

National Labour Law Profile: Kenya

Historical background

The United Kingdom established its influence in Kenya in the 19th century. In 1885, the European powers gathered at the Berlin Conference and partitioned East Africa into spheres of influence. In 1895, Kenya became a British protectorate, and the highlands were opened to white settlers.

When Kenya formally became a British colony in 1920, organized African political activity developed, but its direct political participation was prohibited until 1944. By then, the Kenya African National Union (KANU) had been established, and Jomo Kenyatta, a member of the predominant Kikuyu tribe became its president. From 1952 to 1956, a movement founded by members of the Kikuyu, Embu, Meru and Kamba tribes raised the “Mau Mau” rebellion against the British colonial rule.

The first Legislative Council elections with the participation of Africans was organized in 1957. Kenya’s independence was proclaimed and the Constitution adopted on 12 December 1963. In 1964, it was amended, and Kenya became a republic with a constitution in which the powers of the governor-general and those of the prime minister were rolled into one: the presidency. Jomo Kenyatta, the head of the KANU, became the first president to enjoy those powers. In 1965, one of his first acts as president was to seek an amendment that would lower the majority needed to amend the constitution from 75% in the House of Representatives and 90% in the Senate to 65% in both Houses.

The KANU became de facto the sole political party. After Kenyatta’s death in 1978, his successor Daniel Arap Moi followed the same political and economic policies.

In June 1982, the National Assembly amended the Constitution, making Kenya officially a one-party state. This system was repealed in December 1991, and several new parties were formed. Multiparty elections were held in December 1992 and 1997. President Moi was re-elected both times.

Following the presidential elections in December 2002, Mr. Mwai Kibaki was elected for a term of five years, which brought to an end the supremacy of the KANU, after being in power for 40 years without any interruption. His party, the National Rainbow Coalition won 59 per cent of the parliamentary seats.

Constitutional framework

The current constitutional organization of the country

The [current Constitution](#) differs fundamentally from the Constitution adopted on 12 December 1963. The original Constitution provided for the office of an Executive Prime Minister, and for a bicameral, federal and multiparty system. It has, since then, been amended various times. A constitutional amendment from 1991 limited the term of office of a president to two five-year terms which eventually led to the peacefully achieved shift in power in 2002. The latest amendments stem from 1997.

Local administration is divided among 63 rural districts, each headed by a presidentially appointed commissioner. The districts are joined to form seven rural provinces. The Nairobi area has special status and is not included in any district or province. The government supervises the administration of districts and provinces.

The president is the Head of the State and the Commander in chief of the armed forces.

The Republic of Kenya has a unicameral assembly consisting of 210 members elected for a term of up to five years, plus 12 members appointed by the president. The president appoints the vice president and cabinet members from among those elected to the assembly, in accordance with the strength of the parties they represent. The attorney general and the speaker are ex-officio members of the National Assembly.

Draft Constitution of the National Constitutional Conference

In September 2002 the “Constitution of Kenya Review Commission”, appointed by the Parliament and the President, submitted a Draft Bill of the Constitution of the Republic of Kenya to the National Constitutional Conference (NCC). The Conference consisted of all the MPs, 3 representatives from each district and others from the civil society religious and professional bodies. Major subjects of the debate were among others: The presidential system, namely a new position of a prime minister with considerable executive powers, the electoral system to Parliament (proportional or majority representation), and the development from an individually defined European Human Rights’ tradition towards the recognition of collective and solidarity Rights. The Draft Constitution was adopted by the National Constitutional Conference on 15 March 2004, by majority vote. Following this adoption, the country was still divided on the constitutional review process. The question of the legality of the document was raised. As of 4 June 2004, there are still discussions around the text to be submitted to the people for referendum. While some support the opinion laid down in a ruling given by Justice Aaron Ringera on the constitutionality of the Conference ([Miscellaneous Civil Application No. 82 of 2004](#)), and suggesting to submit the actual draft to the people by referendum, others consider that the Parliament should be given a chance to debate on the draft and amend it before taking it to a referendum. Justice Ringera did not pass a definite verdict on the validity of the draft. He asserted the right to a referendum as a fundamental constitutional entitlement of every Kenyan citizen, without ruling on “which draft” the referendum was to be conducted upon. This issue is important, as there are controversies on the text itself, in particular on the system of checks and balances introduced by this draft Constitution, and the role of the Prime Minister, whose post was created by this text.

Pursuant to the Draft Constitution, many of the powers of the presidency would be transmitted to this Executive Prime Minister, who would become the head of government (Section 172 of the Draft) and preside the Cabinet meetings. When President Kibaki opened the National Constitutional Conference last year, he set the date of 30 June 2004 as a deadline for the Constitution to be adopted. But it has now been admitted that the Constitution will not be ready before this date. Meanwhile, the [current Constitution](#) remains in force.

The Judiciary

The Ordinary Court System

The current Kenyan Constitution provides for an independent judiciary. However, the President has extensive powers over appointments, including those of the Attorney General, the Chief Justice, and Appeal and High Court judges. The President can also dismiss judges and the Attorney General upon the recommendation of a special presidentially appointed tribunal. Although judges have life tenure (except for the very few foreign judges who are hired by contract), the President has extensive authority over transfers.

The court system consists of a Court of Appeals, a High Court, and two levels of magistrate courts, where most criminal and civil cases originate. The Chief Justice is a member of both the Court of Appeals and the High Court, which undercuts the principle of judicial review. Military personnel are tried by military courts-martial, and verdicts may be appealed through military court channels. The Chief Justice appoints attorneys for military personnel on a case-by-case basis.

There are no customary or traditional courts in the country. However, the national courts use the customary law of an ethnic group as a guide in civil matters so long as it does not conflict with statutory law. This is done most often in cases that involve marriage, death, and inheritance issues and in which there is an original contract founded in customary law. Recently concerns have been voiced towards the prevalence of customary law as it is often felt to be biased in favour of men. In addition, Kadhi-Courts apply Islamic law for the Moslem population of the country.

The Industrial Court

Unlike the ordinary courts, the Industrial Court of Kenya is not mentioned in the Constitution, but was established in 1964 under the Trade Dispute Act (Cap. 234). The Industrial Court has found its current shape in 1971, when the Trade Dispute Act was amended in the light of the experience gained from 6 years of practical application. The purpose of the Court is the settlement of trade disputes. Vide the provisions of section 14, Trade Dispute Act (Cap. 234), the President of the Republic may establish the court, and determine the number of judges (not less than two). Eight members are appointed by the Minister after consultation with the Central Organisation of Trade Unions (CETU) and the Federation of Kenyan Employers (FKE). Whenever it appears to be expedient, each judge appoints two assessors, one to represent employees, from a panel of assessors appointed by the Minister, to assist in the determination of any trade dispute before the Court. The jurisdiction of the Court is exercised by the judge and the two other members. Only in the case that they are not able to agree, the matter will be decided by the judge “with the full powers of an umpire” (section 14 (8) Trade Dispute Act (Cap. 234)).

A person shall not be qualified to be appointed as a judge unless he or she is an advocate of the High Court of Kenya of not less than seven years' standing.

The industrial court may award compensation or make an order for reinstatement (Trade Dispute Act (Cap. 234), section 15). The award becomes part of every contract of employment between the employers and employees to whom the award relates

under the Trade Dispute Act (Cap. 234), section 33(4). The award and decision of the Industrial Court are final (Trade Dispute Act (Cap. 234), section 17).

The status of the Industrial Court has led to a number of controversially discussed problems in the past:

Applications for judicial review can be brought to challenge the procedural and substantive validity of the awards and decisions of the Industrial Court. In effect this transfers the jurisdiction over labour law cases to the High Court.

The Trade Disputes Act does not exclude the right of litigants suing in open court. On the contrary, section 14 (9) excludes trade disputes arising in the public sector from the jurisdiction of the Industrial court. In addition access to the Court is limited by the rule of practice that only unions and employers and their organizations have standing before the Industrial Court; and as management staff is excluded from membership in trade unions, the Industrial Court does not deal with white-collar workers' concerns.

Thus, a significant number of labour cases in the broader sense is being handled by ordinary courts, i.e. the High Court, either from the first instance onwards, or – in a few cases - in appeal. Within the ongoing general Labour Law Reform, a taskforce to review the Labour Laws has adopted a draft act on Labour Institutions, introducing a National Labour Court, having the same prerogatives as the High Court, on labour law issues. ([For more details, see the paragraph on the Labour Law Reform](#)).

Labour Rights in the Constitution

Articles 70 to 86 of the current Constitution deal with fundamental rights. Basically the Constitution guarantees fundamental rights and freedoms of the individual. Among these fundamental rights, a range of general principles underpinning labour rights are anchored in the Constitution itself. The Constitution provides for principles, such as the prohibition of inhuman treatment (Art. 74) and the protection from slavery and forced labour (Art. 73).

Freedom of Association is guaranteed in the Constitution under Art. 80. This constitutional provision under Article 80 (2)(d) already regulates in detail procedures for the registration of trade unions and associations of trade unions. Under this provision reasonable conditions relating to the requirements for entry on a register of trade unions include conditions as to the minimum number of persons necessary to constitute a trade union qualified for registration, or members necessary to constitute an association of trade unions qualified for registration. Moreover, the Constitution already names conditions whereby registration may be refused by the registrar: “on the grounds that another trade union already registered or association of trade unions already registered, as the case may be, is sufficiently representative of the whole of a substantial proportion of the interests in respect of which registration of a trade union or association of trade unions is sought”.

The right to strike is not mentioned explicitly, but Art. 80 (1) protects not only the right to organize, but explicitly activities serving the purpose of the union, such as all activities designed to protect the individuals' interests.

Related to an employee's freedom are also the protection of right to personal liberty (Art. 72), his or her freedom of movement (Art. 81), and the protection from

discrimination (Art. 82). Art. 82 (3) specifies the anti-discriminatory provision prohibiting different treatment on the enumerative grounds of race, tribe, place of origin or residence or other local connection, political opinions, colour, creed or sex.

Labour rights in the draft Constitution

The Draft Constitution contains a Bill of Rights in its Chapter Six. This Bill lays down the principle of equality (Section 35, 37), the freedom from discrimination (Section 36), the freedom from slavery and forced labour (Section 46) and the freedom of association (Section 52). Section 59 on Labour relations determines the rights of workers, employers and trade unions, in particular the right to fair remuneration, the right to reasonable working conditions, the right to join a trade union or employer's organization, the right to strike and the right to engage in collective bargaining.

Labour regulation

The Evolution of Labour Law in Kenya

The genesis of labour law and practice can be traced to the 19th century when need arose for the colonial government to pass legislation to ensure adequate supply of cheap labour to service the emerging enterprises in agriculture, industry and in the service sector. Terms and conditions of employment were regulated by statutes and the common law. The law of contract in Kenya was originally based on the Contract Act, 1872, of India, which applied on contracts made or entered into before 1st of January 1961. The Indian Contract Act applied to the three countries Kenya, Tanzania and Uganda . Since then the Kenyan law of contract has been based on the English common law of contract, under the Kenyan Law of Contract Act (Cap. 23), section 2 (1).

With industrialization, towards the middle of the 20th century, an organized trade union movement was well established.

The first wage earners' associations in Kenya can be traced back to the early 1940s and soon after the Second World War.

The first trade union regulation was made in the introduction of Ordinance No. 35 of 1939 that required all crafts organizations to apply for registration which they could be granted or denied depending on whether they had legitimate dealings consistent with government policy. The Ordinance also permitted any group of seven people to form a trade union and operate as one upon registration. Cancellation of registration under the Ordinance was not subject to appeal or open to question in a court of law (Aluchio 1998, 3).

In 1948, in order to gain complete hold on the wage earners organizations the government brought in a Trade Union Labour Officer, to be attached to the Labour Department with the duty to foster "responsible" unionism (Ananaba 1979, 3). In 1952 a more detailed piece of legislation was enacted for Trade Unions but again with significant omissions. It lacked necessary provisions for effective operation of trade unions. It did not legalize peaceful picketing or provide immunity against damages as a result of strikes. On the other hand, the government encouraged creation of staff

associations and works committees since they fitted in its interests to confining workers' organization to economic imperative alone and also lacked strike powers.

This rigid control of trade unions was maintained by the colonial government until the end. This notwithstanding, the movement was able to grow both in numerical strength and power. At independence the total number of following was about 155,000, 52 trade unions, with four centres formed and registered, namely, East African Trade Union Congress (EATUC), Kenya Federation of Registered Trade Unions (KFRTU), Kenya Federation of Labour (KFL) and Kenya Africa Workers Congress (KAWC).

Industrial confrontation arose not merely from traditional trade union activities, but also from the movement's political role in the struggle for freedom from colonial domination, particularly after individual political leaders had been arrested and placed in detention.

On the threshold of independence however, both employers and trade unions, felt that it was vital for the infant nation to make economic process, that capital and labour should work together in harmony: the incidence of strikes and lockouts had to be drastically reduced.

As a result, in October 1962, a landmark was established with the signing of the Industrial Relations Charter by the government of Kenya, the Federation of Kenya Employers and the Kenya Federation of Labour, the forerunner of COTU (K), the Central Organisation Of Trade Unions (Kenya).

The Industrial Relations Charter spelt out the agreed responsibilities of management and unions and their respective obligations in the field of industrial relations, it defined a model recognition agreement as a guide to parties involved, and it set up a joint Dispute Commission.

The Industrial Relations Charter has been revised twice since then, but remained the basis for social dialogue and labour relations in Kenya throughout the years. Currently the "Charter" is under review again; the parties have already produced a draft Charter in 2001 that might be signed in the context of the overall Labour Law review.

With the set up of an Industrial Court in 1964, one additional basic cornerstone was laid for the development of amicable conflict resolution in Kenya.

The Labour Law Reform Agenda

In May 2001 a Taskforce to review the Labour Laws was appointed by the Attorney General (Gazette Notice No. 3204), within an International Labour Organisation project. The terms of reference for the Taskforce were:

To examine and review all the labour laws including the Employment Act (Cap.226); the Regulation of Wages and Conditions of Employment Act (Cap. 229); the Trade Unions Act (Cap. 233), the Trade Disputes Act (Cap. 234), the Workmen's Compensation Act (Cap. 236), the Factories Act (Cap. 514) and make recommendations for appropriate legislation to replace or amend any of the labour law statutes;

To make recommendations on proposals for reform or amendment of labour laws to ensure that they are consistent with the Conventions and Recommendations of the International Labour Organisation to which Kenya is a party; and

To make recommendations on such other matters related to or incidental to the foregoing.

Major points of concern were:

Extension of the application of protective labour regulation into the informal sector;

Harmonisation of the Kenyan labour legislation within the East African Community;

Merging and redrafting the different Acts in order to produce a user-friendly and comprehensive labour legislation for benefit the people;

The elimination of remaining colonial heritage in employment relations and contracts;

The introduction of an Industrial Court of Appeal to overcome contradicting jurisdiction between the High Court and the Industrial Court;

Review registration procedures and trade union monopoly based on the Trade Unions Act (Cap. 233) in view of the ratification of the ILO Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87);

Review regulations on casual employees;

Setting up of an administration system which promotes involvement and democratic participation of the social partners (role of the Labour Advisory Board, possible involvement of civil society concerned in specific fields, etc.);

Review possible limitations of excessive powers and influence of the Minister for Labour in industrial relations;

Creation of an efficient labour administration system (inspection pp.) which is capable of effectively enforcing the laws;

Review the election procedures for trade union officials, and implement a system of directly elected workers' representatives;

The establishment of an affordable, not contribution based, workers social insurance scheme, complementing the National Social Security Fund;

Promote equity and equality in employment by incorporating anti-discriminatory (gender, HIV/AIDS) provisions into the Employment Act (Cap. 226), and as well as provisions against discriminating sexual harassment.

The tripartite Taskforce, comprising of members from the government, the trade unions (COTU) and the employers organization (FKE), officially handed over five new texts to the Attorney General in April 2004. The five drafts, when they reach their final version, will replace the existing legislation on Labour Law. These drafts relate to the following matters:

Draft on the Labour Relations Act: an act to deal with the registration, regulation, management and democratisation of trade unions and employers organizations or federations, to promote sound labour relations through the protection and promotion of freedom of association, the encouragement of effective collective bargaining and promotion of orderly and expeditious dispute settlement, conducive to social justice and economic development and related matters.

Draft on the Labour Institutions Act: an act for the establishment of Labour Institutions, to provide for their functions, powers and duties. This text introduces a system of labour courts with exclusive jurisdiction on labour matters. The act establishes Subordinate Labour Courts, as well as a National Labour Court. The latter is a superior court having the same authority, inherent powers and standing in relation to matters under its jurisdiction, as the High Court. Appeals on decisions from Subordinate Labour Courts lie in the National Labour Court. Second appeals lie in the Court of Appeal. This text also creates a National Labour Board, whose main duty is to advise the Minister on labour legislation and matters.

Draft on the Employment Act: an act to declare and define the fundamental rights of employees, to provide basic conditions of employment of employees and to regulate employment of children. This act contains provisions on freedom from discrimination and from sexual harassment. Provisions on freedom from forced labour expressly domesticate ILO Forced Labour Convention, 1930 (No. 29) and the Abolition of Forced Labour Convention, 1957 (No. 105), both ratified by Kenya in 1964.

Draft on the Occupational Health and Safety Act: an act to provide for the safety, health and welfare of persons employed, and all persons lawfully present at workplaces and related matters.

Draft on the Work Injury Benefits Act: an act to provide for compensation to employees for injuries suffered and occupational diseases contracted in the course of employment, for insurance of employees and related matters. These texts do now have to follow the path towards adoption, which will hopefully be completed by the end of 2004.

Other sources of labour regulation

Employment relations in Kenya are regulated by a number of sources: constitutional rights, as mentioned above; statutory rights, as set out in statutes and regulations; rights set by collective agreements and extension orders of collective agreements; and individual labour contracts.

These legal sources are interpreted by the Industrial Court, and in some cases by the ordinary courts ([see above](#)). A particularly important role to play has the tripartite Industrial Relations Charter that laid the foundation for an industrial relations system already prior to Kenya's independence in 1963. International standards, especially ILO Conventions ratified by Kenya are used by the government and courts as guidelines, even though they are not binding.

Acts of Parliament in the realm of civil and criminal law, which have provisions that may have impact on individual and collective labour relations include the Contract Act, Local Government Act, Public Service Commission Act, the Children Act, laws concerning the Armed Forces, and legislation dealing with the establishment of parastatals.

The following Acts of Parliament form the labour legislation framework for the country:

Employment Act (Cap. 226);

Regulation of Wages and Conditions of Employment Act (Cap. 229), - Industrial Training Act (Cap. 237), - Workmen's Compensation Act (Cap. 236), - Shop Hours Act (Cap. 231), - Mombasa Shop Hours Act (Cap. 232), - Factories Act (Cap. 514), - Trade Unions Act (Cap. 233), - Trade Disputes Act (Cap. 234);

Companies Act (Cap. 486);

Bankruptcy Act (Cap. 53);

Merchant Shipping Act (Cap. 389);

Export Processing Zone's Act (Cap. 547);

Immigration Act (Cap. 172);

Pension Act (Cap. 189);

Retirement Benefits Act (No. 3 of 1997);

National Social Security Fund Act (Cap. 258);

National Hospital Insurance Act (Cap. 255);

Provident Fund Act (Cap. 191);
Public Health Act (Cap. 242).

In individual labour cases British common law is applicable up to now. The Judiciary Act (Cap. 16) of 1967, section 3(1) states: “The jurisdiction of the High Court and of all subordinate courts shall be exercised in conformity with:

- a) the Constitution;
- b) subject thereto, all other written laws; including the Acts of the Parliament of the United Kingdom (...);
- c) subject thereto and so far as the same do not extend or apply, the substance of the common law, the doctrines of equity and the statutes of general application in force in England on the 12th August 1897, and the procedure and practice observed in courts of justice in England at that date:

Provided that the said common law, doctrines of equity and statutes of general application shall apply so far only as the circumstances of Kenya and its inhabitants permit and subject to such qualifications as those circumstances may render necessary.”

For further information see the website of the [Ministry of Labour and Human Resource Development](#).

Contract of Employment

In Kenya, employment is governed by the general law of contract, as much as by the principles of common law. Thus, employment is basically seen as an individual relationship negotiated by the employee and the employer according to their special needs. Parliament has passed laws specifically dealing with different aspects of the employer-employee relationship. These laws define the terms and conditions of employment, and consist mainly of four Acts of Parliament:

The Employment Act (Cap. 226), and the regulation of Wages and Conditions of Employment Act (Cap. 229) make rules governing wages, housing, leave and rest, health and safety, the special position of juveniles and women and termination of employment. The latter Act, in addition, sets up a process through which wages and conditions of employment can be regulated by the Minister.

The Factories Act (Cap. 514) deals with the health, safety and welfare of an employee who works in a factory.

The Workmen’s Compensation Act (Cap. 236) provides for ways through which an employee who is injured when on duty may be compensated by the employer.

The Employment Act does not make any provisions for wages in general. The minimum wage is dealt with by the Regulations of Wages and Conditions of Employment Act.

Unlimited and fixed-term contracts of employment

Employment contracts may be for fixed or unlimited periods of time. If an employment contract specifies a fixed period of employment, the contractual relationship is automatically terminated at the end of this period, without being considered a resignation or a dismissal. Under section 15 of the Employment Act, such a contract may be prolonged for a period of service up to 1 month, if the employee is engaged in any journey. Until the very recent past most female civil servants and parastatals staff were employed on fixed term contract.

In general, temporarily and fixed term employed workers enjoy all the rights of an employee working on permanent terms, except those that are excluded explicitly (such as entitlement to pensions) or by the nature of a short term assignment (such as annual leave).

An employment contract, which does not specify a fixed period of duration, is considered to be for an unlimited period of time, but can be terminated by notice of either party. However, in the organized sector collective agreements which give workers tenure limit the employers' ability to discharge and end the employment contract.

Other limitations on terminating an individual labour contract are the principle of good faith and the requirement of non-discriminatory reasons.

Under section 14 (1) of the Employment Act it is a legal requirement that certain contracts of service be made in writing. These are contracts:

For a continuous period of 6 months;

Which are not continuous, but for which the periods still add up to six months; and

In which the task to be performed may last for six months.

Where a contract is in writing, it must carry a signature or a fingerprint of the employee showing that she or he has agreed to its terms. There must also be a witness who is not the employer. It is the duty of the employer to make sure that the contract is written when this is required by the law.

Special contracts of employment

Casual Employment and Piecework employment

Both types of employment are defined under section 2 of the Employment Act. The "casual employee" is "an individual the terms of whose engagement provide for his payment at the end of each day and who is not engaged for a longer period than twenty-four hours at a time", and Piece-rate "means any work the pay for which is estimated by the amount of work irrespective of the time occupied in its performance". Basically these categories of workers enjoy to a large extent the same rights as other employees, but may be excluded from many benefits, such as leave, medical cover or housing.

The draft Employment Act, handed over in April 2004 to the Attorney General by the Taskforce on the review of labour law, introduces significant changes concerning

casual employment. Employers who offer work that should last for at least one month should, if they cannot employ a worker on a permanent basis, engage him on a term contract. Pursuant to this draft, a casual employee who is engaged for more than a month in a job which otherwise would not reasonably be completed in a period less than three months, shall now be treated as an employee on a fortnightly contract, and on termination should be paid a fortnight salary in lieu of notice. Furthermore, where casual employees are employed for more than one month, they should, if the draft was adopted, be entitled to one paid rest day in a period of seven days.

Apprenticeship Contracts

Apprenticeship contracts that primarily intend to train young people in a profession are considered contracts of employment. The apprentice therefore enjoys all the rights and suffers all the obligations of an employee, subject to the terms of the contract. The only distinction between an apprentice and an employee is that the 'full' employment of an apprentice depends on his or her successful completion of the training. Apprenticeships in the industrial sector are governed by the Industrial Training Act, which provides that the rules and principles governing the must be applied, unless the Act expressly states an exception, or when the application of labour law would not be compatible with the nature and aim of the vocational training being undertaken. The minimum period of an apprenticeship contract under the Industrial Training Act, section 2, is four years of service.

Probation

Kenyan statutes do not relate to trial periods for individual labour contracts. However, collective agreements generally establish a trial period, after which the worker receives tenure.

Trial periods range between 3 weeks (under the Regulation of Wages (Tailoring Garment Making and Associated Trades) Order) and 3 years (the latter in the civil service). Government workers receive tenure according to the requirements set out in the Civil Servants Law (Appointments) and the Civil Service Rules, which are determined by the Civil Service Department of the Government.

An employer may dismiss the worker during the trial period or at its conclusion, depending on the contract terms. Nevertheless, this termination of contract must be done in good faith. When the dismissal is unfair or causes the worker unusual injury, the court may award him damages.

Suspension of the contract of employment

Under the Trade Disputes Act the labour contract is suspended if a worker participates in a lawful strike or is affected by a lawful locked out. Therefore, the employee does not violate his or her contractual obligations to his or her employer when he or she participates in a strike. Likewise, lockouts do not terminate the employment relationship. When the labour contract is suspended by worker participation in a strike, the employer is not required to pay wages, since no work has been performed. Industrial Court judgements have held that an employer is not required to pay wages

when the labour contract is suspended because of a strike.

Termination of the contract of employment

Termination by Notice

(i) Statutory regulations

Under the Employment Act, section 14 (5) “ every contract of service not being a contract to perform some specific work, (...), be deemed to be

(i) where the contract is to pay wages daily, a contract terminable by either party at the close of any day without notice;

(ii) (...);

(iii) where the contract is to pay wages or salaries periodically at intervals of or exceeding one month, a contract terminable by either party at the end of the period of twenty-eight days next following the given of notice in writing.”

This sub-section does not apply in cases when the contract itself, or a given collective agreement, requires a longer period of notice. If an employer does not give notice, he or she should pay to the employee an amount equal to his or her wages for that period.

(ii) Rules of the Industrial Court

Practice in the Industrial Court has produced some rules, thereby modifying the strict regulations of the Act. The period of advance notice for employees who have worked for five years or less has generally been adjusted to a minimum of one month. When the employee has worked for more than five years, however, it is at least two months. And the notice must be in writing.

Collective agreements normally contain these rules too.

Summary Dismissal

i. Statutory regulations

Under section 17 of the Employment Act, a summary dismissal is justified after “gross misconduct”, when a very serious wrong has been proved. The employee is guilty of such misconduct if he or she (section 17 (a)-(g)):

- (a) Is absent from work without permission or good excuse;
- (b) Is so intoxicated that cannot do their work properly;
- (c) Deliberately neglects or ignores the work, or carries it out improperly;
- (d) Uses abusive or insulting language;
- (e) Disobeys orders from persons with authority;
- (f) Is lawfully arrested for an offence punishable by imprisonment, and is not within 10 days either released on bail or otherwise lawfully set at liberty;
- (g) Commits a criminal offence against the employer or his or her property.

ii. Rules of the Industrial Court

Certain procedures have to be followed when such dismissal is being contemplated. First, the employee has to be informed of the claims of gross misconduct. Secondly, the employee has to be called upon and given the opportunity to defend himself or herself against them. Finally, he or she must be informed in reasonable detail of the decision once it is made, and the grounds upon which this is done. The decision should be made honestly and in good faith. There should be no victimisation or any unfair labour practices.

General rules concerning termination

i. Statutory regulations

Under section 18 (1) every employer is bound to give to an employee a certificate of service upon any termination, but no reference or certificate relating to the character or performance (Sub-section 2).

ii. Rules of the Industrial Court: Unfair Dismissals

It has now been accepted that adherence to all the requirements of the law in giving notice is not enough. Serious conflicts have been generated when an employee's services have been terminated by the employer, on the grounds which appear to the general body of the work force to be spurious in order to get rid of the person.

The Court will intervene where there is a lack of good faith. At times, an employer may give notice to an employee when in fact she or he is dismissing him or her for some reason that may not constitute adequate grounds for summary dismissal. Under these circumstances the Court may investigate whether there is any victimisation, bias or unfair labour practice. Disregard of principles of natural justice may also cause the Court to intervene. It is considered to be unfair to base termination on the race, tribe or belief of an employee. The sex of an employee should be considered only to the extent permitted by the law, and in favour of the employee.

Applying these principles, dismissal may be based on other grounds apart from those mentioned in the Employment Act. An employee may be dismissed on medical grounds. But in cases where the ill health affects only a particular type of work, the employee may be given another type of work which is appropriate in the circumstances. (See among others: Industrial Court, Cause No. 11 of 1996 –Kenya Union of Journalists and Nation Newspapers; Cause No. 23 of 1972- Kenya Union of Commercial Food & Allied Workers and Kenya Co-operative Creameries Ltd.)

iii. Restrictions imposed by collective agreements

Collective agreements regulate and limit the employers' ability to discharge workers. Grievance procedures and special dismissal procedures enable the union to represent the workers' interest and negotiate the employers' intent to make an individual or collective dismissal. When agreement is not reached the dispute is often settled in

arbitration. Some collective agreements grant the employer the prerogative to dismiss a worker after the consultation and negotiation requirements have been met.

iv. Other contractual rights

There are many rights that an employee may have by virtue of the contract, such as leave (annual, maternity, sick or study), allowances (leave, travelling, acting, duty or any other), medical and overtime payments, bonuses and many others. They become relevant when the employment ceases. Their equivalent in money will be calculated and paid to the employee as part of the termination rights.

Redundancy and severance pay

In the understanding of the Industrial Court the basic principles that would apply in the event of redundancy were already laid down in the first version of the tripartite Industrial Relations Charter. In addition, “redundancy” is defined under the Trade Disputes Act, section 2, as “loss of employment, occupation, job or career by involuntary means through no fault of an employee involving termination of employment (...)”. Moreover, redundancy and severance pay on redundancy are common features in collective agreements, defining the length of notice to be given to the union, and the notice period in respect of the employees to be declared redundant.

The individual employee is entitled to two basic rights, severance pay and payment in lieu of notice. The rates of payment may depend on the agreement, but many range from fifteen to thirty days basic wage or salary for every completed year of service. Following the jurisprudence of the Industrial Court it has been accepted that an employer whose position improves, and wishes to employ after a financial crisis, must give priority to the employees formerly declared redundant.

Remedies in case of unjustified dismissal

Under Kenyan legislation there are two basic rights of a dismissed employee where the dismissal is wrongful: the right to reinstatement and the right to compensation. These rights can be granted separately or together. Reinstatement can only be ordered by the Industrial Court under section 15 (1) of the Trade Disputes Act. In rectifying the jurisdiction of the Industrial Court, the power of reinstatement had been given to the Court in the amendment of the Act in 1971. The Court normally considers all the relevant circumstances applying the principles of good faith, to decide whether reinstatement is justified, such as the length of time since dismissal, whether an employee has been employed elsewhere since dismissal, and the willingness of both the employer and the employee to reinstate and to be reinstated.

Under the law of contract, the general remedy for breach of contract is compensation, but the Court may also grant specific performance or rescission. The amount paid will depend on the circumstances of the case, but is generally based on the monthly or annual earnings of the dismissed person. Under the Trade Disputes Act, section 15 (2), the amount awarded must not exceed the actual financial loss suffered by the employee as a result of the wrongful dismissal, or an amount equal to his or her wages for twelve months. In computing the amount of compensation any earning which the employee has received since the dismissal is being taken into account.

The above-mentioned draft Employment Act contains a whole part on unfair termination, compiling these already existing rules.

Resignation

Under the Employment Act, sections 14 (5) and 16, the conditions for termination by notice by the employer apply here. Employees who receive monthly payments must inform the employer one month before they intend to stop working. The contract may provide for a shorter or longer period. If employees do not give notice, they should pay to the employer the equivalent of the wages for the period of notice.

If, in addition, the workers' resignation violates a contractual obligation to work for a specified period they may be liable for damages that the resignation caused the employer. Such cases are few though, and difficult to prove. Courts will not grant the specific performance remedy to an employer, i.e., they will not compel an employee to work, the employers' only remedy being damages. In general, when an employee resigns he or she is not entitled to severance pay.

Working time and rest time

Hours of work

Under the Regulation of Wages (General) Order, subsidiary to the Regulations of Wages and Conditions of Employment Act, the general working hours are 52 per week, but the normal working hours usually consist of 45 hours of work per week, Monday to Friday 8 hours each, 5 hours on Saturday under the special Orders for different sectors subsidiary to the Regulations of Wages and Conditions of Employment Act. Collective agreements may modify the working hours, but generally provide for weekly working hours of 40 up to 52 hours per week.

Under the Employment Act, section 8, every employee is entitled to at least one rest day in every period of seven days. In many sectors the regular rest-day may not be the Sunday, but another day of the week.

Overtime

Under these statutory regulations overtime shall be payable at the rates of one and one-half time hourly rate on weekdays, and at the rate of twice the basic hourly rate on Sundays and public holidays. There are different Regulations of Wages Orders in force, covering different sectors of the economy.

Annual paid leave

Under section 7 of the Employment Act, every employee shall be entitled to no less than twenty-one working days of annual leave with full pay. Where the employee works for less than a year, the number of days will be reduced accordingly. This is a minimum and many contracts and collective agreements provide for annual leave of between thirty to forty-five days. In average Kenyan employees enjoy annual leave of 24 days.

For a woman who has taken maternity leave (2 months) in a given year, the maternity leave forfeits her annual leave under section 7 (2) of the Employment Act.

Public Holidays

Kenya has currently 11 public holidays – New Year’s Day, Good Friday, Easter Monday, Labour Day, Madaraka Day, Moi Day, Kenyatta Day, Eid-ul-Fitr-Day, Christmas Day and Boxing Day - described by the Public Holidays Act. Where any of these holidays fall on a Sunday, the next working day will be a holiday.

Maternity leave and maternity protection

Under section 7 (2) of the Employment Act, maternity leave is two months with full pay, provided that a women who has taken two months maternity leave forfeits her annual leave in that year.

The Regulation of Wages (General) Order, subsidiary to the Regulations of Wages and Conditions of Employment Act, specifies the provision under paragraph 13 (ii) and (iii) which read:

(ii) child birth (...) shall not be deemed to be sickness as provided for under paragraph 12, and the employer shall not be inquired to meet medical costs incurred thereon;

(iii) a female employee who takes maternity leave shall not incur any loss of privileges during such period.

The draft Employment Act submitted by the Taskforce to the Attorney General in April 2004, within the labour law reform process, contains a provision stipulating that a woman shall no longer forfeit her annual leave entitlements. If this provision is adopted, a woman may be entitled to two months and three weeks of leave, in a year she delivers a baby. The same text allows the employer to be reimbursed from the funds held by the National Social Security Fund (NSSF). In the case of adoption of this provision, the NSSF Act would have to be amended accordingly.

Further protective legislation of women workers during pregnancy and after childbirth does not exist. The Factories Act that deals with issues of occupational safety and health does not provide any additional protection for pregnant employees in respect to pollution, and hazardous working environments.

Cash benefits and other entitlements during pregnancy, and breaks for breastfeeding are provided in selective collective agreements, without representing a general trend.

Parental leave is unknown.

Other leave entitlements

Sick Leave

Under the Employment Act, section 7 (3), an employee is entitled to paid sick leave after a period of two consecutive months of service. Thus, the Employment Act, provides the minimum period of entitlement while the Regulation of Wages Order, subsidiary to the Regulations of Wages and Conditions of Employment Act, section 12, provides the longest period granted by law.

The minimum period of entitlement is seven days with full pay and seven days with half-pay for every twelve months. The longest period of entitlement is thirty days with full pay and fifteen days with half-pay. The employee is however expected to produce a certificate of incapacity to work signed by a duly qualified medical practitioner.

The above-mentioned draft Employment Act would, if adopted, increase sick leave from seven to thirty days with full pay and fifteen days with half pay.

Compassionate Leave

Under the Regulation of Wages (General) Order, subsidiary to the Regulations of Wages and Conditions of Employment Act, compassionate leave is granted to allow an employee to attend to personal misfortunes such as death, accidents or sickness concerning relatives and friends. The number of days he or she gets are deducted from the annual leave entitlement for the year.

Study Leave

Under the Civil Service Code of Regulations public employees are entitled to study leave. Neither the Employment Act, nor the Regulations of Wages and Conditions of Employment Act provide for an equivalent. But in practice, many companies and employers grant employees time off to go for courses, or to prepare for examinations.

Leave for trade union purposes or because of the holding of public office

Legally binding entitlements for employees to leave the working place for the period the attendance to a public office requires, or even for trade union purposes do not exist. But the tripartite Industrial Relation Charter, in the amended version of 30th April 1980, provides under A, section III, Employers' Responsibilities: "That employers shall not engage in such practices as

(a) Interference with the rights of employees to enrol or continue as Union Members;

(b) Discrimination, restraint or coercion against any employee because of recognised activity for trade unions; (...)" And even clearer under G, Joint Consultation: "Management shall take appropriate measures to facilitate the proper functioning of joint machinery by making available facilities for meetings and in appropriate cases, the staff essential thereto including allowing representatives of the employees the necessary time, within reason, to attend meetings without loss of pay; (...)"

The Industrial Charter imposes at least some moral obligations on the parties who are signatories to the agreement, and to their membership.

Minimum age and protection of young workers

The Employment Act, in part IV, accords special protection to juveniles. Under section 2 “juveniles” is defined as a “child or young person”; and “ ‘child’ means an individual who has not attained the age of sixteen years”, whereas “young person” means a person who has not attained the age of 18 years.

With the adoption of the Children Act, 2001, a new and conflicting definition has been established of which defines “child” as any human being under the age of 18 years.

The regulations for juveniles, minors under 18, under the Employment Act, are as follows:

Children under 16 should not be employed in any industrial undertaking or to attend machinery, unless they are apprentices or learners. “Industrial undertaking” means any of the following: any activity which relates to surface or underground extraction (like mines and quarries), any factory and any form of construction and installation (like buildings, railways, roads, tunnels, bridges, canals, sewers, drains, gas work, telegraphic, telephonic or electrical installations, or water works), and to transportation and handling of passengers or goods by road, rail or inland waterway. Section 24 (2) (a)-(d) thereby covers most of the potentially hazardous working conditions.

Young persons under 18 must not be employed in any industrial undertaking at night except in cases of emergencies. “Night” means the time from six-thirty p.m. to six-thirty a.m. (section 28). Employers engaging juveniles (under the age of 18) are required to keep a register (section 31): the labour officer may cancel or prohibit the employment (section 34), or order the medical examination of the juvenile (section 32).

Section 3(1) of the Employment (Children) Rules, 1977, allows the employment of children with the prior written permission of an authorized officer, and that the only restrictions are that such employment should not cause the children to reside away from parents without their approval, that permission for work in a bar, hotel, restaurant, etc., needs the consent of the Labour Commissioner and that such permit should be renewed annually.

The ILO-Committee of Experts has noted that the provisions of section 3(1) of the above Rules undermine the prohibition set out in Convention 182 – ratified by Kenya - and the provisions of the national legislation establishing the minimum age for admission to employment at 16 years. No permit should be issued by any person, whether they are parents, guardians or the Labour Commissioner, which have the effect of allowing employment or work, apart from light work for persons of between 16 and 18 years of age.

With the ratification by Kenya on 7 May 2001 of the Worst Forms of Child Labour Convention, 1999 (No. 182), and the adoption of the Children Act, 2001, a major step towards improving the protection of children against exploitation and inhuman working conditions has been done, though the system needs to be aligned now. This will be done if the above-mentioned draft Employment Act is adopted. This text defines the “worst forms of child labour” and prohibits it. The Minister is given the power to identify jobs which would constitute worst form of child labour. As noted above, section 2 of the Children Act defines "child" as any human being under the age of 18 years. The second part of the Act, entitled "Safeguards for the rights and welfare of the child", addresses the protection of the child against economic exploitation and any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development (section 10(1)); the protection of the child against recruitment and participation in armed conflicts is addressed in section 10(2), the protection of the child against any other form of exploitation including sale, trafficking or abduction by any person in section 13(1), and the protection of the child against sexual exploitation and use in prostitution in section 15. Under the terms of section 20 of the Act, any person who wilfully or as a consequence of culpable negligence infringes any of the provisions of sections 5 to 19 shall be liable to imprisonment not exceeding 12 months or to a fine of 50,000 shillings, or both. No protection is provided for children working in family agricultural activities or enterprises, and who are not paid. Section 10(5) of the Children Act, 2001, defines the term "child labour" as any situation where a child provides labour in exchange for payment. As according to the 1998/1999 Kenyan Child Labour Report, most of the children who work, or 78.7 per cent, work exactly under these circumstances. The majority of children who work are therefore excluded from the definition of child labour contained in section 10(5) of the Children Act, 2001.

Equality

Gender Equality

The Constitution guarantees the right to equality in Art 82(3): “the expression ‘discriminatory’ means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, tribe, place of origin or residence or other local connection, political opinions, colour, creed or sex whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description”.

The Constitution specifies this commitment for the public sector in sub-section 5 which reads: “Nothing contained in any law shall be held to be inconsistent with or in contravention of subsection (1) to the extent that it makes provision with respect to standards or qualifications (not being standards or qualifications specifically relating to race, tribe, place of origin or residence or other local connection, political opinion, colour or creed) to be required of a person who is appointed to an office in the public service, in a disciplined force, in the service of a local government authority or in a body corporate established by any law for public purposes.”

However, this anti-discriminatory right is directly pointed towards the public authority only, and does not provide any legal entitlement among private subjects.

Even though the Constitution recognises historical disparities between men and women, there is no obligation on employers neither to realise equality in the workplace, nor to implement affirmative action measures to advance women's participation more rapidly.

By contrast, the Draft Constitution adopted by the National Constitutional Conference in March 2004, in its chapter named the Bill of Rights, contains general provisions concerning equality, freedom from discrimination and gender. It stipulates that "The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth." The following paragraph indicates that this provision is not restricted to the State, but also applies to private persons. Another section on gender states that "Women and men have the right to equal treatment including the right to equal opportunities in political, economic, cultural and social activities."

In the tripartite Industrial Relations Charter (1980) the parties agree on abolishing all discrimination among workers on the grounds of race, colour, sex, belief, tribal association or trade union affiliation including discrimination in respect of: (a) Admission to Public or private employment; (b) Labour legislation and agreements which shall afford equitable economic treatment to all those lawfully resident or working in the country; (c) Conditions of engagement and promotions; (d) Opportunities for vocational training; (e) Conditions of work; (f) Health, safety and welfare measures; (g) Discipline; (h) Participation in the negotiation of collective agreements; (i) Wage rates; which shall be fixed according to the principle of equal pay for work of equal value in the same operation and undertaking.

Yet, the Employment Act, Part IV imposes similar restrictions to the employment of women and the employment of juveniles. Under section 28 women must not be employed in any industrial undertaking at night (the time from six-thirty p.m. to six-thirty a.m.) except in cases of emergencies, and in cases where their work is connected with raw materials which are subject to rapid deterioration, and their work is necessary to preserve the material. Another exception exists for women in responsible positions of managerial and technical nature, or employed in health and welfare services, and not normally employed in manual work. The latter categories of women employees can even be employed on underground work, like women in course of their studies and women who have to enter the underground parts of a mine for any other reason than manual work.

The Industrial Charter imposes at least some moral obligations on the parties who are signatories to the agreement and their membership. In reality though, the world of work in Kenya remains far from substantively equal in gender terms.

The above-mentioned draft Employment Act stipulates that "Every employer shall pay men and women equal remuneration for work of equal value". The section on discrimination of employment contained in this act domesticates ILO Equal Remuneration Convention, 1951 (No. 100), ratified by Kenya in May 2001. Moreover, a draft Equality Bill is pending at the Cabinet level. The Bill introduces the implementation of an Equality Board and Tribunal, and recognises equality rights in

employment, education, health services, profession, and many other areas of private and social life.

Sexual harassment

The above-mentioned draft Employment Act contains provisions on sexual harassment, but does not define sexual harassment as an offence, as existing provisions of the penal code were deemed sufficient. This is a new phenomenon in Kenya's employment scene and the country's cultural diversities and beliefs have to be taken into consideration.

Workers with disabilities and persons living with HIV/AIDS

Workers with disabilities are mentioned only in the Regulations of Wages and Conditions of Employment Act, section 18 (1), which allows employment below the minimum wage for persons with disabilities. Further regulations to prevent these groups from suffering discrimination do not exist. As the Anti-discriminatory clauses in the current Constitution are enumerative (see above 10.1), unlike many other constitutions, not prohibiting discrimination on "any other ground" in Art 82 (3) of the Constitution, these groups are not legally protected against discrimination. However, the above-mentioned Draft Constitution prohibits discrimination on the grounds of health status and disability (See above). Furthermore, the above-mentioned draft Employment Act defines discrimination in the following terms: "discrimination includes any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, or HIV status (whether such HIV status is actual, perceived or suspected) or disability or any other arbitrary ground which has a detrimental effect on one's treatment in employment or occupation, or preventing an employee from obtaining any benefit under any contract of service."

Pay issues

Minimum wage

The Employment Act does not make any provisions for wages in general. The Minimum Wage is dealt with by the Regulations of Wages and Conditions of Employment Act and in the Regulation of Wages Order subsidiary to Chapter 229. A tradition has been established according to which the Minister of Labour and Human Resource Development, in exercise of his or her powers conferred to by section 11 of the Regulation of Wages and Conditions of Employment Act, would order the increment of minimum wages to come into effect May 1st of every year. In this order he or she follows the recommendations of two tripartite bodies, the General Wages Council, and Agricultural Wages Council (Regulation of Wages and Conditions of Employment Act, section 11). On 1st May 2004, Labour Minister Chirau Ali Mwakwere announced that the current lowest paid worker's salary would rise by 11% from the current minimum starting salary of 3 500 Kenyan shillings a month.

How wages are usually fixed?

Wage and Income Guidelines

As discussed before, employment is governed by the general law of contract, as much as by the principles of common law. Thus, employment is basically seen as an individual relationship negotiated by the employee and the employer according to their special needs. This includes of course the agreement on the wage to be paid in exchange to the service.

However, for unionised employees wages are fixed by collective agreement, in some bigger companies even company agreements exist.

Section 14 (10) of the Trade Disputes Act allows the Minister of Finance to set guidelines or other directives relating to wage and salary levels. A collective agreement that does not comply with these guidelines cannot be registered by the Industrial Court.

These guidelines are seen to be justifiable for the sake of economic stabilisation in the national economic interest. The institution of the Income Guidelines goes back to the year 1973, when in a difficult period following the Oil Crisis, the Government felt that it had to step in and give guidance to the social partners, and to the Industrial Court in resolving the economic disputes. However, mandatory guidelines of this type may undermine the autonomy of the parties in collective bargaining, which would not be compatible with international labour standards, specifically ILO Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

Protection of wages

Under the Employment Act, section 4, wages should be paid in Kenyan currency to the employee or to an authorized person. The wages may be paid in kind but this must not be in the form of alcohol or drugs. Also, the Act requires that wages be paid in full, except authorized deductions, permitted by the law (under section 6 of the Employment Act).

Housing

Under the Employment Act, section 9, specified under the Regulation of Wages (General) Order, subsidiary to the Regulations of Wages and Conditions of Employment Act, section 4, an employee is either entitled to reasonable housing accommodation, or to housing allowances that enable the employee to obtain reasonable accommodation. The Employment Act does not say what reasonable housing accommodation is, but gives power to the labour officer to enter into any house in which an employee is living and inspect it.

Trade Union Regulation

The formation, structure and organization of trade unions in independent Kenya is clearly provided for in various national instruments, namely, Trade Unions Act, Trade

Disputes Act and the Industrial Relations Charter. The Taskforce on the review of labour law has recently submitted a draft Labour Relations Act, which repeals the two former acts when it is adopted.

Formation and Registration

The Trade Unions Act provides for the formation of staff associations, employees associations and employees' organizations for the registration and control of trade unions.

Under the Act, section 2 (1)(a) a trade union is defined as an association or combination, whether temporary or permanent of more than six persons, whose principle objects are to regulate the relations between employees and employers. Under this arrangement it is presumed that all employees in both the public and private sector have the freedom to join and form associations of their choice. However, in the Industrial Relations Charter, the parties agreed that the following will be excluded from union representation:

persons who are formulating, administering, co-ordinating, and/or controlling any aspects of the organization's policy;
staff who perform work of a confidential nature as shall be defined by a tripartite Committee;
any other category of staff who may in the case of any particular undertaking,

In addition, the parties agreed, in a meeting chaired by the Minister for Labour and attended by representatives of the FKE and COTU (K), that the following persons shall be excluded from Union representation (Appendix B to the draft of the revised Charter, 2001):

1. (i) Executive Chairman, managing Director, General Manager (and his deputy) and functional Heads – that is, departmental Heads (and their deputies).

(ii) Branch Manager (and his deputy).

(iii) Persons in-charge of operation in an area (and their deputies).

(iv) Persons having authority in their organisations to hire, transfer, appraise, suspend, promote, reward, discipline and handle grievances provided that such persons fall within the Industrial Charter Clause No. 11-1.

(v) Persons training for the above positions (including Under-studies).

2. (i) Personal Secretaries to persons under 1 above.

(ii) Persons whose functional responsibilities are of a confidential nature as shall be agreed upon between the parties.

3. Any other category of staff who may, in the case of any particular undertaking, be excluded from union representation by mutual agreement.

The civil service was banned from unionisation by Presidential Decree for years. The ILO Committee of Experts on the Application of Standards has repeatedly made requests to the Government to look into the question of the need for allowing establishment of a trade union to cater to the civil service on issues related to collective bargaining, wages, terms and conditions of service. Similarly the Committee of Freedom of Association has persistently urged that the Government should take necessary steps to insure the right of civil servants, not engaged into the administration of the state, to establish or join organizations of their own choosing. As a result, only recently a Civil Service Union was registered. Membership of trade unions is open to minors above the age of 16. They enjoy all rights of membership but are barred from holding executive posts of the trade unions until the age of 23.

Recognition and Registration of Unions

Restrictions on the formation of a union do not only exist at levels of individual representation but in the substance and orientations of unions as well.

(i) Trade union monopolies

A key provision of the Trade Union Act is the competence of the registrar under section 16(1)(d)(i) of the Act - which traces back to Article 80 (2) of the Constitution, as shown above (2.4.1). This provision allows the registrar to refuse registration of an application if there already exists a registered trade union whom he or she deems “sufficiently representative of the whole or of a substantial proportion of the interest in respect of which the applicants seek registration.” Hence the government decides, whether the representation by one trade union in any given industrial sector is “sufficient” and does in effect bar registration of would be splinter groups or even new trade unions in sectors. The Registrar’s actions have been in breach of this rule from time to time, sometimes arising out of High Court Orders to register splinter unions or out of his or her own decision . The registration provisions – which historically go back to the Industrial Relation Charter, and which are still backed by this tripartite agreement –affect the freedom of association of employees, who should be free to join unions of their own choice.

(ii) Industrial Sectors

It is the Government’s policy, under the Industrial Relations Charter, to pursue industrial trade unionism and to work in co-operation with the Federation of Kenyan Employers and the Central Organization of Trade Unions to encourage conditions, which would progressively achieve this. Section 16(1)(d)(f) of the Trade Unions Act reinforces this position in providing that application for registration may be refused by the Registrar if persons seeking registration for an organization are engaged or work in different trades or calling and if its constitution does not contain suitable provision for protection and promotion of their respective sectional industrial interests. To this extent, crafts and general trade unions are barred. Strict adherence to this rule has however not been achieved as there exist trade unions which have generalist orientation, that is catering for more than one industry, such as the Kenya Union of Commercial Food and Allied Workers. Moreover, there is the tendency of most trade unions including in their name, the term “Allied” thereby giving them way to organize workers engaged in areas which are not strictly in their principal jurisdictions. The

Registrar nonetheless has powers to require alteration of name and also call for additional information when making consideration for registration.

(iii) Other grounds for refusal

Other restrictions imposed by law are that, an organization may also be refused registration if the objects of its constitution are unlawful, its principal purpose is not in accord with what is set out in the Act, if the secretary or treasurer are deemed not sufficiently literate in English and Swahili language and are unable to carry out their duties adequately. Additional grounds for refusal and cancellations are unlawful application of trade union funds, improper keeping of funds of the organization and if the trade union is being used for unlawful purpose. There are also requirements for registration of trade union branches giving details of name, postal address of the office, titles and names of officials, their age, addresses and occupations.

Provision for registration of trade union centres has been made at section 16 (1) (d) (ii) of the Trade Unions Act. The Registrar has powers to defer registration on any of the grounds stated in the Act and accordingly notify the parties and thereupon the organization becomes a probationary trade union in line with provisions of section 11.

(iv) Consequences of cancellation

The consequences of cancellation of registration of a trade union are that it:

- ceases to enjoy any rights and privileges;
- does not take part in any trade dispute or promote, organize or finance any strike or lock out or provide pay or benefits for its members;
- shall be dissolved and its funds disposed of in accordance with the rules of the union;
- no person shall take part in its management or organization, or act on behalf of the union as an officer.

Presently, there exist 37 registered trade unions currently with 35 being affiliates to the Central Organization of Trade Unions (K).

All in all, the Registrar has immense powers in matters of registration. He or she may defer, refuse and suspend registration of a trade union. Section 18(1) of the Trade Unions Act grant leave to parties aggrieved by the decisions of the Registrar to appeal to the High Court, whereupon he or she has right to be heard.

Registration of Trade Unions under the draft Labour Relations Act

The draft Labour Relations Act finalized by the Taskforce in April 2004, lays down a new registration procedure. It defines a trade union as “an association of employees whose principal purpose is to regulate relations between employees and employers, including any employer’s organisation”. Unlike the definition now in force, this new definition does not require a minimum of members to be defined as a trade union.

For a trade union to be registered under this text, this procedure must be followed: First of all, the persons who wish to recruit members for the purpose of establishing a trade union must obtain a certificate from the Registrar. The application for such a

certificate must be signed by two persons promoting the establishment of the trade union.

Within six months of receiving the certificate, the trade union must apply to the Registrar for registration. In order to be registered, the trade union must comply with certain requirements laid down in the draft. One of them is that the decision to register was made at a meeting attended by at least 50 members of the trade union.

“Immunity”

Part V of the Trade Unions Act expressly grants immunity to trade unions, its officers and members, without any distinction, from any proceedings or civil suits in respect of any acts done in contemplation or in furtherance of a trade dispute. They have liability in tort and in contract. Indeed, probationary trade unions enjoy all rights and privileges accorded registered trade unions, except they have no rights to amalgamation.

The Actors of Industrial Relations: Employers’ and Workers’ Organizations in Kenya

Federation of Kenyan Employers (FKE)

As in 2000, FKE claimed a membership of 2541 enterprises.

The FKE has three branches – Coast, Rift Valley and Western Regions; the headquarters are in Nairobi.

FKE operates through its industrial associations by addressing issues affecting individual industries or sectors. FKE spearheads the negotiation and signing of collective bargaining agreements (CBAs) on behalf of its member companies at all levels, i.e. company, industrial or sectoral.

Workers Organizations

Kenyan trade unions are sector based; nevertheless, some are general unions operating beyond individual industries. An example is the Kenya Union of Commercial, Food and Allied Workers which represents workers in varied sectors like banking, food, retail and financial. The big Teachers’ union (Kenya National Union of Teachers, KNUT) is not affiliated to COTU (K) – the national Confederation of Trade Unions. Presently, there exist 37 registered trade unions, with 35 being affiliated to the Central Organization of Trade Unions (K). According to COTU about 244,000 individual members belong to its affiliated unions today.

There has been remarkable decline in trade union membership since the mid 1990s when retrenchment started. To revamp the decline, COTU has raised the minimum contribution from the previous 10. - Kshs. to 50. - Kshs. per month.

Collective Bargaining and Agreements

Collective agreement is defined in the Trade Disputes Act as “ an agreement made between a trade union and an employer or organization of employers which relates to

terms and conditions of employment, whether or not enforceable in law and whether or not concluded under machinery for negotiation.” A collective bargaining process precedes this.

The process of collective bargaining is not specifically provided for in law, but there are prerequisite conditions, which must be fulfilled before parties may proceed with bargaining process. Such conditions are contained in the Trade Unions Act, the Trade Disputes Act and the Industrial Relations Charter. In section 5(2) of the Trade Disputes Act, there is a requirement that the trade union must have legal recognition in law that is duly registered by having a constitutional jurisdiction. Secondly, it must have a simple majority of 51% of unionisable employees in the undertaking, which it seeks to negotiate with, and thirdly there should not be any rival union. Appendix A of the Industrial Relations Charter offers a model parties recognition agreement and it marks out collective claims and grievances as part of the negotiation procedure. The model requires that either the General Secretary or his or her authorized representatives of the trade union may raise such claims with the management in writing three months before expiration of existing agreements.

All agreements must be reduced to writing. Part III of the Trade Disputes Act, requires that collective agreements be lodged with the Minister fourteen days of its execution and thereafter furnishes it with the Industrial Court for purposes of registration. The Minister may object to the registration if he or she deems it undesirable for registration. As discussed above the Registrar and the Industrial Court are bound by guidelines and directives issued by the Minister responsible for finance on matters relating to wages and salaries and other terms and conditions of employment. In cases where the Minister has made objection to registration, the Industrial Court may summon parties to hear them out.

It is an offence to implement a collective agreement before the Industrial Court registers it. Once so registered, the collective agreement binds parties to comply with the commitments made under it. Failure to perform by either party gives rise to a trade dispute which is dealt with in accordance of the provisions of the Act. In general, collective agreements have a duration span of up to two years before renewal by parties. Collective agreements modify individual contracts. Benefits are extended to non-union members serving in enterprises where they are in force. This arises from the constitutional provisions which protect freedom of association, and the Industrial Relations Charter which prohibits discrimination, but it is contentious issue vividly discussed among union members. Agreements may be denounced by mutual agreement of the parties with adequate notice being served by the initiating party.

Collective bargaining in Kenya is commonly conducted either on single establishment or single plant basis or in a multi-employer approach.

Collective labour disputes

Reporting

A report must be made in writing to the Minister after twenty-eight days have elapsed since the date on which the dispute was reported and the period of notice specified in recognition or registered collective agreement has expired.

Decision of the Minister

In Part II of the Act, a disputes settlement machinery is established and under section 5 the Minister has alternative actions that he or she may take upon receipt of a report of trade disputes. He or she may inform the parties that matters on which the dispute has arisen are not suitable to be dealt with under the Act, or refuse to accept the dispute if the reported matter is barred by a parties recognition agreement or collective agreement.

Section 5 (1) of the Trade Disputes Act also states that the Minister should consult a Tripartite Committee before taking the decision. Finally the Minister may endeavour to effect conciliation between the parties in accordance with section 6 of the Trade Disputes Act, or cause an investigation to be made into the dispute in accordance with section 8 of the Act. He or she also has the power to recommend to the parties that the trade dispute be referred to the Industrial Court.

Conciliation

The Minister who has delegated his or her powers to the Permanent Secretary and the Chief Industrial Relations Officer under section 6 (1) of the Trade Disputes Act may appoint a public officer or any person to act as conciliator, or even appoint a conciliation panel. If the conciliation process is successful and the trade dispute is settled, the terms of every settlement are required to be set out in writing and endorsed by and on behalf of the parties and the conciliator. A signed copy of the text lodged with the Minister.

Investigation

The Minister has powers of referring certain trade disputes for investigation by an investigator. The investigators are generally labour officers who under section 7 (4) of the Trade Disputes Act may formulate proposals upon which a settlement of a trade dispute may be negotiated by the parties. The Minister, however, is not precluded by the recommendations of the investigator or the committee of investigation.

Board of Inquiry

Under section 19 of the Trade Disputes Act (Cap. 234) a Board of Inquiry may be appointed by the Minister “for the purpose of any matter which appears to him to be connected with or relevant to any trade dispute”. A board of inquiry is a very rare feature in Kenya though.

The Industrial Court

Procedure

Under section 20 and 58 (1) of the Trade Disputes Act, the Chief Justice is empowered to regulate the procedure and proceedings of the Court. The current Industrial Court (Procedure) Rules were made in 1973 (Legal Notice 186/1965, 4 of 1973). The Industrial Court is not bound by the rules of evidence in civil or criminal proceeding (section 21 of the Act).

The Industrial Court (Procedure) Rules provide that where any trade dispute exists and the parties wish to refer such a dispute to the Court, they file an application to the Court, which contains the basic and necessary information for the Court. Once the dispute has been accepted by the Industrial Court, it is formally registered. After the exchange of memoranda, the parties are allowed a week before the hearing takes place.

Application and Interpretation of Industrial Court awards

The Industrial Court awards take effect from the date of publication in the Kenya Gazette unless a different effective date is specified in the award itself. The Minister, or any other party to the award, is at liberty to apply to the Industrial Court for interpretation of an award when the parties do not agree on its interpretation, or if it is alleged that an award is inconsistent with any written law. The Industrial Court award becomes an implied term of every contract of employment between employees and employers to whom it relates by virtue of section 16 (6) of the Trade Disputes Act.

The Industrial Court does not execute its awards like the civil courts. As mentioned above (2.3.2), the award and decision of the Industrial Court are final (Trade Dispute Act, section 17), and the Civil Procedure Code does not apply to the decisions of so called administrative courts.

Trade unions generally have relied on their right to strike in order to secure the enforcement of an award in their favour. As a result of the provision that an award becomes part of any individual contract concerned, the employee may sue an employer for breach of contract if he or she fails to implement the Industrial Courts award.

Under section 56 of the Trade Disputes Act for any offences committed under the Act, the matter of prosecuting the offenders rests entirely in the hands of the Attorney-General.

Strikes and lock-outs

Strike regulation

Both employees and employers have the right to industrial action and this is guaranteed in both the Trade Disputes Act and the Industrial Relations Charter. In the interest of employees the Trade Disputes Act confers this right to strike which it interprets as “the cessation of work by a body of persons employed in any trade or industry acting in combination, or a concerted refusal under a common understanding of any number of persons who are, or have been so employed, to continue to work or to accept employment and includes any interruption or slowing down of work by any number of persons employed in any trade or industry acting in concert or under a common understanding including any action commonly known as a sit down strike or a go slow.”

Strike practice

A lawful strike takes place only when the procedure laid down in Part V of the Trade Disputes Act is exhausted. This procedure goes through the reporting, the decision of the Minister, conciliation, investigation and the Board of Inquiry, and the Industrial Court procedure described above. In effect, lawful industrial actions are difficult to obtain in Kenya under these regulations. The complex regulations and requirements of the Trade Disputes Act and the jurisdiction of the Industrial Court make it difficult to think of any situation that could justify a legal strike action in Kenya. The system has been voluntarily – based on the early, pre-independence, tripartite Industrial Relation Charter of 1963 – been converted into a complex system of conciliation and arbitration, which basically tries to avoid any industrial conflict in Kenya.

Generally Unlawful Strikes

In the case of strikes in the Public Sector, the Minister may take such appropriate action that would effect settlement of disputes in line with the specific set regulations (section 27, Trade Disputes Act). He or she may also order the parties to adhere to their agreements or any Court award. Section 30 of the Trade Disputes Act outlaws sympathetic strikes and lockouts. All Ministerial orders on matters concerning strikes and lock outs can be subject to appeal to the Industrial Court. It may only take cognisance of the matter when the parties have ceased taking part in the strike or lock out.

Persons who declare or instigate or incite others to take part in an unlawful strike or lock out are guilty of offence and are liable to pay a fine. On the other hand persons who refuse to take part in unlawful strikes or lockouts are protected from expulsion, deprivation of any rights or benefits under section 35 of the Trade Disputes Act. There is a further seven days strike notice requirement to be served to the Minister in the case of essential services.

Strikes in Essential Services

Not all categories of workers have the right to seek, initiate and conduct a strike action. Firstly there are those who are effectively excluded by the Proclamation from its scope of application. Secondly, there are workers who do not have the right to strike under the provision of the Trade Disputes Act, sections 36, 43, First Schedule, on the ground they are engaged in essential services. These services are defined in the First Schedule and include:

Water services;

Electricity services;

Health services;

Hospital services;

Sanitary services;

Air traffic control services;

Civil aviation telecommunications services;

Meteorological services;

Fire services of the Government, of Kenya Railways and the Kenya Ports Authority and of local government authorities;

Air transport;
Supply and distribution of fuel, petrol, oil, power and light;
Telecommunications, posts and telegraphs;
Public transport services provided by Kenya Railways and the Kenya Ports Authority;
Port and docks services including stevedoring and lightering, loading and unloading of cargo from or on to any ship and dispatch of cargo to destination;
Teaching services.

Numerically, the workers engaged in the province of what the law calls essential services constitute a sizable ratio of the population of trade union membership in the country. Furthermore, it is in these enterprises that the more qualified (and probably politically conscious) labour force is to be found.

This broad definition of essential services has been criticised several times by the ILO supervisory bodies as violating the ILO Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), as it deprives a relevant number of Kenyan workers of their basic human rights at work.

Lock Outs

Lock out is defined as “ the closing of a place of employment or the suspension of work, or the refusal by an employer to continue to employ any number of persons employed by him in consequence of a dispute, done with the aim of compelling those persons, or to aid another employer in compelling persons employed by him, to accept terms or conditions of or affecting employment.” The procedure applying to lock outs is the same as the one applying to strikes.

Alternative dispute resolution

The above-mentioned draft Labour Relations Act provides for alternative means of dispute resolutions, by way of a collective agreement. It stipulates that a collective agreement may provide for the conciliation or arbitration of any category of trade disputes identified in the collective agreement by an independent and impartial conciliator or arbitrator appointed by agreement between the parties. In the case of conciliation, there is no requirement to refer the dispute to the Minister. In the case of arbitration, the award is final and binding. It may not be subject to appeal to any court, but it may be reviewed by the National Labour Court and enforced by it. But this text remains a draft for the time being and must still be adopted to have any legal effect.

Settlement of individual labour disputes

A fully-fledged system of labour courts does not exist in Kenya. As mentioned earlier, individual labour disputes are dealt with by the ordinary courts.

Under the Constitution of Kenya, the Magistrates’ Courts Act and the Civil Procedure Act such cases may be filed in the High Court, or in any of the Magistrates’ Courts. Nevertheless, there is another alternative open to an individual with a labour dispute under the Employment Act, section 40. The entry to the ordinary court system is

simplified and modified according to the special needs of the labour sector: under section 40, disputes arising from employment can be forwarded to either the labour officer, or a magistrate.

The Labour Officer is expected to try all he or she can do to settle the dispute. Where he or she fails or feels unable to solve it, he or she may refer it to the magistrate. The magistrate then has the power to hear the dispute, even though it may be outside his or her normal powers. In effect, employees who may be unable to act through trade unions are in disadvantage. Indeed, the access to the Industrial Court is limited by the rule of practice and only trade union disputes can be heard by the Industrial Court. Not only do they suffer from stiffer formality and rigidity of procedure in the ordinary courts, but they will not be entitled to reinstatement. However, as mentioned above, the Taskforce on the review of labour law has written a draft Labour Institutions Act, which was submitted to the Attorney General in April 2004 to go through the adoption procedure. This text introduces a system of labour law courts, at two levels (Subordinate Labour Courts and the National Labour Court), which will have exclusive jurisdiction over labour law disputes. The procedure before these courts will be open for individuals.

ILO Conventions ratified by Kenya

Kenya joined the ILO in 1949. As of 4 June 2004, it had ratified 49 [ILO Conventions](#), of which 43 were in force in the country.

Useful and relevant web links

[Ministry of Labour and Human Resource Development](#)

[Federation of Kenya Employers](#)

[Central Organisation Of Trade Unions](#)

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