1. Introduction to Labour law[1]

Labour law is that branch of law that deals with persons in their capacity as *workers*, or *employees*. Labour law cuts across other branches of law: for instance, contract – the contract of employment is indeed a contract governed by the rules of contract generally – and tort; where an employer is responsible for the torts of his employee.

Labour law has had a chequered past. In the pre-industrial days, people generally lived a subsistence life; they simply produced for their daily existence. Life was, in Hobbesian terms, 'nasty, brutish and short.' Feudalism was the system of economic organisation; where people worked the land for food, in return, they paid the landlord in kind – a system barely recognisable in today's labour law.

As society moved away from these pre-industrial times towards more – albeit crude – mechanisation, small cottage industries became widespread, and masters often worked with their apprentices producing items for generally small markets – indeed, localised markets where each producer knew who his consumers were. The employment contract between a master and servant/ apprentice was generally a personal one; whose terms were as agreed between the parties.

The Industrial Revolution rudely disturbed this state of affairs. The new productive techniques, new machinery and the rise of specialisation and division of labour, improved transport and telecommunications and the vastly increased capital market facilitated by the emergence of the registered company, with limited liability capital, resulted in a scale of production which isolated the worker from his employer, the product and the consumer.

A key feature of this age was the rise of the *factory*. The factory system helped to crystallise social class: society was now divided into the industrial working class and the industrialists who owned the factories and employed and paid the workers wages. The factory system also led to social tensions: political power had long been held by the landowners, who now had to compete for influence with workers, who, given their new role in the country's economic affairs, sought a greater voice.

The factory system was marked by conspicuous iniquities: low wages, appalling working conditions, long hours, bad housing, and exploitation of women and children, and this led to agitation for better working conditions. The associations that workers formed to fight for their rights developed into what are recognisable as *trade unions*.

The conflicts inherent in the employer – employee becomes clearer when the power relation between an employer and employee is examined. The problem of unemployment was widespread and employees generally worked on terms dictated by the employer. The strike, a collective withdrawal of labour, was the only feasible means workers could protect themselves. In general, the employment contract was

[1] The bulk of Kenya's labour law is based, in general, on the historical development of the Industrial Revolution which arose in England, and in any event, Kenya's labour law is based on English common law tenets. For a better historical understanding of the Industrial Revolution and the influence of English law on among others, labour issues, *Anglobalisation* by historian Niall Ferguson is a good read. Other countries, notably the US, have also contributed greatly to labour law, based on their individual experiences.

still judicially seen as a contract like any other; and courts were reluctant to intervene to protect workers.[2]

As the Industrial Revolution reached its zenith, the guiding philosophy that generally informed commercial relations, *laissez-faire,* that heavily emphasised individualism and freedom of contract, equally governed contracts of employment. The general assumption was that the two bargaining parties were of equal bargaining capacity.[3]

In the early 1900s, with world trade more open than before, rivalry in Europe eventually led to the First World War. One of the causes of the war was unhealthy economic competition among countries, and this had had an impact on workers incomes. After the war, with many unemployed young men from the battle lines and devastated economies, action was necessary to put these men into work.[4]

In 1919, the International Labour Organisation was established to '… seek the promotion of social justice and internationally recognised human and labour rights. Its mission is to help women and men around the world to find decent working conditions of freedom, equity, security and human dignity through its Decent Work Agenda.'[5]

The upshot of this was the recognition of the importance and necessity of work to any human being's wellbeing and thus, labour is viewed as intricately linked to, indeed, virtually indistinguishable from to human rights. In its vision of decent work, the ILO notes:

> 'Work is central to people's well-being. In addition to providing income, work can pave way for broader social and economic advancement, strengthening individuals, their families and communities. Such progress, however, hinges on work that is decent. Decent work sums up the aspirations of people in their working lives.'

Thus, in order to protect workers there was movement towards protection for workers to live up to the standards set and demanded by the ILO, as well as a general concern for the plight of workers. Thus, the decline of laissez-faire individual contracts set in: it was generally viewed as acceptable for courts, and later, parliament to intervene in employment contracts. This was however, hastened by an event of enormous magnitude: the Second World War.

---

[2] It is true, however, that Parliament was beginning to listen to people and intervened through the Factories Act and on a wider scale, through the Great Reform Acts to enfranchise workers with incomes. Indeed, the labour movement was to later become a major political force in the UK: in 1900, the Labour Representation Committee was formed to represent workers in political forums. It later became the Labour party, with strong support among the working and lower classes of society and remains a major party in British politics today.

[3] This, of course, was not true.

[4] The rise of communism and socialism, based on Marx's works that denounced the exploitative system of feudalism in Russia also took place at around this time; with the overthrow of Tsar Nicholas in Russia and the installation of Communist rule. Clearly, workers' plight could no longer be ignored.

[5] The ILO became a specialised agency of the United Nations in 1946. It also serves as a forum in which governments reach Conventions that set standards that countries aspire to. By the end of June 2007, the ILO had adopted 188 Conventions and 199 Recommendations. Kenya has ratified 49 of these; 43 are in force. Whether they have made a serious difference is another matter altogether!

As the German economy collapsed in the 1930s partly, as a result of the onerous burden imposed on her as she was the aggressor, unemployment and general malaise spread, directly leading to the rise of Hitler and the Second World War; a war that left destruction on a scale never seen before. After the Second World War, in order to prevent such catastrophic events, the state had to assume more responsibility for its citizens. Thus, the notion of the *welfare state,* a benevolent state that intervened on behalf of its people made inroads into the political belief systems of many.

It then became politically acceptable for Government to actively intervene in many areas of public life; from pensions, to state sponsored health care, social security and attempts at using law and other instruments of state to achieve low unemployment. Employment contracts were not left out; and indeed, strong regulation of employment contracts is the norm today than ever before.

The Constitutional and Economic Bases for the Protection of Labour
There are two widely accepted bases for the protection of labour:

a) the Constitutional basis; and
b) the Economic basis.

The Constitutional Basis for the Protection of Labour
As noted previously, labour in its development moved steadily from an ordinary contractual manner to a broadly human rights issue. The Kenya constitution in its Chapter V, the Bill of Rights, does provide for the protection of labour in Article 41[6]
The Economic Basis for the Protection of Labour

---

[6] **Labour relations.**

41. (1) Every person has the right to fair labour practices.

(2) Every worker has the right—

(*a*) to fair remuneration;

(*b*) to reasonable working conditions;

(*c*) to form, join or participate in the activities and programmes of a trade union; and

(*d*) to go on strike.

(3) Every employer has the right—

(*e*) to form and join an employers organisation; and

(*f*) to participate in the activities and programmes of an employers organisation.

(4) Every trade union and every employers' organisation has the right—

(*a*) to determine its own administration, programmes and activities;

(*b*) to organise; and

(*c*) to form and join a federation.

(5) Every trade union, employers' organisation and employer has the right to engage in collective bargaining.

It is a well-settled principle in economics that there are four factors of production: capital, land, entrepreneurship and *labour*. Thus, if the economic chain is not to be disturbed and the benefits from each factor to be distributed equitably and fairly, it is necessary that labour be adequately remunerated and paid what it is worth. However, from the early development of capitalism, it is clear that the employer – employee relationship is strongly indicative of a *power* relationship; two parties with unequal bargaining power. Therefore, it is necessary that the weaker party – employee – is protected, or at the very least, allowed to collectively bargain for his rights.

Labour Laws in Kenya

Kenya's labour laws are heavily drawn from English statutes and common law. In 2007, these were reviewed and new statutes passed by Parliament.

For a long time, Kenyan labour laws were generally codifications of the common law and were generally viewed as weak in protecting workers rights. To remedy this, in 2001, a tri-partite Task Force consisting of Government, employers' organisations and workers representatives as appointed by the Government to look into and suggest reform to the then prevailing laws.[7] The Task Force reported to the Attorney General in 2004; and was very damning on the state of labour in Kenya. The government then considered introducing new laws to replace the prevailing ones that had been found wanting. These are in the main, the major sources of labour law in Kenya.

These statutes are:

- ✓ The **Employment Act, 2007**; repealing the Employment Act, Cap 226;
- ✓ The **Occupational Safety and Health Act, 2007**; repealing the Factories and Other Places of Work Act;
- ✓ The **Work Injury Benefits Act, 2007**; repealing the Workmen's Compensation Act;
- ✓ The **Labour Relations Act, 2007**; repealing the Trade Unions Act, Cap 233 and the Trade Disputes Act, Cap 234; and
- ✓ The **Labour Institutions Act, 2007**; repealing the Regulation of Wages and Conditions of Employment Act, Cap 229.

These laws for the most part reflect contemporary trends of the perception of labour questions; and must be looked at in this perspective as well as through the broad prism of economic circumstances. Other statutes that have a bearing on labour matters are such statutes as the NSSF Act and the NHIF Act, which are reflective of the idea of the welfare state.

[7] There were many reasons for this; Kenya is a party to many ILO instruments, as well as pressures from activists and industrial unrest and trade reform, that required countries to improve workers' rights and conditions in order to ensure that producers in one country do not undermine others in another part of the world; usually, where producers could move to the third world and take advantage of cheap labour there to the detriment of workers in richer countries.

2. The Employer – Employee Relationship

As will be appreciated, the nature of the employment contract has undergone dramatic change over the years; both at a practical and theoretical level.

At common law, the contract of employment was a contract like any other: it was assumed to have been entered into on the basis of mutual agreement, and was between two parties with equal bargaining power. However, with changes in the economic structure of many countries, the rise of the huge, impersonal company with massive bargaining power over individual employees and technological advances have seen governments intervening at both legislative and policy levels to address this imbalance.

Modern labour law in Kenya and indeed, in many countries of the world, has developed and continues to develop in the direction of the social welfare state in order to protect workers. To this extent, many principles that underlie the common law of contract have been swept aside in the area of contracts of employment: S3(6) makes this clear in the following terms:

> 'Subject to the provisions of this Act, the terms and conditions of employment set out in this Act shall constitute minimum terms and conditions of employment of an employee and any agreement to relinquish, vary or amend the terms herein shall be null and void.'

whereas S7 provides that:

> 'No person shall be employed under a contract of service except in accordance with the provisions of this Act.'

The **Employment Act, 2007** was passed to strengthen these protections. The Act is the central statute governing contracts of employment. The Act is concerned with contracts of service, therefore, independent contractors are not caught within the ambit of the Act.

The General Principles Governing the Employer – Employee Relations

The Act's general principles that underlie the contract of employment are set out in Ss 4 – 6 as:

a) Elimination of *forced labour*;
b) Elimination of *discrimination*; and
c) Elimination of *sexual harassment*.

All other provisions of the Act – whether related to wages protection, employee's rights and duties – reflect and centre on these three broad principles, which in turn reflect both the constitutional and economic basis for the protection of labour.

In S4, the Act outlaws forced labour: it reinforces the common law notion that a contract should be based on the parties' free will. It extends the prohibition by including the whole chain shown to be involved in forced labour: trafficking, recruiting and the use of forced labour. The Act constitutes it an offence to fail to observe the requirements of this section, punishable by a maximum fine of Ksh 500 000 or a maximum two year jail term or both.

In S5, the Act addresses itself to questions of discrimination; and imposes a duty on the Minister, labour officers, the Industrial Court and employers – defined to include employment agencies – not to discriminate against employees – defined to include applicants for employment. The Act requires the above persons to promote *equality of opportunity* in employment.

In particular, the Act outlaws discrimination on the basis of race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, pregnancy, mental status or HIV status; and in respect of training, recruitment promotion, terms and conditions of employment and termination thereof and any other matters arising out of employment.

The Act also incorporates the 'equal pay for equal value of work.'

Other statutes reinforce these provisions; for instance, S31 of the **HIV and AIDS Prevention and Control Act, 2006** prohibits discrimination in employment on the basis of a person's actual, perceived or suspected HIV status, whereas S15 of the **Persons With Disabilities Act, 2003** outlaws discrimination in employment on the basis of disability. This Act establishes a National Council for Persons with Disabilities that is mandated to negotiate with employers a 5% reservation for persons with disabilities in both the public and private sectors.

The Act grants incentives to employers who hire persons with disabilities in the form of a 25% tax relief of the wages paid to persons with disabilities. The Act makes it mandatory for a person who employs a disabled person to make reasonable accommodation to an employee with disability. Alive to the cost implications of such accommodation, the legislature allows a tax relief of 50% for any accommodation made to a disabled employee.

It however, makes policy exceptions in four areas; where affirmative action is taken to eliminate discrimination, where the inherent requirement of a job so necessitates, in keeping with the National Employment Policy on the hiring of citizens and on national security grounds.

The Act similarly shifts the burden of proof in showing there was no discrimination, (or if there was, it was justified) to the employer. S5(5) constitutes it an offence not to observe the requirements of the law as set out in this section.

In S6 sexual harassment is outlawed. The Act defines sexual harassment as:

(a) a direct or indirect request for sexual intercourse, sexual contact or any other form of sexual activity that contains
i) a promise of preferential treatment in employment;
ii) threat of detrimental treatment in employment; or
iii) threat about the present of future employment status of the employee

(b) use of language that is of a sexual nature;
(c) use of visual material of a sexual nature;

(d) shows physical behaviour of a sexual nature which subjects the employee to behaviour that is unwelcome and by its nature has a detrimental effect on that employee's employment, job performance or job satisfaction.

Section 6 requires employers who have more than twenty employees shall in consultation with employees or their representatives issue a policy on sexual harassment.

The policy statement must contain:

a) the statutory definition of sexual harassment; and
b) a statement:
    i) that every employee is entitled to employment free from sexual discrimination;
    ii) that the employer shall take steps to ensure that no employee is subjected to sexual harassment;
    iii) that the employer shall take such disciplinary measures as the employer deems appropriate against any person under the employer's direction who subjects any employee to sexual discrimination;
    iv) explaining how complaints of sexual harassment may be brought to the attention of the employer; and
    v) that the employer will not disclose the name of the complainant or the circumstances related to the complaint except where such disclosure is for the investigation or the taking of any disciplinary action.

General Rules Governing Contracts of Service

S9 provides that contracts of service for three months or more must be in writing; and the duty is on the employee to ensure that the contract is in writing.

An employee signifies his acceptance by signing or affixing a thumb print; illiterate employees or those who cannot understand the language in which the contract of service is written shall have the contract translated and explained to them in a language understood by the employee.

Employment particulars

Under S10, within two months of the employment, the terms of service shall be made to the employee, and the written contract of service shall state:

(a) the name, age, permanent address and sex of the employee;
(b) the name of the employer;
(c) the job description of the employment;
(d) the date of commencement of employment;
(e) the form and duration of the contract;
(f) the place of work;
(g) the hours of work;
(h) the remuneration, scale or rate of such and the method of calculating the remuneration and details of other benefits;
(i) the intervals at which remuneration is paid;
(j) the date when continuous employment began; and
(k) entitlement to annual leave, including public holidays, and holiday pay;

(l) incapacity to work and provision for sick pay;
(m) pension schemes;
(n) the length of notice which the employee is obliged to give and entitled to terminate his employment;
(o) where the employment is not permanent; when it is to end;
(p) where the employee is required to work at various places, the addresses of such place of work;
(q) any collective agreements which directly affect the terms and conditions of the employment including where the employee is not a party, the person by whom they were made, and;
(r) where an employee is to work outside Kenya; - the period during which the employee is to work outside Kenya, the currency in which payment will be made, any additional remuneration payable to the employee by reason of working outside Kenya and any terms relating to the employee's return to Kenya.

Other statements an employer is required to avail to an employee are:
Under S11, a statement of initial particulars; where there are no particulars to be entered in respect of commencement date that fact shall be stated, and allows an employer to refer an employee to other statement in respect of matters related to holiday and pension schemes.

Under S12, a statement on disciplinary rules; setting out disciplinary rules applicable and refer the employee to where those rules are and must also specify channels of appeal available to the employee. This section does not apply to employers with less than 50 employees.

Under S13, where there are any changes of particulars in Ss 10 and 12, the employer must within a month after the change in question, inform the employee of such changes.

S14 requires that any document to which an employee is referred to is reasonably accessible to the employee.

S15 requires employers to inform employees of their rights, which must be in a conspicuous place and where the employer fails to do so, the employee may file a complaint to a labour officer. The Act gives the Industrial Court power to vary amend or substitute any particulars the court deems fit.

S20 requires the employer to give an employee an itemised pay statement, clearly setting out an employees pay and deductions thereon.

Failure to give an employee such statements as may be required is an offence, punishable by a fine of a maximum of Ksh 100 000 and/ or a maximum of two years imprisonment.

As far as the individual contract is concerned, the Employment Act, 2007 regulates and sets out the minimum conditions of work for employees: S26 of the Act clearly stipulates that the Act's provisions are minimum conditions that are implied in each and every contract of employment.

This is in addition to any other industry specific requirements; e.g., radiographers in hospitals must be protected from harmful radiation effects, pilots must have minimum prescribed periods of rest between flights etc.

The employer's duties as set out in the Employment Act, 2007 are:

i) Under **S27**; each employee is entitled to at least one rest day in a period of seven days. This section similarly binds employers not to depart from its provisions notwithstanding an employer's right to fix an employee's working hours.

ii) Under **S28;** each employee is entitled to at least 21 days annual leave with full pay for every twelve months of service. Where this leave is broken, at least fourteen days must be taken at once. Where employment is terminated after two or more months of service, an employee is entitled to at least one and three quarter days of leave with full pay for each month worked. Where an employee is entitled to more than the statutory minimum, the remaining leave days may be used at the discretion of the employee and employer. It is the clear intention of the Act to protect employees from being forced to trade in their leave for work by their employers; however, this has been criticised on the basis that it is overly restrictive in that employees who may wish to work for extra pay are barred from doing so.

iii) Under **S29;** the principle of non – discrimination in respect of women is explicit. The Act increases the maternity leave period from two to three months under the old Act. Similarly, maternity leave is in addition to annual leave as opposed to *in lieu* of annual leave as under the old Act.
A woman is however required to give at least seven days notice in writing before taking such leave. Two weeks paternity leave for men is also provided for.

iv) Under **S30;** employees are entitled to sick leave of at least seven days with full pay after two consecutive months of service, and thereafter seven days sick leave with half pay. The employee can only exercise such rights if he has taken steps to inform his employer of his indisposition.

v) Under **S31;** an employer is required to provide employees with housing near his place of work, or pay such sum of money as will enable the employee obtain housing. The Minister may exclude this provision for any category of employees.

vi) Under **S32;** the employer is required to provide water for the use of his employees at the place of work and accommodation provided by the employer.

vii) Under **S33;** an employer shall, where agreed in the contract of employment, provide food and ensure the employee is well fed at his expense.

viii) Under **S34;** an employer is required to provide his employees with proper medicine during illness and medical attendance during illness. However, the section puts the onus on the employer to be notified of an employee's illness. This section however will not apply where: an employee was absent from his place of work without lawful excuse, or where the injury is self – inflicted or where there is any insurance scheme established under any law, or where the Government provides free health services.

ix) Under common law, in addition to the above generally, an employer is also required to provide work or assign an employee with work, and to indemnify an employee for any extra costs incurred in the course of executing the employer's business.

The employee's duties are not expressly provided for, thus the common would still apply.[8] At common law, the details of an employee's duties are largely left to the contract of employment, but the general position of the law is:

i) **Duty of obedience:** An employee is supposed to be obedient to his employer, or other person placed in authority over the employee: in *Turner v Mason*, the court stated that the 'general rule is obedience.' If an employee is given work unrelated to the contract, and employee may ignore it or treat it as 'constructive dismissal' – that is a dismissal from work.
What amounts to disobedience? In *Laws v London Chronicle* the court explained that the question is not whether disobedience takes place once or more times, but whether such disobedience manifests an intention to repudiate the whole contract. Under S44(3), it is a ground for summary dismissal if an employee has 'fundamentally breached' his obligations under the contract of service.

ii) **Duty of fidelity:** An employee is under a duty to serve faithfully and honestly and to protect and maintain the employer's confidence.

iii) **Duty not to misconduct oneself:** While misconduct is a ground for dismissal in law, what amounts to misconduct is a question of fact. A chronically late secretary may not be serious misconduct compared to a driver who comes to work drunk. For the most part, this is now regulated by statute: S44(4) of the Act.

iv) **Duty to indemnify:** An employee is under a duty to indemnify an employer for any losses caused by the employee's negligence: *Lister v Romford Ice Cold Storage Co Ltd*, where an employee injured a fellow employee and the employer was found vicariously liable, the employer could recover this sum from the offending employee.

[8] However, one can deduce an employee's duties from the provisions of the reasons for termination and dismissal by an employer.

Remuneration: Protection of Wages

One of the bases upon which labour is protected is the economic rationale: people work for a wage.

Under **S17,** an employer shall pay an employee the full sum of the entire wages due in the currency of Kenya, in cash, or in a bank designated by the employee, by cheque or postal order or money order or to a person duly authorised by the employee in writing if the employee is unavailable.

The wages are to be paid on a working day and not near a place where alcohol is sold, unless it is an establishment selling intoxicating drinks.

Non monetary payment is also allowed where it is for the employee's personal use and is not in form of alcoholic drinks or noxious drug.

Where an employee has a decree executed against him, such decree shall not be executed to the extent of more than six months worth of employees' wages. Where an employer is undergoing insolvency, however, these provisions do not apply.

Where an employer advances to the employee a sum in excess of one month's wages of an employee or where there is a written contract of service, two months' wages, such sum is not recoverable.

Failure to comply with the section is an offence punishable by 2 years' imprisonment or a fine of one hundred thousand shillings or both.

Under **S18,** wages are due: at the end of a day, or at the end of a month, or at the end of any such period as the contract may stipulate.

In the case of work to be paid on the basis of tasks completed, the employee may be paid at the end of the day proportionate to the task or when the task is completed.

Where an employee is dismissed from work summarily, the employee's dues must be paid as are due at the time of dismissal. However, where an employee has been detained under any law, no wages are earned.

Under **S19,** an employer may deduct from an employee's wages:

a) any sum due under an approved provident fund;
b) a reasonable sum for any damage done to the employer's property caused by the wilful default of the employee;
c) an amount commensurate to the period during which an employee absents himself from work without wilful cause;
d) an amount of money equivalent to that lost in the employee's custody;
e) any amount paid in excess of the employee's salary erroneously;
f) any amount due under a court order;
g) any amount in which the employer has no direct interest, as directed by the employee to be so deducted;
h) any loan sum advanced to the employee, not being more than 50% of the employees residual salary; and
i) such amount as may be prescribed by the Minister.

Deductions may be made up to ⅔ of an employee's pay: this is up from ½ under the old Act. An employer who fails to comply with these provisions is guilty of an offence and is liable to a fine of not more than 100 000 shillings or two years imprisonment or both.

Under **S20,** an employer is required to provide an employee with an itemised pay statement containing particulars of: the gross amount payable, any variable amounts and any statutory deductions made. This section however excludes employees paid on piece rate or for less than six months.

Under **S21,** the itemised pay statement must clearly state all statutory deductions; the amount, the intervals and the purpose for which such deductions are made. This must be renewed every twelve months. **S22** gives the Minister power to amend by addition or reduction any terms due in statements under SS20 – 21.

Under **S23,** an employer who is not ordinarily resident in Kenya may be required to pay a bond assessed at the equivalent of one month's wages for all employees; such money shall be used solely for paying employees in the event of default by the employer.

Under **S24,** an employer is required to bring to the labour officer (or a district commissioner) [county commissioners] notice of the death of an employee.

Any wages due to the dead employee shall be paid to the legal representatives of the dead employee. An employer is required within seven days to provide the labour officer or DC [county commissioners] with evidence of such payment.

Where no claim is made on a dead employee's wages or any such claim is rejected by the employer, such sums due shall be delivered to the labour officer or DC to be held in trust subject to the Law of Succession Act.

An employer is required to provide a report of any employee killed or incapacitated in the course of duty.

Under **S25,** it is an offence for an employer to fail to comply with these provisions and is punishable by a fine of not more than one hundred thousand or a jail term of at most two years.

Termination of the Employer – Employee Relationship

The general principles upon which the termination is based are the freedom of contract as well as the constitutional basis for labour.

Under **S35,** the termination of the relationship is deemed to be: where the agreement is to pay wages daily, at the end of a day without notice, where for less than a month or for a month, at the end of that period or twenty eight days with notice.

An employee whose services are terminated is entitled to service pay except where such an employee is a member of any scheme established under the RBA; or the

NSSF; or a scheme established under a collective agreement; or any other scheme established by the employer whose terms are more beneficial to the employer.

Under **S36,** where no notice is given, the relationship may be terminated upon payment by the other party.[in leu of notice] Under **S38,** where an employer waives notice, the employer must pay for such waiver of notice. Where a contract ends on a journey, the term may be extended for not more than a month to enable the employee complete the journey.

Under **S37,** where a casual employee worked for more than one month, or assigned work that cannot be reasonably completed in a three month period, such casual employee's contract shall be deemed a contract where wages are paid monthly for the purpose of the payment of service pay.

Similarly, a casual employee who works for more than two months shall be deemed to be entitled to terms of service as if he had been employed other than as a casual employee. An employee on a probationary contract may not be hired for more than a period of twelve months as such.

The Industrial Court is equally empowered to vary and substitute any contract terms such as to constitute an employee a non – causal employee.

There are several heads under which termination may be effected, each of which is governed by different rules.

Termination on Account of Redundancy

Under **S40,** an employer shall not terminate an employee's contract of service on account of redundancy unless the following conditions have been met:

a) the employer has given notice (where the employee belongs to a trade union, to the union), the employee and the labour officer of the intended redundancy at least a month prior to the redundancy;
b) the employer has selected the employees to be made redundant with due regard to the seniority in time and to the skill, ability and reliability of each employee affected by the redundancy;
c) where an employee is not a member of a trade union, an employee is not disadvantaged by the fact;
d) where leave is due, paid off the leave in cash;
e) employer has paid a redundant employee not less than one month's notice or wages in lieu of notice; and
f) the employer has paid severance pay at the rate of fifteen days pay for each completed year of service.

The Minister may also make rules requiring an employer who employees a minimum number of employees to take out an insurance policy in respect of redundancy – unemployment insurance.

Summary Dismissal of an Employee

Summary dismissal means where an employee is dismissed without any notice, or with a notice period less than that allowed by a statutory or contractual term, where the employee has fundamentally breached his obligations under a contract of service, or where the employee has engaged in wilful misconduct.

The question of an employee fundamentally breaching his obligations under a contract of service is a matter of fact: in *Pepper v Webb*, where an employee responded to an employer's order to plant some flowers by stating, 'I couldn't care less about your bloody greenhouse and sobbing garden' had repudiated his contract of employment.

The circumstances under which an employee's services can be terminated for misconduct are:

a) where without leave or other lawful cause, an employee absents himself from his place of work;
b) by becoming intoxicated during working hours such that an employee is unable to perform his work properly;
c) where an employer[employee] fails to perform his work, or fails to perform his work properly which was his duty to perform under the contract;
d) an employer[employee] uses insulting or abusive language or behave in a manner insulting to his employer or any other person placed in authority;
e) the employee refuses to obey a lawful or proper command which it was within his duty to obey;
f) where an employee is arrested for a cognisable offence punishable by imprisonment and is not within fourteen days released on bail or set at liberty; or
g) an employee commits or is reasonably suspected of committing a criminal offence to the detriment of his employer's property.

Under **S41,** where an employer intends to terminate an employee's service for misconduct, the employer must notify the employee and afford an employee a reasonable opportunity of defending his case. The employee shall be entitled to have a third party – a union representative, or a fellow employee, present. This section, however, excludes termination of a probationary contract.

Under **S43,** an employer must give reasons for termination, and where no reasons are given, such termination will be deemed an unfair termination.

Unfair termination

S45 precludes an employer from unfairly terminating an employer's service. An employee who has been employed for more than 13 months has a right to complain that he has been unfairly terminated.

A termination is unfair if:

a) the employer fails to prove that the reason for termination is valid;
b) the employer fails to prove that the reason is a fair reason related to the employer's operational requirements or is related to the employee's conduct, capacity or compatibility;
c) that the employment was terminated in accordance with fair procedure; and under **S46;**

d) where an employee was terminated for reasons of her pregnancy;
e) the going on leave, or a proposal to take leave;
f) an employee's membership of a trade union;
g) the participation in union activities after working hours, or with the employer's consent within working hours;
h) an employee's pursuit of office in a trade union;
i) an employee's refusal to join or leave a trade union;
j) an employee's race, colour, tribe, sex, religion, political opinion or affiliation, nationality, social origin, marital status, HIV status or disability;
k) an employee's initiation of legal proceedings or complaint against his employer, unless it is shown that the compliant is without basis; or an employee's participation in a lawful strike.

Under **S47,** where an employee has been dismissed, the employee may within three months bring a complaint before a labour officer for resolution. The right of the employee is in addition to the right to file suit to the Industrial Court, or any right under a collective agreement.

Employees under probationary contracts dismissed may not file complaints under this section.

The burden of proof that the there was an unfair termination shall rest on the employee, whereas the burden of proving that the termination was justified is on the employer.

Remedies for Wrongful Dismissal or Termination

The labour officer may recommend any of the following where it is determined that an employer has unfairly terminated an employee's services:

a) payment of any sums that would have been paid had notice been given;
b) where the termination ended before wages fell due, the proportion of the wages due and any other loss consequent upon the dismissal and arising between the date of dismissal and date of expiry of notice; or
c) the equivalent of a number of months wages not exceeding twelve months based on the gross salary or wage of the employee at the time of dismissal; subject to statutory deductions;
d) order the reinstatement of an employee and treat the employee as if he had not been dismissed, and to re-engage him in work at the same wage;

The labour officer is however supposed to take into account:

- ✓ the wishes of the employee;
- ✓ the circumstances including the extent to which the employee contributed to the termination;
- ✓ practicability of recommending re-instatement;
- ✓ the common law principle excluding specific performance except in exceptional circumstances;
- ✓ employee's length of service;
- ✓ reasonable expectation of the employee as to length of time in employment may have continued;
- ✓ the opportunities available for securing alternative employment;
- ✓ the value of any severance;

- ✓ the right to press other claims;
- ✓ any expenses incurred by the employee in the termination;
- ✓ any failure by the employee to mitigate the losses attributable to unjustified termination; and
- ✓ any compensation in respect of the termination paid by the employer.

Each employee is entitled to a certificate of service unless the employment has bee for less than four weeks. This does not however, bind an employer to give a testimonial or reference.

The certificate of service ought to contain:

a) name and address of employer;
b) name of the employee;
c) date when employment commenced;
d) the nature and usual place of employment of the employee;
e) date when employment ceased and any other particulars as prescribed.

Failure to give an employee a certificate of service is a criminal offence, punishable by a fine not exceeding one hundred thousand shillings or a jail term not exceeding six months.

Insolvency of Employer

The Employment Act moves in the direction of protecting employees in the event of an employer's bankruptcy or collapse. In the main, the Act deems employees' dues due as **debts** which must be paid as a matter of priority.

Under **S66**, the debts are to be repaid by the Minister out of the National Social Security Fund. It has been argued that this is a nascent move towards a social welfare state.

The debts with which the Act is concerned are:

- ✓ Salary arrears in respect of one to six months
- ✓ Any sums payable as under Ss 35 and 36
- ✓ Any pay in lieu of leave
- ✓ Any award form unfair dismissal
- ✓ Any reasonable sum by way of reimbursement of a fee paid by an apprentice.

Where an officer – either, a trustee in bankruptcy, a liquidator, an administrator, a receiver or manager – is to be appointed, the Minister shall not make an order until such officer has reported to the minister. Where an employee is to be paid a sum, which sum has been paid by the employer, such sum is to be paid to the Minister and paid into the NSSF: **S72**. The question as to what the relationship is among the Minister and employee, and the employer is an open one.

The Industrial Court has exclusive judicial jurisdiction in matters related to questions arising under this part of the Act.

General Statutory Duties of an Employer under the Act

The Act outlaws 'the worst forms of child labour': **S53.**

Under **S55,** a labour officer is given power to cancel any contract between an employer and a child, on the grounds that the employer is an undesirable person or that the nature of the employment constitutes worst form of child labour.

S56 fixes the lawful minimum working age as 13. Contracts with children between 13 and 16 years: such contracts are in the exclusive jurisdiction of labour authorities.

The exceptions to these are contracts entered into under the Industrial Training Act; which allows employers to take in children for the purpose of apprenticeship.

It is an offence to contravene this section; the penalty is a fine of Ksh 200 000 and/ or a jail term of not more than twelve months **S64. W**here a child is killed or is injured by reason of the employer's contravention of this part, the fine is raised to a maximum of Ksh 500 000.

Employment Records and management

Each employer is required to keep records in accordance with the Act; as hereunder

- a policy statement on sexual harassment;
- the particulars specified in Ss 10, 13, 21 and 22;
- rest days, maternity and sick leave;
- housing, food rations;

- Any children employed;
- A record of warning letters or other evidence of misconduct by employees; and
- Any other particulars as required by the minister.

Each employer who employs more than twenty – five people is required to notify the Director of Employment of every vacancy arising in his place of work.

An employer is also required to keep a register of all employees and such register shall be furnished to the Director each year.

Foreign Contracts
Contracts to be performed outside of Kenya must be in writing: significantly, the Act strengthens the agency concept between employers and employment agencies. Any questions arising under this part are to be heard by the Industrial Court.[Employment and Labour Court]