LEGAL ALERT

TERMINATION OF AN EMPLOYEE ON THE GROUND OF POOR PERFORMANCE

When it comes to saying goodbye to employees, it's no secret that poor performance often leads to termination. Although poor performance is a distinct ground for termination of employment, the Employment Act is unclear as to what constitutes poor performance.

Recently, the Employment and Labor Relations Court delivered a groundbreaking judgement in the case of **Vincent Namai versus the National Bank of Kenya Limited E039 of 2023**, to the effect that the failure of an employer to consider an employee's reasons for poor performance and to support the employee amounts to unfair and unreasonable labor practice.

Evidence presented to the court was that Mr Namai was employed by the Bank in 1995 as a clerical officer and rose through the ranks to become a branch manager where he worked for 7 years until his employment was terminated in January 2022. Mr Namai had exemplary service for 27 years and got meritorious promotions throughout his employment. While employed by the bank, he was transferred across several branches but trouble started when he was posted to the Kitengela branch in the year 2020 where his performance began to deteriorate. Mr Namai was put under a performance improvement project but his scores were still determined as unsatisfactory and was eventually terminated. Mr Namai had complained that his poor performance was because of abrupt transfers from one branch to another coupled with internal promotions that lacked proper support mechanisms of mentorship. He also raised concerns of promotions by the bank without proper consideration of his core competencies. In addition, Mr. Namai complained that he had been transferred to the Kitengela branch in March 2020 at the height of the Covid-19 pandemic and it became difficult for him to handle the business due to the uncertain new environment.

The court in in delivering its judgement held that the evidence of poor performance was attributable to the bank's defective operations that could not be visited upon Mr. Namai as an employee. The judge further stated that Mr. Namai raised his concerns during the hearings but the employer was fixated on the unsatisfactory performance. The court therefore ruled in favour of Mr. Namai by declaring that he was unfairly terminated and he was awarded 5 million Kenya Shillings as compensation.

Conclusion

It's important to note that even where there is poor performance by an employee, an employer cannot terminate an employee on grounds of poor performance after only evaluating them once. The Court of Appeal in the case of **National Bank of Kenya v Samuel Nguru Mutonya [2019] eKLR,** *where the employee was terminated about one year* *after the performance review was done, the court held that the employer ought to have conducted another performance review and afford the employee a disciplinary hearing based on the recent appraisal.*

It is therefore recommended that before an employer terminates an employee on the ground of poor performance, the following factors must be taken into consideration;

a. The level of job performance that is required must clearly be communicated to the employee;
b. Adequate instructions and other relevant tools must be given to the employee to enable the employee meet the performance standards;
c. The employer should continuously monitor and evaluate the employee's performance and give feedback;
d. The employer must ensure that the process of evaluation of the employee's performance is reasonable, understandable, verifiable, measurable and equitable;
e. The employer must take into consideration an employee's reasons for poor performance;
f. The employer must also show that there were attempts to address an employee's poor performance through a structured system; and
g. That there had been written warnings to the employee that failure to meet the standards would result in dismissal and that despite all the above factors the employee was still incapable of meeting the standards.