdhlegal.com

OUR TEAM

For more information about our Employment Law practice and services in South Africa and Kenya, please contact:

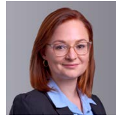
Asma Cachalia
Senior Associate:
Employment Law
T +27 (0)11 562 1333
E asma.cachalia@cdhlegal.com

Jordyne Löser
Senior Associate:
Employment Law
T +27 (0)11 562 1479
E jordyne.loser@cdhlegal.com

Tamsanqa Mila
Senior Associate:
Employment Law
T +27 (0)11 562 1108
E tamsanqa.mila@cdhlegal.com

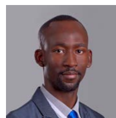
Christine Mugenyu
Senior Associate | Kenya
T +254 731 086 649
T +254 204 409 918
T +254 710 560 114
E christine.mugenyu@cdhlegal.com

Dylan Bouchier
Associate:
Employment Law
T +27 (0)11 562 1045
E dylan.bouchier@cdhlegal.com



Abigail Butcher
Associate:
Employment Law
T +27 (0)11 562 1506
E abigail.butcher@cdhlegal.com

Rizichi Kashero-Ondego
Associate | Kenya
T +254 731 086 649
T +254 204 409 918
T +254 710 560 114
E rizichi.kashero-ondego@cdhlegal.com



Biron Madisa
Associate:
Employment Law
T +27 (0)11 562 1031
E biron.madisa@cdhlegal.com

Peter Mutema
Associate | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E peter.mutema@cdhlegal.com

Kgodisho Phashe
Associate:
Employment Law
T +27 (0)11 562 1086
E kgodisho.phashe@cdhlegal.com

Tshepiso Rasetlola
Associate:
Employment Law
T +27 (0)11 562 1260
E tshepiso.rasetlola@cdhlegal.com

Taryn York
Associate:
Employment Law
T +27 (0)21 481 6314
E taryn.york@cdhlegal.com

BBBEE STATUS: LEVEL ONE CONTRIBUTOR
Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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JOHANNESBURG
1 Protea Place, Sandton, Johannesburg, 2196. Private Bag X40, Benmore, 2010, South Africa.
Dx 154 Randburg and Dx 42 Johannesburg.
T +27 (0)11 562 1000 F +27 (0)11 562 1111 E jhb@cdhlegal.com

CAPE TOWN
11 Buitengracht Street, Cape Town, 8001. PO Box 695, Cape Town, 8000, South Africa. Dx 5 Cape Town.
T +27 (0)21 481 6300 F +27 (0)21 481 6388 E ctn@cdhlegal.com

NAIROBI
Merchant Square, 3rd floor, Block D, Riverside Drive, Nairobi, Kenya. P.O. Box 22602-00505, Nairobi, Kenya.
T +254 731 086 649 | +254 204 409 918 | +254 710 560 114
E cdhkenya@cdhlegal.com

STELLENBOSCH
14 Louw Street, Stellenbosch Central, Stellenbosch, 7600.
T +27 (0)21 481 6400 E cdhstellenbosch@cdhlegal.com

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CDH
CLIFFE DEKKER HOFMEYR

INCORPORATING
KIETI LAW LLP, KENYA