

# Employment Law

ALERT | 26 February 2024



## In this issue

### KENYA

- Missed opportunities: The implications of squandering a disciplinary hearing



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## Missed opportunities: The implications of squandering a disciplinary hearing

In employer-employee workplace tales, a person decrying unfair termination is a common scenario. But what about the instances where the employee had a chance to tell their side of the story in a disciplinary hearing, but they let it slip away? This is the story in the case of *Okun v Kenyatta University (Cause 363 of 2019) [2023]* where the employee sought a declaration from the court that his employment was terminated unfairly. The twist is that the employer had extended two invitations to the employee to appear before a disciplinary committee, which were postponed at the request of the employee. Thereafter, it sent a third invitation which the employee refused to honour entirely. What is the implication of squandering the termination process in this way?

Disciplinary hearings play a pivotal role in ensuring fairness in the realm of employment by presenting a forum where both the employer and employee can resolve workplace disputes. Section 41(2) of the Employment Act establishes both the rights of an employee subjected to a disciplinary hearing and the responsibilities of an employer regarding due process while conducting disciplinary hearings.

It provides that all employers should hear and consider any representations that an employee accused of misconduct or poor performance may have before terminating their employment on those grounds.

### Right to a fair trial

Taking cognizance of the fact that disciplinary hearings are a tenet of the right to a fair trial enshrined in the Constitution of Kenya, 2010, the intricacies of such hearings demand that the employer aligns with the principles of a fair trial. This has been affirmed by the Employment and Labour Relations Court in various instances, including in the case of *Winnie Mbeti Mutua v Brackenhurst Kenya Limited [2021] eKLR*. In this case, the court opined that while disciplinary proceedings are not equivalent to court proceedings, an employer should still ensure that the rules of natural justice, fair hearing, or due process are not blatantly violated when administering them.

However, while the employer has the onus to ensure that an employee has a fair disciplinary hearing, the employee also plays a pivotal role in protecting their own right to be heard by ensuring that they do not squander their chances of being heard in that forum. The consequences of squandering such an opportunity, which are highlighted in *Okun*, are dire and result in an unfavourable and unintended outcome on the part of the employee.

## Missed opportunities: The implications of squandering a disciplinary hearing

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### Chambers Global 2024 Results

#### Employment Law

Chambers Global 2014–2024 ranked our  
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**Band 2:** Employment.

**Aadil Patel** ranked by  
Chambers Global 2024 in

**Band 1:** Employment.

**Fiona Leppan** ranked by  
Chambers Global 2018–2024 in

**Band 2:** Employment.

**Imraan Mahomed** ranked by  
Chambers Global 2021–2024 in

**Band 2:** Employment.

**Hugo Pienaar** ranked by  
Chambers Global 2014–2024 in

**Band 2:** Employment.



In this case, the judge affirmed that continually avoiding and deferring a disciplinary hearing is tantamount to an admission of guilt on the part of the employee. As a result, the employee is considered guilty of the alleged misconduct that they were accused of, which is in an outcome that may have been different had the employee taken the opportunity to defend themselves.

Additionally, the judge opined that squandering the chance to be heard creates justification for an employer to terminate the employee's employment on grounds of misconduct. This follows from the fact that at that point, the employee is considered guilty of the misconduct they were accused of, which substantiates the termination of their employment.

Further, the judge held that if the employee is subsequently terminated, the employee cannot thereafter claim that there was no due process followed in their termination.

This is because an employer who has made great effort to have the employee be heard is considered to have acted fairly, even if the employee remained adamant in avoiding the hearing.

### Conclusion

In conclusion, both the employer and the employee play a crucial part in ensuring that disciplinary hearings achieve their intended outcome of a fair hearing. However, if an employer presents a fair opportunity for the employee to be heard but the employee squanders their chance, the employer can take decisive action to terminate the employee – so long as they can demonstrate that they followed due process to administer a fair hearing in line with their policies and procedure. Such squandering only works to the detriment of the employee, as it contributes to their termination and takes away their right to claim unfair procedure on the part of the employer.

**Desmond Odhiambo and Sara Ndei**

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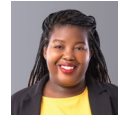
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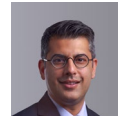
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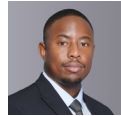
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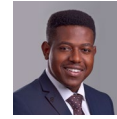
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**BBBEE STATUS:** LEVEL ONE CONTRIBUTOR

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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