Table of Contents

1.0 INTRODUCTION....3
1.1 THE HISTORICAL BACKGROUND OF THE OPPOSING INTERESTS....3
2.0 FUNCTIONS OF LABOUR LAW....4
3.0 SOURCES OF LABOUR LAW....5
TOPIC ONE....7
1.0 THE NATURE OF EMPLOYMENT CONTRACT....7
2.0 DISTINCTION BETWEEN THE CONTRACT OF SERVICE AND THE ...CONTRACT FOR SERVICES 7
2.1 Control test....8
2.2 Organisational test....10
2.3 Multiple tests....12
2.4 Multiple test....13
3.0 THE POSITION UNDER THE LABOUR LAW STATUTES....14
4.0 FORMATION OF THE CONTRACT OF SERVICE....15
5.0 PROBATIONARY PERIOD....15
6.0 CONFIRMATION OF THE PROBATIONARY EMPLOYEE....17
7.0 TERMINATION OF PROBATIONARY EMPLOYEE....18
8.0 EMPLOYMENT CONTRACT....18
9.0 OBLIGATIONS OF THE EMPLOYER AND THE EMPLOYEE UNDER THE CONTRACT OF SERVICE....19
9.1 OBLIGATIONS OF THE EMPLOYER....20
9.2 OBLIGATIONS OF THE EMPLOYEE....21
9.3 FUNDAMENTAL RIGHTS AND PROTECTIONS....21
9.3.1 Prohibition of child labour....21
9.3.2 The Minimum Age (Industry) Convention....22
9.3.3 The Worst Forms of Child Labour Convention....22
9.3.4 Prohibition of Forced labour....23
9.3.5 Forced labour convention 1929....24
9.3.6 Abolition of forced labour convention 1957....24
9.3.7 Obligation as to discrimination....25
9.3.8 The discrimination (Employment and Occupation) Convention 1988....26
9.3.9 Equal Remuneration Convention 1951....26
9.4 Rights of employer and employee....27

9.4.1 Convention on Freedom of Association and Protection of the Right to Organize....28
9.4.2 SUSPENSION....31
9.5 TERMINATION OF EMPLOYMENT....34
9.5.1 TERMINATION OF THE CONTRACT OF SERVICE UNDER THE ELRA....35
9.6 REMEDIES FOR UNFAIR TERMINATION....36
TOPIC TWO....38
TERMS AND CONDITIONS OF EMPLOYMENT CONTRACT....38
Introduction....38
TOPIC 3....46
Rights and Duties/Obligations of parties to a Contract of Service....46
Introduction....46
Duties of the employer....47
TOPIC FOUR....54
WORKERS' COMPENSATION....54
Understanding of Employer's Liability....54
WORKERS' COMPENSATION....57
TOPIC FIVE....61
STRIKE AND LOCKOUT & DISPUTES SETTLEMENT....61
Types of Disputes....61
SETTLEMENT OF DISPUTES....65
NEGOTIATION IN THE PUBLIC SERVICE....72
TOPIC SIX....75
TRADE UNIONS....75
Introduction....75
TOPIC SEVEN....85
Termination of Contract of Service and its Legal Consequences....85
Introduction....85
REFERENCES....93
STATUTES....93
SUBSIDIARY LEGISLATIONS....93
CASES....94
BOOKS....95

1.0 INTRODUCTION

Labour law deals with the relationship between the employer and the employee or master and servant relationship. The law does not confine itself on master and servant relationship but it goes further by dealing with other incidents arising out of master-servant relationship e.g. workers organisation

A major concern of labour law is labour i.e. a capacity or skills of a person to work. Another concern is the relationship between labour and capital; here capital means employer and labour means employee. For the labour laws to apply there must be a contract of service as opposed to contract for service

1.1 THE HISTORICAL BACKGROUND OF THE OPPOSING INTERESTS

In short as Jain[1] states after the First World War there was the considerable increase of the cost of living. This in turn made the owners of industries to devote their sole attention to the maintenance of machines and the improvements of the technical know- how to the utter neglect of the workers employed to run the machines because they were available in the large number and could be replaced in no time.

In that epoch, the employers did not care of socio-economic welfare of employees thus the opposing interest was overweighed by the side of employers as they had hegemony in the contract of service. Though at this juncture there were opposing interests between one side which was weak and the other side which was strong neither the governments nor the courts were at the position to balance the opposing interests which prevailed hitherto because there was the policy of non – interference in employer and employee relation.

[1] S.P Jain, (2002) Industrial and Labour Laws, 9th edition p xi

As the time went on, however, the policy of non – interference became the obsolete policy thus the government intervened the relationship between the employer and the employee by trying to impose the conditions on the employers to improve the labour conditions of the employees. This was achieved by the enactment of the labour legislations.

This tendency of labour legislations had been the great achievement in the contract of employment relationship as it balances the opposing interests. In Tanzania the labour laws mainly the acts of parliament and other sources of law have reiterated the balancing of interests between the two sides.

2.0 FUNCTIONS OF LABOUR LAW

1) The major function of labour law is the protection of the employees

a) By restricting the powers of the employer to dismiss employees or to terminate employment: See s 37 of the ELRA 2004 which deals with unfair termination

b) By regulating the wage to be paid to workers and hence maintaining the financial capacity of the employee SS 26-28 of the ELRA 2004 and PART V of the Labour Institutions Act 2004

c) By regulating conditions of work or employment for example it provides for rest hours, rest days etc: See part III sub part B of the ELRA

d) By providing for care and welfare of the employee such as repatriation of the employee, subsistence allowance, etc

e) By providing the pension and other terminal benefits after retirement

2) Labour law helps to balance conflicts of interests as between employer and the employee (Capital and labour) because in any contract of service employees are there to earn something for

themselves and their families while employer's interest is to make profit

3) Labour law helps to dissolve industrial disputes

4) Labour law helps to maintain industrial peace by maintaining good relationship between employers and employees. By so doing labour law helps to increase production of goods and provision of services.

3.0 SOURCES OF LABOUR LAW

i. Constitution: This is the basic law of the land, article 22 (1) states that every person has a right to work and as far as remuneration is concerned article 23 (10& (2) is very clear to that effect

ii. Statutes: the most part of labour law in this country is codified in the statutes; these statutes are divided in Principal legislation and subsidiary legislation
Examples of principle legislations are

a) the Employment and Labour Relations Act 2004 (Act No. 6 of 2004)
b) the labour Institutions Act, 2004 (Act No. 7 of 2004)
c) the Occupational Health and safety Act
d) the Workers' Compensation Act (Cap 263 R.E 2002)
e) the Public service Act, 2002 (Act N o. 8 of 2002

Examples of subsidiary legislations

a) the Employment and Labour Relations (Code of Good Practice) Rules, 2007 [Government Notice No 42 of 16th February 2007]

b) the Labour Institutions (Mediation and Arbitration) Rules, 2007 [government Notice No. 64 of 23rd March 2007]
c) the employment and Labour Relations (Forms) Rules, 2007 [Government Notice 65 of 23rd March 2007]
d) the Labour Institutions and Code of Conduct for Mediators and Arbitrators Rules 2007, [Government Notice No. 66 of 23rd March 2007]
e) The Labour Institutions (Mediation and Arbitration Guidelines) Rules, 2007 [Government Notice No 67 of 23rd March, 2007)
f) The Public Service Regulations, 2003 (Government Notice No 168 of 20th June 2003)
g) The Public Service Scheme (Government Notice No 169 of 20th June 2003)

iii. Case Law from precedents made previous decisions of higher courts i.e. Court of Appeal and High Court. For instance in the case of **JUWATA V KIUTA**, the case was to the effect that, disputes of management employees are supposed to go directly to the Industrial Court of Tanzania without passing through the Conciliation Board; also in the case of **KITUNDU SISAL ESTATE V SHINGO MSHUTI AND OTHERS** (1970) HCD 243 the case defined summary dismissal to mean termination of contract of service without notice.; the same definition was later reiterated by the case of **WALTER JAGER V CORDURA LTD t/a TANGANYIKA TORIST HOTELS AND OYSTER BAY HOTEL** (1972) HCD 133 that to terminate the contract of service before it being out of its course is as much as summary dismissal.

iv. Received Laws
Received laws are one of the sources of law in Tanzania. This owed its origin from the time Tanganyika received from England the English Common Law, doctrines of equity, statutes of general application under article 17 (2) of the then Tanganyika Order in Council, 1920 (22/07/1920). When Tanganyika Order in Council was repealed after independence the clause which received or rather which

made English laws to be applicable in Tanganyika was enacted under section 2 (2) of the Judicature and Application of Laws Ordinance, 1961 Cap 453. Later after the enactment of the Revised Laws the same is reflected under section – (-) of the Judicature and Application of Laws Act, (Cap 358 R.E 2002). In the field of Labour laws the same is reflected as the position of the English cases and other common law countries have been cited as authorities as the sources of law in Tanzania. The good example can be drawn from the cases of **GOULD V MINISTER OF NATIONAL INSURANCE AND ANOTHER** (1951) ALL E.R 368; the case is an authority in distinguishing contract of service and contract for services. Also the Indian case of **SUCKBANA SINGH V STATE OF PUNJAB** AIR 1962 S.C 1711 the case which is an authority on probations.

v. Others

Books from prominent writers

International and Regional Conventions

TOPIC ONE

1.0 THE NATURE OF EMPLOYMENT CONTRACT

Labour law statutes in Tanzania (i.e. Employment and Labour Relations Act (Act No 6 of 2004) the Labour Institutions Act (Act No 7 of 2004) and the Public Service Act, 2002 (Act No 8 of 2002) regulates the relationship between the employer and employee under the contract of employment. So the laws take care of the contract of service and not the contract for services. There have been problems as in the distinction between contract of service and contract for service; while the former is the relationship between the employer and employee the latter involves the relationship between the employer and independent contractor.

2.0 DISTINCTION BETWEEN THE CONTRACT OF SERVICE AND THE CONTRACT FOR SERVICES

In distinguishing between the contract of service and the contract for services there have been tests which have endeavoured to make a clear distinction between the two. They include

2.1 Control test
2.2 Organisational test
2.3 Multiple test

In the case of **STEVENSON JORDANS AND HARRISON LTD V MACDONALD AND EVANS** [1952] 1 TLR 101 Lord Justice Denning at pp 110-111 stated it raises the troublesome question of distinction between a contract of service and a contract for services. The test usually applied is whether the employer has the right to control the manner of doing work. Thus in **COLLINS V HERTS COUNY COUNCIL** Mr Justice Hilbery said

> "The distinction between the contract for service and a contract of service can be summarized in this way: In one case the master can order or require what is to be done while in the other case he can not only order what is to be done but how it shall be done".

2.1 Control test

This test determines the extent of control the employer has over the employee. This test was once dealt with in the case of **GOULD V MINISTER OF NATIONAL INSURANCE AND ANOTHER** (1951) ALL E.R 368 at 371in which the principles laid down in determining the control of the employer to the employee were stated reference been made from the case of SHORT V HENDERSON a case in which the House of Lords under the Workman's Compensation Act Lord Thankerton (115

L.J.P.C) recapitulated with approval the four indicators of the contract of service i.e.

a) the master's power of selection of his servant
b) the payment of wages and other remuneration
c) the master's right to control the method of doing the work
d) the master's right of suspension or dismissal

In the contract for service, the independent contractor is given what to do, how to do it remains on his own responsibility provided that he abides with the description and quality of the work so agreed upon by his employer.

In the case of **WALKER V CRYSTAL PALACE** (1910) 1 KB 87

A professional footballer was held to have a contract of service with the club. He was paid 3.50 pounds per week for a year contract, in which he was supposed to provide his playing services exclusively to Crystal Palace Football Club. He was given detailed rules about training and under whose direction he was during training. He was also expected to be available for training and matches. The club argued that he did not have a contract of service because, it asserted, it was essential that in such a relationship the master should have the power to direct how work should be done. In **YEWENS V NOAKES** Bramwell J had defined a servant as[2]

> A person subject to the command of his master as to the manner in which he shall do his work

It was argued that this definition should not be applicable to a professional footballer who was hired to display their talents and skills. The control of the club is limited to deciding whether the player is picked for the team or not. Farewell J dismissed the argument on the basis that many workmen display their own initiative, like footballer, but were still bound by the directions of their master. In this case the player had agreed to follow detailed training instructions and to obey his captain's instructions on the field.

[2] (1880) 6QD 530 at p 532

> *"I cannot doubt that the is bound to obey any directions which the captain, as the delegate of the club, may give him during the course of the game – that is to say, any directions that is within the terms of his employment as a football player."*

It is difficult now, perhaps, to comprehend the attempts to fit a professional footballer into this concept of control.

The problem with this control test is limited in its application especially in distinguishing an employee and a self –employed.

In the case of **LANE V SHIRE ROOFING COMPANY** (1995) IRLR 493 at 495 the Court of Appeal recognised this

> *"First, the element of control will be important; who lays down what is to be done, the way in which it is to be done, the means by which it is to be done, and the time when it is to be done? Who provides (hires and fires) the team by which it is to be done, and who provides the material, plant and machinery and tools used?"*

In situations which lacks clarity as whether a person is an employee or self –employed the court have reiterated to apply control test to determine the fate of the employee. The control exercise need not be done directly. In **MOTOROLA LTD V DAVIDSON**; (2) Melville Craig Group Ltd [2001] IRLR 4 concerned an individual who was engaged by an agency to work at Motorola's premises. The individual was dismissed by the agency at the request of the company. The level of the control, even though exercised by a third party, was sufficient to establish an employment relationship between the company and individual.

2.2 Organisational test

- This is sometimes termed as “Integration test”
- Sometimes it is difficult to establish categorically the nature of employment relationship just by looking on control test.
- Some of employees, because of their professional skills, the employer cannot be said to be controlling each and every conducts of such employees.
- In the case of **CASSIDY v MINISTRY OF HEALTH**, Lord Justice Somervell pointed out that there are many contracts of service where the master cannot control the manner in which the work is to be done as in the case of captain of ship.
- Lord Justice further stated that under the contract of service a man is employed as part of the business whereas under the contract of services his work although done for the business is not integrated to it but only accessory to it.
- In the case of **STEVENSON JORDANS AND HARRISON LTD V MACDONALD AND EVANS** [1952] 1 TLR 101 Lord Justice Denning when he was trying to distinguish between the contract for service and contract of services stated that in the contract of service a man is employed as part of the business and his work is done as an **integral part of the business**.
- A good example of a situation where an organizational test can easily be tested is in Hospital workplace.
    - It is hard to see how the hospital management can exercise control over doctors who in surgical room.
    - The only visible possibility of control here is in selection process other than in operation.

- However, it has to be distinguished here between a doctor who has been hired as an expert for a certain specific task (Independent contractor) and one who is employed as an employee.

In modern conditions the application of control test has diminished due to developments in production process. An employee can be highly skilled and qualified, and employed specifically because he has professional training and competence of a particular job so that the employer is frequently unable to instruct the employees as to how the work has to be done. This has paved the way for the development of Organisational test. In the case of **CASSDY V MINISTRY OF HEALTH**, Lord Justice Somerville pointed out that there are many contracts of service where the master cannot control the manner in which the work is to be done as in the case of captain of ship. Lord Justice further stated that under the contract of service a man is employed as part of the business whereas under the contract of services his work although done for the business is not integrated to it but only accessory to it

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The good example of the situation where a person is employed under the contract of service but the employer can not exercise control as stated by the control test is in the situation of hospital cases. In these cases the control of employees is done at the time of the selection of employees only. At this point the employer has to exercise due diligence in the selection of the employee, he must be satisfied with the skills of say a doctor or a nurse as it is difficult to exercise control as to how they are supposed to do their works. Take an example of a doctor who is the conduct operation to a patient there is no way in which the employer can

control such an employee. In works of this kind which requires the professional know-how of the employee the employer can not intervene. Further that one has to note that where a doctor is called on by the employer as the consultant cannot be in the same footing as the doctor who is employed under the contract of service. He remains to be the independent contractor despite the fact that he uses the tools and premises of the employer.

2.3 Multiple tests

- The emergence of organisational test did not automatically wither away the control test, there are situations in which the courts are faced with cases in which they fail to apply either of the two tests to solve them.
- This has led to the formulation of another test i.e. multiple test. According to labour law scholars they argue that multiple test means the use of common senses.
- The test is the combination of the control test and organisational test.
- Several factors are considered under multiple test in order to draw a distinction between contract of service and contract for service. These are like;
    - The power of selection of employee by the employer
    - The payment of wages by the employer
    - National insurance stamps
    - Income tax
    - Holiday monies and pensions; and

- The power to suspend and dismiss

- This test was propounded by Lord Wright **YOUNG V MONTREAL LOCOMOTIVE WORKS** [1974] 1 DLR 161 at 169 that in many cases the question can only be settled by examining the whole of the various elements which constitute the relationship between the parties.

- See also the following cases;
  - **READY MIXED CONCRETE (SOUTH EAST) LTD V MINISTER FOR PENSION AND NATIONAL INSURANCE** [1968] 2 QB 497
  - DPP V ELIATOSHA MOSHA & ANOTHER [1984] TLR 28

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☐ Reflection under the Statute

- S.61 of the LIA (Act. No. 7 of 2004) sets presumptions of who is an employee. The factors considered are;
  - The manner in which the person works is subject to the control or direction of another person;
  - The person's hours of work are subject to the control or direction of another person;
  - In the case of a person who works for an organisation, the person is a part of that organisation;
  - The person has worked for that other person for an average of at least 45 hours per month over the last three months;

- The person is economically dependent on the other person for whom that person works or renders services;
- The person is provided with tools of trade or work equipment by the other person; or
- The person only works for or renders services to one person

- See the definition of who is an employee under s.4 and 98(3) of ELRA, 2004.
- The definition of an employer is provided under s.4 of ELRA.

3.0 THE POSITION UNDER THE LABOUR LAW STATUTES

Section 61 of the Labour Institutions Act stipulates the situations in which the person can be presumed to be an employee. Read Section 61 (a)-(g) of the Labour Institutions Act, the provision contains the ingredients of the multiple test.

4.0 FORMATION OF THE CONTRACT OF SERVICE

Contract of service can be entered for manual labour or on clerical works. Contract of service or contract of employment as referred to under labour law is entered between the employer and employee.

Employer is defined under section 4 of the ELRA 2004 to mean any person including the Government and an executive agency, who employs an employee. The Public Service Regulation defines

employer to mean a person or organisation in the public service, with whom the public servant entered into a contract of service and who is responsible for the payment of salaries of such a public servant.

Employee is defined under section 4 of the ELRA 2004 to mean an individual who

a) has entered into a contract of employment; or
b) has entered into any other contract under which-
    i) the individual undertakes to work personally for the other party to the contract; and
    ii) the other party is not client or customer of any profession, business, or undertaking carried on by the individual; or
c) Is deemed to be an employee by the Minister under section 98 (3)

Employee is defined under the Public service regulations to mean any person termed by the Act as the public servant.

5.0 PROBATIONARY PERIOD

When parties enter into the contract of service there is the need for the parties to understand each other in terms of behaviour and skills. This makes an employee to subject himself to the probation period before is actually confirmed for permanent basis. Rule 10 of the employment and Labour relations (Code of Good Practice) Rules, 2007 [Government Notice No 42 of 16th February 2007 (herein under referred to as the Code of Good Practice states under sub rule 3 that the purpose of probation is normally to enable the employer to make an informed assessment of whether the employee is competent to do the job and suitable for the employment. Under sub rule 4 the law is to the effect that the probation should be of a reasonable length of

not more that 12 months having regards to the factors such as the nature of the job, the standard required, the custom and the practice in the sector.

For the public servants the same is provided for under rule 14 of the Public Service Regulations that where any person is first appointed in the public service on pensionable terms, he shall serve a probationary period which shall depend on the scheme of service and shall not exceed twelve months

The Public Service Regulations gives power to the immediate supervisor of the probationary employee to reduce the probation period if the public servant concerned has fulfilled all the requirements necessary to be fulfilled before his confirmation and if either

a) he has previously served in that office or in the similar office on non pensionable terms or
b) the reduction of probationary period is necessary for administrative reasons

The proviso under the same rule provides that no probationary period shall be reduced under this regulation by a period exceeding the period which the public servant has served in such office or a similar office on pensionable terms or a period of six months whichever hall be the less.

The Code of Good Practice further states that an employer may extend the probation of the employee save that there is consultation to the said employee, the extension of probation is supposed to be for a reasonable time and this is done where the employer has not yet been able to assess whether the employee is competent to do the job or suitable for the employment[3].

[3] See rule 10 (5) of the Code of Good Practice; Under rule 14 (2 of the Public Service Regulations the immediate supervisor of the probationary servant is supposed not later that three months before the expiration of the probationary period to consider whether;

a) the public servant should be confirmed in his office
b) the probationary period should be extended to afford the public servant an opportunity of improving in any respect in which his work or conduct has been has been adversely reported on or
c) the public servant appointed should be terminated

For the public servant in case the immediate supervisor is of the opinion that the probation period has to be extended or the probationary employee is to be terminated ; before terminating the employment or extending the probationary period the immediate supervisor has to inform the public servant of his intention in writing.[4]

The employer s during the probation period shall[5]

a) Monitor and evaluate the employee's performance and suitability from time to time
b) Meet with the employee at regular intervals in order to discuss the employee's evaluation and to provide guidance if necessary. The guidance may entail instruction, training and counseling to the employee during probation

6.0 CONFIRMATION OF THE PROBATIONARY EMPLOYEE

This is well dealt with by the Public Service Regulations; where the authorized public servant is of the opinion that a public servant has successfully completed a probationary period, he shall confirm such a public servant to the appointment with effect from the date of his probationary appointment Rule 14 (7) of the Public Service Regulations

The case laws are to the effect that confirmation is formally effected by the employer serving his employee a note to that effect. The case law further states that the expiry of the probationary period does not automatically make such a

[4] Rule 14 (3) of the Public Service Regulations. The public servant has the right to representation and has to be informed of that right in writing and has to make acknowledgement of the receipt of letter in writing; rule 14 (4)

[5] This is provided for under rule 10 (6) of the Code of Good Practice. The law further states that where the employer finds during the probation period that the employee is not performing to standard or may not be suitable for the position the employer shall notify the employee of that concern and give the employee an opportunity to respond or an opportunity to improve (rule 10 (7) of the Code of Good Practice. In case the probationary employee is not performing to the standard or it is the concern of the employer that he is not suitable in response of the employer's concern the probationary employee may be represented by the fellow employee or the trade union. The law is very clear under rule 10 (9) of the Code of Good Practice

probationer a permanent employee; that will be so if the rules appointing a probationer states to that effect.[6]

7.0 TERMINATION OF PROBATIONARY EMPLOYEE

This is provided for under rule 10 (8) of the Code of Good practice; the law states that such a termination shall take place if;

a) the employee has been informed of the employer's concern
b) the employee has been given an opportunity to respond to those concerns
c) the employee has been given a reasonable time to improve performance or correct behaviour and has failed to do so

Under rule 14 (5) of the Public Service Regulations the immediate supervisor may terminate the probationary public servant at any time

8.0 EMPLOYMENT CONTRACT

According to section 14 (1) of the ELRA a contract with an employee shall be of the following types

a) a contract for unspecified period of time
b) a contract for a specified period of time for professional and managerial cadre
c) a contract for a specific task

The law further stipulates that if the contract with an employee is to work outside Tanzania then such a contract should be in writing. Therefore the requirement of law under section 14 (2) of the ELRA is that all contracts of service with an employee to work outside Tanzania to be in writing

Another interesting provision of law is section 15 (1) of the ELRA which requires the employer to have written statements of

[6] This is the position of the case of S**UCKBANA SINGH V STATE OF PUNJAB** A.I.R 1962 S.C 1711. The same position Is given In the case of **MTENGA V UNIVERSITY OF DAR ES SALAAM** [1971] HCD 247 in this case the Court of Appeal Judges; Law, Mustapha JJA and DUFFUS P held the following
The payment of increments to probationer either by mistakes or intentionally not entitled by regulations doe not on itself amount to confirmation. See also the case **of STELLA TEMU V TANZANIA AUTHORITY** Civil Appeal No 72 of 2002 (CAT) (AR) (Unreported)

particulars to be supplied to the employee.[7] The law mentions the written statement of particulars. The law is not specifying specifically as to whether these particulars are for written contracts. It means even where the contract between the employer and employee is oral these particulars have to be supplied to the employee and the employer retain and keep the record of the same particulars.[8]

The has to supply to the employee following written statement of particulars in writing when the employee commences employment

a) name, age, permanent address and sex of the employee
b) place of recruitment
c) job description
d) date of commencement
e) form and duration of the contract
f) place of work
g) hours of work
h) remuneration, the methods of its calculation, and details of any benefits or payment in kind; and
i) any other prescribed matter

If the written statements of particulars stated above forms part of the written contract and the employer has supplied the employee with the contract then the employer may not furnish the written statements referred to in section 14. If the employee does not understand the particulars of the written statement of particulars it is the duty of the employer to make sure that they are explained to the employee in the manner in which the employee understands.[9] Where there are changes of the written statement of particulars there should be the consultation between the employer and the employee to revise the written particulars to reflect the change and to notify the employee in

[7] The provisions of this section doe not apply to an employee who works less than six days in a month for the employer
[8] Under section 96 of the ELRA it is the duty of the employer and employee to keep written statement of particulars prescribed in section 15 of the ELRA and the changes to those particulars
[9] Section 15 (2) and (3) of the ELRA

writing the changes.[10] Tin case the contract between the employer and the employee is terminated the law puts it clear that it is the duty of the employer to keep the record of written statement of particulars for five years after the termination of the contract of employment.[11]

9.0 OBLIGATIONS OF THE EMPLOYER AND THE EMPLOYEE UNDER THE CONTRACT OF SERVICE

The formation of the contract of service between the employer and employee results to posing obligations to either part in the contract of service. It follows therefore that after the contract of service is concluded the employer has obligations to fulfil for the employee. These obligations are there to balance the conflict of interests between the two parties to the contract. The employer is not supposed to benefit on the detriment of the employee; that is why the labour law statutes have striven to distribute obligations to either party of the contract f employment.

9.1 OBLIGATIONS OF THE EMPLOYER

a) The employer is supposed to give work to the employee
b) The employer is supposed to take reasonable care in respect of the safety, health and welfare of the employee specifically those working in industries and those covered under the Occupational Health and Safety Act (Act No 5 of 2003) and the Workers' Compensation Act (cap 263 R.E 2002)
c) The employer is duty bound to observe incidents and terms provided for under the ELRA 2004 such as provision of rest hours, rest days and leaves such as annual leave, sick leave, maternity leave paternity leave etc See PART III Sub Part B and Sub Part D of the ELRA 2004

[10] Section 15 (4) of the ELRA

[11] Section 15 (5) of the ELRA The duty is for the purpose of using the particulars as evidence in case there is the case between the employee and the employer. If there is a legal proceedings and the employer fails to produce the written statements of particulars as prescribed under section 15 (1) the burden of proving or disproving an alleged term of employment stipulated under section 15 (1) lies on the employer

d) The employer is supposed to keep the record as per section 96 of the ELRA 2004. these records includes the records of any remunerations paid to the employee and written particulars referred under section 15 (1) of the ELRA 2004
e) The employer has the duty to provide a trade union which is recognised as per section 67 of the ELRA 2004 reasonable and necessary facilities to conduct its activities at the work place.[12]
f) Employer has the duty to insure his workers under the Workers' Compensation Act to cater for injuries occurring in the accident when the employee is out of or in the course of employment or in case for the occupational disease attacking the employee working for the employer.
g) Employer is supposed to pay an employee wages and other remunerations due to an employee as per section 27 of the ELRA 2004, and further that the employer is supposed to pay the employee the required wage not below the minimum wage out of which the employee may apply the provisions of section 41 (3) of the Labour Institutions Act
h) The employer is further duty bound to inform the employees of the minimum wage rates[13] in force by posting notices at the workplace or by any other more effective means
i) The employer has the duty to treat employees with respect and humanity. He is not supposed to victimise the employee

9.2 OBLIGATIONS OF THE EMPLOYEE

a) The employee is duty bound to obey lawful orders and reasonable instructions of the employer pertaining to his employment. Failure to obey the lawful orders amounts to misconduct which may drive the employer to terminate employment. It can lead also to the termination of employment without notice as per section 41 (7) (b) of the ELRA 2004; see also the case of **KITUNDU SISAL ESTATE V SHINGO MSHUTI & ORS**

[12] This is as per section 60 (3) of the ELRA 2004; under section 67 (1) of the same Act a registered trade union that represents the majority of the employees in an appropriate bargaining unit shall be entitled to be recognized as the exclusive bargaining agent of the employees in that unit

[13] Minimum wage rate is set by the Minister by making the a wage order determining the minimum wage and other conditions of employment of employees in any sector and area of economy after considering the recommendations of the Wage Board appointed under section 35 of the LIA . The wage Order is made as per section 39 of the LIA by notice in the Gazette and with effect from the date specified in the gazette. See also section 39 (2) o f the LIA 2004

b) The employee is supposed to cooperate with the employer and other employees and adapt changes in the process of production and provision of services i.e. technological changes
c) The employee has duty of loyalty and good faith. As the employee of the certain employment agency the employee is not supposed to disclose the secrecy of the employer to other competitors.
d) The employer is supposed to conduct properly for the good of the employer
e) The employee has the duty to attend the working place during working hours and fulfil his job descriptions

9.3 FUNDAMENTAL RIGHTS AND PROTECTIONS

These fundamental rights and protections either impose duties to the employee and rights to the employer or both

9.3.1 Prohibition of child labour

Child labour means employment or work given to a person who has not attained the age of majority. The report states that child labour is scourge. It stunts the development of a child and that it exposes the child to hash, exacting and sometimes dangerous environment[14]

International laws have prohibited child labour. There are two conventions which deal with the aspect of child labour and which has been ratified and registered in Tanzania these are:

1) The minimum age (industry) 1973 Convention [15]

2) The worst forms of child labour convention 1999[16]

[14] First Report of the Task Force on Labour Law Reform: Ministry of Labour, Youth Development and Sports p 39
[15] Convention no 138
[16] Convention no 182

9.3.2 The Minimum Age (Industry) Convention

This convention was the first which dealt with the abolition of child labour. It sets a minimum age of employment to be 13 to 15 years and not less than this age so as to allow children under the age for compulsory schooling. In the case of hazardous work the age is 18 years.

9.3.3 The Worst Forms of Child Labour Convention

The convention aims at elimination of child labour. By ratifying this convention the state has obligation of ensuring immediate elimination of worst forms of child labour. This kind of labour as stipulated under Article 3 of the convection[17] includes;

All forms of slavery and practices similar to slavery use/procuring/offering of a child for prostitution or the production or performance in pornography, or involving a child in illicit Activities with particular reference to production and trafficking of drugs or any work that may jeopardize the health, safety or morals of a children.

The convention imposed an obligation to the state to make legislations relating to child labour and which will provide penalties for those in breach of the law. To keep record by the employers who employs children of age between 15 to 18 years

Now considering the labour laws in Tanzania so as to see how they comply with the international convention. It should be known that the problem of children labour is also prevalent in Tanzania. The Tanzania labour laws provides for conditions of employing a person under the age of 18 years

[17] **Ibid**

Under section 5 of the ELRA the Act, the law prohibits the children of under the age of fourteen from being employed.[18] The law further stipulated under section 5 (3) of the Act the child under the age of eighteen years shall not be employed in mine, factory or as a crew in a ship or in any other worksite including non-formal setting and agriculture where work may be considered to be hazardous by the Minister.[19]

However this is one side of the coin whereby we can see the compliance of the law with the international conventions. This is because under article 7 of the convention 138 it is prohibited for a person who has not attained the age of 18 years to work in hazardous works. The Employment and Labour Relations Act to this point is to the effect that, though the statute prohibits a person who is below the age of 18 years to do hazardous works, it allows such a person to be employed in such hazardous works provided that there is a written law which provides for the same.[20]

9.3.4 Prohibition of Forced labour

Forced labour includes a work or service exacted on a person by a state, private person, or organisation whether legally or illegally[21]. The term has also been defined under Article 2 of convention 29 [22] to mean any work or service which is exacted from any person without consent and under menace of penalty. It is also called Compulsory labour. Under section 6 (2) of the ELRA forced labour includes bonded labour or any work exacted from a

[18] The position under the employment and labour relations in relation to the age of a child to be employed complies with what has been stipulated under Article 5(5) of convention no 138. That a child of an age of 14 years can be employed in light work the only problem with the law is that it does not stipulate as to what amounts to light workHowever section S 5 (2) of the Act the child of fourteen years may only be employed to light work which is not likely to be harmful to the child's health and development, and does not prejudice the child's attendance at school or participation in vocational orientation or training programs approved by the competent authority or the child's capacity to benefit from the instruction given.

[19] Ship in this section includes a vessel of any description used for navigation

[20] Section 5(5) of the ELRA

[21] First Report of the Task Force on Labour Law Reform: Ministry of Labour, Youth Development and Sports

[22] Forced Labour Convention 1920 no 29

person under the threat of the penalty and to which that person has not consented; forced labour does not include for the purposes of this section the works done pursuant to section 6 (2) (a) – (e). The ELRA has retained what was previously provided under the old laws in relation to the concept of forced labour under section 6 of the Act.

There are two international conventions which deals with forced labour and which Tanzania has ratified and registered. These are:

1) Forced labour convention 1929 No 29 registered on 30th January 1962

2) Abolition of forced labour convention 1957No 105 registered on 30th January 1962

9.3.5 Forced labour convention 1929

The convention imposes obligation on the states that they should eliminate all forms of forced labour and obliged to Act against the forced labour.

However some forced works have been exempted by the convention. They include: Compulsory military service laws, working forming part of normal civil obligation of citizens of a full self governing country, a work resulting from court order, minor communal works and works during emergencies[23] for example in event of natural disasters such as floods and earth quake.

9.3.6 Abolition of forced labour convention 1957[24]

This convention imposes obligations on state to abolish compulsory labour. Under Article 1 paragraph 1 of the convention[25] there is a specification on the abolition of forced

[23] Article 2 paragraph 2 of convention 29
[24] Convention 105
[25] **Loc cit**

labour. The convention requires the abolition of any form of forced labour where such labour is used as a means of political coercion, education, or as punishment for holding or expressing political views which are against an existing political system, or where such work is used as a means of mobilizing and using such work for economic development, or where it is used as disciplinary measure in labour matters or punishment in participation in strike or where such is used as a means of discrimination of any kind. Thus if the work is used as a means of achieving any of the above mentioned ways then the state is obliged to prohibit such kind of work.

The constitution of the United Republic of Tanzania 1977 as amended here in after referred to as the Constitution prohibits forced labour, as provided under Article 25(2) of the Constitution. However the Constitution under Article 25(3) (a) to (d) permits the exaction of some works which are for national development or as a means of execution of court order. The performance of such duties does not amount to forced labour.

The Employment and Labour Relations Act prohibits forced labour under section 6 by stating categorically that any person who procures, demands or imposes forced labour, commits an offence.[26]

9.3.7 Obligation as to discrimination

Discrimination in employment and work occurs in variety of forms and in a range of different settings[27].

Discrimination is one of the major issues that the international labour organization and the international community at large have been trying to abolish especially in relation to employment.

[26] Section 6(1) of the ELRA 2004
[27] Report **ibid** p 45

Discrimination can be direct in which case a law specifically cite a particular ground for example sex, race religion to deny equal opportunities or indirect it can be indirect in which case rules or practices appear on the surface to be neutral but in reality they lead to exclusion. A requirement that only persons of a certain height are required for a job amounts to discrimination because persons who are not of that height are excluded.

Discrimination ranges from that of race, sex, nationality, health (currently reflection has to be made to victims of HIV/AIDS pandemic whore discriminated), disability, or age. This kind of a person do not affect only the respective person but the society at large, in the sense that discrimination hinders; innovation, practice of skills which could have been done had it been not for discrimination.

The ILO provides that quality of work means that all individual to develop fully the knowledge, skills and competence that are relevant to the economic Activities they wish to pursue.[28]

Looking at the international level it can be seen that some conventions have been passed and ratified which deals with the abolition of this concept.

1) The discrimination (Employment and Occupation) Convention 1988 no 111

2) Equal Remuneration Convention 1951 no 100

9.3.8 The discrimination (Employment and Occupation) Convention 1988

[28] The report quoting the ILO'S fundamental conventions in focus programme on promoting the declaration: Geneva ILO P 162

The convention deals with prohibition of all kinds of discrimination. It calls for states to promote equal opportunities and treatment which has been explained above.

9.3.9 Equal Remuneration Convention 1951

This convention specifically deals with remuneration as its name suggests. It requires equal pay and benefits for men and women for work of equal value

Discrimination is an international problem, and to solve it has been suggested that, in relation to labour laws to eliminate the problem then it can be regulated as a part of a general labour statute, or a specific statute that will deal with the matter or workplace discrimination can be prohibited by condemning it as an unfair practice.

In relation to our labour matters we have first to reflect on the constitution under article 9 of the constitution it is to the effect that state authorities and all; the agencies there under have to ensure that there are equal opportunities for all citizens when implementing their policies. This is supported by Article 12 of the constitution which proclaims that all human beings are equal. This suggests that they have equal opportunities regarding the thing to be achieved and hence reflecting the fact that the law is against discrimination. The emphasis to this section is can be seen on Article 13 of the Constitution which prohibits discrimination by stating that all persons are equal before the law and that it prohibits any authority from making any law which is discriminatory. It can also be said that the Article 22(2) of the constitution provides for the fact that every person is allowed to work and under article 23(1) of the constitution it is provided that a person who has worked is entitled to get a just remuneration for the work do

To some extent the aspect of discrimination as required by international labour statutes has been complied with. This is because in our labour legislations there are no provisions which affect the rights of employees who are citizens as a result of consultation. However the National Employment Promotion Act which gives preference to citizens in getting employment can be said to cause discrimination to a certain extent. This is due to the fact that, it seems to contravene the Articles of the Constitution which proclaims that all human beings are equal, but such is not true as far as the persons who are not citizens[29].

It is our view that the National Employment Promotion Act by giving preference to citizens is not discrimination as every country should be allowed to make some labour laws which will help their citizens in their socio-economic development.

The new Act[30] dealing with labour matters which though enacted it is not yet in force i.e. has complied with the obligation imposed by the convention 111 under Article 1(1) (a) of the convention which provides for the prohibition of discrimination. In the new Act section 7 prohibits discrimination in the work place and section 8 deals with prohibition of discrimination in trade unions and employer associations

9.4 Rights of employer and employee

Freedom of association means, freedom of employer or employee to unite for the purpose of regulating the relationship between themselves i.e. either single group (employees or by regulating relationship between employer and employees.

[29] This is because if a citizen and a non citizen applies for a job then in case they all qualify for the job the citizen will get preference in getting the job. This idea has been supported by the mrossos report on reformation of labour matters which recommended that the job requirements which are fixed by the employers including those giving preference to citizens under he national employment promotion Act should be incorporated in the legislation.

[30] Employment and Labour Relation Act

Collective bargaining means negotiation about pay, working conditions etc between a trade union and an employer[31]

Freedom of association and collective bargaining are among fundamental rights in labour laws they have been also fixed in the ILO conventions

1) Convention on freedom of association and protection of the right to organize no 87

2) Convention on right to organize and collective bargaining no 98

9.4.1 Convention on Freedom of Association and Protection of the Right to Organize

Dealt with matters related to employee and employer's rights to freedom of association; the convention gave out four main principles in which the freedom of association can be exercised. These principles are:

- Everyone is entitled to freedom of association
- The absence of the need for previous authorization to establish organisation
- Freedom of choice with regard to the membership of such organizations[32]
- The right to participate in the lawful Activities of the organisation subject only to its own rules.

These principles manifest the obligations provided under convention 87 to member states which ratified it. The states are obliged to protect employees from Acts of ant union discrimination. This means that in order to secure or maintain

[31] Oxford advv learn dict p 220
[32] Paragraph 44 of the report **ibid**

employment, workers cannot be made to relinquish trade union members or because of their participation in trade union Activities outside working hours[33] or with the consent of the employer within working hours.

The ILO convention 87 is to the effect that the army and the police should not join the organizations. Hence they are excluded from labour legislation regulating freedom of association.

Also the convention prohibits the distinction between public and private sector workers as far as the involvement in freedom of association is concerned.

The conventions further guarantee the collective rights of trade unions and employers association. The right includes the right to form a federation without prior authorization, the right to plan and organize their own Activities, right to participate in lawful Activities, right to participate in the lawful Activities of the union to affiliate with, and participate in the affairs of any international organizations including the ILO and to give or receive, assistance from those organisation.

Freedom of Association is provided for under sections 9 to 11 of the ELRA in which section 9 provides for the right of the employees to form and join trade union as well as participating in lawful activities of the trade union and section 10 provides that every employer shall have the right to form and join as well as participating in lawful activities of the Employers' Association. The two provisions prohibits discrimination on either the employee or the employer on the basis that such an employee or employer has exercises the right provided for under sections 9 and 10

Section 11 of the ELRA provides for the rights of the trade union and employers association which includes the right to:-

[33] Paragraph 45, and 61 to 65 of the report

a) determine its own constitution
b) plan and organise its administration and lawful acts
c) join and form a federation
d) participate in the lawful acts of the federation
e) affiliate with, and participate in the affairs of any international workers' organisation or international employers' organisation or the International Labour Organisation, and to contribute to, or receive financial assistance from those organisations

The right to involve in trade Unions has been elaborated under the Employment and Labour Relations Act, Act No. 6 of 2004 which stipulates for matters relating to employers and employees association, and among its objects, is to give effect to the provisions of the Constitution[34] of The United Republic of Tanzania of 1997, in so far as they apply to employment and labour relations and conditions of work. As explained above, the Constitution provides under article 20 for the right to freedom of association.

The term Trade Union is defined under section 4 of the Act to mean any number of employees together for the purpose, whether by itself, or with other purpose, of regulating relations between employees and their employers or the employer's associations to which the employees belong.

This definition changes the past position. From the definition, there is no limitation of number of members of a trade union unlike the old law. The old law restricts some category of employees to join in trade unions[35], the mischief which is cured in this new law. All employees and employers are allowed to join trade unions.

[34] Section 3(f) of the Act; sections 9 and 10 of the employment and labour relations act, 2004
[35] Section 2(2) of Trade Unions Act, 1998

The new Act, unlike the old one, provides for effects of registration of a trade union. Upon registration, an organization or federation becomes body corporate with perpetual succession and some capacities.[36]

The time limit for period of registration of trade union is wider now. The union will have six months to establish the union before registration while three months set in the old laws was not enough for the union to establish itself before registration thus tempting dissolution.[37]

The new law empowers trade unions to hold, purchase or otherwise acquire or dispose of movable or immovable property unlike the old law provides for all movable and immovable properties belonging to any trade union to be vested in the trustees for the time being of the trade union.[38]

Under the new law, powers of the registrar of trade unions have been reduced. Unlike under the old law where the registrar had power to cancel registration himself[39], in the new law, the registrar have to apply to the labour court for an order to cancel the registration of a registered organization or federation.[40]This is the same on dissolution of trade union.[41]

Under section 79 of the Trade Unions Act, there are some laws, which are restricted to be applied by trade unions, an example being company law. In the new law, section 47(2) provides for the rules of organizations not to conflict with the Constitution, provisions of the new law and any other written law. Moreover, becoming a body corporate on its registration, application of companies Act is necessary.

[36] Section 49(1) of Employment and Labour relations Act
[37] Section 45 of Employment and Labour Relation Act, 2004 and section 7(1) of the Trade Unions Act, 1998
[38] Sections 49(b) (iii) and 52(1) of Employment and Labour Relations Act, 2004 and Trade Unions Act, 1998 respectively
[39] Section 15(2) of the Trade Unions Act, 1998
[40] Section 55(1) of Employment and Labour Relations Act, 2004
[41] Section 56, ibid

In the new labour law, federation of trade unions is allowed under part IV of the Act. The old law was silent on this feature. More over amalgamation of trade unions is allowed, under section 54 of the Act in the new law, which is different from the past laws.

Section 37(3) (iv), of Employment and Labour Relations Act, prohibit unfair termination of employees for reason of them belonging to a trade union. The old law was silent on the matter.

9.4.2 SUSPENSION

Industrial relation is a dynamic socio-economic process. It is “a designation of the whole field of relationships that exist because of the necessary collaboration of men and women in the employment processes of industry”. It is not the cause but an effect of social, political, and economic forces.

It has two faces, like a coin, co-operation and conflict. The relationship undergoes changes from thesis to ante thesis and then to synthesis. Thus the relationship starting with co-operation soon changes into conflict and after its resolution again changes into co-operation. This changing process becomes a continuous feature in industrial system[42]

The strict law of master and servant conferred upon the employer an unfettered right to hire and fire his employees. This traditional law of employer workmen relationship was based purely on contract. Quite apart from the law of contract it is obvious that in day-to-day running of the industry the management is required to take disciplinary actions against the erring workmen. Initial decisions as to the maintenance of discipline rest with the employer. These decisions, when made bona fide are related to, and depend upon the considerations of the overall needs of the industry.

[42] S.C Sirvastava (2000) Industrial Relation and Labour Laws, P.3

One of the disciplinary actions which may be taken by an employer is that of dismissing an employee. However in some circumstances the employer is required to suspend the employee before he dismisses him.

Suspension is a temporary discharge of an employee from the employment, pending some other event usually an investigation into some act on the party of the employee after which re-instatement might be had. This position was held in the case of **BENBROS MOTORS TANGANYIKA LTD V. RAMANLAL HARIBHAI PATEL**[43]

Suspension does not amount to punishment, it is only an interim measure and will last till the application for permission to punish the workman and is made and the tribunal passes an order thereon Therefore suspension as applied to labour law is just an interim measure pending investigation and proceedings. In the case of **HOTEL IMPERIAL V. HOTEL WORKERS UNION**[44]it was held inter alia that;

> *"The master can after holding proper inquiry temporarily terminate the relationship of master and servant by suspending his employee pending proceedings".*

Under rule 27 of the Code of Good Practice it is stated that where there are serious allegations of misconduct or incapacity, an employer may suspend an employee on full remuneration whilst the allegations are

[43] (1967) H.C.D 435
[44] (1959)2 LLJ 544

investigated and pending further action. The employee suspended shall be given a written letter of suspension setting out the reasons of suspension and any terms of suspension.[45]

The reasons of suspension are the following

a) The employee's presence at work may obstruct investigation and/or
b) the employee ongoing performance of work duties may present a problem whilst investigation takes place

The law is to the effect that the period of suspension must be reasonable, taking into consideration how long the investigation and the decision on any further action may take. Rule 27 (5) is to the effect that notwithstanding the provisions of section 35 of the Act an employee charged with criminal offence may be suspended on full remuneration pending a final determination by a court and any appeal thereto on that charge

The employer must bear in mind that suspension does not amount to termination of contract, rather a discharge of an employee from an employment pending investigations and proceedings. Therefore the contract of employment does not come to an end by the suspension of an employee. In the case of **RAJASTHAN STATE ROAD TRANSPORT CORPN V. SOHAN LAL & ORS[46]** the court held that a suspended employee continues to be in employment and he will be entitled to benefit of revised pay scales also.

[45] Under the Public Service Regulations suspension is under regulation 39 of the Regulation; the Regulations have distinguished between suspension and interdiction which is provided for under regulation 38 of the Public Service Regulations
[46] (1996) LLR 930 (RAJAN HC)

When the investigation and the proceedings are complete and it is found out that the employer is liable for misconduct or whatever he was accused of, the employer will have a right to dismiss such an employee from the employment, thus the contract of employment will be said to come to an end. In the case of **SUNIL MADHUKAR KULKARNI V. STATE OF MAHARASHTRA & OTHRS**[47] it was held that;

> *"Suspension of an employee alleged to be guilty of grave and serious misconduct will be justified…. And when such allegations are proved, the employer may exercise the right of suspension over such an employee"*

Conversely, when the allegation are found out not to be true, the employee will have the right to be reinstated in the employment and be entitled to all his benefits. In the case of **K.K KIBAYA V. U.A.C OF (T) LTD**[48] it was held inter alia that**;**

> *"once there is an order for an employee's reinstatement, he is entitled to all his rights as the contract of employment has revived with all its incidents"*

9.5 TERMINATION OF EMPLOYMENT

There are various ways of under which the contract of service may be terminated

a) Termination by notice
b) Termination by payment in lieu of notice
c) Termination by operational requirements

[47] (1999) LLR (BOM HC)
[48] [1996] TLR 76

d) Termination by summary dismissal
e) Termination by death of the employer/employee or insolvency of the employer
f) Termination by the expiry of the term of the contract especially written contract

9.5.1 TERMINATION OF THE CONTRACT OF SERVICE UNDER THE ELRA

Under section 36 of the ELRA termination of employment includes

a) a lawful termination of employment under a common law
b) a termination by an employee because the employer made the continued employment intolerable for the employee; and
c) a failure to renew a fixed term contract on the same or similar terms if there was a reasonable expectation of renewal
d) a failure to allow an employee to resume work after taking maternity leave granted under this Act or any agreed maternity leave;
e) a failure to re-employ an employee if the employer has terminated the employment of a number of employees for the same or similar reasons and has offered to re-employ one or more of them

Under section 37 1) of the ELRA the law is to the effect that it is unlawful for an employer to terminate the employment of an employee unfairly. The termination of employment becomes unfair under the law if the employer fails to prove the following;

a) the reason for termination is valid
b) the reason is fair reason-

i) Related to the employee's conduct, capacity or compatibility; or

ii) Based on operational requirements of the employer, and that

c) that the employment was terminated in accordance with fair procedure

The law further dwelt on the aspect of fair reason and it specifically states under section 37 (3) of the ELRA that the reason will not be a fair one for reasons of termination if

a) the employee discloses information which he was supposed to disclose under the Act or any other written law
b) that the employee failed or refused do anything that the employer may not lawfully permit or require the employee to do
c) that the employee exercised any rights conferred by agreement, this Act or any other law
d) the said employee belonged to any trade union
e) that the employee participated in lawful activities of the trade union, including lawful strikes

The law further puts it very clear that if the reason of termination of employment is because of the following such a termination will be taken as unfair termination[49]

a) where termination is for reason of pregnancy
b) where termination is for a reason related to disability
c) where termination constitute discrimination under this Act

The law is to the effect that no disciplinary action in form of penalty, termination or dismissal shall lie upon an employ that has been charged with a criminal offence which is substantially the same until final determination by the court and any appeal thereto

9.6 REMEDIES FOR UNFAIR TERMINATION

These are provided for under section 40 of the ELRA ; the law is to the effect that where the arbitrator or the court finds that termination of the employment of the employee is unfair the court or arbitrator may order employer to

a) reinstate an employee from the date the employee was terminated without loss of remuneration during the period

[49] See section 37 (3) (b) of the ELRA

that the employee was absent from work due to unfair termination

b) re-engage the employee on any terms that the court or the arbitrator may decide
c) to pay compensation to an employee of not less than twelve months' remuneration

An order for compensation made under this section shall be in addition to, and not a substitute for, any other amount to which the employee may be entitled in terms of any law or agreement. However the employer may decide not to reinstate or re-engage the employer by paying such an employee the compensation of twelve months wages in addition to wages due and other benefits from the date of unfair termination to the date of payment.[50]

In the making of orders of reinstatement and re-engagement under the old laws the courts have found themselves in the situation where a number of litigations are instituted by the employer. These includes the cases which were instituted under the old laws such as

a) **Peter Ndonde v Tanzania Shoe Company** Misc. Civil Cause NO 9 of 1986 (Unreported)
b) **Mohana V University of Dar es salaam** (1981) TLR 55 (HC)
c) **Obadia Salehe v Dodoma Wine Company LTD** Civil Case No 53 of 1990 (HC)
d) **Juma Alli Kaziabure v Tanzania Posts and Telecommunication Corporation** (1994) TKR 1 (HC)

[50] See section 40 (2) & (3) of the ELRA

TOPIC TWO

TERMS AND CONDITIONS OF EMPLOYMENT CONTRACT

Introduction

- Just like any other contract, parties to an employment contract (Employer v Employee) are in principle expected to agree on the terms for which their contract is going to operate.
- This is what is termed as “freedom of contract.”
- The terms and conditions agreed by the parties are the ones which parties will be expected to comply to during their period of relationship.
- Terms and conditions of employment are the express or stated terms agreed by the employer and the employee, either verbally or in writing, as well as those terms implied by workplace custom or practice, the law or collective agreements.
- Their major sources are;
    - The contract of employment
    - Collective agreements
- Basically terms and conditions of employment may be grouped into four major categories;
    - Those which are agreed by the parties in course of forming their contract;
    - Those which are expressly provided by the law;
    - Those which are implied from the nature of the relationship or any other pre-existing law;
    - Those which are varied by the parties unilaterally or by collective agreement

- Terms and Conditions agreed in formation of a contract
- Unless where the agreement is illegal, where parties to a contract agree on the terms of the contract, that agreement is enforceable by the law.
- Where the agreement is reduced in writing, the court will enforce what is found on the document as a true intention of the parties to a contract.
- In the case of *Gascol Conversions Ltd v JW Mercer [1974] IRLR 155 at p.157*, the Court of Appeal (UK) stated that;
    - It is well settled that where there is a written contract of employment,… and the parties have reduced it to writing, it is the writing which governs their relations. It is not permissible to say they intended something different.
- It follows therefore that, where the employer and employee enters into an agreement and set out clearly their terms and conditions of employment relationship, then such agreement will be enforceable unless;
    - That agreement contravenes any existing law; or
    - Is contrary to public policy or interests
- Those which are expressly provided by the law
- The ELRA, 2004 (Act no. 6 of 2004) sets out some minimum employment standards under PART III of the Act.
- Under s.14(1) the Act provides for three types of contracts of employment;
    - A contract for an unspecified period of time;
    - A contract for a specified period of time for professionals and managerial cadre;

- A contract for a specific task

- The Act provides under s.15(1), written particulars which are essential to be supplied to the employee at the time of commencement of the employment
- It has to be noted here that, commencement of employment is different from the actual date when the employee starts his/her official duties.
- The date for which a contract of employment is signed by the two parties is what constitutes commencement date unless the contrary is clearly shown.
- The written particulars required by the law are;
  - Name, age, permanent address and sex of the employer;
  - Place of recruitment;
  - Job description
  - Date of commencement;
  - Form and duration of the contract
  - Place of work;
  - Hours of work;
  - Remuneration, the method of its calculation, and details of any benefits or payments in kind; and
  - Any other prescribed matter
- These particulars are what constitutes terms and conditions of employment.
- It is important to specify the identity of the employer in order to;
  - Clearly identify who is the employer in case of a dispute where one is placed on the control of another

person who actually is not his/her employee, e.g in employment agency

- Avoid dispute where there is a question of transfer of undertaking/business

- It is important to establish the date when the employment begin for the purpose of ascertaining some entitlements which the employee may have
- The terms also need to specify hours of work.
    - While these may be specified under the law as per s.17-25 of the ELRA, yet the employer and employee, through collective agreement may agree otherwise provided that the agreement is not in breach of any law.
- Hours need to expressed clearly otherwise a problem in interpretation may arise in case of any dispute.
- In *Ali v Christian Salvesen Food Services Ltd* [1997] IRLR 17;
    - The dispute was over an annualised hours in a contract of employment. Employees were paid on a notional 40hours per week, but were not entitled to overtime until they had worked 1824 hours in one year.
    - The problem arose for employees who were terminated during the course of the year and wanted payment for hours they had worked in excess of the notional 40hours per week. The court dismissed their claim.
- It is important for terms and conditions to stipulate entitlements of employees in holidays.
- The terms and conditions may require separate arrangement for pension deductions or other statutory deductions which employees, by virtue of their employment contract, are required to contribute to certain schemes.

- Implied terms
- Not everything that constitutes terms and conditions of employment may be expressly provided in a contract of employment.
- There are some other sources of terms and conditions which may exist prior to the conclusion of the employment contract but which also bind future contracts
- Such sources include;
    - Collective agreements, workforce agreement, custom and practice and work rules.
- The guidance as to implication of such terms was discussed in the case of *Mears v Safecar Security Ltd [1982] ICR* 626 where the court stated the following conditions;
    - First, one needs to see if there is an express term agreed;
    - If not, one should decide if there was a term which can be said to have been agreed by implication;
    - If this is not the case, then one looks to see whether such a term can be derived from all the circumstances including the actions of the parties during the period of employment.
- Terms may be implied by the law where for instance the law sets minimum standards of wage-it is implied that any agreement between employer and employee will not provide less favourable terms than those provided by the law.
- Terms and conditions of employment may also be implied in fact.
    - This is where there is no express agreement but from the intention of the parties it can be drawn that the parties also intended this term to be part of their contract.

- In the case of *Jones v Associated Tunnelling Co. Ltd* [1981] IRLR 477;
    - There was a dispute on whether an employee was required to work at a particular location.
    - The court stated that, in order to achieve business efficacy, the starting point must be that a contract of employment cannot simply be silent on the place of work;
        - “In such a case, it seems to me that there is no alternative but for the tribunal or court to imply a term which the parties, if reasonable, would probably have agreed if they had directed their minds to the problem.”
- Terms imposed unilaterally or by collective bargaining
- Terms and conditions of employment are subject to changes whenever a need arises.
- The interest to change terms and conditions of employment may come from either employer or employee.
- When that move is from the employer who is interested to vary the terms and conditions of employment and employees refuse, then any imposition by the employer is what is termed as unilateral change of the terms and conditions of employment.
- The employer may be interested to improve productivity and maximize profit in his business and therefore inform employees of certain changes which may affect the terms and conditions of employment which were agreed before.
- The main issue is how the employer can effect such changes without jeopardizing the rights of his employees.

- It is important to distinguish work practices from fundamental terms of contract of employment.
    - The employer normally has a prerogative right to change work practices without even consultation but not changing terms of employment.
    - In the case of *A Mauchle Ltd v NUMSA [1996] 16 ILJ* 349 the employer ran a plant which was producing motor vehicle components.
    - Due to increasing demand, he proposed to ran three machines instead of the usual two machines. The employees refused.
    - The employer threatened to dismiss all employees for a collective misconduct of failure to obey instructions.
    - The court stated that, while it is unlawful for the employer to change the terms and conditions of employment through instructions, in this case what was proposed to be changed was not a fundamental term of the contract rather it was just a work practice.
- A unilateral change of the terms and conditions of employment may be enforced if the employer has shown;
    - Sound commercial reasons for doing so and that there was no other possible measures to be taken without effecting such change;
    - If the employer has negotiated the matter with his employees in good faith.
- Variation through collective bargaining is another way of imposing new terms and conditions of employment.
- Collective bargaining is a means of achieving a collective agreement between employees and employer. It is an agreement or arrangement made between trade unions and employers relating to a number of specific issues.

- These issues may include;
    - Terms and conditions of employment;
    - Engagement non-engagement, termination or suspension of one or more workers;
    - Allocation of work or duties between workers;
    - Matter of discipline;
    - Membership or non-membership of a trade union;
    - Facilities for official of trade unions;
    - The machinery for negotiation or consultation;
- Further discussion in Topic 6.
- A contract in restraint of trade
- As a general rule, any contract that restrains another person from exercising his calling or profession is void.
- This rule is provided for under s.27 (1) of the Law of Contract Act, Cap 345 R.E 2002.
    - The exception to this rule lies where the restraint imposed is reasonable and it is in the public interests.
- In employment contracts, sometime it happens that the employer and employee enter into an agreement which has restrictive covenants against an employee.
- These covenants are what is termed as "*Restraint of Trade*".
- In the case of *Herbert Morris v Saxelby Ltd* [1916] AC 688 at p.707 Lord Parker had an opportunity to state the conditions for application of a restraint of trade.
- The judge stated;

- First, it must be reasonable in the interests of the contracting parties, and secondly, it must be reasonable in the interests of the public.
- To be reasonable in the interests of the parties, the restraint must afford adequate protection to the party in whose favour it is imposed; to be reasonable in the interests of the public it must in no way be injurious to the public.

- It happens that employers may often impose such terms in their employment contracts to restrict their employees from transferring the information they have to a rival competitor.
- But whenever that is done, the test of reasonableness applies when a dispute arise between the employer and employee.
  - The legitimate object of a restraint is to protect the employer's goodwill and customer connections (or trade secrets) and the restraint remains effective for as specified period (the period must be reasonable) after the employment comes to an end.
  - The need for protection does not automatically cease upon the termination of an employment. Even where the consequence of a breach is by the employer, such protection will extend to the time specified-*Reeves and Another v Marfield Insurance Brokers* [1996] (3) SA 766 (A) at 772.
- Therefore, restraint of trade is one of the terms and conditions of employment which may sometimes be adverse to the employee.

TOPIC 3

Rights and Duties/Obligations of parties to a Contract of Service

Introduction

- ☐ Employment relationship sets certain rights and obligations on parties.
- ☐ Each party to a contract has an obligation to meet his/her obligations in employment contract.
- ☐ A breach of either party to a contract may entitle the other party remedies available at common law or under statutory law.
- ☐ Employer's rights

• The employer has the following rights;

- ☐ Right to receive equitable services from his/her employee
- ☐ Right to protect confidential information relating to his financial or business affairs
  - This right is both common law and statutory. It is provided for under s.101 of the ELRA and s.59 of LIA. See also the PSA, 2002 its Regulations and Scheme of 2003
- ☐ Right to form employers' organizations or associations- s.10 of ELRA
- ☐ Right to formulate workplace policies and workplace practices
- ☐ Right to see his lawful instructions or directives obeyed by his employees

- Right not to see unfavorable or unfair competition from his own employees
- Right to control the affairs of his business and selection of employees

Duties of the employer

- Employer has the following duties to an employee;
  - Duty of mutual trust and confidence.
    - This basically is the duty that cuts across both parties to an employment relationship.
    - Both the employer and employee are expected not to act in a manner which jeopardises an implied term of mutual trust and confidence which enables their relationship to continue.
    - In the case of *United Bank Ltd v Akhtar [1989] IRLR 507* an employee had a mobility clause in his contract of employment which provided that he could be transferred to any place in the UK.
    - The Bank, relying on that clause, asked the employee to be move from Leeds to Birmingham with less than one week's notice.
    - The Court held that this amounted to a fundamental breach of the implied term that employers will not conduct themselves in such a manner that will harm or destroy the relationship of confidence and trust between employer and employee.
- **Duty to provide work**

- It is upon the employer to provide the work to an employee. The employee has no obligation to look on what to do if the employer has not provided him what to do.

- In the case of *Beveridge v KLM UK Ltd [2000] IRLR 765* an employee informed her employer that, after a long period of absence through sickness, she was fit to return to work.

- However, the employer refused to allow her to return until their own doctor had certified her fitness to do so.

- The process took six weeks, during which she was not allowed to work and was not paid.

- She then claimed that this amounted to an unathorised deduction from her wages.

- The Employment Appeals Tribunal (UK) ruled that an employee who offers services to her employer is entitled to be paid unless there is an express provision of the contract providing otherwise.

- It has to be understood that so long as the employer continues to pay the employee the agreed remuneration, it not a breach of contract if the employee is left sitting idle.

- However, where for instance the employee's wage depends on work being provided by the employer, then failure on the part of the employer to provide work will amount to a breach of contract-Case of *Faberlan v McKay and Fraser [1920] WLD 24*

Duty to pay his employees

- An employment contract is usually an exchange agreement of labour or skills with a reasonable pay in monetary value or in kind.

- The duty to pay an employee is there regardless of whether the employer has given the employee work to do or not.
- A mere fact that the employee has not been given work, does not remove the right upon employee to have his wage.
- An employer, for instance, may decide to keep certain employees idle in order to stop them going to work for a rival competitor.
- This may be aimed at stopping the competitor from taking advantage of the individual skills, abilities and expertise. This period of idleness is what is termed as ‘garden leave’.
- Nevertheless, the employer has duty to pay.

- **Duty of care**
  - The employer has several responsibilities towards an employee. These include;
    - Implied duty to take all reasonable steps to provide and maintain a safe system of work so as not to expose the employee to unnecessary risks of injury.
    - In the case of *Wilsons and Clyde Coal Co Ltd v English [1938] AC 57* (HL) the court stated that;
    - The master has duty to see his servants do not suffer through his personal negligence such as

        - Failure to provide proper and suitable plant;
        - Failure to select fit and competent servants;
        - Failure to provide a proper and safe system of working; and
        - Failure to observe statutory regulations.
    - This duty of care extends to all such circumstances where the employer ought to have taken reasonable and practicable measures to ensure safety of his employees.
        - The test was stated in *Stokes v GKN Ltd [1968] 1 WLR 1776* that the overall test is the conduct of the reasonable and prudent employer taking positive thought for the safety of his workers in the light of what he knows or ought to know.

☐ Rights of an employee

☐ There are number of rights which an employee is entitled to enjoy in an employment relationship. These include;

- Right to be provided work
    - There certain special relationships and circumstances which make it necessary for the employer to provide work. There certain skills which once kept without being utilized, the employee runs a risk of losing his market value and this may disadvantage him in case he seeks new employment.
    - In the case of Steward Wrightson Ltd v Thorpe 1977 (2) SA 943 an insurance agent Thorpe (who was also a director) was told not to come for work (or use his office) while on notice of termination of service.

- The Court found that because Thorpe was a director of the Company and a director and manager of the branch company, and because of the special relationship that existed between Thorpe and his clients, denying Thorpe work and the use of an office for six months had amounted to a fundamental breach of contract.
- That denial degraded Thorpe of his status and was prejudicial to Thorpe's future prospects (i.e finding work again in the insurance field).

- Right to be paid
- Right to equality (Protection against unfair discrimination)
- Right to be informed and consulted on any change that affects terms and conditions of employment
- Right to have safe and secure workplace environment
- Right to be trained or afforded opportunity for carrier development
- Right to be compensated for injuries arising out of and in course of employment.
- Right to be given paid leave
- Right to be given fair trial in disciplinary proceedings
- Right to have fair termination of his employment
- Right to have better working tools at workplace, etc

☐ Employee's obligations

☐ The employee has the following obligations towards his employer;

- To tender his services as required by the contract
    - This could be one of the most important obligations which an employee has towards his employer.
    - The employee is expected to offer his full contractual services to his employer and be rewarded accordingly. This goes together with working in accordance to agreed hours of work. Punctuality is essential at any workplace in order to ensure effective productivity and efficiency.
- To abide with lawful instructions or directives from his employer
- To protect the property of his employer or to serve and protect the employer's interests and act in good faith
- To conduct himself in such a manner that will not tarnish the good image of the business of his employer
- To keep confidential such information which, if disclosed, may harm the business of his employer.
    - There is both common law and statutory prohibition against divulging employer's confidential information.
    - S.101 of the ELRA & S.59 of LIA are just and example of this statutory prohibition.
    - It is in the public interests that the employer should be allowed to ran freely his business without threats of his confidential information be disclosed to his detriment.
    - In the case of *Camelot v Centaur Publications Ltd [1998] IRLR 80* a copy of the draft accounts of the company which ran the National Lottery was sent

by an unknown employee to an interested journalist.

- The information revealed, amongst other matters, increases in remuneration for some of the company's directors. The Company asked the court to ensure that the leaked documents were returned, so that they could identify the employee who caused the leak.
- The Court accepted that it was in the public interest to enable the employer to discover a disloyal employee the document be sent back to the employer.

- To respect and cooperate with his fellow at work place and elsewhere within the scope of his employment
- To work competently and diligently
- To act in mutual trust and confidence.
  - The employee owes his employer a fiduciary duty which is derived from the common law duty of mutual trust and confidence.
  - The employee is, for instance, not expected to compete unfairly with his own employer or work against the interests of his employer.
  - The employee should not use the advantage of gaining confidential information or trade secrets belonging to his employer to his own advantage.
  - In the case of *CyberScene Ltd and Others v i-Kiosk Internet and Information Ltd* 2000 (3) SA 806 a number of senior employees resigned to form a new company.
  - Because of their positions they had access to the employer's confidential information relating to its

business and operations. The former employer claimed breach of fiduciary duty since the employees used such confidential information to compete unlawfully with their former employer.

- The Court held that fiduciary duty does not cease automatically after termination of an employment. The employees may use general skills, knowledge and experience for their personal gain but not using their employer's confidential information to their advantage.

☐ Generally, the question of rights and duties of the parties to an employment contract has to be determined by looking on;

- Terms and conditions of employment agreed by the parties
- Minimum standards provided by the law
- Common law principles
- Implied rights and duties.

TOPIC FOUR

WORKERS' COMPENSATION

Understanding of Employer's Liability

- Employer's liability denotes duties which the employer owes at common law towards persons he/she employs. It can be the liability of the employer to pay damages to his servant for personal injuries which the servant has sustained while in the 'course of employment'.
- In tort, employer's liability refers to the duty imposed upon the employer to take reasonable care to ensure the employee's safety.
- There are two ways by which the employers' liability arises:
- The employers' personal liability- Where the employer is personally liable as a result of an accident which is due to his own acts, faults or unsafe conditions of employment.
- Vicarious liability- Liability of the employer for acts of his employees in the course of their employment.
- Vicarious Liability
- Vicarious liability refers to a situation where one person is held liable for acts or omission of other person.
    - *It signifies the liability which A may incur to C for damage caused to C by the negligent act or other acts of B. It is not necessary that A shall have participated in any way in the commission of the tort nor that a duty owed in law by A to C shall have been broken. What is*

required is that A should stand in a particular relationship to B and that B's tort should be connected in a certain manner to that relationship.

- It is a doctrine which vests the liability on the master for acts done by his servant in course of employment.
- The doctrine of Vicarious liability operates under two maxims;
    - *Respondeat superior* (let the principal/superior be liable); and
    - *Qui facit per alium facit per se* (he who does an act through another does it himself)
- Lord Brougham in **Duncan v Finlater** [1839] 6CI & F 894 at 910 observed;
    - *The reason that I am liable is this, that by employing him I set the whole thing in motion; and what he does, being done for my benefit and under my direction, I am responsible for the consequences of doing it.*
- An employer will only be liable for torts which the employee commits in the course of employment. In fact, the master can only be liable where the servant could be liable.
- There is no single test for this, although Parke B famously stated in **Joel v Morison** (1834) 6 C&P 501 at 503, that the servant must be engaged on his master's business, not 'on a frolic of his own'.
- An employer will usually be liable for;
    - Wrongful acts which are actually authorised by him; and for
    - Acts which are wrongful ways of doing something authorised by the employer, even if the acts themselves were expressly forbidden by the employer

- In each case, the first question is to see whether the servant was liable, if the answer is in affirmative, then the second question is to see whether the employer must shoulder the servant's liability.
- It is important to establish the relationship that exist between the tort-feasor-the person who committed tort, and his master are in a relationship of master and servant.
- In terms of employment, it is important to establish whether there was a contract of service or for service.
- Read the following cases;
    - Machame Kaskazini Corpn. Ltd v Aikaeli Mbowe [1984] TLR 70
    - DPP v Eliyatosha Moshi & Another [1984] TLR 28
- The doctrine of Common Employment
- Initially, at common law, an employer was not liable for injury suffered by an employee in course of his employment if such injury was caused by a negligent act of another employee.
- This was a status in the case of **PRISTLEY v. FOWLER** (1837) 3 M & W 1.
- In order to be compensated, the employee was required to prove negligence on the part of the employer.
- This was what was termed as the doctrine of common employment.
- In England, the doctrine of Common employment was abolished in 1948 by the Law Reform (Personal Injuries) Act, 1948 vide S. 1(i).
- In Tanzania the Doctrine was abolished by the Law Reform (Fatal Accidents and Miscellaneous Provisions) Ordinance (CAP 360) Part VI S. 13 (Read with Part V S. 11)

- Judicial decisions have helped in developing rules relating to employer's liability.
- In SMITH vs. BARKER (1891) AC 325 it was stated that in the contract of employment the employer is required to take reasonable care to provide adequate and safe system of work and maintain them in a proper condition.
- Also that the employer is required to carry out his operations so as not to expose those employed to unnecessary risks.
- It has to be noted that, employer's liability arises generally from the nature of his duties towards the employee such that;
    - Provision of competent staff of men and women,
    - Provision of adequate material, and
    - A proper system and effective supervision.
- Failure to discharge any of those duties may affect the performance of the employee and may cause unsafe conditions of work.

WORKERS' COMPENSATION

- In Tanzania, this is governed by the provisions of the Workers, Compensation Act [Act No 20 of 2008].
- Before that, it was regulated by the Workmen's Compensation Ordinance [CAP 263]
- Act no 20 of 2008 provides for compensation to the employees who get injured through accidents or occupational diseases while in the course of employment.
- The compensation payable under the Act is not dependent on any negligence/fault but rather is in the form of an insurance of the work man against risks of accidents.

- The Act thus is a social security legislation based on the United Kingdom Compensation Law of 1925 which conforms with I.L.O workmen’s Compensation for Accidents Convention No. 17 of 1925
- The Act applies to Tanzania Mainland and covers all employers and employees including those in Public Service.
- Section 3 of the Act sets objectives of this law which include;
    - Provide for adequate and equitable compensation for employees who suffer occupational injuries or contract occupational diseases arising out of, and in the course of their employment and in the case of death, for their dependants;
    - Provide for the rehabilitation of employees who have suffered occupational injuries or contracted occupational diseases in order to assist in restoring their health, independence and participation in society;
    - Provide for a framework for the effective, prompt and empathetic consideration, settlement and payment of compensation benefits to employees and their dependants;
    - Provide for the establishment, control and administration of the WCF & the legal framework for contributions to and payments from the Fund;
- Right to be compensated
- Section 19 (1) of the Act provides that where an employee has an accident resulting in the employee's disablement or death, the employee or the dependants of the employee shall, subject to the provisions of this Act, be entitled to the compensation provided under this Act.
- The term disablement has been defined under section 4 of the Act as temporary partial disablement, temporary total

disablement, permanent total disablement or serious disfigurement, as the case may be;

- The terms temporary partial disablement, temporary total disablement, permanent total disablement are all defined under section 4 of the Act.
- An employee is not entitled to be compensated if the injury was attributable to the serious or willful misconduct of the employee himself-s.19(2)
- That subsection has some exceptions, which are;
    - If the accident results into permanent total disablement or
    - the employee dies as a result of the accident leaving a dependant wholly financially dependent upon the employee
- Nonetheless, Section 19(3) gives the Director-General the discretion to pay the whole or portion of medical costs in respect of accident suffered in section 19(2)
- The accident may nevertheless be deemed to be arisen out of, and in the course of employment of the employee, notwithstanding that the employee was at the time of the accident-
    - Acting contrary to any law applicable to the employee's employment or to any instruction given by or on behalf of the employer; or
    - The employee was acting without any instruction of the employer.
- This can only occur where the Director-General believes that an employee at the time of an accident was acting for the purposes, or in the interests of, or in connection with the business of an employer-s.19(4)
- Other forms of accidents include;

- Accidents during conveyance by employer-s.20
- Accidents during training for or performance of emergency services-s.21

- Compensation for occupational diseases
- According to section 22.-(1) where an employee contracts a disease set out in the Third Schedule to .the Act, or any other disease, and the disease has arisen out of, and in the course of the employee's employment, the employee shall, subject to the provisions of the Act, be entitled to the compensation.
    - Where an employee dies as a result of a disease referred to under subsection (1), the dependants of the employee shall, subject to the provisions of the Act, be entitled to the compensation.
- The Act affords protection to employee who contracts occupational disease outside Tanzania or the one employed by the employer outside Tanzania but works inside Tanzania.
- Nevertheless, no employee can be entitled to double compensation-s.25(3)
- Compensation may be refused if any of the events in s.26 occurs.
- Right to compensation cannot be relinguished by any agreement-s.28.
- The provisions of PART V and VI of the Act governs procedures for claiming compensation and also determination of the Compensation.
- It is important to take note of various powers vested to Director-General in respect of this process.
- It is also important to take not of the workers compensation fund which is used for that purpose.

- Dispute Settlement
- By virtue of section 79 (1) of the Act, the DG may review any decision in connection with a claim for compensation or the award of compensation on the ground;
    - That the employee has not submitted himself for an examination referred to in section 38
    - That the disablement giving rise to the award is prolonged or aggravated by the unreasonable refusal or failure of the employee to submit to medical aid;
    - That compensation awarded in the form of a periodical payment or a pension is excessive or insufficient because of existing or change circumstances;
    - That the decision or award was based on an incorrect view or misrepresentation of the facts, or that the decision or award would have been otherwise in the light of evidence available at present but which was not available when the DG made the decision or award.
- Under section 79 (2) of the Act in reviewing the decision in accordance with subsection (1), the DG shall issue notice inviting a party concerned to make representation.
- The DG may, after considering the evidence and representations submitted and making such inquiry as the Director General may deem necessary;
    - Confirm, amend or set aside its decision, and may suspend discontinue, reduce or increase compensation awarded.
- Section 80 (1) the Act provides that, any person aggrieved by the decision of the DG may appeal against the decision within thirty working days to the Minister.
- Under section 80 (2) any person aggrieved by a decision of the Minister may, within sixty working days, from the date

of decision, appeal against that decision to the Labour Court.

- Section 88 of the Act is to the effect that where the DG or any authorized person makes a decision, the DG or the authorized person, as the case may be, shall furnish reasons to a person affected by that decision.

TOPIC FIVE

STRIKE AND LOCKOUT & DISPUTES SETTLEMENT

Types of Disputes

- Traditionally there are two distinctive labour disputes;
    - Disputes of interest
    - Disputes of right
- A dispute of interest is simply defined as a dispute about the creation of new rights.
    - It arises where employees, or trade union on that behalf, seek to further their interest where there are no currently existing rights that they may enforce. e.g seeking higher wages, improvement of other terms and conditions of employment, etc
    - On part of the employer, or employers' association, the demand or interest may be on downward adjustment or forfeiture of some of the existing terms and conditions of employment.
    - Therefore it is a dispute which is typically resolved by means of collective bargaining in which the failure may give recourse to strike or lock out

- A dispute of right is simply defined as a dispute about the interpretation or application of a right that already exists.
    - It is a dispute where employees or employers do not seek to create a new right but rather seek to enforce an already existing right in the event that one party is of the view that the other has breached the terms of the existing right.
    - It is a dispute on how the existing right should be interpreted and applied in a given circumstance.
- In terms of the ELRA, a dispute of right has been termed as a “complaint” which is defined under s.4 of the Act.
- While a dispute of interest is recognized as a dispute other that the “complaint”. See s.4 of the ELRA
    - See Rule 41(4) of the ELRA Code of Good Practice for what constitutes Dispute of Interest
    - See Rule 41(5) of the ELRA Code of Good Practice for what constitutes Dispute of Right
- Strike and Lockout
- S.75 of the ELRA provides for;
    - A right to every employee to strike in respect of a dispute of interest; and
    - A right to every employer to lockout in respect of a dispute of interest
- S.4 of the ELRA defines a strike and lockout
    - Partial or total stoppage of work by employees-strike
    - Total or partial refusal by employer to allow his employees to work-lockout

- The two actions, strike and lockout, must be lawful, that is, must comply with lawful procedures prescribed in the ELRA and its Regulations.
- Procedures for a lawful strike are provided for under s.80 of the ELRA
- Procedures for a lawful lockout are provided for under s.82 of the ELRA
    - These procedures are supplemented by Rule 42 of the ELRA Code of Good Practice
- These procedures may be modified by a collective agreement-Rule 42 of ELRA Code of Good Practice
- The role of strikes and Lockouts in collective bargaining is to resolve matters of mutual interest themselves without outside interference.
- Strikes and lockouts are measures of last resort.
- Nevertheless they are lawfully sanctioned economic pressure in resolving dispute of interest
    - The purpose however is not to damage the organisation-see Rule 39 of the ELRA Code of Good Practice.
- The object of a strike or lockout is to settle a dispute and shall come to an end if the dispute that gave rise to it is settled-Rule 40 of the Code of Good Practice.
    - Employees may embark on a secondary strike to give support to a primary strike-s.81 of ELRA read together with Rule 44 of the Code of Good Practice.
    - The meaning is provided under s.81 of ELRA
- Limitations

- S.76 of the ELRA imposes restrictions on right to strike or lockout
- Persons engaged in essential services have their special procedures for engaging in strike or lockout.
- S.77(2) provides for services which are considered to be essential services
- Essential services include the following;
    - Water and sanitation
    - Electricity
    - Health services and associated laboratory services
    - Fire-fighting services
    - Air traffic control and civil aviation telecommunications
    - Any transport services required for the provision of these services

- That list is not a closed one.
- The essential service Committee established under s.29 of LIA, 2004 is empowered to designate a service as essential service.
    - This is as per s.77(3) of ELRA
    - The condition is if the interruption of that service endangers the personal safety or health of the population or any part of it.
- The procedures for designating a service as essential service are set under s.77(4) of ELRA
- Procedures include;

    - Giving notice
    - Conduct investigation
    - Make any written representations
    - Hold a public hearing
    - Consider representations
    - Publication in official Gazette
- Consequences of failure to comply with procedures
- S.84 provides for effects of non-compliance with procedures for a lawful strike or lockout.
- The Labour Court may issue an order restraining any person from participating in an unlawful strike or lockout or engaging in any prohibited conduct.
- The order may include also compensation for any loss attributable to the strike, lockout or any prohibited conduct.
- It has to be noted that the law affords protection to an employee who engage in a lawful strike or who refuses to accede to employer’s demands during lockout.
- Such protection include;
    - Not to be terminated from employment
    - Not to be prosecuted for criminal or civil actions-see s.83 of ELRA.
- Nonetheless, an employee or employer is not required to commit;
    - Any breach of contract
    - Criminal offence
    - Tort, during a strike or lockout-s.83(1) of ELRA

- Rule 45(1) of the Code of Good Practice provides that protection against termination does not cover violence, malicious damage to property.-picketing
- Protest Action
- Apart from a strike, employees may have a recourse to a protest action in terms of s.85 of the ELRA.
- A protest action is a total or partial stoppage of work by employees for the purpose of promoting or defending the socio-economic interest of workers but not for a purpose of strike or a dispute in respect of which there is a legal remedy.
- Before commencing a protest action a notice must be served to the LESCO established under s.3 of LIA.
- There are restrictions on employees engaged in essential services to engage in a protest action.
- LESCO has powers to convene a meeting and determine/resolve the matter that gave rise to a protest action.

SETTLEMENT OF DISPUTES

- The ELRA and LIA establish several organs/institutions of labour disputes settlement. They include;
    - The Labour, Economic and Social Council;
        - Established under s.3 of the LIA 2004 and whose functions are provided for under s.5 of LIA
    - The Commission for Mediation and Arbitration;
        - Established under s.12 of the LIA 2004 and whose functions are provided for under s.14 of the LIA
    - The Essential Services Committee;

        - Established under s.29 of LIA and its functions are provided for under s.30 of LIA
    - The Wage Board;
        - Appointment of wage boards is made in accordance with s.35 of LIA and their functions are provided for under s.36 of LIA
    - The Labour Commissioner;
        - For the purpose of administration of the labour laws, the President shall appoint a Labour commissioner in accordance with s.43 of LIA.
        - The Labour Commissioner shall be assisted by other officials as per s.43 of LIA.
    - The High Court, Labour Division (The Labour Court)
        - It is established under s.50 of the LIA and consists of Judges whose number is determined by the CJ and two panels of assessors appointed in accordance with s.53 of LIA.
        - The Labour Court has exclusive civil jurisdiction over any matter which has been reserved for its decision by the labour laws.
        - The Labour Court is a division of the High Court, that is, its decisions have the status of any decision or order given by the High Court.
    - Modes of Dispute resolution
- Generally, there are different approaches of resolving disputes;
    - Power based approaches
    - Rights based approaches
    - Interest based approaches

- The forms of labour dispute resolution recognized in our laws include;
    - Mediation;
    - Arbitration; and
    - Adjudication
- Mediation
    - It is basically a facilitated or assisted negotiation.
    - It is one among the processes of alternative dispute resolution. It is a process whereby a neutral party brings the parties in dispute together and encourages them to talk about their problem and he facilitates the settlement of the dispute.
    - This term is also defined as a process in which an impartial person, a mediator, helps disputing parties to try to reach a voluntary, mutually acceptable resolution of some or all of the issues of their dispute.

- Arbitration
    - The parties again go to a neutral 3rd party called an arbitrator.
    - The arbitrator hears the parties and makes a decision.
    - A decision is called “an award” which is binding upon parties.
    - Arbitration and adjudication are almost the same the only different is that some formal and procedural technicalities in adjudication are not strict as in arbitration.
- Adjudication

- It is sometimes known as litigation. A process whereby a party institutes his case to a court in order to get his claim determined against the other party.
- Formal procedures are applied and the decision is enforced as a court decree.

- Advantages of Mediation process
- Mediation has the following advantage;
  - Less costs
  - Saving of time
  - The ultimate agreement is tailored by the parties themselves as distinguished from court judgment imposed by judges
  - Procedures are simple and informal, no technicalities involved and intimidating situation.
  - Here there is no winner nor loser
  - Parties leave the place for settlement peacefully and their relations continue friendly.
  - In adjudication parties are bound with their pleadings, but in mediation can look for a solution out of their pleadings. They are not bound to their pleadings on document submitted because the decision is given in a wide range to cover or prevent the likely hood for future dispute.
  - Parties are part to the decision, hence this makes it simple to execute the decision
  - Also it is confidential; hence parties are free to be open in setting the disputes. The documents submitted are either destroyed or returned to the parties
- Settlement procedures

- A dispute which is referred for mediation to CMA shall be in a prescribed form (CMA-F1)
    - This form is found under the ELRA (Forms) Rules of 2007 (G.N. No. 65 of 2007)
- The CMA shall appoint a mediator, fix date, place and time of hearing and advise the parties on the details of their dispute.-see s.86(1)-(3) of ELRA
- The mediation process is expected to take only 30 days but that period may be extended further-s.86(4)-& s.87(1)(a) of ELRA
- If the mediation process fails;
    - If it was a dispute of interest, a party to the dispute may give a notice of intention to commence a strike or a lockout in accordance with s.80 & 82 of ELRA
    - If it was a dispute of right (a complaint), a dispute may be referred to the arbitration; or to the Labour Court (for adjudication)-s.86(7) of ELRA
- Consequences of non-attendance in mediation hearing;
    - If it is a dispute of interest, extension of time for further 30days if the non-attendance is by the party who referred the matter for mediation;-see s.87(1)(a) & s.87(2)(a) of ELRA
    - Shortening 30days period for hearing if the non-attendance is by the party to whom the dispute is against.- see s.87(1)(b) & s.87(2)(b) of ELRA
    - If it is a dispute of right (a complaint), the mediator may dismiss the complaint if the party who referred the complaint fails to attend;
    - Decide the complaint if the party to whom the dispute is made against fails to attend.-see s.87(3) of ELRA-(ex parte decision)

- The decision made in mediation may be enforced as a decree of a court in the Labour Court
- The CMA has power to reverse its own decision-see s.87(5) of ELRA
- In Arbitration process;
    - Matters which can be taken to the arbitration are those;
        - Referred by the parties after a collapse or failure of mediation;-s.86(7)(b)(i) of ELRA
        - Matters relating to dispute of interest in essential services; -s.88(1)(a) of ELRA
        - Matters agreed by the parties to be referred to the arbitration by voluntary arbitration-s.93 of ELRA
        - A dispute referred from the Labour Court by virtue of s.94(3)(a)(ii) of ELRA
        - A dispute relating to breach of contract or any labour law
        - A dispute over fairness or lawfulness of employee's termination of employment-s.88(1)(b)(i) of ELRA
- The arbitrator is expected to conduct the hearing fairly, quickly and with minimum legal formalities-s.88(4) of ELRA
- An arbitration award is binding on the parties to the dispute and can be executed in the Labour Court-s.89 of ELRA
    - The award however may be corrected on application or on arbitrator's own motion-s.90 of ELRA
- An arbitration award can be set aside or revised by the Labour Court-s.91of ELRA

- Adjudication
    - This is the role vested to the Labour Court.
    - It has exclusive jurisdiction to hear and determine such matters vested on it by virtue of the Labour Law statutes and subject to the Constitution.-see s.94 of ELRA
    - The Labour court has exclusive jurisdiction over matters listed under s.94(1)(a)-(f) of ELRA
    - Appeals from the Labour Court lie to the Court of Appeal of Tanzania-s.57 of LIA
- Remedies
- Remedies in labour disputes will depend on the nature of the dispute.
- Generally one expects the following remedies;
    - In case of unfair termination from employment by the employer, the employee may be re-instated/re-engaged, awarded damages, etc-see s.40 of ELRA
    - In case of conflict over interpretation of rights, a declaratory order
        - A wage dispute may be resolved by wage board by taking into consideration different factors
        - If it is a dispute of interest and the mediation has failed, a strike or lockout may result into mutual agreement between the two parties
- Termination of employment contract shall be considered to be unfair if; (S.37 of ELRA)
    - The employer fails to prove the validity of the reasons for termination;
    - And that those reasons were fair;

- The procedure for termination was fair.

- The termination of employment is **automatically unfair** if it was for the reason that;
  - An employee has disclosed the information he was entitled to disclose;
  - An employee has refused to comply with unlawful instructions from his employer;
  - An employee has lawfully exercised his right under the law;
  - An employee belong to a trade union;
  - An employee has participated in lawful activities of a trade union
- Other reasons for automatically unfair termination include;
  - Termination related to pregnancy;
  - Termination related to disability, and
  - Termination that constitute discrimination
- The application of these terms are well elaborated in the ELRA Code of Good Practice
- An employee cannot be taken a disciplinary action merely because he is charged with a criminal offence unless where the final conviction is made.

NEGOTIATION IN THE PUBLIC SERVICE

- Though ELRA, 2004 applies even to public servants, there is a law that has been enacted to carter categorically for the public service.
- This is the Public Service Negotiation Machinery Act, 2003(Act no.19 of 2003).
- The objective of this Act is set to the preamble to this Act.

- The Act is enacted for the purpose of enabling participation of public servants in negotiation and rendering advice to the Government and settling disputes in the Public Service.
- The Act establishes the following organs;
    - Service Joint Staff Council-s.4(1) of the Act
        - This organ is a negotiating body which shall provide a forum for discussion by public servants in respect of terms and conditions of service in the particular scheme.
    - The functions of the Service Joint Staff Council (SJSC) are provided for under s.6 of the Act.
    - Matters discussed and determined by the SJSC shall be referred to the Public Service Joint Staff Council (PSJSC) for endorsement-S. 8(2) of the Act.
    - The PSJSC may endorse, amend, defer or refer back the matter to the SJSC
- S.9 of the Act establishes the Public Service Joint Staff Council whose functions are provided for under s.10 of the Act.
- The SJSC and PSJSC are prohibited from considering, offer advice or make recommendations in relation to Minimum wage.
- This has been left to Minimum Wage Boards-established by LIA.
- Strikes and Lockout in the PS
- S.26(1) of the Act provides for a right to strike or lock-out
- This right can only be exercised where the following circumstances have been met;
    - There is a substituting dispute or complaint

- The dispute or complaint has not been resolved
- A ballot strike has been conducted
- A sixty days notice has been served to the Government-s.26(2) of the Act

- Any public servant who fails to comply with such procedures is likely to face disciplinary action-s.26(3) of the Act.
- It is prohibited for public servants to strike or lock-out to the extent of causing interruption or continued interruption which endangers the life, health or personal safety of the whole or part of the population-s.27 of the Act
- Another organ established by this Act is the Master Workers Council-s.30(1) of the Act.
- S.30(3) requires each Ministry, Independent Departments, Regions, LGAs, Government Institutions and Executive Agencies to establish Workers Councils.
- The functions of the Master Workers Council include;
    - To advise the Government on procedures for promotion and disciplinary measures in respect of public servants;
    - To advise the Government on measures to be taken in order to ensure effective delivery of services;
    - To advise the Government on the changes that are to be made to the Government Standing Orders and conditions of work and service;
- Recommendations are submitted to the Minister responsible with PS.

TOPIC SIX

TRADE UNIONS

Introduction

- A number of ILO instruments recognise the need of upholding freedom of association.
    - E.g is the Freedom of Association and Protection of the Right to Organise Convention, 1948 (Convention No.87)
- Right to associate has been a concern of international organizations and is seen as a basic right of workers in a democratic society.
- Continue
- Art.2 of Convention No. 87 provides that;
    - Workers without distinction shall have the right to establish and, subject only to the rules of the organization concerned, to join organisations of their own choosing without previous authorisation
- The preamble to the ILO Constitution records that the principle of freedom of association is among the means of improving the conditions of workers and ensuring peace.
- Generally Convention No. 87 provides for following principles;
    - Everyone is entitled to freedom of association
    - The absence of the need for previous authorization to establish organisation
    - Freedom of choice with regard to the membership of such organizations
    - The right to participate in the lawful Activities of the organisation subject only to its own rules.

- Freedom of association is also a subject of a number of other international human rights instruments.
    - For instance, Art.20(1) of the Universal Declaration of Human Rights, 1948 states that each individual has the right to freedom of peaceful assembly and association.
- Our Constitution has incorporated this right under Art. 20
- So it can simply be said that this right is constitutionally guaranteed.
- Reflection in Labour Law
- Freedom of Association is provided for under ss. 9 to 11 of the ELRA.
- S. 9 provides for the right of the employees to form and join trade union as well as participating in lawful activities of the trade union
- S. 10 provides that every employer shall have the right to form and join as well as participating in lawful activities of the Employers' Association.
- The two provisions prohibits discrimination on either the employee or the employer on the basis that such an employee or employer has exercises the right provided for under sections 9 and 10
- Section 11 of the ELRA provides for the rights of the trade union and employers association which includes the right to:-
    - determine its own constitution
    - plan and organise its administration and lawful acts
    - Join and form a federation
    - Participate in the lawful acts of the federation

- Affiliate with, and participate in the affairs of any international workers' organisation or international employers' organisation or the International Labour Organisation, and to contribute to, or receive financial assistance from those organisations

- Trade Unions
- The term Trade Union is defined under section 4 of the Act to mean;
    - Any number of employees associated together for the purpose, whether by itself or with other purposes, of regulating relations between employees and their employers or the employers' associations to which the employees belong.
- As per s.9(2) there are limitations relating to membership in Trade Unions to some of employees like;
    - Magistrates
    - Prosecutors
    - Senior management employees
- The Act prohibits discrimination against an employee on the grounds relating to his participation or past participation in affairs of Trade Union-see s.9(3) & (4)
- A Trade Union has to be registered within 6months of its establishment-s.45(1) of ELRA.
    - It is an offence for a trade union to operate without being registered six months after its establishment.
- Requirements for registration of a trade union are;
    - It is a bonafide trade union;
    - It is an association not for gain;

- It is independent of any employer or employer's association;
- It has been established at a meeting of at least 20employees;
- It has adopted a constitution and rules that comply with provisions of s.47
- It has adopted a name that does not resemble the name of another union so as to mislead or create confusion; and
- It has an address in the URT.

- The requirements for registration of a federation are almost the same to those of a trade union except that;
  - The meeting of its establishment should have at least five registered organizations; and
  - That it should comprise of only registered organizations
- S.47 sets out necessary matters to be included in the Constitution of any trade union, employers' association or federation.
- There are limitation as to contents of the Constitution of a registered organization that;
  - Should not conflict with the rights and duties set out in The CURT, 1977;
  - Should not conflict with the ELRA or any other written law; or
  - Evade any obligation imposed by any law
- Regardless of the registration to a federation as per s.45(2) of ELRA, a Trade Union may also apply for registration to the Registrar-s.48(1) of ELRA.

- S.4 of ELRA defines the Registrar to mean the Registrar appointed under s.43(2) of the LIA, 2004
    - The Registrar is responsible for the regulation of trade unions, employer organizations and federations.

- Effect of registration
- An organisation or federation, upon registration, shall be a body corporate;
    - With perpetual succession and a common seal;
    - With the capacity to sue or being sued, enter into a contract, etc-see s.49
    - No one shall be liable because of his/her obligations in the trade union or organization
- The functions of the Trade Union are stipulated under s.62(4) of ELRA
- Employers' Associations
- Just like employees, employers have a right to freedom of association.
- By virtue of s.45(1) employers may also establish their own association and register it with the employers' federation and the Registrar of organizations.
- Requirements for registration of employers' association are provided for under s.46(2)
    - There should be at least a minimum number of four employers in a meeting establishing employers' association.
- Organizational rights

- In order to enjoy or exercise the rights provided under PART V of the ELRA a trade union should be registered.
- A registered trade union enjoys the following organizational rights;
    - Right to get access to the workplace/employer's premises-s.60
    - Right to receive deductions or trade union's subscriptions or levies-s.61
    - Right to have representatives of the employees interests-s.62
        - Trade Union representatives have the functions provided under s.62(4) of ELRA.
    - Right to be granted paid leave to attend various affairs of the trade union-s.63
    - Right to ask/request the employer to disclose certain information in order to facilitate effective carrying of trade union's duties-s.70
- In case of any breach of the terms and conditions of exercising organizational rights, employer may pursue the remedies provided for under s.65 of the ELRA.
- Acquisition of Organizational rights
- A registered trade union can acquire any of the organizational rights provided in the law by;
    - Notifying the employer on the need to exercise any of the right;
    - Concluding a collective agreement with the employer on the manner of exercising such right;
    - If the employer fails to meet such demands, refer the dispute to CCMA for mediation

- If the mediation fails, refer the matter to Labour Court

- Termination of Organizational Rights
- Where there is a material breach of the terms and conditions of exercising organizational rights, the employer may
  - Refer the matter to CMA
  - If mediation fails, may apply to the Labour Court
- Powers of the Labour court in respect of this application are set under s.65(2) of ELRA
- Collective Bargaining
- Collective bargaining has been described as;
  - A process in which workers and employers make claims upon each other and resolve them through a process of negotiation leading to collective agreements that are mutually beneficial.
  - In the process different interests are reconciled. For workers, joining together allows them to have a more balance relationship with their employer.
  - It also provides a mechanism for negotiating a fair share of the results of their work, with due respect for the position of the enterprise or public service in which they are employed.
  - For employers, free association enables firms to ensure that competition is constructive, fair and based on a collaborative effort to raise productivity and conditions of work.
    - This meaning is according to the ILO Report on Social Justice (2004)

- The Supreme Court of Canada in Health Services & Support - Facilities Subsector Bargaining Assn. v. British Columbia, 2007 SCC 27, [2007] 2 SCR 391 stated that;
    - Right to collective bargaining concerns the protection of the ability of workers to engage in associational activities, and their capacity to act in common to reach shared goals related to workplace issues and terms of employment.
- S.4 of the ELRA defines collective agreement to mean a written agreement concluded by a registered trade union and an employer or registered employers' association on any labour matter.
- PART VI of the ELRA provides for provisions relating to collective bargaining process in Tanzania.
- Bargaining process
- Bargaining process involves a registered trade union which has acquired recognition by the employer by virtue of s.67 of ELRA and the employer or registered employers' association.
- Trade unions may act jointly in bargaining process if the interests of their employees are common.
- If the employer refuses to recognize a registered trade union which has majority of the employees as an exclusive bargaining agent, the trade union may;
    - Refer the matter to the CCMA for mediation
    - If the mediation fails, then refer the dispute to the Labour Court for decision.
- Procedures of Acquiring Recognition
- A registered trade union having majority of employees is entitled to be recognised by the employer as an exclusive bargaining agent

- Procedures for a trade union to be recognised as an exclusive bargaining agent are provided under s. 67 of ELRA read together with Rule 51 of its Code of Good practice.
- Rule 50(2) of the ELRA Code of Good Practice states the purposes of having a recognised trade union

- Refusal of recognition
- The employer may refuse to recognize a trade union as an exclusive bargaining agent if;
    - The union does not represent a majority of the employees
    - No agreement between the two on the appropriate bargaining unit
    - The Labour Court has authorised withdrawal of recognition-s.69 of ELRA
    - The employees are members of the senior management-Read Rule 51(5) of the Code.
- A dispute over recognition can be referred to the CMA and if it fails, the matter can be referred to the Labour Court-s.67 read together with Rule 51 of the ELRA Code of Good Practice.
- The Labour Court may order for;
    - An opportunity to get more employees to become representative;
    - Altering bargaining unit;
    - Suspending recognition for a period of time;
    - Withdrawing recognition;

- Duty to bargain in good faith
- There is a general duty upon both employer or employers association and registered trade union to bargain in good faith.
- This duty is provided for under s.68 of the ELRA and Rule 54 of the ELRA Code of Good Practice.
- This duty entails that the parties to the bargaining process should strive to achieve the best to their interests by trying to reconcile their different interests without jeopardizing genuine interests one another.
- In order to be consistent with duty to bargain in good faith a conduct has;
    - To be respecting representative of the parties
    - Preparation, in advance, for negotiations
    - To be consistent in negotiation process
    - Attending meetings timely
    - Motivating proposals made
    - Considering proposals made by the other party or give reasons for refusal-see Rule 54(2) of the ELRA Code of Good Practice.
- The legal effects of a Collective agreement
- A collective agreement shall be in writing and signed by the parties to it-s.71(1) of ELRA
- The agreement shall be binding upon;
    - Parties to the agreement
    - Their members
    - Any other employee if the trade union is recognised as an exclusive bargaining agent

- Agency and Closed shop agreements
- The law in Tanzania does not enforce closed shop agreements-s.72 of ELRA.
- An agency shop agreement is such an agreement by which members are not compelled to become members of the trade union even though an agency fee is deducted from their wages.
- A closed shop agreement is such an agreement for which all employees who are covered by the collective agreement must be or must become members of the trade union.
- Disputes concerning Collective Bargaining
- Any dispute relating to application, interpretation, or implementation of a collective agreement shall be referred to the Commission for mediation
    - In event the mediation fails, any party to the dispute may refer the matter to the Labour Court for decision.
    - Read s.74 of ELRA.

TOPIC SEVEN

Termination of Contract of Service and its Legal Consequences

Introduction

- Just like any contractual agreement, a contract of employment can come to an end in different forms and for different reasons.
- Basically, the common law principles applicable in contractual relationship also extend in employment relationship to that extent of filling the gap of where the statutory provisions provide otherwise.
- The terms and conditions of employment also may be having the time frame for which the employment relationship is going to subsist.
- The employer is empowered at common law and in statutory law to take control of his own business and ensure that the state of affairs is in good order at workplace.
- In so doing, the employer is empowered to take fair disciplinary actions against his employees where there is misconduct or breach of certain lawful instructions.
- Fair disciplinary process involves an opportunity to the employee to defend himself after having been shown the nature of the allegations put against him.
- In ensuring that the process is fair to both, the employer and employee, the law affords power to the employer to suspend the employee pending the determination of his case.
- In the case of **BENBROS MOTORS TANGANYIKA LTD V. RAMANLAL HARIBHAI PATEL** (1967) H.C.D 435, Suspension was held to be a temporary discharge of an

employee from the employment, pending some other event usually an investigation into some act on the party of the employee after which re-instatement might be had.

- ☐ Therefore, Suspension does not amount to punishment, it is only an interim measure and will last till the application for permission to punish the workman and is made by the tribunal which passes an order thereon.
- ☐ It is just an interim measure pending investigation and proceedings.
- ☐ In the case of **HOTEL IMPERIAL V. HOTEL WORKERS UNION** (1959)2 LLJ 544 it was held inter alia that;
    - *"The master can after holding proper inquiry temporarily terminate the relationship of master and servant by suspending his employee pending proceedings".*
- ☐ Nevertheless, suspension can be grouped into two;
    - Preventive suspension
        - This is where disciplinary charges are being investigated against an employee and the employer wants to suspend the employee pending the outcome of the disciplinary enquiry. The reason for this is usually to remove the employee from the workplace so that he does not interfere with the investigation or intimidate witnesses.
    - Punitive suspension
        - Here, a suspension is imposed as a disciplinary measure short of dismissal after the disciplinary hearing has been held and the employee found guilty.

- ☐ Under rule 27 of the Code of Good Practice it is stated that where there are serious allegations of misconduct or incapacity, an employer may suspend an employee on full remuneration whilst the allegations are investigated and pending further action.
- ☐ The employee suspended shall be given a written letter of suspension setting out the reasons of suspension and any terms of suspension.
- ☐ Under the Public Service Regulations suspension is under regulation 39 of the Regulation; the Regulations have distinguished between suspension and interdiction which is provided for under regulation 38 of the Public Service Regulations.
    - Interdiction is defined under Regulation 3 of the Public Service Regulations 2003
- ☐ The period for which an employee is suspended must be reasonable by taking into consideration the period for which investigation is conducted and any further action that might be taken.
- ☐ Suspension does not amount to termination of contract.
    - It is merely a discharge of an employee from an employment pending investigations and proceedings.
    - Therefore the contract of employment does not come to an end by the suspension of an employee.
- ☐ In the case of **Rajasthan State Road Transport Corpn v. Sohan Lal & ors** (1996) LLR 930 (RAJAN HC) the court held that;
    - A suspended employee continues to be in employment and he will be entitled to benefit of revised pay scales also.

- ☐ When the investigation and the proceedings are completed and it is found out that the employee is liable for misconduct or whatever he was accused of, the employer will have a right to dismiss such an employee from the employment, thus the contract of employment will be said to come to an end.
- ☐ Conversely, when the allegation are found out not to be true, the employee will have the right to be reinstated in the employment and be entitled to all his benefits.
    - In the Public service Disciplinary grounds are found under the following provisions;
    - S.23 & 25 of the Act
    - Regulations 35-49, 60-64
    - Clause 46, 47 & 48 of Schemes
    - Before and disciplinary action is taken against any public servant there must be;
        - preliminary investigation
        - The public servant must be given notice of the charge against him
        - The public servant must be afforded an opportunity to be heard
- ☐ In the Public Service there are two types of disciplinary proceedings-Regulation 41;
    - Formal proceedings-Regulation 42 (See also types of offences for this kind of proceedings under Part A to the First Schedule of the Regulations)
        - These proceedings may warrant dismissal, reduction in rank or reduction in salary

- Summary proceeding-Regulation 43 (See also types of offences for this kind of proceedings under Part B to the First Schedule of the Regulations)
    - These proceedings may not warrant dismissal, reduction in rank or reduction in salary

☐ Termination of Employment

☐ Generally there are several forms of termination of employment contract like;

- Dismissal
- Mutual agreement
- Operational requirements
- Death of an employee/insolvency of an employer
- Supervening impossibility of performance
- Resignation
- Retirement age
- Expiry of time or the happening of a specified event, etc

☐ Under section 36 of the ELRA termination of employment includes

- A lawful termination of employment under a common law
- A termination by an employee because the employer made the continued employment intolerable for the employee;
- A failure to renew a fixed term contract on the same or similar terms if there was a reasonable expectation of renewal

- A failure to allow an employee to resume work after taking maternity leave granted under this Act or any agreed maternity leave;
- A failure to re-employ an employee if the employer has terminated the employment of a number of employees for the same or similar reasons and has offered to re-employ one or more of them

☐ In terms of the PSA and its Regulations, see s.24 of PSA 2002, Regulation 29-34 of the Public Service Regulations.

☐ Dismissal

☐ In terms of the statutory requirements, a dismissal may mean any of the following forms of the termination of employment;

- Termination of a contract of employment by the employer with notice
  - S.41 of the ELRA, Rule 8(1)(b), Rule 8(2)(d)(i) of the ELRA Code of good practice
- Termination of a contract of employment by the employer without notice/summary dismissal
  - S.41(7)(b) of the ELRA, Rule 8(2)(d)(ii) of the ELRA Code of good practice.
- Refusal or failure by an employer to renew a fixed-term contract
  - S.36(a)(iii) of ELRA, Rule 3(1)(c), Rule 4(4)-(5) of the ELRA Code of good practice
- Refusal to allow an employee to resume work after leave
  - S.36(a)(v) of ELRA, Rule 3(1)(e) of the ELRA Code of good practice

- Selective dismissal
    - S.36(a)(v) of ELRA, Rule 3(1)(c) of the ELRA Code of Good Practice
- Constructive dismissal
    - S.36(a)(ii) of ELRA, Rule 3(1)(b) and Rule 7 of the ELRA Code of Good Practice
    - This happens when the employee terminates the employment contract (by giving notice or summarily) but his resignation is not entirely voluntary rather it was caused by the actions or omissions of the employer which made the employment on the part of the employee intolerable.
- In the case of **Pretoria Society for the Care of the Retarded v Loots (1997) 18 ILJ 981 (LAC)** at 985 the court in describing the circumstances for constructive dismissal held that;
    - The enquiry is whether the employer without reasonable and proper cause conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. It is not necessary to show that the employer intended any repudiation of the contract; the court's function is to look at the employer's conduct as a whole and determine whether…its effect, judged reasonably and sensibly **is such that the employee cannot be expected to put up with it**.
    - Therefore resignation of an employee in these circumstances must be one of a last resort. An employee must show some degree of coercion, duress or undue influence exalted to him by the employer. Those acts or omissions must be one

which any reasonable person cannot be expected to tolerate.

- ☐ In the case of **Mafomane v Rustenburg Platinum Mines Ltd [2003] 10 BLLR 999**, the court set the following tests which the employee need to prove to establish constructive dismissal;
    - That the employee terminated the contract;
    - That the continued employment was intolerable;
    - That the intolerability was of the employer's making; and
    - The employee resigned as a result of the intolerable behaviour of the employer
    - Those tests are reflected in terms of Rule 7 of the ELRA Code of Good Practice.
    - The test is objective one, that is, any reasonable employee in the circumstances would have found the circumstances to be intolerable.
- ☐ It is to the employee's own risk if he decide to resign without exhausting the available mechanisms for remedy.
    - However it is not necessary to exhaust such available mechanisms if there is good cause for not doing so- Rule 7(2)(b) of the ELRA Code of Good Practice.
    - Dismissal due to transfer of undertaking
        - ■ Rule 5(2) of ELRA Code of Good Practice
- ☐ Redundancy/Retrenchment
    - This is what is termed as "termination for operational requirements
    - It is provided for under s.38 of the ELRA

- The term operational requirements has been defined under Section 4 of Act no.6 of 2004 to mean requirements based on the economic, technological, structural or similar needs of the employer.
- Read also Rule 24-26 of the ELRA Code of Good Practice on the requirements for Retrenchment
- Before any process of Retrenchment, the employer shall;
    - Give notice of any intention to retrench
    - Disclose all relevant information on the intended retrenchment
    - Make proper consultation prior to retrenchment
- The employer is required to make proper consultation on;
    - The reasons for intended retrenchment
    - Any measure to avoid or minimise the intended retrenchment;
    - The method of selection of the employees to be retrenched;
    - The timing of the retrenchment; and
    - Severance pay in respect of the retrenchment

☐ Retirement

- Employment contract may come to an end due to employee reaching retirement age

- This is one of the automatic termination forms recognized under the Code of Good Practice-see Rule 5(4).
- Also see Regulation 32 of the Public Service Regulations 2003

☐ Death

- This also is a form of automatic termination-see Rule 5(1) of the Code of Good Practice.

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