Employment Law
ALERT

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INCORPORATING
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Are your justifications for termination reasonable or simply a smokescreen?

It is well known that Kenya's employment and labour relations courts are considered more lenient towards employees, especially when the balance of power favours the employer. An employer, therefore, has to take all precautions to ensure that its relationship with its employees, as well as the termination of the said relationship, occurs as required by the Employment Act, 2007 (Employment Act). This may be particularly difficult as employers and employees are human after all – prone to mistakes and decisions made in the heat of the moment.

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Section 43 of the Employment Act requires an employer to ensure that a termination is not only procedurally fair but also substantively fair. If not, according to section 45 of the Employment Act, an employer may be found to have unfairly terminated the employee.

Procedural fairness requires an employer to ensure that the steps taken to terminate the employee are fair and justified. In summary, the employer must ensure that the employee is (i) given sufficient notice; (ii) provided with an opportunity to defend themselves; (iii) provided with sufficient time to prepare for the disciplinary hearing; (iv) provided with sufficient information about the alleged claim; (v) permitted to have a colleague accompany them to the disciplinary hearing; and (vi) provided with a chance to appeal the decision.

The second element, substantive fairness, is challenging to prove as substantive reasons for termination subjectively differ from employer to employer. A recent decision in the matter of *Jacinta Wambua v Stanbic Kenya Limited* cause no. 1487 of 2018 clarified how substantive fairness should be tested, which is our focus in this alert.

Facts of the *Wambua* case

The claimant, Jacinta Wambua (the respondent's personal assistant) claimed that the respondent conducted an unlawful and irregular disciplinary proceeding and that as a result, she was unlawfully terminated.

The respondent contended that the claimant had wilfully neglected her duties as specified in her employment contract by failing to promptly apply for a visa, which was detrimental to the respondent.

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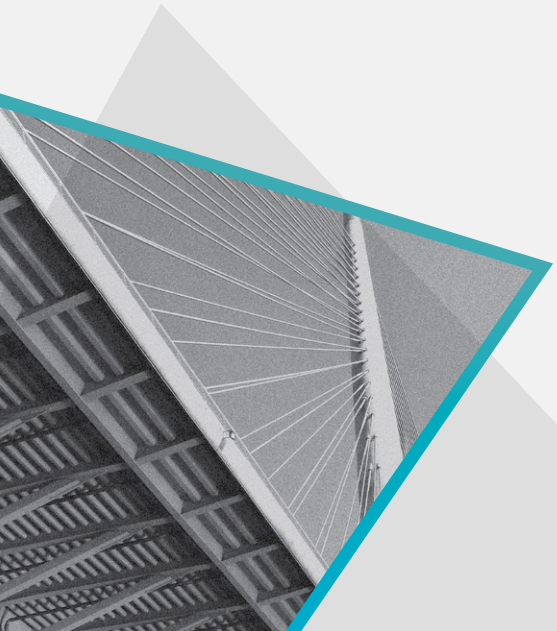

The responded argued that the claimant did not exhibit a sufficient level of proactiveness in discharging her obligations and in failing to ask for requisite visa documents, and this caused the application to not be made in time. The respondent asserted that the claimant's employment contract explicitly provided that the claimant could be summarily terminated from employment for wilfully neglecting to perform any work which she was duty bound to perform or if she carelessly or improperly performed any work that she was duty bound to perform.

The law and the court's analysis

Section 43(1) of the Employment Act provides that an employer will be deemed to have a substantive justification for terminating a contract of service if they genuinely believe that the matters that informed the decision to terminate existed at the time the decision was taken. The question, therefore, is, how does one practically determine that the issues informing the decision were fair?

The court in the *Wambua* case relied on the matter of *Kenya Revenue Authority v Reuwel Waithaka Gitahi and Two Others* [2019], which held that the:

> *"Standard of proof is on a balance of probability, not beyond a reasonable doubt, and all the employer is required to prove are the reasons that it 'genuinely believed to exist', causing it to terminate the employee's services. That is a partly subjective test."*

The court in the *Wambua* case further explained that when determining the reasonableness of the employer's conduct, an employment tribunal must inquire whether a reasonable employer could have decided to dismiss based on the facts before them. This is known as the reasonable response test. This test considers that one employer may legitimately hold one opinion while another may reasonably hold another. The employment tribunal must determine whether the decision to dismiss the employee fell within the band of reasonable responses that a reasonable employer might have adopted in the particular circumstances of each case.

The court further referred to Lord Denning's *obiter dicta* in the English case (which is persuasive in Kenya) *Leyland UK Ltd v Swift* [1981] IRLR 91 where, when using the reasonable response test, the court held that, *"if it was quite reasonable to dismiss him, then the dismissal must be upheld as fair even though some other employers may not have dismissed him"*.

In this respect, as long as an employer's reasoning is justified and considered reasonable to the particular employer based on the specific set of facts, the reason for termination may be deemed substantively fair. It is important to note that the test does not require all possible employers to find the reason justifiable – the test is subjective and based on a particular set of facts.

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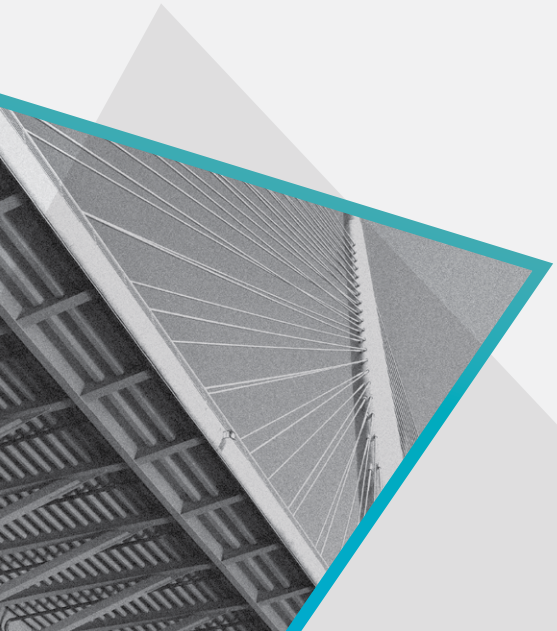

Court decision

The court in the *Wambua* case found that the respondent had discharged their burden of proof as they had complied with the test of substantive justification. In reaching this decision the court found that the respondent had proved on the balance of probability that the claimant neglected to perform her duties in getting a visa for the respondent, causing inconvenience and financial loss. The claimant failed to demonstrate that she had asked the respondent for the documents and that the respondent had neglected to provide the same. Based on the fact that the claimant's employment contract provided for summary dismissal on wilful neglect to perform any work the court found that the respondent had a valid reason to ask the claimant to attend a disciplinary hearing.

Further, the respondent proved that he had complied with the mandatory procedure as required under the Employment Act, as the respondent sent the claimant a notice to show cause, invited the claimant to a disciplinary hearing, and permitted her to invite fellow colleagues to the hearing as her witnesses, which she chose not to do. The claimant was further given a chance to postpone the disciplinary hearing due to illness. The minutes produced from the disciplinary hearing were fair and seemed to capture the proceedings very accurately.

The claim was therefore dismissed.

Summary

As an employer, it is important to ensure that the facts evaluated prior to inviting an employee to a disciplinary hearing are reasonable and supported by the relevant circumstances. Making sure the reasons are legitimate beyond a shadow of a doubt should not be an employer's primary concern, but rather whether the employer's behaviour or conduct would be that of a reasonable employer. It doesn't matter if the procedures taken to terminate the employee are

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carried out in accordance with the Employment Act: if an employer is shown to be fabricating a legitimate justification in order to simply terminate an employee, often known as a smokescreen, the termination will be declared unlawful.

What to look out for

Considering the above analysis, what can an employer, therefore, do to ensure that their substantive reasons hold water in court and are not deemed a smokescreen? They can:

- Ensure that the employment contracts and company policies clearly define what amounts to a disciplinary hearing and summary dismissal – this clarity strengthens the employer's position in that the employee will be duly aware that their conduct would result in a specific action.
- Ensure that the process followed is procedurally fair, as stipulated in the Employment Act.
- Ensure that all steps and actions are accurately documented. This includes the minutes of the disciplinary hearing, which all parties in attendance should sign.
- Ensure that its reasons for termination comply with the law. If the reasons given for termination fall within the scope of section 46 of the Employment Act, such as reasons connected with pregnancy, going on leave or joining a union, the termination will automatically be deemed unfair.

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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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