

# THE PROCESS OF DECLARING REDUNDANCY



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Certain circumstances such as the prevailing economic conditions, operating conditions, legislative changes, loss of a contract etc. can force an employer to make the difficult decision to part ways with its employees. This process is known in law as redundancy.

Redundancy is a prerogative right of the employer; one that is expensive but indispensable. It is defined under the Employment Act, 2007 (the Act) as the loss of employment, occupation, job or career by involuntary means through no fault of an employee, involving termination of employment at the initiative of the employer, where the services of an employee are superfluous and the practices commonly known as abolition of office, job or occupation and loss of employment.

Employers have both the right and the responsibility to assess and address the needs of their businesses. An employer understands the operational requirements of his organization more than the court, and he has a right to carry out a redundancy provided he complies with the law in the process and has a valid reason for doing so. Redundancy serves as a mechanism through which an employer can realign operations and restructure the organization to enhance profitability. However, it is essential that this process is carried out in strict adherence to legal requirements, as any deviation may result in significant financial and legal repercussions for the employer.

Termination on account of redundancy should qualify both the procedural and substantive requirements. In determining a claim for unfair termination on account of redundancy, the court in *Pridelnn Hotels & Investment Limited v. Hamisi Madzungu* (2015) eKLR, held that the following must be demonstrated to exist for the process of redundancy to be found to be valid:

*"there must be a reason for termination; the second is that the reason must be valid, the third is that the termination must be based on operational requirements of the employer, and the last is that the employment must be terminated in a procedurally fair manner"*

## Substantive Justification

The courts have held that substantive justification must satisfy three considerations, being:

- a. there must be a reason for declaring a redundancy;
- b. the reason referred to in (a) above must be valid; and
- c. The reason must be based on the operational requirements of the employer.

As the guiding provision in the Employment Act, 2007 provides, the test of what is a fair reason is subjective. The phrase 'based on operational requirements of the employer' means that while there may be underlying causes leading to a true redundancy situation, such as reorganization, the employer must nevertheless show that the termination is attributable to the redundancy, that is that the services of the

1 Jane Jacobs (2007). "Dark Age Ahead", p.159, Vintage

2 Section 2, Employment Act, 2007

3 *Communication Workers Union of Kenya v Camusat Kenya Limited*

4 *Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others*

employee have been rendered superfluous or that redundancy has resulted in abolition of an office, job or loss of employment.

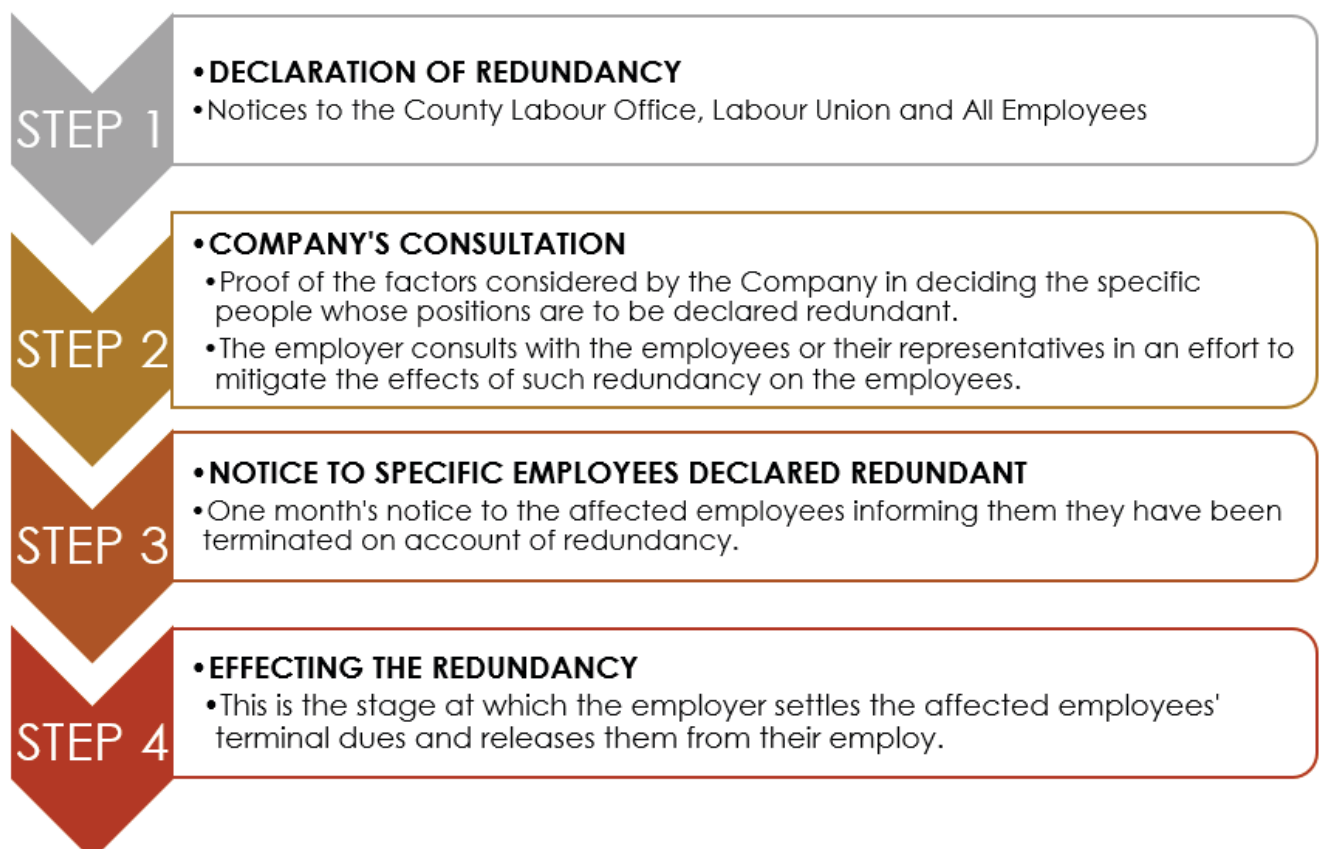
It should however be noted that this contemplated 'reason' is not for the court to extensively examine and validate. The court will be under an obligation to declare a reason valid where the employer can demonstrate that the decision was informed by its operational requirements. This means the employer may be required to place supporting documentation such as proof of loss of a contract or financial statements showing an operating loss before the court. Insofar as the reason proffered in justifying the declaration of redundancy is founded upon the employer's decision to redesign its organizational structure to suit its business structure for profit making, the court will have limited discretion to challenge or

invalidate the employer's substantive justification. The courts have however shunned and condemned a redundancy process that was found to have been commenced with the sole purpose of laying off specific employees. The same is considered a sham and cannot be justified or sanctioned by the court.

## Procedural Requirements

An employer's or a company's discretion to determine any redesign of its business operations does not negate the obligation to abide by the legally established redundancy process in line with the applicable law, being Section 40(1) of the Act.

Redundancy is a process rather than an event. The steps that must be followed in that regard are listed below:



1 Section 43(2), Employment Act, 2007

2 Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others

3 Tobias Ongaya Auma & 5 Others v. Kenya Airways (2007) eKLR

4 Africa Nazarene University v David Mutevu & 103 others [2017] KECA 381 (KLR)

## Step 1: Declaration of Redundancy

Once an employer has made the decision to declare employees redundant, the next thing they have to do is declare the redundancy through a notice to the County Labour Office, as well as a general notice to the Labour Union (where all or some of the employees in the organization are unionized) and to all non-unionized employees. As a precautionary measure, it is advisable to issue notices to both the County Labour Office and the Labour Union, simultaneous with an internal memo to all employees in the company.

### Unionized and Ununionized employees

While the Act under Section 40(1)(a) and (b) does not mandate a notice to all employees, the Court of Appeal has held that where an affected employee is unionized, a notice to the trade union alone suffices. Therefore, the employer is required to issue a notice to the trade union and another to non-unionized employees. However, as Victor Hugo wisely stated, 'caution is the eldest child of wisdom'. Thus, exercising an abundance of caution by issuing a notice to all employees, whether unionized or not, is a more prudent approach.

At this stage, the employer is not expected to have identified the specific employees to be affected by the redundancy exercise. Therefore, the notices addressed to the Labour Office, the Labour Union and the employees should not disclose the identities of the affected employees. The notices should however disclose the reason for the

intended redundancy and the estimated number of employees to be affected by the redundancy exercise. The notices should also be issued not less than a month prior to the date of the intended date of termination on account of redundancy.

## Step 2: Consultations

The requirement for consultation is not expressly provided for under the Act. However, it is impliedly considered as the main reason and rationale for giving notices as discussed above under step 1.

Kenya's current Constitution was promulgated on 27th August 2010. Pursuant to Article 2(6) of the Constitution, the Treaties and Conventions ratified by Kenya are now part of the law of Kenya. By virtue of the provisions of this Article, the treaties or conventions which Kenya had ratified before this date, whether domesticated or not, automatically became part of the law of Kenya. Kenya is a state party to the International Labour Organization and is therefore bound by the ILO conventions. Article 13 on recommendation No. 166 of the ILO convention No. 158 – Termination of Employment convention, 1982 requires consultation between the employers and their employees and/or their representatives before termination of employment.

A case for consultation is further anchored in the reasoning of Article 47 of the Constitution of Kenya, which mandates the right to Fair Administrative Action and entitles every person to expeditious, efficient, lawful, reasonable and procedurally fair administrative action. Consultations in the context of a redundancy process serve two main purposes:

- the selection of the employees to be declared redundant based on an objectively established criterion; and
- giving the parties an opportunity to consider alternative measures to be taken to avert or minimise the adverse effects of any termination on the workers concerned, such as redeployment to other departments within the organization.

### **The criteria for selection of employees to declare redundant**

Section 40(1)(c) of the Act provides that the criteria used to select employees to be declared redundant has to give regard to the seniority in time and to the skill, ability and reliability of each employee of the particular class of employees affected by the redundancy. This criterion of seniority or the length of service is commonly referred to as last-in-first-out (LIFO).

The courts have taken varying positions on whether it is mandatory for an employer to apply the LIFO criterion. Some judges contend that its application is obligatory, while others maintain that the employer has the discretion to select any of the criteria outlined in Section 40(1)(c) of the Act, as mandating the use of the LIFO criterion may not adequately address the employer's needs.

It is important to note that the consultations must be real and not cosmetic or a charade. The employee to be affected by the redundancy and the trade Union (where the employee(s) to be affected are unionized) must be informed of the intended redundancy and provided with clear and specific details to enable a reasonable opportunity to respond. Sufficient time should be allowed for their

Input. The person conducting the consultation should therefore document and/or minute the consultations; and must maintain an open mind, listen to suggestions attentively, consider them thoroughly and, only after this, make a final decision.

The consultations or negotiations must be meaningful. The courts in establishing whether meaningful consultations were held will look at the:

- period within which the consultations and negotiations were held;
- time the parties were given to prepare for the consultations;
- information and details provided to the employee; and
- minutes of the meeting or negotiations.

### **Step 3: Notice to specific employees declared redundant**

Once the consultations are held and concluded by the union, the employer and non-unionized employees, and the employer has conclusively decided on the specific employees who shall be let go, the employer should issue a one month's notice informing the specific affected employees that they have been terminated on account of redundancy. In this termination notice, the employer must decide, depending on preference, whether it will give one month's notice or pay one month's pay in lieu of notice so that the termination takes effect immediately; and inform the employee of this election in the termination notice.

## Step 4:

### Effecting the redundancy

The final action to be undertaken in a redundancy exercise is the payment of not less than one month's wages (where applicable), severance pay at the rate of not less than fifteen days' pay for each completed year of service (or any higher rate provided in a collective bargaining agreement with the trade union), leave pay and any other outstanding sums the company owes the terminated employee.

## Conclusion

Redundancy is a prerogative of the employer but it must be exercised in good faith. The law is clear that when it comes to the process of redundancy, the substantive reason must be valid and the procedural requirements outlined above must be followed. Failure to adhere to the redundancy procedure risks financial liability for the employer when the affected employee(s) eventually sues and is awarded monetary compensation of up to twelve months' salary for unfair termination by the court.

Authors: Louis Muia & Brenda Hope  
Waweru  
Editor – Dedan Wachira

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217 Kyuna Crescent

Address: P. O. Box 49393 – 00100, Nairobi, Kenya

Mobile: 0720 994 511 | 0736-520767

Email: [info@omlaw.co.ke](mailto:info@omlaw.co.ke)

[omlaw.co.ke](http://omlaw.co.ke)

