

LABOUR LAW IN TANZANIA

LECTURE ONE

INTRODUCTION

This subject deals with the relationship between the employers on one hand and employees on the other. It is a subject of immense theoretical interest because of the great *variety of regulative techniques* it employs and because in the study of this subject one so frequently comes up against the question of what are the true limits of effective regulation by the law.¹

Another interesting thing in this subject *is the use of special courts*. It is argued that the use of specialised and industrial tribunals have been adopted because they are thought to be able to offer advantages of ***speed, informality and cheapness*** that normal courts cannot not provide.²

The *approach to the subject* is also remarkable. There are different approaches to labour law depending on the level of development. Thus, while in Tanzania the labour law is less developed in areas of organised labour, in the developed countries the principal purpose of labour law is to regulate, to support and to restrain the power of management and the power of organised labour.³ The field of organised labour is not as strong compared to the one found in developed countries.

The *origin of this law* should not be ignored. Modern, Tanzanian labour law traces back to the colonial period. The main source of this branch of law is statutory law although case law also has played but only a significant role in the development of labour law in Tanzania. This is not surprising because generally even in developed countries the case law has played a minor role in formulating

¹ Davies, P. et. al., *Labour Law Text and Materials*, London, Weidenfeld & Nicholson, 1979, p.1

² Davies, P. et. al., *Op. Cit.* p. 9

³ Kahn-Freund, O. *Labour and the Law*, London, Stephen and Sons, 1972, p.5

the labour laws. Explaining this situation, Kahn-Freund the English writer argues that:-

“In the formulation of the rules which regulate the relationship between employers and workers the Common Law has played a minor role. The courts have had a small share in the evolution. ... This is because the rules and principles in which we are interested are designed to govern the normal typical behaviour of the parties (ie. hours of work, length of overtime, rates of wages etc.) which case law can only deal with pathological situations ...but rules needed in labour relations must work *ex-ante*, while case law operates *ex-post*.”⁴

In line with the above view, one can learn that most of labour regulation come from enactments rather than case law.

Thus the main labour statute of the colonial time was the **Master and Native Servants Ordinance of 1929**. This statute underwent various amendments before it was repealed and replaced by the **Employment Ordinance in 1955** (which came into force in 1957). Ever since, the Employment Ordinance has been the main statute governing the relationship between employers and employees until today subject to several amendments effected to it from time to time. Other important statutes governing labour relations in Tanzania today include the **Permanent Labour Tribunal Act of 1967 (the Industrial Court Act)**, the **Security of Employment Act 1964**, and the **Workmen's Compensation Ordinance Cap 263** to mention but a few.

Sources of Labour Law in Tanzania

⁴ Ibid. p. 21, See also Hepple & O'Higgins, *Employment Law*, 4th Edn., London, Sweet & Maxwell, 1981,p.3

The sources of labour law in Tanzania include the Legislation (principal and subsidiary), the Case Law and the International Conventions (including recommendations). These sources are elaborated below:-

LEGISLATION (STATUTES)

This comprises of the laws made by the parliament (principal legislation) as well as the by-laws made by various administrative bodies (subsidiary legislation). The principal legislation are divided into two main groups namely Ordinances (those made during colonial times) and Acts of Parliament (those made after independence). The Principal legislation governing labour law in Tanzania today include: the Labour Institutions Act, 2004 and Employment and Labour Relations Act, 2004 which are rather new legislation coming into force effectively on December 20th 2006⁵.

The Employment and Labour Relations Act, 2004 repealed and replaced a myriad of statutes which used to govern labour relations in Tanzania. Among the repealed laws were the Employment Act, Cap. 366, the Security of Employment Act, 1964, the Industrial Court of Tanzania Act 1967, the Trade Unions Act, 1998 and the Workmen's Compensation Act, Cap. 263 to mention but a few.

The other statutes which govern employment in Tanzania include the social security laws. Here there are many statutes depending on who the employer is. In short the Public Service Retirement Benefits Act governs the pensionable employees in the public sector; the National Social Security Fund Act, 1997, governs the non-pensionable employees in the private sector, The Public Parastatal's Fund Act, 1978, governs the employees in the parastatal sector and The Local Authorities Provident Fund to mention but a few. It should be noted

⁵ See GN no. 1, 2007 published on the 5th January, 2007

that most of the payments under these social security legislation are based on contribution from both the employer and the employees.

There are also specific legislation which govern the public sector. Such legislation include the Public Service Act, 2002 (repealed and replaced the Civil Service Act 1989 and the Local Government Commission Act, 1982); the Public Service (Negotiating Machinery) Act, 2003 (which repealed the Civil Service (negotiating machinery) Act 1962 and the Local government (negotiating machinery) Act 1982) and the National Defence Act of 1966.

CASE LAW

Various decisions of the courts have become sources of labour law in Tanzania. Many cases come from the East African Court of Appeal, Tanzanian High, The Court of Appeal of Tanzania and Industrial Court of Tanzania (trade disputes).

INTERNATIONAL CONVENTIONS AND RECOMMENDATIONS

These conventions and recommendations are sourced from the International Labour Organisation (ILO). However, the conventions and recommendations made by the ILO be come binding on Tanzania only after ratification.

HISTORICAL DEVELOPMENT OF LABOUR LAW IN TANZANIA

The literature assumes that in the early societies the working class was inexistent but it emerged during colonial period. This is the period when capital symbolised by the colonialists was introduced into colonial Tanganyika. Before colonial period there was a class of peasants and a class of landlords.

The colonialists regulated [labour through legislation known as Ordinances. The colonial masters passed a number of Ordinances to regulate the relationship between the newly created class of semi-proletariats (workers). The colonial

statutes played a major role in facilitating the aims of colonialism because of the nature of the relation between the colonialists and the labourers. Thus, labour relations were imposed into the territory by force and they carried penal sanctions through labour legislation.

Such colonial legislation include: -

- ❖ The Master and Native Servant (Written Contracts) Ordinance Cap.79
- ❖ The Master and Native Servants Ordinance Cap. 78
- ❖ The Master and Native Servant (Recruitment) Ordinance Cap. 80
- ❖ Employment of Women and Young Persons Ordinance Cap. 82
- ❖ The Porters (Restriction on Employment) Ordinance Cap. 171

It can be observed that most of these statutes were of Criminal nature. That is to say, failure to observe them amounted into a criminal liability. This reflects the objectives of colonial labour legislation which were to safeguard the interests of the colonial masters. Therefore, the laws were strict to ensure that the colonial interests are met even if this resulted to ill treatment of the workers. Later on, all of the above named statutes were repealed and replaced by the Employment Ordinance, Cap. 366 (now the Employment Act, Cap. 366 R.E. 2002)

The Employment Ordinance and the Change in Labour Relations

With the enactment of the Employment Ordinance, labour relations became more of a contractual than criminal in nature although the criminal aspects were maintained. The Employment Ordinance provides for the rights and obligations of Employers on one hand and the rights and obligations of employees on the other. Under the former statutes, the employers had only rights while the employees had no rights but only obligations. Therefore with the enactment of Employment Ordinance the employer was accorded with obligations, the breach of which would lead to criminal offences unlike the past where by it was only the employee who were to be subjected to criminal punishment.

Position-wise, the Employment Ordinance is a kind of an umbrella legislation designed to regulate relations between employers and employees by setting minimum standards.⁶ This legislation remains an umbrella legislation today providing for the minimum standards of a contract of employment despite its novelty. Shivji,⁷ groups the provisions of Employment Ordinance in three categories at the enactment:

- a) There are provisions specifically designed to cover long distance migrant labour (contract labour and irregular local labour)
- b) There are provisions which attempts to restrict and in some cases to eliminate, semi-bondage features of wage labour which were recognised and reflected in the previous legislation.
- c) Provisions which attempts to come to grips with the development of a permanent labour force.

Most of these provisions have hardly been repealed, and this makes the Employment Ordinance to be an old piece of legislation with some provisions which are inapplicable in the modern contract of employment. A good example

⁶ Shivji, I. G. *Law, State and the Working Class in Tanzania, Dar es Salaam, TPH, 1986, p.120*

⁷ *Ibid.*, p.121

of the obsolete provisions include those which covers the migrant worker and those which concern relocation.

The Current trends

Generally the law concerning the labour relations has changed. Formerly it was based more on employee side and this will be noticed in the older cases due to populist policies- Ujamaa. But today the relation favours the employers due to liberalisation policies. The state has been loosing the grip of becoming the largest employer and it is remaining with the work of regulating the employment relations between the parties to the contract of employment. The liberal policy of privatisation coupled with the world trends of globalization reflected the need to have a new labour law regime.

Responding to these demands, in 2004 the Tanzanian parliament enacted two new labour legislation namely the Employment and Labour Relations Act, 2004 and the Labour Institutions Act, 2004. These legislation compliment each other in the sense that while the latter establishes the necessary organs, provides for the appointment of staff, vests them with jurisdiction and declares their functions and delimits their powers, the former promulgates substantive law which is supposed to be administered by the said organs. It is important therefore to note that the two statutes work together. The new statutes attempt to consolidate all the existing labour statutory law and in the process aim at a more streamlined regime that avoids most of the shortcomings of the previous regime. The new regime came into force in two stages ie. the Labour Institution Act 2004 became operational on 01/07/2005 while the Employment and Labour Relations Act, 2004 came into force on 20/12/2006.

That being the case, in these lectures we shall deal with the old position of the law and wherever possible make a cross reference to the new labour regime

which is has just come into force. What is important is to understand the labour law principles since the statutes may change over time but the principles remain the same.

Refferences:

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THE CONCEPT OF A CONTRACT OF SERVICE / EMPLOYMENT.

For the reasons which you will learn as we go along in labour law it is very important to grasp the understanding of the concept of a contract of service/employment and be able to distinguish it from a contract for service. Labour law it should be noted is all about the contract of service. For that reason let us begin with the definitional understanding of the phrase:

What is a contract of employment? /service?

Section 2 of Employment Ordinance defines a contract of service as:

“Any *contract*, whether in *writing* or *oral*, whether expressed or implied to *employ* or to serve as an *employee* for *any period* or *number of days to be worked*, or *to execute any task or piece-work* or *perform any journey* and include a *foreign contract of service*.”

Important Terms in the Definition:

Contract:

The term *Contract* is not defined in the Employment Ordinance. Therefore, to define the term contract one has to refer to the Law of Contract Act, Cap. 345. The Law of Contract Act defines a contract as:-

“An agreement which is enforceable by law.” (s.2(1) (h))

However, some authors have defined a contract of employment as merely an agreement between employer and employee under which the employee agrees to give service to the employer and the employer engage the employee.⁸ Noteworthy is the fact that the word used in the Employment Act is *contract* and not *agreement*. Therefore, any employment agreement must be enforceable by law. But again, this depends on the laws of a particular country. Under the Tanzanian law, it can be observed that the term agreement was not preferred because not all agreements are enforceable by law. Eg. An agreement to employ a person to work as a prostitute or drug dealer is not enforceable under the Tanzanian law and therefore it will not amount into a contract.

It is argued that, since there was no contractual tradition at the time of the enactment of the Employment Ordinance, the statute had to provide for such elementary rules of contract as the time of its commencement, period of

⁸ Janner, G. *The Employer's and Personnel Manager's Hand Book of Draft Letters of Employment Law*, London, Business Books Ltd., 1977, p.3

contract, termination and ways of terminating a contract of employment.⁹ Otherwise these are matters which are to be agreed upon by the parties to the contract themselves.

ESSENTIALS OF A CONTRACT OF EMPLOYMENT

Employment contract like any other contract require the essential elements such as offer and acceptance, parties, capacity, consideration, lawful object, free consent and intention to create legal relation. In this part the discussion is centred on the elements which vary from the normal contracts element. These elements include parties, capacity, free consent and consideration.

Parties: the parties to a contract of employment are the employer and the employee. The employer can be a natural or artificial person (eg a limited liability company, the government etc) while the employee is usually a natural person.

Capacity: In employment contract like in any other contract, the parties must be competent to contract. However, there are differences when we look at the capacity as required by labour laws for a contract of employment and capacity to contract generally. While the general contracts refer to the age of majority (18 years) under the Age of Majority Act, Cap 348 as a peg for capacity, the labour laws do vary with such requirement in some instances. Moreover, the employment laws concerns much with the employee's capacity rather than the employer's capacity. The capacity to employment also depends on sex of a particular employee.

Under the Employment law capacity to enter into contract varies with the type of employment. Thus, the Employment Ordinance, defines a child as a person

⁹ Shivji, Op. Cit. p.125

below 15 years and it provides that a child of the age of 12 and above can be employed to do light work where he works with his parent(s). The Ordinance provides further that a child shall not be employed in industries, mining or in hazardous works (see s. 77 and 78 Employment Ordinance). The Ordinance also defines a young person as a person between the age of 15 to 18 years and it provides that such a person shall not enter into employments which are injurious to health, dangerous or otherwise unsuitable (ss. 79, 88, 89 Employment Ordinance).

The Ordinance also provides that a woman shall not be employed in any industrial undertaking between 6pm and 6am except in certain circumstances. These circumstances include:-

- a) Cases of emergency which could not have been foreseen and which are not of periodical nature
- b) Cases of work connected with raw materials or materials in the course of treatment and which are subject to rapid deterioration
- c) Cases in which a woman holds a responsible position of management not normally engaged in manual work. (s. 83 Employment Ordinance)

Free Consent: Employment is a consensual arrangement. The parties are supposed to have entered to such arrangement out of their free volition or free will. Thus, the Ordinance prohibits forced labour. This came as a result of the ratification of the Forced Labour Convention, 1930 and the Abolition of Forced Labour Convention, 1957 on the 30th January 1962. However, forced labour is defined to mean all work/service which is exacted from any person under the menace/threat of any penalty and for which the said person has not offered himself voluntarily. But this does not include:

- a) any work/service exacted/obtained by virtue of any compulsory military service law for work of a purely military character

- b) work/service exacted/obtained from a person as a consequence of a conviction in a court of law
- c) work/service exacted/obtained in case of emergency eg. During war, natural calamity etc
- d) minor communal services of a kind to be performed by members of community in the direct interest of that community. Eg. Sanitation, maintenance and clearing of local roads, repairing village fences etc. But before the exaction of such minor communal services, consultation shall have been had with the inhabitants of the place.

Consideration: the legal consideration in employment contracts are wages in monetary/pecuniary form. Under s. 61 of the Employment Ordinance, the wages are supposed to be paid in currency which is legal tender at the place where the wages are paid. There is no part or whole part of the wages shall be payable in any other form but the law does not prohibit remuneration in addition to wages (s.65). Wages are protected by law so that when earned no one even the employer shall have the right to deduct the said wages (s.63)

Position under the Employment and Labour Relations Act, 2004

There is no much difference between the old legislation and the new legislation in so far as the requirements of a contract of employment is concerned. However, there are some variations in the element of capacity and consent.

Capacity: s. 5 prohibits child labour. Section 4 on the other hand defines a child as a person under the age of 14 years but in case of hazardous sectors a child is defined to mean a person under the age of 18 years. Under s. 5(2) a child of 14 years can be employed to do light work which is not likely to be harmful to the child's development health wise and does not prejudice the child's attendance to school. Likewise, under s.5(3) a child under 18 years of

age is prohibited to be employed in a mine, factory or as a crew in a ship ... where work conditions may be considered hazardous by the minister. The minister is empowered to make regulations to prohibit or place conditions on employment of children under 18 years of age (s.5(3). The Act makes it an offence for a person to employ a child in contravention of these provisions as well as to procure a child for employment in contravention of these provisions. (s.5(7))

Consent: S. 6 of the Act prohibits forced labour. Under s.6(2) forced labour is defined to include bonded labour or any work exacted from a person under threat of penalty. It should be noted that the Act excludes certain types of labour from forced labour category in which case it reproduces the position under the Employment Ordinance s.122. Thus work exacted under the National Defence Act, work exacted in consequence of conviction in a court of law, work exacted in emergency and minor communal works are excepted from the category of forced labour. The Act adds a new category to be excluded namely work that forms part of the normal civic obligations of citizen of the URT (s.6(2)(b)).

WRITTEN AND ORAL CONTRACTS OF EMPLOYMENT

Written

The normal English interpretation of the word means reduced into writing. However, the phrase “written contract of service,” it should be noted, has a technical meaning under the Employment Ordinance. The Ordinance defines a written contract of service as *a contract which under the provisions of part V of the Ordinance is required to be made in writing*. This brings us to the following question: What are the types of contracts of service that are required to be in writing?

Section 42 of Employment Ordinance mentions the contracts of service which are required to be made in writing. These include:-

1. A contract which is made for a period of or exceeding 6 months or a number of working days equivalent to 6 months.
2. A contract which stipulate conditions of employment which differ materially from those customary in the district of employment for similar work.
3. The foreign contract of service: This is defined by cap 366 as a contract of service made within the territory (Tanganyika) and to be performed wholly or partially outside the territory. And any contract of service with the foreign state.
4. A contract which is made between a recruiter, whether on his own behalf or on behalf of some other person, and an employee who is recruited.

Note:

- a) This section was enacted to cover migrant workers who came on contracts.¹⁰ It is therefore argued that written contracts dealt mainly with long distance migrant labour and foreign contracts of service while oral contracts referred to all contracts of service other than written contracts.¹¹
- b) The fourth category of contracts is no longer in existent. Although recruitment in practice came to an end around 1965, this provision continued to be on the statute book until 1969¹² when they were repealed and recruitment (whether by an employer or by a professional recruiter) was made illegal.

Oral contract

Like most contracts (with exception of hire purchase, insurance, share transfer, transfer of interests in land and contracts of guarantee), contracts of employment are just as binding if made orally as if every term is set out in writing.¹³ The

¹⁰ Shivji, Op. Cit. p.121

¹¹ Shivji, Op. Cit. p.125

¹² See Act no. 5 of 1969, s. 2

¹³ Janner, G. Op. Cit., p.3

Ordinance doesn't tell us much about the concept of oral contracts of service. However, the Ordinance defines the oral contract of service as any contract of service other than a written contract. This is rather a non-definitive definition. From this definition therefore it can be correctly inferred that the oral contract of service is a contract which is not the type stipulated for under section 42. (Refer to above categories of written contracts of service).

It should not be overemphasized that the distinctions between oral and written contracts of service are very important under the Ordinance. This is because the Employment Ordinance is divided into 2 main parts, one governing written contracts of service and the other governing oral contracts of service. Conversely, if a contract is supposed to be in a written form but it was made orally *in ignorance of the law*, the contract is valid as a written contract.

To Employ:

The Employment Ordinance defines the term to employ as *to use as an employer the service of any person under a contract of service*. Thus the services must relate to the contract of service. A condition precedent in employing a person is a contract of service. A contract for service doesn't amount to employment. A person using the service under a contract for service is not an employer and likewise a person performing the service is not an employee but an independent Contractor.

Employee:

The Employment Ordinance defines an employee as any person who has entered into or work under a contract of service with an employer whether by way of manual labour, Clerical work or otherwise and whether the contract is express or is oral or in writing.

The Execution Of Task Or Piecework Or Journey

This relate to the type of contract which is determined not on the basis of time but on a basis of task, piecework or journey. Here wages are calculated on the basis of the amount of work done. The contract period is immaterial in determining the wages to be paid to the employee.

There is no definition for the term *contract for task* in the Employment Ordinance but there is a definition for the term *task*. Task is defined as such amount of work as in any area which is customarily performed in the trade, industry, occupation or undertaking concerned in an ordinary working day. Historically, contracts for task relate to a period during which employees were recruited elsewhere to work in another place. Migrant Labour system during colonial times used this system in plantations. Eg. The sisal plantations and cotton plantations used to be worked by migrant labourers. However the idea of task is still applicable to date.

The Employment Ordinance also does not define the term ***contract for piece work*** but there is a definition for ***piece work***. ***Piece work is defined as any work the pay for which is estimated by the amount of work performed irrespective of the time occupied in its performance.***

Again, the Employment Ordinance is silent on what journey is. Examples of this type are to date, the tourist business, mountain climbing etc. The escoters / porters and safari business carriers enter into a contract for journey.

Position under the New Labour Legislation

The Employment and Labour Relations Act does not define the terms *contract*, *contract of service*, *employ* or *employment*. It defines an employee as an individual who has entered into a contract of employment or has entered into

any other contract under which he undertakes to work personally for the other party to the contract where the other party is not a client or customer of any profession, business or undertaking carried on by the individual. Under s.98(3) the minister for labour may also deem a person as an employee. The employer is defined to as any person who employs an employee. Thus, the rules of determining whether a person is an employee or a self employee/independent contractor remain the same.

Under the Employment and Labour Relations Act, 2004, the issue of form of contract of employment is dealt with under part III which deals with employment standards. Here it seems that the employment contract can either be written or oral. However under s.14(2) there is a mandatory requirement that the contract for employment which is to be performed outside the URT shall be in writing.

Under s. 15 it is a mandatory requirement that an employer shall supply an employee with the written statement of particulars at the commencement of employment. The particulars to be included are name, age, permanent address and sex of the employee, place of recruitment, job description, date of commencement, form and duration of the contract, place of work, hours of work, remuneration, method of its calculation, details of any benefit or payment in kind and any other prescribed matter. This statement may not be supplied to the employee if these matters are provided for in the written contract.

The particular employer is supposed to keep the written statement of particulars for a period of 5 years after the termination of the contract of employment (s.15(5) Employment and Labour Relations Act). It should be borne in mind that the particulars of the statement are more or less the same as the provisions of s. 35 of Employment Ordinance as repealed and replaced by the Security of

Employment Act 1964 which represents the record of oral contracts. But unlike the record of oral contracts the written statement of particulars also apply to written contracts unless the same is provided for in the written contract.

The common argument about whether there exists a difference between oral and written contracts may not be so much sound since the Act does not address itself into defining what a written contract is or what an oral contract is and neither is it divided into two parts like the Employment Ordinance, Cap. 366. The Act mentions about a contract of employment exercisable outside the URT to be in writing but talks nothing about the other former categories under the Employment Ordinance s. 42.

Any Period Or Number Of Days To Be Worked

The expression refers to what is known as a contract period. The expression assumes that a contract of service is made for a particular period namely the contract period. The Common Law recognises two principal methods of defining the duration of employment. The first one is **by the setting of a fixed term** and the other is **by provision for determination by notice of a given length**.¹⁴ It should be understood that under the Common Law duration of employment is a matter which the employer will normally have determined by express stipulations and where this is not the case, the Common Law looks to employment practice to determine whether the employment concerned should be viewed as of the fixed term type or not, or to determine the appropriate length of notice to be given.

The Employment Ordinance defines contract period as *a period of time or number of days or hours to be worked for which expressly or by implication a*

¹⁴ Davies, P. Labour Law: Text and Materials, London, Weidenfeld and Nicholson, 1979, p. 329

contract of service is made. Here one can see that the provision has permitted both express and implied contract period. It is express where there are stipulations on the contract period and it is implied where there are no express stipulations.

The contract period can be computed on an hourly, daily, weekly, fortnightly, monthly or even yearly basis and more. Ordinarily, the contract period is determined by reference to the time at which wages are calculated.

Presumptions as to Contract Period in Contracts for Task, Piecework and Journey

Here the time expended by the employee is irrelevant but what is relevant is the amount of work done.¹⁵ Originally this was section 4 but through the 1964 (The Security of Employment Act) amendment the section was repealed and replaced by section 34 which provides that:-

“Contracts for task, piece work or journey shall have effect as if they were and shall for all purposes be deemed to be, contract for service for the performance of work of the kind envisaged under such contracts or for a period of time which, the absence of any agreement between the parties for a lesser period be deemed to be monthly contracts.”

Explanation:

The contract period for a contract for task, piecework, or journey is deemed to be a month. The provisions of this section do not however prevent the parties (employer and employee) from concluding an agreement for a lesser period. Ie. A period less than a month. This means that the presumption for a monthly contract is not absolute it can be displaced by an agreement to the contrary. Furthermore, although the law presumes contracts for task, piecework and journey to be monthly contracts, it does not prevent the calculation of wages

¹⁵ Section 34 of the Employment Ordinance.

according to piece rates or work performed. To this effect therefore, the remuneration under these contracts is not affected by the presumption as to monthly contracts.

Section 34(3)Employment Ordinance has one exception to the presumption as to monthly contracts i.e. the presumption does not apply to **CASUAL Employees**. Casual employees are defined under section 2 of the employment ordinance as *any employee the terms of whose engagement provide for his payment at the end of each day and who is not engaged for a longer period than 24 hours at a time*.

In the definition of casual employee there are two ingredients which apply cumulatively:

- a) Time of payment
- b) Contract period

Time of Payment

A casual employee is usually paid at the end of each day.

Contract Period

The contract period does not exceed 24 hours at any given time

NB: All the two ingredients must be present in order for a person to infer casual employment.

Conversely, a person who receives payment at the end of each day will not be a casual employee if the contract period exceeds 24 hours.

Contract Period Under the New Labour Legislation

The Employment and Labour Relations Act, 2004 provides for three types of employment contracts namely:

- a) contracts for an unspecified period of time,
- b) contracts for a specified period of time for professional and managerial cadre
- c) contracts for a specific task (see s. 14)

CONTRACT FOR SERVICE AND CONTRACT OF SERVICE

The determination of whether an individual is an employee or a contractor is a question of law for the courts rather than giving the sole reliance on the description of the contract given by the parties. There are a number of tests which are used to determine whether a particular person is serving under a contract of service or a contract for service.¹⁶ The tests include control test, organisation test and multiple/mixed/economic reality test.

1.Control Test:

This is an old test. It dates back to the 19th C. The test evolved under circumstances in which industrialization was being fulfilled. Under this test the in order to recognize that there exists a contract of service or a contract for service the following question is asked.

“Whether the Employer controls not only what a person does but also the manner of doing it.”¹⁷

If the answer is yes, then there is an existence of a contract of service. Otherwise the contract is taken to be a contract for service. However, this test is suitable to only certain categories of employees e.g. House-employees, agricultural workers, clerks etc. These are employees whose employments do not require highly specialized skills. In these circumstances, the employer provides the tools of work. For the most specialized skills the control test is insufficient. After the industrial revolution the control test failed to operate since most of the services

¹⁶ See Kahn-Frond, O. “Servants and independent contractors.” 14 Modern Law Review. P. 504.

¹⁷ See Rideout, R., *Principles of Labour Law*, 4th edn. London, Sweet & Maxwell, 1983, p. 4

were more technical. Therefore the employer could not dictate the manner of performing that service. E.g. A surgeon, Pilot, Architect. In fact the test became irrelevant to all professionals. This is logical because it is not practicable for someone to employ a professional and dictate to him how to perform his duty.

2. Organisation Test:

This is sometimes known as integration test. This test developed later after the control test. Under this test the question for determining whether there is an existence of a contract of service or a contract for service is:

“Whether the person is an integral part of a given organisation in which he works.”¹⁸

If the answer is yes then the law assumes that there is a contract of service. If the answer is negative then there is a contract for service. This is a test which has brought many professionals to serve under a contract of service. A good reference is found in the case of *Cassidy V. Ministry of Health*¹⁹

In this case Denning, L.J. (as he then was) argued as follows:

“The hospital authority is liable for the negligence of professional men employed by the authority under contract for services as well as under contracts of service. The authority owes a to give proper treatment –medical, surgical, nursing and the like and though it may delegate the performance of that duty to those who are not its servants, it remains liable if that duty is improperly or inadequately performed by its delegates.”

In considering a distinction to be drawn between a contract of service and a contract for service Lord Somarrel, referred to **Simmons V. Health Laurendly Co.** in which it was argued that a servant is a subject to the command of his master as to the manner in which he shall do his work. He quoted Hilbery J. in that case and said:

¹⁸ Ibid. p. 6

¹⁹ (1951)2 KB 343

“ In a contract for service the master can order or require what is to be done while in a contract of service he can not only order or require what is to be done but how it shall be done...”

He proceeded,

“with respect I think that in the first case, the word master is inappropriate and the later case would I think, if applied in the ordinary meaning of the words exclude many cases where the relationship of master and servant clearly exist. To take the example given by Mackinnon L.J. in Gould’s case of a certified master of a ship: the owner can of course tell him where to go but not how to navigate.”

In the case of *Rosen V. Queen*²⁰ the organisation test was used to determine whether a university professor who used to lecture in three universities was serving under a contract for service or a contract of service. This was important for income tax purposes. It was argued by the professor that he was an independent contractor. This submission was dismissed by the court on the ground that he was doing what any university professor would do and so he was serving under a contract of service because what he did formed an integral part of the business of the university.

In *Gould V. Minister of National Insurance and Another*²¹ it was held that it is easy to say that this is a contract of service and this is a contract for service but there are cases in between the two extremes where it is not easy to draw a line.

“... It is clear that the real question is one of degree of control exercised by the person employing and this ... means not only the amount of control but the nature of that control and the direction in which it is exercised. In this case Lord Thakerton quoted from Lord Justice Clerk the indicia of the contract of service. These are:-

a) the master’s power of selecting his employees,

²⁰ (1976) CTC 462

²¹ (1951) All ER 363

- b) the payment of wages or other remunerations,
- c) the master's right to control the method of doing the work and
- d) the master's right of suspension or dismissal."

Also in Stevenson Jordan and Harrison Ltd. V. Macdonald and Evans²² the court discussed of the distinctions between the two concepts. In this case Sir Raymond Evershed (as he then was) held;

"... the distinctions between a contract of service and a contract for service lies on the following; the case of a man engaged to do some specific work under a considerable measure of control extending not only to the work which he does but to the way in which he does it on the other hand and that of a man engaged more in the capacity of an independent contract or for example a man engaged professionally."

In the same case Denning L.J (as he then was) held as follows:

"... The test applied is whether the employer has the right to control the manner of doing work ... the distinctions between a contract for service and a contract of service can be summarised as follows ... In the one case the master can order or require what is to be done while in the other case he cannot only order or require what is to be done but how it shall be done ...referring to Cassidy's case he proceeded ... **Under the contract of service, a man is employed as a part of the business whereas, under a contract for service his work although done, for the business is not integrated into it but only an accessory to it.**"

3. Multiple/pragmatic/mixed/economic reality test:

This test is a response to the inadequacies of the 2 foregoing tests ie. control and organisational test. It is called pragmatic because it is not based on rigid doctrines and also it is practical because it calls the court to consider all circumstances in totality and infer whether there is a contract of service. It is multiple because it draws its conclusion from multiplicity of factors. Thus some scholars refers to this test as multiple factor test.²³

²² (1952) 1 TLR 101.

²³ Rideout, R., *Op. Cit.* p.7

In order to draw a conclusion whether there is a contract of service or a contract for service the answers to the following indicators are important: -

1. Whether the person performing the services in a given concern is doing so in his own account.
2. Whether there is power to hire and fire the employee
3. Whether there is a direct payment of some form of remuneration. This indicator is open to criticisms because no service is rendered freely so it seems to be inadequate.
4. Whether there are any deductions made on remuneration.

The case of *D.P.P. V. Eliatosha Mosha and another*²⁴ explains this point more clearly. In this case the respondents were charged with various offences under the Employment Ordinance, The Regulation of Wages and Terms of Employment Ordinance and the Workmen's Compensation Ordinance. They were acquitted in the lower court and the High court. The charges were premised on assumptions that the respondents were employers who committed offences under the above named ordinances. They were alleged to have employed someone to drive a taxi but they didnt prepare as the law required a proper contract of service. They didnt keep records of wages, they did not ensure themselves in respect of liability arising under the workmens compensation ordinance and stating the minimum wage. The taxi Driver would receive a commission on presentation of he income he would have collected. The respondents argued that there was no contract if service and the issue was whether there was a relationship of employer and employee. Unfortunately there was no time to have the court of appeal of Tanzania to make an investigation to positively determine the liability.

However the court made the following obiter:-

²⁴ (1984) TLR 28; see also *Market Investigation Ltd. V. Minister of social security* (1969) 2WLR 1

“If the prosecution had proved that the respondent controlled the business for which the taxi driver was employed then there would have been a contract of service.”

The court tells us that the control test is still very much part of the law in Tanzania and the obiter is an indication that one could cite this in future as an authority in a similar case.

Conclusively it can be argued that there is no single test to infer the contract of service.

Legal and Economic Implications of contracts of service and contracts for service

- 1. Liability:** In a contract of service the employer may be vicariously liable for the wrongful acts of employees committed during the course of their employment. While in a contract for service he may not be liable for the wrongful acts of contractors he employs other than in exceptional cases.
- 2. Health and Safety:** In a contract of service there is a high standard of care owed by the employer both under the statutory and the common law with regard to the safety and health of his employees. While in a contract for service there is a lesser standard of duty of care in relation to health and safety of his contracting parties.
- 3. Statutory employment rights:** In a contract of service there is a large number of individual employment rights conferred on employees by statute which generally arise after a period of service. Eg. Redundancy payments, right to belong to a trade union, security of employment, maternity and other leaves etc. While in contracts for service, the contractors are excluded from the mass of individual employment rights conferred by statute.

4. **Income Tax:** In a contract of service the income tax payable by an employee is deducted at source by the employer under the pay as you earn scheme. While in a contract for employment the income tax of a self employed person is not paid by the employer but by the taxpayer himself.
5. **Welfare benefits:** In a contract of service there is normally a duty under the social security laws to both the employer and employee to contribute to the social security funds for such benefits like retirement pension etc. In a contract for service a self employed person is individually responsible for his welfare if he wishes and he has limited right to claim welfare benefits, eg. statutory sick pay

LECTURE TWO

CONTENTS OF THE EMPLOYMENT CONTRACT

The employment contract contains terms of employment which in effect are mutual promises of the parties giving rise to rights and duties to the parties thereto. It is important to note that rights and duties of parties may come into existence through express terms (this include such terms as may be incorporated in a contract by a collective agreement) or implied terms. On the issue of express terms it is the parties who determine what should be part and what

should not be part of their contract. The law through implied terms provides for mandatory terms which must be read in any contract of employment. Thus, while the express terms provides for the express rights and duties, the implied terms provide for the implied rights and duties.

Express Rights and Duties

The express rights and duties in a contract of employment are provided by the parties expressly in the contract of employment. Worth remembering is the fact that express rights and duties may either be written or oral depending on the type of the contract. Matters such as **leave, salary, overtime, hours of work, job description, job title, holidays, sick pay, pension, notice, confidentiality, restraints, disciplinary and grievance procedure**, are covered by the express terms. In most cases these contents are provided in standard form to the employees with little room for negotiation.

However, the various sources of express terms could include a formal contract, a letter of appointment, a statutory statement of the main terms and conditions, oral statements made prior to the contract and even the job advertisement.

Note:

1. It should be noted that express statements become part of the contract only if they were made prior to the contract and post express statement are ineffective unless they constitute a mutual agreement to vary the original terms.
2. The express terms of employment may be varied by mutual agreement between employer and employee or between the employer and a trade union by means of collective bargaining.

IMPLIED RIGHTS AND DUTIES

IMPLIED RIGHTS

Rights of The Parties to the Contract of Employment

The rights of the parties to the contract of employment are provided for in the contracts of employment as well as in the employment laws. These rights include leaves, remuneration, hours of work, working days, repatriation, retirement benefits, medical treatments etc

ANNUAL LEAVES, PUBLIC HOLIDAYS, MATERNITY LEAVE AND WEEKLY REST DAYS.

This is dealt with under sections 25 A, B, C and D of the Employment Ordinance as amended by Acts no. 1 and 20 of 1975 respectively.

ANNUAL LEAVE

Section 25A deals with the annual leaves. It states that:-

‘once in every calendar year every employee shall be entitled to a holiday with pay’

This brings up the concept of annual leave in a contract of service. This means that the holiday comes at the expense of the employer. The employee shall take the annual leave at the rate of 7 days in respect of each period of 3 month’s service. S.25A(1)(a)

When shall this leave be taken?

This leave may be taken at any time during the calendar year as the employee may agree with the employer. Therefore, as regards the time when the annual leave should be taken, it depends on the agreement between the employer and

employee. It should be noted that it is the employee who must ask for his leave. If the employee does not ask for his leave he forfeits it.

Public Holidays

The Public Holidays Ordinance Cap. 35 empowers the President to proclaim public holidays. The employees are not required to work on a public holiday. Whether a certain day is a Public Holiday or not is a matter of law. However, the contractual obligations & duties remain unaffected.

Paragraph 25A(1)(b) governs the holidays with pay. This is an addition to annual leave. An employee shall be entitled to a day's holiday with full pay at the expense of the employer during public holiday. An employee may be required to work on a Public Holiday and that is not unlawful. But the law says that when the employee works for the employer in a public holiday he will be entitled to a day's holiday at full pay at the expense of the employer on some other day that will otherwise be a day of work. However, this is not absolute for there are exceptions. Thus, where an employer pays to the employee who work on a Public Holiday at double the wage payable for work of a day which is not a public holiday such employee shall not be entitled to a day's holiday with full pay in lieu of the public holiday.

Note:

- (a) The law sets the minimum days for the annual leave of the employee. i.e. 28 days. This is just a minimum. The employer can give more but not less.
- (b) Certain types of employees are not entitled to annual leave e.g. Casual employees.
- (c) **Full pay:** is defined under section 25C as the normal remuneration together with remuneration in kind or the cash equivalent thereof and any

cost of living allowance which may be payable to the employee from time to time.

(d) *Bonus* is not part of the definition of full pay. It is rather a payment by the employer to his employees *ex-gratia* or a token of appreciation. The employer cannot be forced to give bonus. But it must be understood that sometimes bonus may be included in the contract and in this sense it is not *ex-gratia* and so it can be claimed by the employee.

MATERNITY LEAVE

Under section 25B a female employee is entitled to 84 days maternity leave. In order to be able to ask for maternity leave, the medical officer must have given a certificate of expectation of giving birth.

When may this leave be taken?

This leave may be taken at any time between the commencement of the 7th month of the pregnancy and the days following determination of pregnancy by delivery. This means that the leave may be taken prior to delivery. Maternity leave may not be taken under certain circumstances. Thus, to be entitled to a maternity leave the female employee must not have taken a maternity leave within the last 3 years immediately within the application for the leave which she is applying for.

Why such a restriction?

It can be argued that, the legislature is interested in maintaining the female labour flowing. It appreciates that at certain time a female employee becomes pregnant but it has to fall within the law, if it is so close as say pregnant after every year then she will not be entitled to maternity leave.

What if pregnancy results in an abortion/ the child dies?

The law says that the female employee shall still be entitled to the maternity leave notwithstanding the fact that she had taken a leave within the last three years.

Note: the maternity leave comes with full pay. Maternity pay is an aspect of security of earnings. Also there is nothing to prevent the employer from granting a female employee more favourable terms in respect of maternity leave, say he can allow the female employee a maternity leave of more than 84 days.

WEEKLY REST DAYS

This is covered by section 25D of the Ordinance. The provision states that:-

“An employee shall not be required to work for more than 6 consecutive days without a day’s rest.”

The weekly rest days will be taken on such a day as shall be agreed upon by the parties. This provision must be read together with regulation 8 of the Regulations of Wages and Terms Employment Orders of a particular year. This is a subsidiary legislation made under Cap.300 (Regulation of Wages and Terms of Employment Ordinance). The regulations provides that where an employee works on the statutory weekly rest days he shall be paid in respect of every hour or part of an hour during which he works at a rate which is twice his hourly wage in addition to his monthly wage.

Position Under the ELRA

The new labour legislation have maintained and improved the rights of an employee in relation to leaves and holidays. To start with, the ELRA, 2004 provides for hours of work, time of work, break in working day, overtime, daily and weekly rest periods and public holidays.

Annual Leave: s. 31 provides that an employer shall grant an employee at least 28 consecutive days leave in respect of each leave cycle and such leave shall be inclusive of any public holiday that may fall within the period of the leave. During annual leave, the employer shall not require or permit an employee to work for him (s.31(6)). Leave cycle in respect to annual leave means a period of 12 months consecutive employment with an employer following the employee's commencement of employment or the completion of the last 12 months leave cycle (s. 30). But the employer and employee may agree to a standard leave cycle provided that it shall not prejudice the paid leave afore said. As regards the number of days in respect of the annual leave, they may be reduced by the number of days during the leave cycle which, at the request of the employee, the employer granted that employee paid occasional leave. (s. 31(2)).

The annual leave may be taken at the time which may be determined by the employer provided that such a leave **shall not be taken later than six months after the end of the leave cycle or twelve months after the end of the leave cycle if the employee has consented and the extension is justified by the operational requirements of the employer** (s.31 (3)).

Payment: An employer shall pay an employee the remuneration the employee would have been paid had he worked during the leave period before the commencement of the leave (s.31(4)).

The employer is prohibited from paying an employee an amount of money in substitution for the annual leave to which that employee is entitled whether or not the employee agrees to such payment (s. 31(7)). But this provision is subject to prorata payment which is made under s. 31(8). Under this section, the employer shall pay an employee a prorata amount for annual leave accrued, at

the termination of employment or at the expiry of each season in respect of an employee employed on seasonal basis (s. 31(8)). Such a prorata amount of annual leave shall not be availed to an employee who has not taken the leave within the periods provided by the law (s.31(9)). The prorata amount of annual leave shall be calculated at the rate of one day's wage for every 13 days the employee worked or was entitled to work (s.31(10)). This shows that under the ELRA, 2004 annual leave cannot be sacrificed by substituting it with pay. Also there is an additional benefit namely a prorata amount of annual leave which is not found in the old statutes.

Sick leave: s. 32 provides that an employee shall be entitled to sick leave for at least 126 days. The sick leave is a leave with pay but there is a modification as to the amount to be paid. The amount paid on sick leave is calculated as follows:

- a) the first 63 days are paid at full wages
- b)** the second 63 days are paid at half wages

But there are restrictions which apply to payment during sick leave. For the employee to be entitled to paid sick leave he must produce a medical certificate and he must not be entitled to paid sick leave under any law, fund or collective agreement. The rationale for the first restriction is to make sure that the employer pays only in genuine cases while the rationale for the second restriction is to prevent a double payment to the employee in respect of the same subject matter.

Maternity Benefit: S. 33 provides for maternity leave. The employee is required to give notice of intention to take maternity leave supported by a medical certificate at least 3 months prior to the date of birth. The leave may commence at any time from four weeks before the expected date of confinement or on an earlier date if a medical practitioner certifies it as necessary for the health of the employee or that of her unborn child (s.33(2)).

The duration of the leave is 84 days or 100 days in case of giving birth to more than one child (s.33(6)). It should be noted that the leave cycle in relation to maternity is 36 months consecutive from an employee's commencement of employment or the completion of the last 36 months leave cycle (s.30). This means an employee shall not be granted maternity leave under the terms of this Act if the cycle is not complete. But an employee is entitled to additional 84 days paid maternity leave within the leave cycle if the child dies within a year of birth (s.33(7)). Moreover, an employer is only obliged to grant paid leave for 4 terms of maternity leave to an employee in terms of this law (s.33(8)).

The law also protects the pregnant and nursing women in many other ways. For instance it is provided that no employer shall require a pregnant or nursing woman to perform work which is hazardous to her health or the health of the child (s.33(5)). Thus, where an employee performs work that is hazardous to her health or that of her child, her employer shall offer her suitable alternative employment, if practicable, on terms which are not less favourable than those she is serving (s.33(9)). Also no employee shall work within 6 weeks of the birth unless a medical practitioner certifies that she is fit to do so (s.33(3)). Again where an employee is breast-feeding a child, the employer shall allow the employee to feed the child during working hours up to a maximum of two hours per day (s. 33(10)).

Paternity Leave: S. 34 provides for the paternity leave together with other forms of leaves. Paternity leave of at least 3 days is granted to the male employees on the conditions that such leave is taken within 7 days of the birth of a child and the employee is the father of the child (s.34(1)). Before paying, the employer may require reasonable proof of the event of birth. The three days referred to here is the total number of days to which the employee is entitled

irrespective of how many of the employees children are born within the leave cycle.

Other Leaves: the employee is entitled during any leave cycle to at least four days paid leave for the sickness or death of the employee's child or the death of the employee's spouse, parent, grand parent, grand child or sibling (s.34(1)(b). The four days referred here is irrespective of how many events prescribed here occur within the leave cycle, but the employee may take more days as may be authorised by the employer for the event provided that such extra days will be without pay.(s.34(3)(b)

Public Holidays: Section 25 provides that if an employee works on a public holiday specified in the Public Holidays Ordinance, the employer shall pay the employee double the employee's basic wage for each hour worked on that day.

Note:

1. the provisions elaborated above does not apply to employees who manage other employees on behalf of employer and who report directly to a senior management employee (s.17)
2. the provisions concerning maximum hours of work, maximum overtime, break in working day, daily rest period and public holiday shall not apply in an emergency which cannot be performed by employees during their ordinary hours of work (17(2)

Secondly, the ELRA, 2004 provides for different kinds of leaves. Under s.29 it is provided that employees with less than six months service shall not be entitled to paid leave. Thus as a precondition to a paid leave under the Act, one must have served not less than six month to be entitled to a paid leave. But it should be borne in mind that a seasonal employee is entitled to paid leave as well as an employee who has worked for less than six months provided that he has worked

for the same employer more than once in a year and the total period worked for in that year exceeds six months in that year (s. 29(2)). Moreover, paid leave is defined to mean any leave under part III subpart D of the ELRA and calculated on an employee's basic wage.

Daily and Weekly rest periods: An employer shall allow an employee to have a daily rest period of at least 12 hours between ending and recommencing work. Also he shall allow an employee a weekly rest period of at least 24 hours between the last ordinary working day in the week and the first ordinary working day in the next week. But a daily rest period may be reduced to 8 hours if there is a written agreement and the ordinary working hours are interrupted by an interval of at least three hours or the employee lives on the premises of the workplace. (s. 24(2)). A weekly rest period may by written agreement provide for a rest period of at least 60 hours every two weeks, or a reduced weekly rest period by 8 hours if rest period in the following week is extended equivalently (s. 24(3)). An employee may only work during the weekly rest period if he has agreed to do so provided that the employer shall pay the employee the double hourly basic wage for each hour worked during the period. (s. 24(4)).

Overtime: Under s. 19 the employer is prohibited from requiring or permitting an employee to work more than 12 hours in any day. The law fixes the maximum number of ordinary days or hours that an employee may be permitted or required to work as being; six days in a week, 45 hours in any week, and nine hours in any day. In this respect, the overtimes are also limited by this law in the sense that, no employer is permitted to require or permit an employee to work overtime except in accordance with an agreement and the overtime hours are limited to not more than 50 in any four week cycle. The remuneration for overtime payment is also provided for in which case, an employer is prohibited

from paying less than one and one half times the employee's basic wage for any overtime worked.

Night Work: Section 20 also provides for restrictions as to night work. Note that night time is defined to mean hours after 20hrs and before 6hours. During this time it is prohibited that the employer should not allow pregnant employees, mothers(for period of two months after the date of birth or before that date if the mother requests to work and produces medical certificate that her baby's health shall not be endangered), children under 18 years of age and an employee who is medically certified as being unfit for night work, to work at night. The remuneration at night work is also provided for in which the employer is required to pay an employee at least 5% of that employee's basic wage for each hour worked at night and if the hours worked are overtime hours, the 5% to be calculated on the employee's overtime rate.

Compressed Work Week: Section 21 provides for the compressed working week. In this case a written agreement must be signed by the employer and employee to require or permit an employee to work up to 12 hours in a day inclusive of any meal interval, without receiving overtime pay. An agreement under this provision shall not require or permit an employee to work more than five days in a week or more than 45 hours in a week or more than 10 hours overtime in a week.

Break in working day: Section 23 provides for break in a working day in which an employee who works for 5 hours continuously is granted a break of at least 60 minutes. But the employer may require an employee to work during a break only if the work cannot be left unattended or cannot be performed by another employee. The employer is not obliged to pay the employee during the break

period unless the employee is required to work or to be available during the break.

Rights in Case of Relocation

What happens if the employer changes the residence?

Under section 18 of the Employment Ordinance, the employee is not bound to continue to perform his services under the contract of service when his employer relocates. The residence meant here is the place where the business is performed. The place where the firm is located. This rule is also not absolute for there are exceptions to it. These exceptions are:-

- 1) Where there is consent:- If where the employee has consented to continue to render the service to his employer after relocation then he will be bound to perform the contract of service after relocation. Where the said employee is a minor, the consent must come from his parent or the guardian *ad litem*. It is interesting to note that the consent needed here need not be expressed but it will be deemed to be there when the employee has been for a period of 14 days in a place where his employer has relocated the firm without any complain or objection.
- 2) Where there is an agreement:- If the employer and his employee enter into an agreement to continue to perform services then the employee will be bound to perform the contract of service even after relocation. This agreement can either be express or implied. It is not clear how an implied agreement can be entered into since it is provided that the agreement should come prior to relocation.

It should be noted that section 18 deals with relocation within the country. The issue of relocation outside the country is dealt with under section 19. Under section 19 no employee is bound to accompany his employer out of the territory.

However, where there is consent on the part of an employee then he will be bound to accompany his employer.

What is the rationale of the two sections? (i.e. ss.18 and 19)

The rationale is to protect the employee who may be victimised by employers who relocate.

Rights in case of Imprisonment Or Detention Of Employee

Whether the employer is bound to pay wages during imprisonment or lawful detention?

Under section 25 of the Ordinance as amended by the Security of Employment Act states that,

“No wages will be paid to any employee in respect to any period during which the employee is imprisoned under any law or otherwise detained in lawful custody”

The reason that wages are not payable during the period of imprisonment or other lawful custody is that there is a failure of consideration on the part of employee. There is a failure of an employee to perform services under the contract of service.

NB: Imprisonment or lawful custody is not in itself on ground of termination of contract as far as section 25 is concerned. If the employee reports back to work after imprisonment the employer cannot pay him on the time of imprisonment. So the employee can proceed with the contract. It is not safe for the employer to rely on imprisonment as a reason to terminate the contract under s.25.

Other Rights Under the ELRA (not Operational)

Fundamental Rights

PART II of the ELRA, 2004 deals with the fundamental rights and protections.

Prohibition against discrimination

The ELRA prohibits discrimination in the workplace (s.7)

- Employers are required to promote equal opportunity and to eliminate discrimination in workplace.
- It is further provided that the Labour Commissioner may require an employer to develop a plan to promote equal opportunity and to eliminate discrimination in workplace and register the same with the commissioner.
- The type of discrimination which is prohibited includes direct and indirect discrimination against employee on the grounds of colour, race, nationality, tribe of origin, social origin, sex, gender, religion, political opinion, HIV/Aids etc (s.7(4))
- It is further provided that in proceedings where an employee alleges discrimination, it is the duty of the employer to prove that: (1) discrimination did not take place as alleged or (2) the discrimination does not fall under those categories prohibited by law

Note: An employee under this provision, include an applicant for employment.

The ELRA also prohibits discrimination by a trade union or employer's association of its members in admission, representation and termination of membership on the grounds of discrimination afore mentioned. This applies to collective agreements and employment policy and practice.

Right to freedom of association

Every employee has right to form or join trade union and to participate in lawful activities of the trade union (s. 9) However, this right is subject to qualification in certain kinds of employment. The employees who have a

restricted right are magistrates, prosecutors and senior management employees.

For magistrates they may only form or join trade unions that restrict their membership to judicial officers. The prosecutors on the other hand may only form or join trade unions that restrict their membership to prosecutors or other court officials. The senior management employees may not belong to a trade union that represents the non-senior management employees of the employer.

The right to association is also available to employers. The employers have a right to form or join employer's association and to participate in the lawful activities of such associations (s.10).

There are also rights accorded to trade unions and employers association such as right to determine their constitutions, right to plan and organize their administration and lawful activities, right to join and form federations, right to participate in the lawful activities of the federation and right to affiliate and participate in the affairs of any international workers or employees organization or the ILO (s11).

Other rights include the right to severance pay, repatriation, right to strike and lockout, will be discussed in future lectures.

IMPLIED DUTIES

There are necessary terms which are implied in every contract of employment by law. Some of these duties are a result of customs, common law or practice but most of them are a result of statutory law. Lets now consider these implied duties on the side of both the employer and employee.

Implied Duties of the Employer

The duties of employer include but not limited to duty to provide work, duty of mutual respect, duty of confidentiality, duty to indemnity, duty to ensure employee's safety etc.

1. Duty to Provide work

Part III of the Employment Ordinance contains provisions of general application regardless whether the contract of service is oral or written. Section 16 provides that it is the duty of an employer to provide work for the employees. It must be borne in mind that the work provided by an employer must be in accordance with the contract of service. It means that the employer cannot give an excuse for not providing work to his employee so long as the employee is ready to work.

What if the employer does not provide work?

The failure of an employer to provide work to his employee is detrimental to the employer. This is because the employer is supposed to pay the employee's wages at the same rate as if he has actually performed the kind of work that is reserved under the contract of employment. However, it should be understood that this duty is not absolute because there are some circumstances which exempt the employer from liability to pay wages. These include:

- (a) Where the employee has broken his contract of service
- (b) Where the contract of employment is frustrated
- (c) Where the performance of the contract is prevented by force *majeure* or act of God

2. Duty of mutual respect

The employer has the duty to treat his employees with due respect and consideration, mindful of their needs and problems, sympathetic to their problems. This duty arises at the outset of the contract and continues during its performance up to its termination. The employer therefore should not carry on the provocative conducts towards his employees. This duty is so much linked with the discussion on the disciplinary or dismissal policies where it is alleged that the employer has been carrying out himself provocatively.

3. Duty of confidentiality

The employers are duty bound not to disclose any confidential information about their employees to third persons. Thus, the employer cannot disclose a confidential information concerning without the employee's consent. This is because the employer comes into the possession of that information only for the purposes of employment relationship and not for any other purpose.

4. Duty to indemnify

Where an employee reasonably incurs any expense in the performance of his contract ought properly to be met by the employer he should be indemnified by the employer. These include costs of travelling, lodging, etc while in performance of his contract of service. Normally, the employer provides for all these expenses in terms of travel allowance, lodging allowance etc but if it happens that the employer has not provided such allowances, then where the employee will have spent his own money for these he should be reimbursed by the employer. This duty covers even situations where the employee commits a wrongful act, if the wrong was done for the employer's business and was authorised or if the employee was acting under the employer's orders.

5. Duty to ensure employee's safety

The employers have a duty to take reasonable care to ensure the safety of their employees. This duty originates from the Common Law duty for the employer to provide his workers with a safe system of work. It encompasses the obligation of the employer to provide safe plant and appliances, appropriate safety equipment, safe work methods and safe fellow workers. This duty is an aspect of the law of negligence which requires that the activities of one person should not cause injury to others. In the same way the employees are required to cooperate in relation to their own safety otherwise the employer may raise a defence of contributory negligence. However, there are a number of statutory provisions which are aimed at ensuring that employers provide safe working environment.

Implied Duties of the Employee

The implied duties of employee include the duty of faithful service, the duty to obey lawful and reasonable orders, the duty to use skill and care, the duty not to disclose confidential information about employer's business to an unauthorised person (eg. Working for competitor, moon-lighting etc) etc. This part therefore, deals with the implied terms in as far as they give rise to implied duties to an employee.

1. The duty of faithful service

The law requires by implication, the employees to serve their employment faithfully because the relationship between the employer and employee is one of trust and confidence. This duty involves an obligation on the employee to respect confidence, take care of employers property, account for moneys received in the performance of duties and not disrupt the employers business. Thus any attempt by the employee to use his position for undisclosed personal gain, for instance by accepting secret bribes or making secret commission will constitute breach of employment contract.

2. The duty to obey lawful and reasonable orders

The employee is required to submit to the employer's control and this involves obeying reasonable orders. What constitute a reasonable instruction depends upon objective interpretation of the employee's contractual duties both express and implied. If the employee can show that the order was unlawful, he need not obey it. In the same way if the employee can show that the order involves a risk of serious injury or breach of public law, it can be held to be unreasonable even if it is within the scope of an employees duties. A wilful refusal to obey a lawful order will often lead to the termination of employment.

3. The duty to use skill and care

The employee has a duty to perform his work competently, using reasonable skill and care. The employee is obliged to take care of the employer's property. The breach of the duty to use care and skill entitles the employer to claim damages in respect of the negligent performance of the contract. In the same way an employee who negligently allows his employer's property to be stolen or causes it wilful damage breaches his contract and may be liable to dismissal.

LECTURE THREE

TERMINATION OF CONTRACT OF SERVICE

GENERALLY

Termination means the act of bringing a contract of service to an end. It must be understood that this is due to procedures other than disciplinary measures. When a contract is brought to an end through disciplinary measures it is called *dismissal*. Therefore the points of determination here is otherwise than the ones governed by the Security of Employment Act. This is because the Employment Ordinance is not concerned with disciplining the employees but the Security of Employment Act deals with disciplinary matters.

Circumstances which lead leads to termination of contracts generally include the following:-

- I. *Relocation or removal of employer*: This happens where the employee doesn't consent with the relocation. Section 20 of Employment Ordinance provides that the contract of service shall be deemed to have terminated from the date of removal or relocation.

What is the duty of Employer in the event of termination of Employment through removal? Section 20 says that the employer shall pay wages to the employee and other remuneration specified in the contract of employment.

For how long shall the duty attach to the employer? The answer depends on the following:-

- 1) where a notice to termination has been given by the employer, the law says he shall pay wages and remuneration up to the date on which the period of the notice expires.

2) where no notice is given, the employer will be deemed to have obligation to pay wages only up to the actual date of removal. I.e. up to the date he relocates. In that event the contract of service will be terminated by payment of wages in lieu of notice.

II. *Death or Insolvency of the Employer:* The law recognizes that the employer cannot be forced to proceed to pay wages if he is dead or insolvent. Section 21 governs this situation. Also the law assumes that the estate of the deceased employer has no obligation to continue the contract of service. In the case of insolvency the person in charge of insolvency matters has the obligation to continue to pay the employees who were serving in contract with insolvent employer. It should be noted that there cannot be questions of succession in the contract of service. I.e. The successor cannot succeed the contract of employment. **Why?** This is because a contract of service is in the nature of personal contracts. I.e. people saving under a contract of service are considered to be rendering personal services to the employer. Section 21 holds that these types of contracts are too personal to be a subject of succession. The remedy of specific performance is not available in the contract of service or contract of employment.

When does determination take effect in the event of death or insolvency?

The law says that determination takes place one month after the event.

What are the rights of the employee in the event of death or insolvency?

When the contract of service is terminated by reason of death or insolvency, the employee is entitled to all benefits of the contract of Employment up to the expiration of one month. (S.21)

What are the duties of an employee in the event of death or insolvency?

The duty of an employee on the occurrence of either event above mentioned is to perform the services under the contract of service.

Who is to receive the services or benefits of the contract of employment?

In case of death it the widow(er) or the legal representative of the deceased employer as the case may be. In case of insolvency, it is the insolvent employer.

What are the duties of the legal representatives?

Just as the employee has a duty to perform the services during the one month period after the occasion of death or insolvency, the insolvent employer or legal representative as the case may be have a duty to pay wages. Therefore, both parties to a contract of service are bound to perform the various stipulations in the contract up to 1 month following death or insolvency of the employer.

- III *Where the Employer becomes Penurious:* Section 22 deals with a penurious employer or an impoverished employer who cannot pay wages. The law recognizes that there are times in which an employer come under financial constraints as to be unable to pay wages. It must be learnt that the incidence of poverty *per se* does not terminate the contract of service. It is upon the employer to follow specified procedures in-order to terminate the employment. The employer here is required to produce an affidavit to a Labour Commissioner which is sworn before a magistrate testifying to the fact of his inability to pay wages. Furthermore, the employer is required to furnish a statement showing wages owing to his employees.

On receiving the affidavit and the statement, the Labour Commission can issue an order of terminating the contract of Employment. Upon the making of this order the contract of service in question shall be deemed terminated. This means that, during all this period before the order of termination the contract of service continues and it comes to end on the

issue of the order. The determination of a contract it must be understood, shall be without prejudice to any rights of either party which had accrued under the contract. Therefore, the order of termination does not operate retrospectively so as to take away vested rights of the parties.

- IV *Death of the Employee:* Section 24 of the Ordinance provides that the contract of Employment shall be terminable at the election of the employer in the event of death of employee. This is questionable as to whether the employer can choose to leave the contract of service running after the death of the employee because there is an obvious failure of consideration. Therefore under normal circumstances, given the nature of the contract of service, the employer will terminate the contract of service after the death of the employee.

What happens after the death of the employee?

Section 23 provides that in all cases where the death of the employee occurs, the rights which had accrued to him prior to his death shall be exercised by his estate. I.e. his or her heirs or legal representatives are entitled to claim from the employer full wages and other remunerations due to the deceased employee as well as all property belonging to the employee which they are lawfully entitled. It is the duty of the employer to entertain only lawful claims. The heirs or legal representatives can claim whatever is due to them by themselves or through District Commissioner or Labour Officer. They can also use the personal agents such as Power of Attorney or an Advocate to pursue their claim.

When a claim is made the procedure is that the employer is required to pay wages or remuneration and to avail all property belonging to the deceased employee to the District Commissioner or Administrator General for distribution in accordance with the law. The assumption here is that, the District Commissioner or Administrator General already know who is entitled to what.

- V. *Dismissal*: Common law recognises the right of one party to terminate the contract of employment without the consent of the other. Under the Common Law a sufficiently serious breach of contract is regarded a repudiation of contractual obligations, either totally or partially. This ends the contract automatically or entitles the party not in breach to accept the repudiation as terminating the contract.²⁵ In an English case of Turner V. Mason (1845) it was established that termination depended not on any moral or equitable right, but on a strictly contractual approach. Although this right was accorded to both parties to the contract of employment, it was mostly abused by the employer due to the inadequate protection offered by the Common Law to the employees. The common law had left the employee unprotected in two main aspects:**
1. It accorded to the employer an implied right of summary dismissal that employee's chances of successfully challenging a dismissal for cause were slight indeed.
 2. The wrongfully dismissed worker was entitled to so extremely limited a set of remedies that it was hardly worth his while to sue in the courts and he rarely did so unless he was a director of a company who had been granted a fixed term of contract.²⁶

²⁵ Rideout, R. *Rideout Principles of Labour Law*, 4th Edition, London, Sweet & Maxwell, 1983, p.169

²⁶ Davies, P., Op. Cit. explains that the wrongfully dismissed worker faced the prospects of obtaining an award of compensation more or less limited to his remuneration for the period of notice required to terminate his contract, and had no chance of obtaining an order of reinstatement because the doctrines concerning the equitable remedies of specific performance and injunction were rigorously opposed to the positive implementation of employment relationships.

The situation above necessitated the passing of a law in Britain called the Unfair Dismissal Act which reduced the powers of the employers to dismiss summarily.

Therefore from this context it can be observed that the right to terminate a contract of employment without consent of the other party was meant to apply on breach of contractual obligation as a punishment. It is in the same context that the Tanzanian labour law is shaped to view summary dismissal as a punishment to an employee. But it should be noted that the right of an employer to dismiss summarily has been restricted by the provisions of the Employment Ordinance s. 37 as it was amended by the Security of Employment Act of 1964. Therefore the employer can only dismiss an employee within the confines of the law otherwise, a wrongfully dismissed employee will be reinstated or reengaged.

Presumption and termination of Oral Contracts

Oral contracts can simply be referred to as contracts which are not required to be made in writing. They are contracts which are not governed by section 42 of the Ordinance. Generally, the oral contract of service rests upon the following presumptions:-

- 1) *Contract period- what is the contract period of an oral contract of service, how do we determine the length of an oral contract? For how long is it made?*

This presumption is important since these contracts are not in writing so there can be ambiguity as regards contract period. This is also important since when it comes to terminating the contract, the contract period determines the length of notice that should be given.

Section 29 of the Employment Ordinance states that,

“an oral contract shall be deemed to be a contract for the period by reference to which wages are calculated.”

The section gives us the formula for ascertaining the contract period in reference to a contract of service. It is important that to note that it is not the time on which wages are payable which defines a contract period but a contract period is defined by reference to the period at which wages are calculated. If wages are calculated by reference to a week then it is a weekly contract of service. The time of payment is immaterial but the period at which wages are calculated is material.

However the presumption doesn't apply in case of:

- 1) Contracts for task or journey or piece work.
- 2) Where wages are calculated by reference to any period of less than a day.

E.g. An hour, such a contract shall be deemed to be a daily contract. I.e. the shortest contract period in relation to an oral contract is a DAY.

Note: The presumption as to contract period is rebuttable. Thus the parties can by an express agreement agree on the period of the contract. Therefore, the law allows the parties to contract out of s.29.

Presumptions As To New Contract

Section 30 addresses a situation where a weekly, monthly etc. oral contract of service has come to an end but it has not duly been terminated. It addresses the issue of an implied renewal or an automatic renewal of the contract of service.

The section states that:-

“each party to an oral contract for a period not exceeding one month shall, on determination of such contract, be conclusively presumed to have entered into a new oral contract for a further period of the same duration and

subject to the same terms and conditions as those of the contract then terminated.”

The section states that these conditions of the original contract shall continue unless there is an agreement to the contrary. The same section mentions circumstances under which an implied renewal cannot be upheld. These circumstances are:-

- 1) Where the contract is terminated by notice to determinate
- 2) Where the contract is terminated by payment in lieu of notice
- 3) Where the contract is terminated by summary termination for a lawful cause by either party
- 4) Where the contract is terminated pursuant to the circumstances specified under the employment ordinance

Termination Of Oral Contracts

The concept of termination of oral contract of service was discussed in the case of Burka Coffee Estate Ltd. V.The senior Labour Office²⁷ in which Nyalali, Ag. (As he then was) held that,

“the termination of contract of service or employment arises when a contract is brought to an end by the unilateral action of either the employer or the employee concerned...such a unilateral action can be taken by either party with or without notice or payment in lieu of notice to the other party. when such unilateral action is taken by employer it is called a **dismissal** but when the unilateral action is taken by the employee it is called **resignation**. When the employee us dismissed without notice or payment in lieu of notice it is called **summary dismissal**. The

²⁷ (1976)LRT 43

employment ordinance refer to this as summary termination instead of summary dismissal.”

Termination of oral contract by notice is governed by section 31 of Cap.366 as amended by Act 82 of 1962. The section provides that:–

“Either party to the contract may terminate the employment on the expiration of notice given to the other party of his or her intention to do so.”

The contract terminates when the period of the notice expires during the currency of a contract period. This brings us to another issue concerning the length of the notice.

How long is the notice to terminate the contract?

The length of the notice depends on the contract period. Section 31(2) of the Ordinance discusses this issue. It provides that where a contract is for a period of less than a week. E.g. a daily contract or a weekly contract. The length of the notice is 24 hours. So either party can give a notice of 24 hours where it wishes to determinate that type of contract. In A DAILY CONTRACT under which by agreement or custom wages are calculated on daily basis but they are payable at intervals not exceeding 1 month, the length of notice is **14 days**. A contract period of one week or more –weekly contract or a monthly contract, the length of the notice is 30 days.

NB: - the notice is to be given when the contract is still running.

Form Of The Notice

Whether the notice should be oral or written. This issue is answered by Section 31(3) of the Ordinance. Thus the notice may either be verbal or written. The

notice can be given at any time. The subsection also addresses the problem of time when the notice starts to run as against both parties. The time of the notice should start running is the day when the notice is given and it is inclusive of the day of delivery.

Rights Of The Employee When Notice Is Given

Section 31(4) provides that where notice is given there shall be paid to the employee on the expiry of the notice all wages and benefits due to him. After being given the notice the employee continues to work, since it is given when the contract is running and on expiry of it the employee is entitled to the wage of the month.

Termination By Payment In Lieu Of Notice

This is covered by section 32 of the Ordinance. This is an alternative to termination by notice. It is upon the discretion of the party wishing to terminate to choose the way to terminate the contract.

What does the payment consist of? What is the criterion used to determine the quantum of the amount to be paid in lieu of notice?

The payment consists of a sum equal to all wages and other benefits that would have been due to the employee. In the event of termination by payment, the contract terminates upon the payment being effected. E.g. If the employer pays you on the 1st of March he will have paid you in advance so the employee will have to work for that amount. Since wages are paid in arrears this is an exception.

If the employer offers to terminate by payment in lieu of notice and the employee refuses, the employer is relieved for he is considered to have furnished his obligation.

In *Burka Coffee Estate's* case (supra), it was held that an offer by employer to pay in lieu of notice which is rejected by the employee discharges the employer from liability for wrongful dismissal or termination. The same apply to refusal to notice.

Termination of a Written Contract

This is subject to S. 51 c provides 3 ways;

1. S. 51(1)(a) provides termination by expiry of the term for which the contract was made. e.g. A term created by a lease which is not renewable. The contract ends when the period expires. There is no automatic renewal of a written contract.
2. S. (51)(1)(b) provides termination by death of employee before expiry of the term agreed upon the contract. e.g. Law of Contract Ordinance provides as frustration i.e. the contract is impossible of further performance.
3. S. 51(1)(c) for an employee covered by the Security of Employment Act, the employee may be terminated by SUMMARY DISMISSAL. This is where an employee is terminated without notice or payment in lieu of notice. This was designed to employees not covered by the Employment Ordinance.

Is it possible for summary dismissal to apply to those covered by Employment Ordinance? S. 55(1)(c) covers only non-management workers.

If the employee is not covered by Security of Employment Act, he/she will not be terminated through summary dismissal or simply the law is silent. S. 51 is silent on the question of termination by notice & payment in lieu of notice.

In S. 51, the draftsman had only the idea of written contract for fixed period so the employer & employee are only bound by the terms of the contract

In practice every lawyer will tell you that whenever you draft a contract of service there must be a **termination clause**; whether by notice or by payment in lieu of notice. If you omit the termination clause you follow the Ordinance which does not provide termination of written contract by notice or payment in lieu of notice.

Legal incidents in termination by death

1. S. 51(2) Employment Ordinance provides that termination of contract by death of employee shall be without prejudice to a legal claim to his heirs or legal representatives. S. 52 covers other circumstances in which a written contract may terminate. S. 52(1) covers an inability of employer/employee to fulfill the contract. (As covered in the oral contract) e.g. inability to pay wages, penurious employer, employee becoming sick etc.
2. S. 52(2) provides for agreement between the two parties that the contract is to be terminated. But there must be consent of the Labour Officer.
3. S. 52(3) provides termination on application by either party in court. This is under subordinate courts i.e. a court other than High Court & other than a primary court.

Why consent of Labour Officer?

Whenever contract is terminated under either of the three circumstances above, the employee's rights must be safeguarded;

1. The right to wages earned.
i.e. the wages worked for, they are due and payable.
2. Compensation in respect of accident or disease. This is more relevant to a situation where contract is terminated by accident or disease. Compensation as provided by The Workmen's Compensation Ordinance, Cap. 360
3. Right to repatriation; ie to send the employee from the place of employment to a place of engagement.

REPATRIATION

This refers to the act of returning an employee from **place of employment to place of engagement**. This definition is derived from the Employment Ordinance on English context.

S. 53 of Employment Ordinance covers repatriation. Also Section 103 provides for repatriation. However, Section 103 does not follow under part that deals with written contracts but it falls under part VII of the Ordinance which deals with care & welfare of employees which apply to both the written contracts and oral contracts. Thus, since s. 53 apply only to written contracts, the legal basis for right to repatriation in respect of employees serving under oral contract is S. 103 which is of general application.

There is difference between place of employment and place of engagement. The Ordinance is largely based on recruiting/or Manamba system, i.e. the place of engagement.

S. 53 provides that every employee who is a party to a contract & who has been **brought to the place of employment** by the employer or any person acting on behalf of the employer shall have the right to be repatriated at the expense of the employer to his place of engagement.

Where the place of employment is the same place of engagement there is no right of repatriation.

Note: The place of engagement should not be ones home (domicile). In present day this is outdated.

When can you exercise the right of repatriation. (Circumstances)

- (a) On the expiry of the contract period.
- (b) On termination of the contract by reason of the inability of the employer to fulfil the contract. e.g. by bankruptcy, retrenchment.
- (c) On the termination of the contract by reason of the inability of the employee to fulfill the contract owing to sickness or accident.
- (d) On termination of the contract by agreement between the parties.
However the employer & employee can agree together that the right to repatriation is not available unless the agreement otherwise express.
- (e) On termination of the contract by Order of the court in pursuance of its powers under part XI of the Ordinance.

What are the expenses in question?

S. 53(3) provides traveling & subsistence expenses during journey. Also it provides for subsistence allowance. Expenses also include **subsistence expenses** during the period if any between the date of termination of contract and the date of actual repatriation.

Under S. 54(4) the employer is not liable for subsistence expenses if repatriation is delayed by;

- (a) Employee's own choice.
- (b) If delayed by act of God ("Force Majeure").

Relationship between Oral & Written contract

Section 60A (as amended by the Security of Employment Act, 1964) provides that nothing in the Provisions of this part shall be construed as prohibiting an employee who has completed a written contract other than a foreign contract of service from continuing in the service of his employer under an oral contract of service. He can proceed under an oral contract of service.

When a written contract transforms to an oral contract the provision of Part IV of the Act comes in or applies.

TERMINATION UNDER ELRA, 2004

Under the ELRA, 2004 termination can be categorized into lawful and unlawful termination or fair and unfair termination. Lawful or fair termination is a termination in accordance with the labour laws and for a lawful cause/reason while unlawful or unfair termination is a termination for a cause/reason which is not justified by law or not in accordance with the labour laws. The term termination is defined under s. 36 of the ELRA. It includes lawful termination under common law, termination by employee where the employer make continued employment to be intolerable, failure to renew a fixed term of employment, failure to allow an employee to resume work after maternity leave and failure to re-employ.

Unfair termination

According to ELRA, this is a termination in which the employer fails to prove that:

- (a) the reason for termination is valid,
- (b) the reason is fair in relation to the employee's conduct, capacity or compatibility or based on the operational requirements of the employer, and
- (c) the employment was terminated in accordance with a fair procedure (s.37)

Therefore, by necessary implication, a lawful termination requires valid reason which is fair in relation to conduct, capacity or compatibility as well as fair procedure. Short of this, the termination is unfair.

The law continue to provide that it shall not be a fair reason to terminate an employee on grounds of pregnancy, disability, or any other ground that would constitute discrimination under the ELRA. Likewise, it is not a fair reason to terminate an employee on grounds of failure/refusal of an employee to do anything that an employer may not lawfully permit or require the employee to do; or because he belongs to a certain trade union; or participates in lawful activities of a trade union; or exercises any right conferred by agreement or the law; or discloses an information that he is required or entitled to disclose to another person under the law (s. 37(3)).

When determining whether termination is fair or not the law requires the arbitrator or labour court to take into account any code of good practice issued by the minister (ss. 37(4) and 99). The law also provides that it is the duty of the employer to prove that termination was fair. (s. 39)

Termination due to operational requirements (Retrenchments and Redundancy)

In order to avoid termination caused by changes in operation requirements from falling into unfair termination the ELRA provides for the procedure to be followed (s. 38) The failure to follow this procedure therefore results into unfair termination. This procedure includes:

- a) giving notice of the intention to retrench
- b) disclosure of all relevant information on the intended retrenchment
- c) consultations prior to retrenchment/ redundancy on the reasons, measures to avoid, methods of selection, timing and severance pay

The notices, disclosures and consultations are made to the trade unions or to employees where they don't belong to a registered trade union. Where such consultations are made and there is a failure to reach an agreement, the matter shall be referred to mediation (s.38(2)).

Remedies for unfair termination (s.40)

Where the arbitrator or labour court finds the termination to be unfair, it may order the employer to either:

- a) reinstate the employee, or
- b) re-engage the employee, or
- c) to pay compensation equal to 12 months remuneration which shall be in addition to any other amount to which the employee may be entitled in terms of any law or agreement.

Incidents of termination

In case of any lawful termination, the following rights accrue to the parties:

a) Notice (s. 41)

Where it is provided that a contract can be terminated on notice, it is provided that the length of notice shall not be less than:

- 1) 7 days in case of notice given in the first month of employment
- 2) 4 days if the employee is employed on a daily/ weekly basis
- 3) 28 days if the employee is employed on a monthly basis

Note:

- The length of the notice can be varied by agreement between the parties provided that it gives equal duration for both parties.
- The notice must be in writing stating reasons for termination and the date on which it is given.
- The notice shall not be given during any period of leave or shall not be given to run concurrently with such period.
- Termination can also be by payment of remuneration in lieu of notice (s. 41(5))

b) Severance Pay (s. 42)

Severance pay is defined as an amount at least equal to 7 days basic wage for each complete year of continuous service with the same employer up to a maximum of 10 years. The duty to pay severance allowance arise where the employer has completed 12 months continuous service with an employee and the employer terminates his contract.

However, it should be borne in mind that severance pay shall not be paid in relation to:

- a) a fair termination on grounds of misconduct, or
- b) an employee who is terminated on grounds of capacity, compatibility or operational requirements of employer but who unreasonably refuses to accept alternative employment with that employer or any other employer.

c) Transport to the place of recruitment (s. 43)

The law requires an employer who terminates the services of an employee to transport the employee to the place of recruitment where the contract is terminated in a place which is not the place of recruitment. The employer can do this by transporting the employee and his personal effects direct to the place of recruitment or by paying for transportation or by paying an allowance for transport to the place of recruitment equal to at least a bus fare to the bus station near the place of recruitment. The employer is also required to provide for the subsistence expenses during the period between date of termination and date of transporting him and his family to the place of recruitment.

d) Certificate of Employment

On termination, the employee is entitled to get a certificate of service in a prescribed form. (s.44(2))

Note: The summary of the rights available to an employee on termination is provided for under s. 44(1) which includes any remuneration for work done before the termination, any annual leave pay due to an employee for leave that the employee has not taken, any notice pay due, any severance allowance and any transport allowance due.

LECTURE FOUR

DISCIPLINARY PROCEDURE UNDER THE EMPLOYMENT AND LABOUR RELATIONS ACT,2004

GUIDELINES FOR DISCIPLINARY , INCAPACITY AND INCOMPATIBILITY, POLICY AND PROCEDURES

Guidelines are published by the Minister in terms of **Section 99 (1) (b)** of the Employment and Labour Relations Act, for the proper administration of the Act and to guide employers, employees and their organizations.

1:0 PURPOSE OF THESE GUIDELINES

- ☐ The purpose of these guidelines is to provide for a **fair procedure** to be applied-
 - if the conduct of an employee is **unacceptable**;
 - if an employee is **incapable** of rendering satisfactory services due to ill health, injury or poor work performance or
 - in cases of **incompatibility**.

2:0 WHAT IS EXPECTED FROM THE EMPLOYEES

- Employees are expected to carry out their duties **effectively** and conduct themselves in a ***reasonable manner***.

- Their **actions** should at all time be **in accordance with the policies and rules** existing within an organization

3:0 APPLICATION OF DISCIPLINE BY EMPLOYERS

- An employer should apply discipline **where possible in a corrective** manner, with the aim of attempting to ensure that employees **comply** with the **rules** and **policies** governing their employment.
- This procedure serves **as a guide**, and should be implemented in a flexible manner.
- Management may deviate from it in appropriate circumstances. \

4:0 COUNSELLING

- The primary aim of discipline is **to correct employees' behaviour**, in order to ensure that they conduct themselves in an acceptable manner.
- The **primary means** of achieving this objective should be the **counseling** of employees by supervisors or managers, who should explain to employees **what is expected of them**.
- **If this does not achieve** the desired objectives, **stronger action** may be required.

5:0 VERBAL WARNINGS

- If an employee commits **minor misconduct** or **performs poorly**, the action taken should be a **verbal reprimand** coupled with **an instruction** from the employee's manager to **correct the behaviour**.
- These **reprimands** constitute **informal corrective action** and are not reflected on the **employee's personal file**.

6:0 WRITTEN WARNINGS

- ☐ A **written warning** may be issued by a **supervisor or manager**, **if the work performance or conduct of an employee has not improved following counseling or verbal warnings**, or if the misconduct or work performance requires that stronger action than a verbal warning be taken.
- ☐ The **manager** should inform the employee of the reasons for **concern** and give the employee an **opportunity to make representations**.
- ☐ After having **considering any representations** made, **the manager** should decide whether or not to give the employee **a written warning**.
- ☐ Any warning **should be issued to an employee personally** and in **accordance with the attached form**, and a copy of the completed form should be given to them employee

7:0 APPEAL AGAINST WRITTEN WARNING

- ☐ If an employee feels **aggrieved** by having been given a written warning, the employee **may complete the appropriate appeal section of the employee copy of the warning form within five**

working days of having received it, and hand it to the manager who issued the warning.

- ❑ The appeal **should be referred to the next level of management** above the level of the manager who issued the warning.
- ❑ The **manager considering the appeal** should consider the written representations contained on the form and **may speak to the person** concerned to obtain additional information, but **no formal hearing should normally take place.**
- ❑ The manager considering the appeal should personally **advise** the employee of the outcome of the appeal **within five working days** of having received it. The manager should record the outcome on the appropriate section of the original warning form and the employee's copy of this, and **return this copy to the employee.**

8:0 DISCIPLINARY HEARINGS

- ❑ A sufficiently **senior manager** should be appointed as **chairperson** to convene a disciplinary hearing, in the event of –
 - further **misconduct following a written warning or warnings;**
or
 - **repeated written warnings for different offences;** or
 - **allegations being made of serious misconduct** such as those referred to in the **Code of Good Practice: Termination of Employment,** and which could on their own justify a final written warning or dismissal.
- The **Chairperson** of the hearing should be **impartial.** The chairperson should not, if possible, have been involved in the issues giving rise to the hearing. In appropriate circumstances, **a senior manager from a different office** may be used as chairperson.

- The employee should be **advised in writing** of the **allegations** and the **time and date** of the proposed hearing, giving the employee a reasonable opportunity **to prepare for the hearing.**
- The employee should be **informed** of the right to choose **another employee** to be present as a representative at the hearing, to provide assistance. This employee providing assistance **may be a trade union representative.**
- The **employee** and the **representative** are entitled **to be present at all times** during the hearing and should be informed of the facts of the case against the employee. An interpreter should be provided by the employer if required.
- A **management representative** should present the case in support of the allegations against the employee, and **the employee** should be given an opportunity to present a case at the hearing. Both parties may **call witnesses** and **question any witnesses** called by the other party.
- After having heard all the evidence, the **chairperson** should **make a decision**, based on **a balance of probabilities,** as to whether the employee is guilty of the allegations. If the **chairperson is undecided**, the **employee** should get the **benefit of the doubt.**

9:0 DISCIPLINARY PENALTY

- The question of guilt and the penalty to be imposed should be considered separately, and the employee or the representative is entitled **to make representations in regard to an appropriate sanction.**
- The **chairperson** should consider any applicable **disciplinary code** in deciding on the sanction.

Mitigating and aggravating factors to be considered should include:-

- ☐ the **seriousness of the offence**, and the likelihood of repetition.
- ☐ The **employee's circumstances** (including personal circumstances, length of service and previous disciplinary record);
- ☐ The **nature of the employee's job** (including health and safety considerations); and
- ☐ The **circumstances of the infringement** itself.

10:0 OUTCOME OF HEARING

- The chairperson should advise the employee of the outcome of the hearing as soon as possible, but not later than five working days after the hearing and giving brief reasons for a decision.
- The chairperson should sign the disciplinary form and give a copy to the employee.

11:0 CONSEQUENCES FOR FURTHER MISCONDUCT

- Where the employee is given a **final written warning**, it should be made clear that any further misconduct of a similar nature whilst the final written warning is operative, **may result in termination of employment.**
- In appropriate circumstances, the chairperson may issue a **comprehensive final written warning**, which specifies that any further misconduct of whatever nature whilst the final warning is operative, may result in termination of employment.

12:0 TERMINATION OF EMPLOYMENT

- Termination of employment should only take place in cases of serious or repeated misconduct, when the employer is justified in concluding that the misconduct has made the employment relationship intolerable to be continued.
- When considering whether a **termination for misconduct** is fair, the chairperson should consider the following;
 1. Whether the employee contravened a **rule** or **standard** regulating conduct relating to employment.
 2. If such a **rule** or **standard** was contravened, whether it was:-
 - reasonable;
 - clear and unambiguous;
 - known, or ought to have been known, by the employee;
 - consistently applied; and
 - sufficiently serious to justify dismissal

13:0 APPEAL AGAINST THE OUTCOME OF HEARING

- An **employee** may appeal against the outcome of a hearing, **by completing the appropriate section** of the copy of the **disciplinary form** and giving it to the chairperson **within five working days** of being disciplined, together with any written representations the employee may wish to make.
- The **chairperson** must **within five working days** refer the matter to the **next more senior level of management**, with a written report summarizing reasons for the disciplinary action imposed. The employee appealing must be given a copy of this report.

14:0 CONSIDERATION OF APPEAL

- The manager considering the appeal must take into consideration the documentation provided.
- An appeal should not normally constitute a re-hearing of the entire case, and it should normally focus specifically on the grounds for appeal and be decided on the basis of the written submissions provided.
- The manager considering the appeal may however arrange a further hearing to consider evidence and argument relating to the appeal, in which event the employee may be assisted by a representative.
- The manager considering the appeal must record the outcome of the appeal, the employee may utilize whatever dispute mechanisms are contained in the Employment and Labour Relations Act.
- The time period within which to exercise these rights shall commence from the date the employee is advised of the outcome of the appeal.

15:0 SUSPENSION

- In circumstances in which serious misconduct or incapacity appears to have occurred, a sufficiently senior manager may suspend the employee from work pending an enquiry.
- An employee may also be suspended if the employee's presence would obstruct the investigation into the alleged offence or if the employee's presence could create difficulties at the workplace.

- An employee who is suspended by management under these circumstances **must be paid normal basic earnings** for the period of suspension.
- **Management** may in appropriate circumstances and **only with the consent of the employee**, suspend an employee **without pay for up to a maximum period of 30 days** as a form of disciplinary action.
- This suspension should normally **be accompanied by a final written warning**, which runs from the time the employee recommences employment.
- **Suspension without pay** should be used for offences which justify a **more serious sanction than a final written warning**, but where the employment relationship **has not irreparably broken down**.
- An employee should be given **written notice** of any suspension, which should briefly describe the **reasons for the suspension** and any conditions applicable.

16:0 INCAPACITY: POOR WORK PERFORMANCE

- ☐ In case of alleged poor work performance by an employee, a **manager should consult the employee** with a view to **identifying** and **analyzing the problem**.
- ☐ The **employee** should be given an opportunity to **account for the poor performance**.
- ☐ If the manager believes that it is a matter which constitutes possible **misconduct**, it should be dealt with in terms of the procedures for misconduct.

- Where the manager believes it is a matter that constitutes **incapacity** on behalf of the employee concerned, a process of **consultation** and **counseling** between management and the employee should take place **in an attempt to rectify the problem.**

- This process may include **appropriate evaluation training, instruction, guidance** or **counseling** and should normally **provide for a reasonable period of time for improvement**
- In case of alleged poor work performance by an employee, a **manager** **should consult the employee** with a view to **identifying** and **analyzing the problem.**

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- Where the manager believes it is a matter that constitutes **incapacity** on behalf of the employee concerned, a process of **consultation** and **counseling** between management and the employee should take place **in an attempt to rectify the problem.**

- This process may include **appropriate evaluation training, instruction, guidance** or **counseling** and should normally **provide for a reasonable period of time for improvement**

- Where the employee continues to perform unsatisfactorily, the employer should warn the employee that employment may be terminated if there is no improvement. An opportunity to improve may be dispensed with if:
 1. the employee is a manager or senior employee whose knowledge and experience qualify him or her to judge whether he or she is meeting the standards set by the employer;
 2. the degree of professional skill that is required is so high that the potential consequences of the smallest departure from that high standard are so serious that even an isolated instance of failure to meet the standard may justify termination.

17:0 DECISION FOR TERMINATION

- Prior to decision making to terminate the employment of an employee for poor work performance, management should call a meeting with the employee, who should be allowed to have a fellow employee or trade union representative present to provide assistance.
- At the meeting, management should outline reasons for action to be taken and allow the employee and/or the representative to make representations, before finalizing a decision.
- Management should consider any representations made and, if these are not accepted, explain why. The outcome of the meeting should be communicated to the employee in writing, with brief reasons.

18: CONSIDERATION OF DISMISSAL FOR INCAPACITY

- When considering whether a dismissal for incapacity in respect of poor work performance is fair, management should consider the following:-
 - whether or not the employee failed to meet a performance standard

if the employee **did fail** to meet the required standard, whether or not-

- ☐ the employee was **aware**, or ought to have been aware of the standard;
- ☐ The performance standards are **reasonable**;
- ☐ The employee **was given a fair opportunity to meet the standard** and the reason why the employee failed to meet the standard;
- ☐ **Dismissal** was the appropriate sanction.

19:0 INCAPACITY: ILL HEALTH AND INJURY

- ☐ In cases of **alleged incapacity** of an employee due to **ill health or injury**, a manager should **consult the employee** with a view to **identifying and analyzing the problem.**
- ☐ The **manager** should be guided by **the opinion of a registered medical practitioner**, in determining the cause and degree of any incapacity and whether it is of a **temporary** or **permanent** nature.
- ☐ The parties should use their best endeavours during this process **to agree solutions to the problem.**
- ☐ Consideration should be given to the **extent of the incapacity** and whether it is **temporary** or **permanent**, and all possible alternative to dismissal **should be considered.**

20:0 DECISION FOR TERMINATION

- Prior to decision making to **terminate the employment of an employee for ill health injury**, management should **call a meeting** with the

employee, who should be allowed to have a fellow employee or trade union representative present to provide assistance.

- At this meeting, management should outline reasons for action to be taken and allow the employee and/or the representative to make representative, before finalizing a decision.
- Management should consider any representations made and, if these are not accepted, explain why. The outcome of the meeting should be communicated to the employee in writing, with brief reasons.

21:0 CONSIDERATION FOR DISMISSAL

- When considering whether a dismissal arising from ill health or injury is fair, management should consider the following:-
 1. whether the employee is able to perform the work; and if the employee is incapable;
 2. the extent to which the employee is unable to perform the work;
 3. the extent to which the employee's work circumstances might be adapted to accommodate the disability, or if this is not possible, the extent to which the employee's might be adapted ; and
 4. the availability of any suitable alternative work or employment.

22:0 INCOMPATIBILITY

- Incompatibility may constitute a fair reason for termination of employment. There are two types of incompatibility:
 1. unsuitability of the employee to his or her work due to his or her character or disposition;

2. **incompatibility** of the employee to his or her work environment, in that **he or she relates badly with fellow employees, clients or other persons** who are important to the business.

☐ Incompatibility is treated in a similar way to incapacity for poor work performance.

☐ The steps required in clause 6 are applicable, read with changes required by the context. In particular, the employer should –

1. record all incidents of incompatibility that gives rise to concrete problems or disruption;
2. warn and counsel the employee before termination. This should include advising the employee of the conduct; who has been adversely affected by that conduct; and what remedial action is proposed.

23:0 GROUNDS FOR TERMINATION

■ Before **terminating employment** on this ground, the employer should **give** the employee a **fair opportunity** to :-

1. **consider** and **reply** to the allegation of incompatibility;
2. **remove the cause** for disharmony ;
3. **propose an alternative** to termination

24:0 DISCIPLINARY PROCEDURE

■ This disciplinary procedure applies to all employees and is a guide for appropriate disciplinary sanction.

- As such, it does not detract from management's right to depart from this procedure depending on the circumstances of each case.
- The procedure aims to achieve the required blend of flexibility and consistency, and to ensure fairness in the application of discipline.
- This *list of offences is also not exhaustive*, and an employer may discipline any employee for good cause *even though the specific offence may not be stated in this procedure*.
- The *penalties* relate to the commission of the offence in isolation.
- The existence of any *previous warnings* and other *material factors* should be taken into account in deciding on the appropriate disciplinary action.

24:1 EXAMPLES OF FIRST OFFENCES FOR WHICH WARNINGS MAY BE GIVEN

■ ABSENCE

- ☐ Late for work, leaving work place without permission, or general time keeping offences.
- ☐ Absence from work without permission or without acceptable reason (for up to 5 working days).

■ INSTRUCTIONS

- Failing to carry out the reasonable instructions of a superior.

■ WORK PERFORMANCE

- Poor performance without acceptable reason

- ☐ Doing unauthorized private work.

■ **PROPERTY**

- Causing damage to or loss of the employer's property, or other property (e.g. belonging to other employees, customers, clients or members of the public), either through negligence or failure to carry out instructions.

- ☐ Misuse or neglect of the employer's

■ **BEHAVIOUR**

- Unacceptable behaviour towards customers, clients, fellow employees or members of the public.

■ **GENERAL**

- General offences and breaches of organizational rules or policy.

24:2 OFFENCES WHICH MAY CONSTITUTE SERIOUS MISCONDUCT AND FOR WHICH AN EMPLOYEE MAY BE DISMISSED

■ **ABSENCE**

- Absence from work without permission or without acceptable reason (for 5 working days or more).

■ **INSUBORDINATION**

- Commission of serious or repeated act of insubordination at the employer or during working hours against the employer.

■ **POOR WORK PERFORMANCE**

- Habitual, substantial or willful negligence in the performance of work.
- Unacceptable work performance or behaviour, or consistent work performance below average despite at least 2 written warnings.
- Dishonesty or any other major breach of trust.
- Gross incompetence or inefficiency in the performance of work.
- Lack of skill, which the employer expressly or impliedly held himself out to process.

■ PROPERTY

- Causing serious damage (real or potential) to or loss of the employer's property or other property (e.g. belonging to other employees, customers, clients), either through gross negligence or willful damage.
- Theft or unauthorized possession of the employer's property or other property (e.g. belonging to other employees, customers, clients).
- Fraud or misappropriation of organizational funds.

■ BEHAVIOUR

- Abusive behaviour, assaults, threatened assault or other unacceptable conduct towards other employees, customers, clients or members of the public.

- ☐ Being under the influence of alcohol or drugs whilst at work, or consuming alcohol or drug whilst on duty.

■ GENERAL

- Other serious breaches of organizational rules or policy, which have the effect of causing an irreparable breakdown in the employment relationship.
- ☐ Criminal conviction relating to an offence which impacts, directly or indirectly on the employment relationship.

25:0 CONCLUSION

- The word 'discipline' has unpleasant association with punishment but with addition of the 'just cause' concept involving a limitation on the employer's right to discipline and discharge.
- The word has been extended to embrace a system of training and education of both the employees and his supervisor, designed to achieve orderly conduct.
- The keystone of just cause is the principle of 'corrective' or 'progressive discipline' that is, the misconduct must be handled under a system of warning and graduated penalties which gives the employee time to reflect upon his errors and mend his ways, before the final act of discharge, when efforts at correction as failed.
- Discipline is required only when only when all other measures have failed.

- Management should ideally try to establish what has been called ‘positive discipline’, an atmosphere in which subordinates willingly abide by rules, which they consider fair.
- In such an atmosphere the group may well exert social pressure on wrong doers and reduce the need for ‘negative’ (punitive) discipline.

LECTURE FIVE

LABOUR DISPUTE SETTLEMENT MECHANISM UNDER ELRA AND LIA 2004

The two legislation provide for three methods of labour dispute settlement. These are mediation, arbitration and adjudication. The Labour Institutions Act establishes the organs which are responsible to settle labour disputes while the Employment and Labour Relations Act provides for the procedure to be used in settling labour disputes.

The Institutions for Settling Labour Disputes

1. Commission for Mediation and Arbitration

This is established under s. 12 of the LIA as an independent department of the government. Its composition is:

- a) a chair person, appointed by the President who shall not be a member or office bearer of trade union or employer’s association or an employee in the public service
 - b) two commissioners representing the interests of the employees
 - c) two commissioners representing the interests of the employers
 - d) two commissioners representing the interests of the government
- (s.16)

NB: the chair person is appointed among list of three persons recommended by the Council while the other commissioners are appointed by the minister upon recommendation by the Council. The commissioners hold office for three years and are eligible for re-appointment (s.17).

Its functions include:

- a)** To mediate any dispute referred to it under any labour law
- b)** To determine any dispute referred to it by arbitration where it is so required by law or agreed by the parties or referred to it by Labour Court to be so determined
- c)** To facilitate the establishment of a forum of workers participation if so required. (s. 14(1))

The Commission in performance of its functions has the following powers:

- a)** power to appoint a director, mediators and arbitrators
- b)** power to assign mediators and arbitrators to mediate and arbitrate disputes in accordance with the provisions of any labour law
- c)** power to establish offices
- d)** power to establish divisions of the Commission
- e)** power to make rules to regulate internal administration, practice and procedure for mediation, practice and procedure for arbitration, practice and procedure of essential services committee etc
- f)** power to publish the code of ethics for mediators and arbitrators

2. Labour Court

The Labour Institutions Act provides for the establishment of a labour division of the High Court which shall consist of such number of Judges as the Chief Justice may consider necessary and two panels of assessors appointed in terms of one panel representing the interests of the employees and another panel representing the interests of the employers (ss. 50, 53) .

The Labour Division of the High Court shall be duly constituted when a Judge sits with at least two assessors one from either panel of assessors. The Labour Court shall have exclusive jurisdiction over any matter reserved for its decision by the labour laws.

3. Essential service committee

This is an organ which is established within the Commission under s.29 of the LIA. The organ comprises of 5 persons appointed by the minister in consultation with the Council. The qualifications for these members include knowledge and experience in labour law and labour relations. Among these members, the minister shall appoint a chairperson of the committee (s.31). The tenure of the committee is three years but a member may be reappointed at the end of his term of office.

The functions of the Essential Services Committee are: to designate essential services in terms of the provisions of the ELRA, 2004; and to determine disputes about whether or not an employee or employer is engaged in a designated essential service (s.30). However, in the performance of its activities, the Committee has the following powers:

- a) It may summon any person for questioning where it considers that the attendance of this person will assist in the performance of its functions;
- b) It may summon any person believed to have the possession or control of any book, document, or object relevant to the performance of its function to appear for questioning and production of such a document;
- c) It may administer an oath or accept an affirmation from any person called to give evidence; and
- d) It may question any person about any matter relevant to the performance of its functions (s.32)

It should be noted that a person shall not be required to answer any question or furnish any information, book, document or object if there is a lawful ground for not doing so. Also the Commission shall pay the prescribed witness fee to each person who appear before a mediator or arbitrator in response to a subpoena issued in this regard (ss. 32(2) and (3))

4. The Labour Economic and Social Council

This is an organ established under s. 4(1) of the LIA as a Council for Labour, Economic and Social matters. It is composed of a Chairperson and sixteen other members all of whom are appointed by the Minister. Provided that a member, official or office bearer of a trade union, employer's association or federation or an employee in the public service of the government of the URT shall not qualify to be appointed as a Chairperson. The idea here is to avoid an interested person from acting as a chairperson because he may be biased in his decisions. The sixteen other members are appointed by the Minister are as follows:-

- a) the permanent secretary and three other members to represent the interests of the government
- b) four members to represent the interests of the employers
- c) four members to represent the interests of employees
- d) four members appointed because of their expertise in labour, economic and social policy formulation

It should be noted that the Minister appoints the representatives of trade unions and workers associations from the list of members nominated by such trade unions. Duration of membership into the Council is three years but a member may be re-appointed (s.6)

The Council has the following functions among others. (s.5)

- a) to advise the government through the Ministry on the matters of measures to promote economic growth and social equity, economic and social policy, promotion of a coordinated policy on labour economic and social matters.
- b) To advise the Minister on national labour market policy, any proposed labour law before it is submitted to the cabinet, any issue arising from the International Labour Organisation,
- c) To ensure employers and employees nominate assessors for appointment to panels, members for appointment to governing board of the Commission and individuals for appointment as members of the Essential Services Committee.
- d) To survey and analyse social and economic affairs
- e) To keep abreast of international development in social and economic policy etc etc

For the purposes of performance of its functions, the Council may establish committees to perform specific functions. The committees established shall be tripartite (comprising the representatives from the trade unions, employer's associations and the government). The committee must also comprise at least three of the Council's members (s.8). However, despite the fact that the Council may establish committees, it may only assign any of its functions to a committee, subject to the approval of the Minister. In addition to this, the Council may assign such a functions on conditions it may deem necessary to impose. Any function performed by the committee in these terms shall be deemed to have been performed by the Council (s.8(3))

The Council shall operate by meetings. There shall be at least three meetings in a calendar year, meetings of the council in accordance with its rules, and a special meeting of the council all of which shall be summoned by the chairperson (s.9). The special meeting of the council shall be either at the

written and motivated request of four members or at the request of the minister. The Chair person shall preside over all meetings of the Council at which he is present and where he is not present the members shall elect one of them to be a chairperson in that meeting. In the meeting of the Council the quorum shall be constituted by the majority of the members provided that there is at least one member representing the interest groups (ie. The employers, employees and the government) and the decision of the majority members of the Council present in a meeting shall be the decision of the Council. In case of a tied vote the presiding member shall (chairperson in that meeting) shall have a casting vote (s. 9(6)). The Council is required to keep written record of its meetings.

The Council is required to submit an annual report of its activities in each calendar year to the Minister before 30th June of the next year (s.11)

Other Institutions Established by LIA

There are other institutions which are established under this law which deal with the labour matters. These are discussed below.

Wage Boards

These are *ad-hoc* boards established by the Minister in respect of a sector and area to investigate remuneration and term and conditions of employment in any area (s.35(1)). The members of these boards are appointed by the Minister. A board is made up of a Chairperson, a member nominated by the Council who represents the interests of the employees and a member nominated by the Council to represent the interests of the employers (s.35(3)). The Minister publishes a notice in the gazette prescribing the names of the members, and the terms of reference of the investigation. The terms of reference of the investigation include the sector and area to be investigated, the categories and classes of employees to be included as well as the matters to be investigated. A member of a board remains in office until the Minister discharges the wage

board or until he is removed by the Minister due to misconduct, illness, bankruptcy, conviction of a crime etc (s.35(4),(5). The functions of a wage board are to conduct an investigation on minimum remuneration and other conditions of employment; to promote collective bargaining between registered trade unions, employers and registered employer's associations; and to make recommendations to the Minister on a minimum wage and conditions of employment.

Thus, board reports to the Minister on its findings and recommendations.

THE LABOUR COMMISSIONER AND LABOUR OFFICERS

The law entrusts the power to administer labour laws to the Labour Commissioner (s.43(1). The term Labour Commissioner is defined under LIA to mean Labour Commissioner appointed in terms of section 43(1) and in the absence of the Labour Commissioner, the Deputy Labour Commissioner. However the Labour Commissioner can delegate any of his duties, functions and powers to the Deputy Labour Commissioner, Assistant Labour Commissioners or Labour Officers (s.44(1). The Labour Commissioner as well as the Deputy Labour Commissioner are appointed by the president while the Assistant Labour Commissioners are appointed by the minister. The minister also appoints the Registrar of Organisations and Deputy Registrar who are responsible for the regulation of trade unions, employer organisations and federations.

Functions of Labour Officers

The law provides that there shall be as many labour officers as are necessary to administer and enforce the labour laws (s.43(4). Labour Officer is defined to mean a labour officer stipulated in s.43(3) and it includes the Labour Commissioner or Deputy Labour Commissioner. Thus, the Labour Commissioner and Deputy Labour Commissioner are Labour Officers. Section 43(3) provides that the Minister shall appoint Assistant Labour Commissioners

to head the sections of Labour Relations, Labour Inspection and Social Security. Given this cross reference it seems that Assistant Labour Commissioner is also a Labour Officer. For the purposes of the administration of labour laws, a labour officer with a prescribed certificate and at a reasonable time may enter premises and:

- a) require that premises or any part thereof shall not be disturbed during an inspection;
- b) search and examine any information books, document or object;
- c) seize, make a copy of any information, book, document or object;
- d) take sample of any object found;
- e) take measurements, readings recordings or photographs; and
- f) question any person on the premises

In any other case he may:

- a) order, in the prescribed form, any person to appear before him at a specified date, time and place and to question that person
- b) require any person who has control over any information, book, document or object to furnish it and explain any entry in the information, book or document or the object;
- c) examine, make copy or seize any book, document or object

Categories of disputes under the ELRA, 2004

Disputes under the ELRA can be categorised into two:-

- i) Complaints
- ii) Disputes of interest

i) A complaint

This is defined as any dispute arising from the **application, interpretation or implementation** of:

- a) an agreement or contract with an employee;
- b) a collective agreement;
- c) the ELRA or any other written law administered by the minister for labour
- d) Part VII of the Merchant Shipping Act, 2003 (this part concerns engagement and welfare of seafarers which encompasses things like wages, the property of the deceased seafarer, safety, health, manning, qualification, civil liability as well as offences by seafarers etc)

ii) *Disputes of interest*

The Act defines a dispute of interest as any other dispute which is not a complaint. Thus, all other types of disputes which are not concerned with application, interpretation or implementation of an agreement, the ELRA or other laws administered by the minister for labour or part VII of the Merchant Shipping Act, 2003 (the engagement and welfare of seafarers).

PROCEDURE

Under the ELRA, 2004 there are three dispute resolution methods namely Mediation, Arbitration and Adjudication. Thus, the statute establishes a three-tier scheme that commences with mediation and then follows with arbitration and ends up with adjudication. Mediation and arbitration are supposed to be conducted by the Commission for Mediation and Arbitration as established under section 12 of the Labour Institutions Act.

a) **Mediation**

The word mediation is not defined in the ELRA, 2004 but there is a definition of the word “mediator” who is defined as a mediator appointed under section 19 of LIA, 2004. under s. 19 of LIA it is provided that the Commission shall appoint as many mediators and arbitrators as it considers necessary to perform the

functions of the Commission. The Commission may appoint mediators on part time or full time basis and it shall be the responsibility of the Commission to control and discipline the mediators and arbitrators but the Commission shall not interfere with the independence of the mediator or arbitrator in any dispute before such mediator or arbitrator.

However, in the dictionaries, mediation is defined as a private, informal dispute resolution process in which a neutral third person, the mediator, helps disputing parties to reach an agreement. The mediator has no power to impose a decision on the parties.

All disputes are supposed to pass through this stage of mediation.

Procedure in Mediation:

- 1) The dispute is referred to the Commission in the prescribed form by or on behalf of the aggrieved party. The Commission must be satisfied that a copy of the referral has been served on the other parties to the dispute by the party who refers the dispute to it. (s. 86)
- 2) On receiving the referral the Commission shall appoint a mediator to mediate the dispute and decide the time, date and place of the mediation hearing. It shall also advise the parties to the dispute on such appointment and time, date and place of the hearing.
- 3) The mediator is required to resolve the dispute **within thirty (30) days** of the referral or any longer period to which the parties agree in writing. But if the dispute of interest is referred to the Commission, the mediator may extend the period by a further 30 days if the employees or union fails to attend the hearing arranged by the Commission or shorten the period of 30 days if the employer

or employer's association party to the dispute fails to attend the hearing (s.87(1). The **mediator has the mandate to decide the manner in which the mediation shall be conducted** and if necessary may require further meetings within the stipulated 30 days. Also, in the mediation proceedings a party may be represented by **a member or official of that party's trade union or employer's association or advocate.**

- 4) If the mediation is successful, the decision of the mediator may be enforced in the Labour Division of the High Court as a decree of a Court of competent jurisdiction.
- 5) Where the mediator fails to resolve the dispute within 30 days, a party to the dispute has the following options depending on the nature of the dispute. If the dispute is a dispute of interest, he may give notice of its intention to commence a strike or a lockout in accordance with the provisions of ELRA. And if the dispute is a complaint he may either refer the complaint to arbitration or refer the complaint to the Labour Court.

However, despite the time limit of 30 days, the mediator may convene meetings between parties to the dispute in order to settle the dispute at any time before or during any strike, lockout, arbitration or adjudication until the dispute is settled. This brings up uncertainty and confusion in the process. The first thing that comes out here is the fact that once a matter has been referred to a mediator then the Mediator is seized with that dispute until it is resolved one way or another and it is immaterial who or how that dispute is resolved. This means despite the fact that the dispute has moved on in the process the mediator can still intervene and continue the efforts to resolve the dispute. This wholesale adoption of the dispute by the mediator is certainly odd and one can say quite impracticable, as it tends to set in motion two parallel dispute settlement mechanisms at once.

How will an Arbitrator or the Labour Court for that matter function if the matter is still within the charge of the mediator?

The mediator may also dismiss the complaint if the party who referred the complaint to it fails to attend a mediation hearing. The mediator may also decide the complaint if the other party fails to attend the hearing and his decision may be enforced in the Labour Court as a decree of a court of competent jurisdiction. The Commission may reverse the decision based on failure to attend by a party on application where it is satisfied that there are good grounds for failing to attend hearing (s.87(5)).

b) Arbitration

The ELRA, 2004 doesn't define the word arbitration but it defines an arbitrator as an arbitrator appointed under s. 19 of LIA, 2004. Like the mediators, the arbitrators are appointed by the Commission and they are subject to the control of the Commission in all aspects save for their independence in settling a dispute.

The dictionary meaning of the word arbitration is “ a process of dispute resolution in which a neutral third party (arbitrator) renders a decision after a hearing at which both parties have an opportunity to be heard.” The decision of the arbitrator is binding on the parties to the dispute.

Under the ELRA, s.88 a dispute in respect to arbitration carries a special meaning. It means a dispute of interest if the parties to the dispute are engaged in an essential service or a complaint over either (i) the fairness or lawfulness of an employee's termination of employment or (ii) any other contravention of ELRA or any other labour law or breach of contract in which the amount

claimed is below the pecuniary jurisdiction of the High Court or (iii) any dispute referred to arbitration by the Labour Court under s.94(3)(a)(ii).

Arbitration under the ELRA may be invoked where mediation has failed to resolve a dispute or even where the dispute has not been mediated at all depending on the Commission's discretion.

However, the notion of compulsory arbitration has been greatly watered down under the statute. In the first place Employment and Labour Relations Act allows trade unions and employers to opt out of compulsory arbitration by inserting a clause in the collective agreement allowing them to refer their disputes to independent arbitrators under the Arbitration Ordinance. Secondly even those working in essential services to whom arbitration is compulsory before they contemplate strikes or lockout, may circumvent this procedure if according to section 78 of the Employment and Labour relations Act they have in place the Essential Services Committee has approved a collective agreement providing for minimum services during strikes and this agreement.

Procedure

- a) A dispute is referred to the Commission as in the case of mediation or in case of failure of mediation a party to the dispute refers the matter to arbitration. In case of failure of mediation, in order to apply arbitration the dispute must have been a complaint because if it is a dispute of interest, a party to the dispute may give a notice of its intention to commence a strike unless it is involved in essential services in which arbitration is compulsory on failure of mediation.
- b) The Commission appoints an arbitrator to decide the dispute, determine time, date and place of the arbitration hearing and inform the parties on such appointment and arrangements.

- c) The arbitrator conducts the arbitration in a manner he considers appropriate in order to determine the dispute fairly and quickly. The arbitrator deals with substantial merits of the dispute with the minimum legal formalities. The arbitrator therefore has discretions as to the appropriate form of the proceedings in terms of giving evidence, calling witnesses, questioning witnesses and presentation of arguments. The parties to the dispute may be represented by a member or official of that party's trade union or employer's association or an advocate. Where the parties to the dispute consent, the arbitrator may suspend proceedings and resolve the dispute through mediation (s.88(6)).
- d) The arbitrator is required to make an award with the reasons signed by the arbitrator within 30 days of the conclusion of the arbitration proceedings. The arbitrator has no mandate to make an order for costs unless a party or a person representing a party acted in a frivolous or vexatious manner. (s.88(8)). An award made by the arbitrator is binding on the parties to the dispute and may be served and executed in the Labour Court as if it were a decree of a court of law. (s.89)

Note:

- i) An arbitrator has power to correct clerical errors, errors arising from any accidental slip or omission made on an award, on application or *suo moto*.
- ii) A party alleging a defect in any arbitration proceedings may **under the auspices of the Commission apply to the Labour Court for a decision to set aside the arbitration award**. Such application should be made **within six weeks of the date of the service of the award on the applicant** unless it involves improper procurement in which case the application should be made **within six weeks of the date that the applicant becomes aware of the fact**.

- iii) The Labour Court may set aside an arbitration award on the ground that either **there was a misconduct on the part of the arbitrator** or **the award was improperly procured**. Where the award is set aside the Labour Court may either **determine the dispute in the manner it considers appropriate** or **make any order it considers appropriate about the procedures to be followed to determine the dispute**.
- iv) The parties may agree to submit their dispute to arbitration under the Arbitration Ordinance.

c) Adjudication

The word adjudication is not defined in the ELRA, 2004 but the dictionary defines the word as a legal process of resolving a dispute. It contemplates that the claims of all the parties thereto have to be considered and set at rest. Normally the adjudication process involves the courts of law and quasi judicial bodies. Under the ELRA, 2004 the adjudicatory powers are conferred on the Labour Court in respect to the application, interpretation and implementation of the provisions of the ELRA, 2004. The Labour Court also is empowered to decide appeals from decisions of the Registrar made under part IV; to decide reviews and revisions of arbitrator's award and decisions of the Essential Services Committee; to decide reviews of decisions, codes, guidelines or regulations made by the minister; to decide complaints, other than those that are to be decided by arbitration under the provisions of the ELRA; to decide any dispute reserved for decision by the Labour Court under the ELRA; and to decide applications including a declaratory order in respect of ELRA and injunction.

The Labour Court may do either or the following in respect to a dispute which has been referred to it:-

- i) it may decide the dispute, or

- ii) it may refer the dispute to the Commission to be decided by arbitration (s.94(3)(a)(ii))

However, the Labour Court may refuse to hear a complaint under certain circumstances. These includes:

- i) where the complaint has not been referred to mediation by the Commission under s. 86; or
- ii) where the provisions of section 86 have not been complied; or
- iii) where the application is not urgent

d) Appeal

It is important to note that appeals from the Labour division of the High Court to the Court of Appeal are restricted to those involving points of law only. In other words, a decision of the Labour Court on matters of fact and procedure is final and one can only appeal to the Court of Appeal if they dispute the determination of the Court on matters of law. If it happens that there are conflicting decisions of the Labour Division of the High on a point of law, the Labour Commissioner is specifically empowered to refer that point to the Court of Appeal for a decision. He may do so where the parties to the dispute have not preferred an appeal.

LECTURE SIX

STRIKES AND LOCKOUTS UNDER ELRA, 2004

The ELRA provides for the right to every employee to strike in respect of a dispute of interest. In the same way the employers are accorded a right to lock out in respect of a dispute of interest (s.75). The law protects persons who

engage in a lawful strike or lockout. Section 83 provides that a lawful strike or lawful lockout shall not amount into a breach of contract or a tort or a criminal offence and an employer is prohibited from terminating employment on the ground that an employee has participated in a lawful strike or for not acceding to an employer's demand in a lockout. Thus, no civil or criminal proceedings shall lie against any person for participating in a lawful strike or lawful lockout.

Whether employers have a duty to remunerate during strike and lockouts
The law provides that an employer **shall not be obliged to remunerate** an employee for services that the employee does not render during a lawful strike or lawful lockout. But the employer is bound to continue doing the following during a lawful strike or lawful lockout:

- a) he shall continue to make his contribution and employees contribution to any funds that the employee is required to belong to by the law or under the contract of employment
- b) if the employer provides accommodation, the provision of food or other basic amenities of life, the employer shall continue to provide that accommodation, food or amenities of life

Note:

1. After the end of the strike or lockout, the employer may deduct any of the employee's contribution made to the fund during a strike or lockout from the remuneration of the employee. The employer may also deduct the agreed value of the accommodation, food or amenities from the employee's remuneration with the consent of the employee.
2. Where a strike or lockout is not in compliance with this Act, or a trade union or employer or employer's association engages in a prohibited conduct, **the Labour Court shall have exclusive jurisdiction** to issue an **injunction** to restrain a person from engaging in an unlawful strike or lockout or to engage in any prohibited conduct. The Labour Court shall

also have an **exclusive jurisdiction to order the payment of just and equitable compensation** for any loss attributable to the strike, lockout or conduct having regard to the degree of fault, the cause of the strike, lockout or conduct, the ability to pay, the extent of harm etc. (s. 84)

Restrictions on the right to strike or lockout

A “strike” is defined as a total or partial stoppage of work by employees if the stoppage is to compel their employer, any other employer or an employer’s association to which the employer belongs, to accept, modify or abandon any demand that may form the subject matter of a dispute of interest. However, the right to strike as enshrined in the ELRA is not an absolute one but a restricted right. Thus, the following are the restrictions:-

Persons who can strike

The law envisages that although there is a right to strike accorded to employees, there are some categories of employees and employers who do not have a right to strike or engage in a lockout. The following employees cannot absolutely engage into or contemplate a strike or a lockout:

- i) persons engaged in an essential service. However, the persons employed and employers in essential services can strike or engage in a lockout if there is a collective agreement providing for minimum services during a strike or lockout and that agreement has been approved by the Essential Services Committee (see ss. 76, 77). The essential services are listed under s. 77(2) as including water and sanitation, electricity, health services and associated laboratory services, firefighting services, air traffic control and civil aviation telecommunications and any transport services required for the provision of these services (s.77)

- ii) persons engaged in minimum services. The employer and employees may enter into a collective agreement for the provision of minimum services during the strike or lock out. Alternatively, the employer may apply in the prescribed manner to the Essential Services Committee for the designation of a minimum service **if a minimum service is necessary to prevent damage to property, machinery or plant during a strike or lawful lockout and there is no collective agreement providing for minimum services during a strike or lockout.** When this agreement has been reached or a designation has been made by the Essential Services Committee for the provision of minimum services, those employees engaged in such minimum services have no right to strike (ss. 76 and 79)
- iii) Persons bound by an agreement that requires the issue in dispute to be referred to arbitration. Where parties to a dispute have entered into an agreement that their dispute is to be referred to arbitration, then neither of them can engage in a strike or lockout.
- iv) Persons bound by a collective agreement or arbitration award that regulates the issue in dispute. These have no right to strike or to engage in a lockout.
- v) Persons bound by a wage determination that regulates the issue in dispute during the first year of that determination. These are also not allowed to engage in a strike or lockout.
- vi) Magistrates, prosecutors and other court personnel. This category of employees do not have a right to strike or lockout

Subject matter of strike

Under the Act, it is not every kind of a dispute that entitles an employer or employees a right to lockout or strike respectively. Thus, for the employees and employer to have a right to strike and lockout respectively, the dispute must be a

dispute of interest. By definition, a dispute of interest is any dispute except a complaint. The law provides that if the dispute is a complaint, the employer and employees has no right to lockout or strike (s.76(1)(g))

Procedures which must be followed

The law provides that where procedures for engaging in a lawful strike or lawful lockout have not been followed, no person is allowed to engage or to take part or to conduct himself in a manner that contemplates a strike or lockout. The procedures for a lawful strike and lawful lockout are discussed hereunder:-

Procedures for a engaging a lawful strike

In order to have a lawful strike, the following conditions/ procedures must be fulfilled.

1. The dispute in respect of the strike must be a dispute of interest
2. The dispute must have been in the prescribed form to the Commission for Mediation and Arbitration and remained unresolved owing to the failure of the Commission to do so at the end of the period of mediation.
3. The strike must be called by a trade union and a ballot has to be conducted under the trade union's constitution in which a majority of the voters, votes for the strike for it to be lawful.
4. The employees or their trade union must have given a 48 hours notice to their employer of their intention to strike after the failure by the Commission to resolve.

Note: Where the dispute relates to the unilateral alteration of the terms of contract, the employees or trade union may require the employer not to implement any proposed change to terms and conditions or if he has implemented them to restore the terms and conditions of employment which applied before the change. If the employer doesn't comply with such requirement within 48 hours, the employees may commence the

strike without waiting for the determination in mediation or getting the approval of majority or issuing the 48 hours notice.

Secondary strike

Section 81 defines the term “secondary strike” as a strike that is either in support of a lawful strike (the primary strike) by other employees against their employer (the primary employer) or a strike that is in opposition to lockout (the primary lockout) imposed by another employer (the primary employer) against its employees.

This is a new feature in the Tanzanian labour laws. This shows that there can be a series of strikes but all premised on one major strike (primary strike) or on a lockout.

Procedure for a secondary strike

- It must be called by a trade union
- There must be a relationship between the secondary and the primary employer that may permit the exercise of the pressure
- A fourteen days notice of the commencement of the secondary strike must have been given to the secondary employer
- The secondary strike must be proportional by taking into account the effect of the strike on the secondary employer and the possible effect that the strike may have on resolving the dispute giving rise to the primary strike or primary lockout.

Note: the restrictions to the employees in essential services are also applicable here.

Lockouts

A lockout is a remedy of an employer. Lockout is defined as a total or partial refusal by one or more employers to allow their employees to work, if that refusal is to compel them to accept, modify or abandon any demand that may form the subject matter of a dispute of interest (s.4). Like in a lawful strike, for a lockout to be lawful certain procedures must be followed.

Procedures for a lawful strike

The following conditions and procedures must be fulfilled for there to be a lawful lockout:

- a) The dispute must be a dispute of interest
- b) The dispute must have been referred to the Commission in the prescribed form and the Commission must have failed to resolve the dispute within the prescribed time.
- c) The employer must have given a 48 hours notice of intention thereof to their employees or trade union.

General note:

The procedures provided under the ELRA concerning strikes and lockouts **shall not apply** where a trade union and an employer or an employer's association has entered into a collective agreement which provides for the procedures to be followed in a strike or lockout (ss. 80(4), 81(4) and 82(2)).

Protest Action

This is a new development in the Tanzanian employment laws. A protest action is a right granted to an employee under s. 85 of the ELRA. Under s. 4, the phrase "protest action" is defined as **a total or partial stoppage of work by employees for the purpose of promoting or defending the social-economic**

interests of workers but not for the purpose referred to in the definition of strike or a dispute in respect of which there is a legal remedy.

Conditions and procedures for engaging/ taking part in a protest action

An employee may take part in a protest action if:

- a) the protest action has been called by a registered trade union or a registered federation of trade union
- b) the trade union or federation has served a notice on the Council stating the reasons for the protest action and the duration and form of the protest action
- c) thirty days have elapsed from the date the notice was served and
- d) the union or federation has given atleast 14 days notice of the commencement of the protest action.

Note:

- i) The restrictions which apply to the essential services employees also apply in protest action.
- ii) Upon receipt of the notice, the Council shall convene a meeting within 30 days of the notice to resolve the matter giving rise to protest action and on failure to resolve, it may secures an agreement with the trade unions or federation of trade unions calling for the protest action on the duration and form of the protest action in order to minimize the harm that may be caused by the protest action.
- iii) In resolving this Council may establish a tripartite committee to perform its functions or appoint a mediator after consultation with the Commission to mediate or may apply to Labour Court for declaratory orders of injunction.

LECTURE SEVEN

SOCIAL SECURITY LAW

1.0 INTRODUCTION

Social Securities trace their origin to the formation of societies. Societies used traditions and norms in providing social security among its members which later developed into modern written laws and regulations on social security.

The earliest social security legislation was enacted in the 16th century in England for the purpose of protecting the poor people. In 1883 the National Health Scheme law was enacted and this was the beginning of the establishment of social security schemes by different countries in the world.

2.0 THE SOCIAL SECURITY PROGRAMMES IN TANZANIA

The history of social security laws in Tanzania dates back to the colonial period when the colonial government provided social security to civil servants.

The Social Security Programmes in Tanzania today have been of diverse nature and they are composed of:-

- a) Pension Schemes
- b) Provident Funds Schemes
- c) Social Security Scheme

All these are public programmes and they differ in various aspects. Below is an analysis of each category.

2.1 The Pension Schemes

The pension schemes aims at assisting an employee after retirement from employment. The truth is that an employee has a pay because he works so when he stops working the earnings fly away. Thus the pension schemes' objectives are to fill the gap which occurs after retirement. There is a difference between

pension and a gratuity. The difference between a pension and a gratuity lies in the fact that pension is paid annually while a gratuity is paid in lump sum upon the retirement.

Originally, pension used to be regarded as an old age payment but as time goes pension has been given not only as an old age payment but also in the happening of other events such as suffering an invalidity, becoming sick and failing to continue with employment.

In this area, the laws which are responsible to regulate the pensions include the following:

2.1.1 The Pensions Ordinance, Cap. 371

In Tanzania generally pension schemes began during the colonial times as we have noted earlier. However, the colonial government considered pension not as of right but as a privilege and therefore certain employees were eligible for pensions while others were not eligible at all. The law which used to govern this aspect was the Pensions Ordinance, Cap. 371. Under this law pension is an old age payment to the employees of the government (civil servants) who were employed in the pensionable offices. This law was repealed and replaced by the Public Service Retirement Benefit Act, 1999.

Due to the changes in the law, the employees who were governed by the Pensions Ordinance were transferred to be governed by the new law. The conditions for entitlement to a benefit under the Public Service Retirement Benefit Act remained the same as those under the Pensions Ordinance but there has been an increase in the number of benefits and there has been many changes in the law to modernise it.

2.1.2 Parastatals Pensions Scheme Act, 1978

This law was enacted during the time when public sector was the leading employer in the economy. It established a scheme for the employees in permanent employments with the public parastatals who held pensionable offices. Thus, the temporary employees as well as the casual employees were not covered by this law. In 2001 this law was heavily amended due to the changes which were being experienced in the country's economy that affected the employment area. There had been changes in economic policies from late 1980's to early 1990's as the country was moving from the planned economy into the free market economy. These new policies insisted on the reduction of the public sector and the increase in the private sector. Thus, during this time one could witness privatisation of the parastatals and this was accompanied with retrenchments and redundancies in a bid to cope with the new forms of ownership and control of the economy. The government was slowly moving from becoming the major employer into becoming a regulator.

2.1.3 The Political Leaders Pensions Act, 1981

This law was passed in order to regulate the pension to be given to the political leaders on retirement from their political positions. In 1986 this law was amended by the Specified State Leaders Retirement Benefits Act, 1986. In short the Political Leaders Pensions Act covered all leaders in general while the Specified State Leaders Retirement Benefits Act, 1986 covered the specified state leaders namely the President, Vice President and The Prime Minister. In effect therefore the Specified State Leaders Retirement Benefits Act took the President, the Vice President and the Prime Minister out of the ambits of the Political Leaders Pensions Act, 1981.

The two legislation continued to operate until 1999 when they were both repealed and replaced by the Political Service Retirement Benefits Act, 1999.

This law covers all leaders including the President, Vice President, Prime Minister, Ministers, Deputy Ministers, the Speaker of the National Assembly, Assistant Speaker, Members of Parliament, Regional Commissioners and District Commissioners.

2.2 Provident Fund Schemes

There has been three types of these schemes in Tanzania namely the National Provident Fund Act, 1964, Government Employees Provident Fund, Ordinance, 1942 and Local Government Authorities Provident Fund Ordinance, Cap.53. The provident schemes were aimed at covering the non pensionable employees and they were named as such because it is the employees who were preparing themselves by saving for the time after retirement. Due to this reason, the provident schemes have been regarded as a wise way of arranging for the future of an employee.

2.2.1 Provident Fund (Government Employees) Ordinance, 1942)

This law established a fund for the benefit of the government employees who were not in pensionable offices under the existing laws.

2.2.2 Provident Fund (Local Authorities) Ordinance, Cap. 53

This law established a fund akin to that under the Government Employees Provident Fund but for the benefit of the employees working under the Local Government in non-pensionable offices under the existing laws.

This law was repealed by the Local Government Service Act, 1982 under s. 16 which established a Fund for the Local Government servants. Later on, the Local Government Service Act, 1982 was amended by The Local Authorities Provident Fund, 2000 and s.16 was repealed. The Local Authorities Provident Fund, 200 creates a fund for the benefit of the non-pensionable officers and employees of the Local Government.

2.2.3 National Provident Fund Act, 1964

This law covered the employees in the parastatals who were not pensionable together with the employees under other employers who were not the Central Government or the Local Government. This law was repealed by the National Social Security Fund Act, 1997 following this, all the employees under the National Provident Fund Act were transferred to be under the new law.

2.3 National Health Insurance Schemes

There has been health insurance schemes too to cover the employees in respect of their health and the health of their dependants. In Tanzania the law which deals with this aspect is the National Health Insurance Fund Act, 1999. This law establishes a National Health Insurance Fund and provides for the manner of contributing as well as the benefits available to the employees. This law excludes the employees in the local governments, military, prisons, as well as those already covered under the NSSF Act. The reason for such exclusion is that they are already covered by schemes offering the same benefits with this one, offering benefits in the nature of the health insurance.²⁸

2.4 Social Security Schemes

At international level social security has been defined by International Labour Organisation (ILO) in 1948 as follows:-

“The protection which the society provides for its members through a series of public measures, against the economic and social distress that otherwise would be caused by the stoppage or substantial reduction of earnings resulting from sickness, maternity, employment injury, unemployment, inability, old age and death, the

²⁸ SS. 21 (g) and 41 of the NSSF Act, 1997

provisions of medical care and the provisions of subsidies for families with children.”²⁹

It can be observed that the ILO definition seems to be narrow because it excludes the largest population on agriculture and informal sector.

It is argued that social security schemes are more important than private insurance schemes because it is the society itself which tries to protect itself internally, through obligatory schemes against the dysfunctional effects of income interruption. However this is done so as to prevent the citizens from being a burden on the rest of society.³⁰

There is also a contention that the social and economic changes increases the need for social security. For instance changes such as mechanisation and automation give rise to the use of less labour and as a result, it gives rise to the less use of labour a result of which creates unemployment, hence a need for social protection.

2.4.1 The National Social Security Fund Act, 1997

In 1997 there was a change from the National provident fund scheme to the National social security scheme. The NPF was therefore replaced by NSSF whereby the NPF Act was repealed and replaced by the NSSF Act. It can be observed that the NPF was created for the dependent workers who had a regular income and employers who could be obliged to pay contributions directly to the

²⁹ “Social Security Schemes in English Speaking African Countries,” *Hifadhi News*, Quarterly Journal of NSSF, Vol. 3, June 1999- August 1999

³⁰ Berghman, J. “The Resurgence of Poverty and the Struggle Against Exclusion: A new Challenge for Social Security in Europe?” In *International Social Security Review*, No. 1 of 1997 by International Social Security Association (ISSA), Geneva.

social security institutions while the NSSF included the self employed as well, provided that they can contribute the statutory amount.³¹

Factors which led to the replacement

1. Changes in the social economic and political pattern from the mid 1980's to 1990's. This is the time when multiparty system was introduced in the country. It is the time when liberalisation of economy was the main policy. Thus such market oriented policies such as privatisation and promotion of private sector development were becoming popular. These changes brought new aspirations and expectations among Tanzanian working class and society at large. As a result of these the government retrenched part of its workforce. For instance over 10,000 civil servants were retrenched for the year 1995/6 alone.³² This caused NPF to pay substantial amount of terminal benefits. These changes necessitated a transformation of the national provident fund into a social insurance scheme. Therefore the formation of NSSF was inevitable.

2. Fragmentation of Social Security Scheme

This was evidenced by the existence of social security institutions reporting to different parent ministries with different operating policies. For instance, NPF reported to the ministry of finance, and the Local Authorities Provident Fund reported to the prime minister. This fragmentation of social security scheme needed rectification, so as to have a comprehensive national social security policy under which to coordinate all those systems.

3. Poor Institutional Framework

Since 1964 to 1990 benefit processing and payment functions were centralised at the NPF headquarters. This led to inconveniences to its

³¹ Boseert, A., *Traditional and Modern Forms of Social Security in Tanzania*, "An Examination of Their Development," University of Augsburg, 1967

³² Ref. NPF Annual Report, 30th June, 1996, Dar es Salaam, p.6

members. In 1991 the system was decentralised leading to 11 paying centres scattered through regional office. But the members accounts were not updated in time due to the use of external computers. This continued even after installation of own computers owing to computer literacy.

4. Failure to meet the ILO standards

The NPF scheme was short of ILO standards for minimum social protection.³³ The standard which stipulated that, cash benefits should be in the form of periodical payments and not lump sum payments, the duration of which may be limited in respect of medical care and cash benefits for sickness, maternity and employment, but should be throughout the contingency with regards to employment injury, old age, permanent invalidity and survivorship, cash should replace last earnings to a prescribed extent, the state at least should assume general responsibility for the provision of benefits and the representatives of the participants in the scheme as contributors and beneficiaries should be involved in the management of the scheme and associated in an advisory capacity.

5. Other Reasons

Other reasons include the weaknesses of provident funds as a means of providing protection against contingencies. Generally they lacked principles of insurance (risk pooling) and solidarity. The employees are dependent on income from employment, when work is cut off they have to entirely depend on their own contributions, risk are not shared.

Also the fund had a narrow scope of coverage as they cater for employment sector only but with the result of the civil service sector reform, restructuring and privatisation of parastatal organisations and

³³ ILO Convention no. 102 of 1952

other economic hardships brought by the liberalised economy, the trend is towards more informal sector which calls for a wider social security scheme.

The provident fund system had no mechanism of adjusting the lump sum paid to inflationary trends. There had not been any categorical proposal of indexation of benefits to inflation brought by micro-economic instability and a salary system which is not indexed to inflation.

3.0 MEMBERSHIP INTO SOCIAL SECURITY FUNDS

After this brief description one may now come to a point on the membership to such schemes. Generally, membership in the schemes may be divided into two parts namely:-

- a) Compulsory Membership
- b) Voluntary Membership

3.1 Compulsory Membership

The compulsory membership happens in circumstances where on employment, the employee automatically become a member in a particular scheme. This means the employee is taken to be a member in a scheme merely because of the employment that he secures. In other words the membership in such a scheme is not voluntary but compulsory during the whole tenure of employment. Examples of laws that appears to offer compulsory memberships include the following.

3.1.1 Public Service Retirement Benefits Act, 1999

The Pensions Ordinance was the first law in Tanzania governing pensions and its conditions apparently showed that it was a compulsory scheme to all who were employed in the pensionable offices in the civil service. It was repealed and replaced by the Public Service Retirement Benefits Act, 1999 which has

furthered the spirit of the former as being a compulsory scheme. Under Section 5 of this law all employees who have been confirmed in the pensionable offices are regarded as members of this scheme.

3.1.2 Political Service Retirement Benefit Act, 1999

Membership to this scheme is compulsory as well since on appointment to a political post a particular person becomes a member. Under section 4 a leader is defined to mean a person who has ever served or is serving as the president, vice president, prime minister, speaker, minister, deputy minister, deputy speaker, member of parliament, regional commissioner or district commissioner.

3.1.3 National Social Security Fund Act, 1997

Membership to this fund is compulsory to all employees employed in the private sector or in the central government but who are not pensionable or covered by the Parastatals Pension Fund Act, 1978.

3.1.4 National Health Insurance Act, 1999

The membership in this scheme is compulsory to every employee in the Public sector except those exempted as we have seen under the Act.

3.1.5 The Local Authorities Provident Fund, 2000

The membership in this Fund is compulsory to all employees in the Local Authorities and the associated institutions such as the employees in the local government loans board and the employees in this Fund.

3.2 Voluntary Membership

The issue of becoming a member of a Fund or scheme can also be voluntary. This is to say that an employee may choose a fund or a scheme in which to

belong. However, this is only possible to employees who are not by virtue of their employment required to be under a particular Fund or Scheme. Some of the voluntary schemes may be found under the following laws:

3.2.1 Parastatals Pensions Scheme, 1978

The period between 1978 to 2001, the membership to this scheme was compulsory and direct only. A person could become a member on being employed into a pensionable permanent office only. However, following the 2001 amendments, it became possible for a person to choose to be a member under this scheme by his own choice. Definition of the word parastatal was taken to include any person who has chosen to become a member. Thus, any person who is not covered by any other scheme may chose to become a member under this scheme.

3.2.1 Local Authorities Provident Fund, Act 2000

Under this law there is a voluntary membership and compulsory membership as well. The compulsory membership is for those employed by the local government as we have seen earlier but again; any person who is not covered by any other scheme may become a member in this scheme.

4.0 SOURCES OF FINANCE

The question of sources of funds for these schemes is very important. This is because the benefits are offered in monetary terms. It should be emphasised also that the Funds are regarded as financial institutions. These institutions are also involved in various projects and investments which needs money.

Thus, the social security funds have various sources of finance to accomplish their tasks. There are those which get their finances from the Consolidated Fund and those which get their finances from the contributions of the members.

4.1 The Schemes Finances from the Consolidated Fund

These schemes have been decreasing in number. The Pensions Ordinance, Cap. 371 created a scheme of this nature but after the repeal and the replacement of the same, the Public Service Retirement Benefits Act has changed the system in which the members contribute to the Public Service Provident Fund.

4.1.1 Political Service Retirement Benefits Act, 1999

By now there is only one scheme which depends on the Consolidated Fund and this is contemplated under the Political Service Retirement Benefits Act, 1999. However, this is the best scheme in terms of the benefit structure and the amount of the benefits when compared with other schemes.

4.2 The Contributory Schemes

The schemes of this nature are increasing in number as time goes on. It seems that depending on today's lifestyle schemes of this nature are better than non contributory schemes. These Schemes depend on the contributions of both the employer and the employees for their existence. These schemes include those created under the Public Service Pensions Fund, the Government Employees Provident Fund, the Local Authorities Provident Fund, the National Social Security Fund and the National Health Insurance Fund. It is under these schemes that one needs to define clearly the roles of both the employer and those of the employee.

The roles of the employer and employee

In the contributory schemes the roles of an employer are stated to be among *inter-alia* to make sure that their employees are registered under the Funds, to contribute and to remit both their contributions and the contributions of their employees to the Funds. The roles of an employee on the other hand is to

contribute to a particular fund in which they are registered. The laws governing these schemes in particular provide for procedures of making the contributions, time for remitting the contributions, amount to be contributed and remitted as well as the penalty to be issued in case of non-adherence to the law or refusal or failure to contribute or to remit the said contributions. Specifically we can look at some of these laws to see how the particular provisions in this respect.

4.2.1 The Public Service Retirement Service Act, 1999

This law establishes a Fund known as Public Service Pensions Fund under provisions of section 31 for the purposes of keeping and managing the the contributions and other moneys obtained under this law. Under section 37 the sources of funds have been identified to include the contributions from the employers and employees, funds available from the investments of the Fund and any amount availed to the Fund by the parliament. This law requires the employers to contribute to the Fund every month. Normally, the employer shall deduct the employee's contribution from the salary of that particular employee and pay the same directly to the Fund. The rate of contribution is 5% of the employee's salary.

It is worthy noting that the employer has three roles under this law. The first role is to deduct the contribution of the employee from the salary of that employee. The second role is to contribute to the fund, in which case he is required to contribute 15% of the salary of the employee. Thirdly, he is required to remit the contributions to the Fund every month without delay.

An employer who gives false statements or false documents intentionally, or who fails to disclose any factor which is important in relation to the contributions to the Fund commits a criminal offence. Also any person who fails to pay his contributions in time or who prevents the functioning of the officers

of the Fund commits a criminal offence as well. An employer who deducts a greater amount from the salary of an employee than that which is required under the law commits a criminal offence. Any person convicted of any of these offences shall be liable to a fine of not more than 100,000/= or to imprisonment of not more than two years or both.

4.2.2 Parastatal Pension Scheme, 1978

The system under this law does not differ much with the one under the Public Service Retirement Benefits Act, 1999. Both the employers and the employees have the duty to contribute to a Fund established under this law known as the Parastatals Pension Fund. As to the amount to be contributed, the law gives the powers to the minister for finance to determine the rate of contributions and publish the same under the government Gazette. Currently, the employers contributions are at the rate of 10% of the employees salary and that of the employees is 5% of their salaries. The employer who fails to remit the contribution commits a criminal offence. Delay in submitting the contributions is attracts a penalty of 2.5% of the amount due. The furnishing of false statements or false documents as well as the failure to disclose an important matter for the purposes of avoiding the duty to contribute or in order to prevent another person from contributing amounts to a criminal offence which attracts a fine of 500,000/= or imprisonment of not less than two years or both.

4.2.3 The National Social Security Fund Act, 1997

This law establishes a Fund to be known as the National Social Security Fund under section 3 in which all contributios and other money under this law shall be paid. The employers and employees have a duty to contribute to the Fund every month. The employer in particular has four roles to play under this law.

The first role is to make sure that he together with his employees are registered under the Fund. Secondly, he has the duty of contributing the 10% of his employee's salary to the Fund as required under the law. Thirdly, he has a duty to deduct from the employees salary an amount equal to 10% as employee's contribution to the Fund. Finally, he has the duty to remit his contribution together with the contribution of the employees to the Fund. The employer is required to remit the contributions to the Fund at the end of every month. Delay in remitting the contributions attracts a payment of an additional amount of 5% of the amount due as a penalty for such a delay.

4.2.4 The National Health Insurance Act, 1999

Under this law a fund known as the National Health Insurance Fund is established under section 4. It is in this Fund that all contributions to from the members and the moneys obtained under this law are kept and managed. In section 9 the employers are required to contribute to the Fund a sum equal to 3% of the employee's salary and the employee is as well required to contribute a sum equal to 3% of his salary every month. The law gives the duty of remitting the contributions to the Fund to the Treasury since the employees covered here are government employees whose salaries are paid by the Treasury.

4.2.5 The Local Authorities Act, 2000

Under the provisions of section 4 of this law a Fund known as the Local Authorities Provident Fund is established. The employees covered by this law are known as the depositors while the employers are known as contributing employers. Generally, the depositors have the duty to deposit a sum equal to 5% of their salaries every month to the Fund. The contributing employers on the other hand have the duty to contribute a sum equal to 15% of the employees salary to the Fund every month. Like in other schemes, the employer is required to deduct the contribution of the employee from the salary of the respective

employee every month. He shall then remit the same together with his contribution to the Fund every month. However, it is a crime to furnish a false statement or false document with an intention of evading or reducing the lawful contributions. Failure to keep the important records concerning the contributions and deducting a greater amount than the one required by law is also a criminal offence.

5.0 THE MANAGEMENT OF THE FUNDS

The Funds and schemes established under different laws as we have seen, are managed by the boards established under these laws. These boards have different statuses depending on the nature and status of the particular Fund. There are those with corporate status and some which have no corporate status. It can be seen that where the Fund has the corporate status the board established under such a law does not have the corporate status but where the Fund has no corporate status then the Board has the corporate status.

This is because where the Fund has the corporate status then under its name; it can hold property, it can enter into contracts, it can sue and be sued and it has a common seal and perpetual succession. If the Fund has no corporate status then it can not do all these in its own name and that is why it becomes necessary to have a Board with corporate status and which therefore shall have the duty to hold the property of the Fund, can sue and be sued, and can enter into contracts for the Fund as a trustee.

Generally, many of these funds have no corporate status and therefore they are managed by a board with corporate status. Examples include the boards established under the NSSF Act, LAPF Act, and the PPF Act. The boards with no corporate status include those established under the National Health

Insurance Act, Public Service Retirement Benefits Act and Political Service Retirement Benefits Act.

These boards generally have the duty to administer the Funds, to keep the moneys of the Funds, to distribute the benefits obtainable under these Funds, to make and review policies for the funds as well as doing many other things depending on the status of the particular board. The boards have a final say in regard to membership, contributions (where it is contributory), investments, payment of benefits, setting of rates, establishment of branches, employment of the fund's employees and many other matters concerning the funds.

6.0 BENEFITS AND CONDITIONS

Although benefits are a right of a member of a particular fund or scheme there are many other factors to be considered before they are awarded depending on a particular Fund or Scheme.

Every scheme differs from other schemes in a number of ways in as far as number of the benefits, the amount in respect of a benefit, and the conditions for their realisation are concerned. Briefly, we look at some of these schemes.

6.1 Public Service Retirement Benefits Act, 1999

Under this law, the benefits obtainable include the pension, gratuity, invalidity payments, **Survivorship payments**, sickness and funeral benefits and withdrawal benefits.³⁴ The benefits under this law are given as a right to a member and not a privilege.

6.1.1 Pension

³⁴ Ss. 6 and 8, PSRB, Act, 1999

Normally, pension is an old age benefit availed to an employee after retirement from employment. Conditions for granting pension under this law are that the member must have retired and the Director General is satisfied that this employee was in a regular employment. Under this law the retirement age is 55 years but an employee may choose to continue working until 60 years which is a compulsory retirement age. To be eligible to pension the retired employee must have been confirmed to the employment as opposed to an employee serving on probationary terms.³⁵ The pension will also be paid in cases of abolition of an office, compulsory retirement, suffering an invalidity, and retirement for public interest.³⁶

6.1.2 Death Gratuity³⁷

Where an employee dies while in service, the Board shall give a certain amount of money to his legal representative, which doesnot exceed either his annual pensionable emoluments or his commuted pension gratuity, if any, which ever is greater. Also in cases where a retired employee dies before receiving his pensions or gratuity, the board shall give a gratuity to the legal representatives.

If the deceased leaves no widow/er and if his parents were dependent on him without any other means, the board shall grant a pension to the parents the amount of which does not exceed that which should have been given to the said widow/er. In cases where the deceased will have left a child or children who were still dependants, the board shall grant a pension in respect of every child until they reach the age of 21. This pension generally does not exceed the amount that would have been available to the widow/er.

Other benefits obtained under this law include:-

-Survival's Benefit³⁸

-Sickness benefit³⁹

³⁵ S. 18, *Ibid.*

³⁶ S.16, *Ibid*

³⁷ S.10, *Ibid.*

³⁸ S. 11, *Ibid.*

³⁹ S. 12, *Ibid*

- funeral benefit⁴⁰
- Invalidity Benefit⁴¹
- Withdrawal Benefit⁴²

6.2 The Parastatal Pension Scheme Act, 1978

This law has provides for pension, gratuity, withdrawal benefits and survivors benefits. Of importance here is the fact that the pensions and other benefits under this law are not given as absolute rights.⁴³ Thus, where it is established to the satisfaction of the Board that a member has been guilty of negligence, irregularity or misconduct, the pension, gratuity or other benefit may be reduced or altogether withheld. However there have been various proposals that the provisions be changed so that they provide for pension as of right.

6.2.1 Pension

Under this law as we have noted, pension is an old age benefit that doesnot come as an absolute right. Conditions for granting of pension include the attaining of 55 years or retirement on the grounds of sickness, compulsory retirement for the purposes of facilitating investment, removal for public interest, retirement from service with consent of the president and transfer to public service in circumstances in which he is permitted by law or such service to retire on pension or gratuity. Again the member must have been in service on a pensionable office for not less than 10 years. Pension shall be payable every month in arrears and it shall cease on the death of the member.

Payment of pension may cease in total or partially where a member in receipt of pension is employed afresh in a parastatal where the particular member consents. Where a member in receipt of pension is sentenced to imprisonment

⁴⁰ S.12(2), *Ibid*

⁴¹ S.13

⁴²

⁴³ S. 25 Parastatals Pensions Scheme, 1978

by a competent court for any offence involving moral turpitude or is detained under the order of the president made under the Preventive Detention Act, 1962.⁴⁴ However, in such circumstances the board may direct all money or any part of it to be paid to the dependants of the member. After imprisonment the board shall be restored to him with effect from the date when it so ceased but the board may deduct any amount paid to the dependants.

6.2.2 Gratuity

This is a lumpsum payment made to an employee on retirement. The conditions for gratuity are just the same as those for granting pension. However there are various circumstances which may entitle a member to gratuity apart from retirement. Thus where an employee does not qualify to pension the board may grant a gratuity.

For instance, where an employee would have been eligible for pension but only that he has not served for 10 years, he may be entitle to a gratuity of not smaller than the total of his contribution to the Fund together with the compound interest of 5% per anum.

Again a gratuity on marriage of female member⁴⁵ may be granted in circumstances where she was employed in a pensionable office for a duration not less than 5 years and she decides to retire from public parastatal service in circumstances which does not make her qualified for pension. The amount shall not exceed 1/12 (one twelveth) of her salary per month she worked or one year salary which ever is smaller. To be granted this gratuity, one must produce evidence to the marriage and the board must be so satisfied that the member has been married.

⁴⁴ S. 32 *Ibid*

⁴⁵ S. 35, *Ibid*

6.2.3 Death gratuity⁴⁶

This is a benefit that is given when a member dies in service of public parastatal. It is normally paid to the legal personal representative of the deceased. The amount of this gratuity shall not exceed the annual pensionable emoluments or commuted pension gratuity which ever is greater.

6.2.4 Survivors Benefits⁴⁷

In cases of the death of a member who had completed not less than 10 years in service of a pensionable office his dependants may be granted a survivors benefit. Such dependants under this law are the husband/wife of the deceased, who shall satisfy the board that he/she was a dependant on the income of the wife/husband, every child of the deceased under 18 years except a child who was married before the occurrence of death, as well as the parents of the deceased who satisfy the board that they were dependants on the deceased's income.

This is an additional to the death gratuity and shall be given to the estate of the deceased. These benefits shall be paid in arrears and shall be paid for a period of not less than 3 years after death. The payments shall cease where the widow remarries, or on the attainment of 18 years.

6.3 Political Service Retirement Benefit Act, 1999

The benefits obtainable under this law include the pension, gratuity, winding up allowance and many other benefits offered to political servants. These benefits differ in terms of application, the post held and the amount to be payable to a particular member. The circumstances under which these benefits are granted include retirement from a political office following the end of a tenure of office,

⁴⁶ S. 39, *Ibid*

⁴⁷ S. 40, *Ibid*

retirement on medical grounds, abolishment of an office as well as death. In this law we shall only discuss the benefits available to the president.

Benefits to President

On retirement the president is entitled to the following benefits under this law. To begin with he shall be entitled to annual pension that will be payable to him every month at the rate of 80% of the incumbent president. He will also be entitled to a gratuity the amount of which is 50% of the total salaries received when in office as a president. He is also entitled to winding up allowance the amount of which is the total salaries accorded to the incumbent president for 24 months. Other benefits include the diplomatic passport, for him and the spouse, Health insurance for treatment in the United Republic of Tanzania, the service of two vehicles availed to him by the government, a full furnished house with not less than four rooms (self contained) together with the servant quarter. Maintenance allowance for every month the amount of which shall be equal to 80% of the salary of the incumbent president. He shall also be entitled to security services to him and his family, one personal assistant, one personal secretary, office attendant, one cook, one laundry man, one laundry man, domestic servant, one gardener, two drivers and he will also be entitled to use the VIP lounge. ⁴⁸

If the president dies while in power or after retirement but before receiving his benefits the dependants shall be entitled to a gratuity the amount of which is equal to the total of all salaries which were received by the president while in power.⁴⁹ Again where a retired president dies the widow shall be entitled to a pension of 25% of the salary of the incumbent president.

6.4 The Local Authorities Act, 2000

⁴⁸ S. 9 *Ibid*

⁴⁹ S.10, *Ibid*

The benefits which are offered under this scheme are of one type which is the total of the amount available in the account at the time of retirement or on attaining the age of retirement or when employment is terminated on medical grounds or abolishment of an office or any other ground. The dependants are entitled to the whole amount available in the account where the employee dies in service.

6.5 The National Health Insurance Act, 1999

The benefits obtainable under this law are known as the health benefits and they are available to a public servant, his spouse as well as his dependant children up to four children. For this benefit to be obtained the employee must have contributed for more than three months. Incase of an employee who retires he shall enjoy the benefits for about three months after which the membership shall cease. The benefits include the costs for treatment of a member who becomes sick, the hospital care costs as approved by the Board and drug and medicine costs in accordance with the Essential Drug List except where the Fund grants otherwise. Where the costs in the list is lower than the actual costs the member shall bear the difference.⁵⁰ However the law identifies circumstances underwhich benefits under this law shall not be paid.

These include:

- health care services and drugs not prescribed in an accredited health facility
- public health care services
- illness or injuries arising from attempt suicide or self destruction while the person is insane or is of unsound mind
- purchase of eye lenses, wheel chairs or prosthetic appliances
- illegal abortions

⁵⁰ S. 16, *Ibid*

- abuses in the use of drugs or alcohol and any illness that may arise from such abuses
- employment injuries or illness arising from occupational hazards or accidents which are compensated under the schemes
- circumcision
- cosmetic surgery.

6.6 The National Social Security Fund Act, 1997

Part V of the Act deals with the benefits. This part spells out the basis of the scheme which is to provide benefit to members. Section 21 in particular gives a summary of benefits. The elaboration of these benefits flows from ss. 22 to 52 of the Act. It can be seen that some schemes would allow as the working time to be 35 to 40 years and the benefit to be based on that criterion.

A close look at the Act reveals that NSSF is a pension scheme although it is termed NSS. The general idea is social security although the three items of the scheme as seen in section 21 are pension. The NSSF aims at taking care of the employee who become a member from the time he get employed, retire and die.

In order to realise any of the category of the benefits accrued certain conditions have to be fulfilled.

6.6.1 Retirement Pension

Retirement pension shall be payable to a person who attained pensionable age and in respect of whom not less than 180 monthly contributions have been paid.⁵¹ Ie. 15 years of contribution and 60 years of age. Every pension scheme does have a limitation on the period of maximum pensionable working period. The amount of the monthly retirement pension is 30% of the average monthly

⁵¹ *Ibid.* s. 23

earnings of the retiree supplemented by 1.5% of his average monthly earnings for every 12 months of pension insurance addition to 180 months specified in the Act to a maximum of 67.5% of the average earnings. It should be noted that the average earnings is calculated over the best five years in the last ten years prior to pensionable age. This as it can be seen is a tendency to give advantage to the employee. The obvious reason here for this tendency is interwoven in the intention to give the best pension to the retiree. The Act also fixes the minimum monthly pension as being 80% of the minimum age.⁵²

As far as the period of the currency of the pension, it is provided that the retirement pension payment shall commence from the month following the month in which the retired employee satisfied the retirement age and the 180 monthly contributions and ends with the death of the pensioner.⁵³

Section 26 addresses a situation where a member has attained a retirement age and has retired from employment but he does not qualify for the failure to meet the 180 monthly contributions. Here it is provided that such a member shall be entitled to the payment of a special lump sum. This special lump sum is defined under section 2 to mean an amount equal to the insured person's last monthly contribution times the number of months of contribution paid to the Fund.

In connection to early retirement it is provided that a person who is within five years of the pensionable age has paid contributions for at least 180 months, may claim early retirement pension under 27(1) of the Act. The payment of early retirement pension is not without restrictions. The first restriction is that the amount of early retirement pension is the normal pension under s. 24 but reduced by 0.5% of the monthly average earning.⁵⁴ The second restriction is that

⁵² *Ibid.* s. 24

⁵³ *Ibid.* s. 25

⁵⁴ *Ibid.* s. 27(2)

if such amount to be paid after the calculation is lower than the minimum pension under subsection (3) of section 24 then it shall not be paid.⁵⁵ The aim of these restrictions is to discourage people from early retirement.

6.6.2 Invalidity Pension

Under s. 28 (1) an invalidity pension is payable to an insured person who

- a) is suffering from permanent invalidity,
- b) is under pensionable age,
- c) either-
 - i) has made 180 contributions
 - ii) at least 36 monthly contributions have been paid in respect of him of which twelve or more were paid in the period of 36 months immediately preceding the date of commencement of invalidity.

Permanent invalidity is defined under the subsection (2) of section 28 to mean permanent loss of two thirds or more of the earning capacity because of physical or mental invalidity. As far as s. 28(1)(c) (ii) is concerned, there are two main arguments advanced. First it is argued that this condition is intended to make sure that some consideration must have been paid for the benefit. Second argument is that this condition is intended to encourage people to be contributing. The amount of invalidity pension is 30% of the average monthly earnings of the insured person supplemented by 1% of his average monthly earnings for every twelve months of pension contributions in addition to 180 monthly contributions. If a person qualifies under s.28(1)(C) (ii) can not get supplemented benefits. Under s. 29(2) the monthly rate of invalidity shall be supplemented by 1% of average monthly earnings for every twelve months between which ever is later of the pensionable age and either the date of entitlement to invalidity pension; or the date of completion of 180 months

⁵⁵ *Ibid.* s.27 (3)

contributory employment. If for example pensionable age would have been 01/01/2003; and the date of invalidity occurs on 01/01/1990 and date of completion of 180 months of contributory employment was on 01/01/1994. The pensioner can begin to add 1% on the later date of completion of 180 monthly contribution.

The invalidity pension is payable for the duration of a permanent invalidity from one month after the date of invalidity until the attainment of a pensionable age or on the death of the invalid. It should be noted that the payment of invalidity pension will end at the attainment of pensionable age only if at the time the insured person is entitled to retirement pension at the same or higher rate.⁵⁶ As regards the insured persons suffering from invalidity but has not satisfied the conditions under paragraph (c) of subsection (1) of section 28 a special lump sum is awarded. Sometimes a beneficiary of an invalidity pension may be required to undergo a medical examination failure of which the payment ceases.⁵⁷

6.6.3 Survivors Pension

The basic condition for an award of this pension is that the deceased would have been entitled to pension himself. This means that if the deceased would have been entitled to an invalidity pension or would have attained a pensionable age and was entitled to retirement pension then the survivors pension shall be payable to his dependants.⁵⁸ If the insured person was in receipt of retirement or invalidity pension, the amount of survivors pension is paid in lump sum equal to the insured person's monthly pension times 12.⁵⁹ If the insured person did not satisfy conditions specified under s. 33 then his dependants are entitled to a special lump sum payment.⁶⁰

⁵⁶ NSSF Act, s.30

⁵⁷ *Ibid.* s.32

⁵⁸ *Ibid.* s.33(1) and (2)

⁵⁹ *Ibid.* s. 33 proviso

⁶⁰ *Ibid.* s. 36

Section 34 provides for the breakdown of the amount of survivors pension. This breakdown cuts down across the two types of dependants defined under s.33(2) namely the spouse (widow or widower) and children under the age of 21 years receiving full time education or a child under 18 years. Thus where the widow or widower is accorded 40% of the pension and where there are more than one widow or widower then this amount will be distributed equally among such widows. The dependant children are accorded 60% of the pension which should be distributed equally among them. Where there are no dependant children then the widow or widows are accorded 100% of the pension and likewise if there is no widow the dependant children shall receive 100% of the pension. In the event that there are neither children nor a widow then 100% of the pension is accorded to the parents of the deceased for life. It should be noted that this provision does not prejudice the relevant laws of inheritance and it is subject to any will of the deceased. Therefore if a person dies without a will then s. 34 will apply.

Duration of the survivors pension is provided for under s. 35. Here it the duration of survivors pension is for life or until remarriage, if at the occurrence of death of the insured person the widow is above 45 years and has dependant children who are below 15 years. Where the widow is below 45 years and has no dependant children below 15 years then the duration is two years. As far as the child is concerned the payment will go on until he attains the age of 18 or until he terminates full time education but not later than the age of twenty one. It may be for life if the child is an invalid.

6.6.4 Retirement and Invalidity grant

This is provided for under s.37 of the Act. Thus where an insured person qualifies for retirement pension or invalid pension he shall be entitled to a lump sum payment before getting monthly payment. This lump sum payment is

sometimes called compounded lump sum and sometimes it is called gratuity pension lump sum. The amount of this lump sum payment is equal to 24 times monthly amount of the retirement or invalidity pension.⁶¹ Normally the amount paid as lump sum is reduced from the total entitlement thus monthly pension is reduced. Worthy noting is the fact that if the deceased insured person had not received a retirement or invalid pension prior to his death, the dependants of the deceased insured person are entitled to the lump sum payment.

6.6.5 Funeral grant

An insured person who dies is given burial benefits under s. 38. This grant is given as a reimbursement to a family member who incurred expenses for the burial of the deceased insured person. The amount payable is to be determined by the board having regard to general economic conditions. It should be noted that the funeral grant is not claimable except as reimbursement.

6.6.6 Employment Injury Benefit

This is provided for under sections 39 and 40 of the NSSF Act. In regard to this there two issues needs to be addressed:

The first one is whether there is a conflict between NSSF Act and the Workmen's Compensation Ordinance; and the second one is whether one can enjoy benefit both from NSSF Act and Workmen's Compensation Ordinance.

The answer to both issues is negative.

Here unlike the Workmen's Compensation Ordinance, employment injuries include commuting accidents as defined under s. 3 of the Act.⁶² Also the Act covers accidents occurring to the employee during working hours ant the work place as well as at any other place where the insured person would not have been except for his employment. This provision seems to be wider than the one

⁶¹ NSSF Act s. 37(3)

⁶² Commuting accident means accident occurring to the insured person and involving his employers means of transport.

under the Workmen's Compensation Ordinance. The occupational diseases are also covered where they occur in connection with specific activity in a special occupation or where there are causal relationship to specific agents or exposure. Type and amount of the injury benefits are stipulated under s.40. Thus as regards medical care the amount is what shall be prescribed by the qualified medical practitioner which shall include essential pharmaceuticals or hospitalisation while cash payment is also recoverable in both temporary and permanent disability suffered by the insured person. As far as temporary disability is concerned, cash payment after certification of a medical board on the disability is 60% of the average daily earnings for up to 26 weeks. On the other hand on occurrence of permanent disability, the amount payable after certification by a medical board on the disability, shall be 70% of the average monthly earnings, to be paid monthly throughout the period of the disability.

Differences between invalidity pension and employment injury benefit lies on the fact that invalidity pension is given whether an invalidity is connected with the employment or not while employment injury benefit is given only where the injury is connected with employment.

6.6.7 Health Insurance Benefits

These are benefits provided for under s. 41 as described under s. 42 of the same Act. This kind of benefit become available after the insured person has contributed to the Fund for a minimum of three months before the medical contingency. This benefit is available to the insured person, his or her spouse, and his four children. The medical benefits envisaged here are to be provided by accredited hospitals⁶³ having agreements with the Fund. This covers, preventive and curative care, simple pathology, essential drugs, x-rays, laboratory tests, hospitalisation and minor surgery. The forms and procedures

⁶³ NSSF Act s.43

for the payment of these benefits are described by the regulations made by the Minister.

6.6.8 Maternity benefit

This kind of benefit is accorded to an insured person who has made at least thirty six monthly contributions of which twelve contributions are made in the thirty six months prior to date of confinement and upon the receipt of the director general of medical certificate from an accredited medical provider, certifying that the woman expects delivery of a child. Also such a benefit is payable after 3 years from the day when the last payment was made to the insured person unless the child dies within a period of twelve months.⁶⁴

There are two types of benefits namely cash benefits and medical care. The cash benefit is at the rate of 100% of the average daily earnings for a period of twelve weeks while the medical care is made during pre-natal and post-natal period by an accredited medical practitioner or midwife.⁶⁵ If prolonged post –natal cares is entertained, that may make the scheme unable to meet the risk. Thus the proviso to s. 45(b) limits the prolonged medical care after delivery to only twelve weeks.

NB: -This section apply to both married and unmarried employees

-The provisions of s. 25B of the Employment Ordinance are made inapplicable to employers registered with the Fund.⁶⁶

7.0 INALIENABILITY AND PROTECTION OF THE BENEFITS

Most of the Schemes discussed here offer benefits which are inalienable. Thus every assignment or charge on benefit and every agreement to assign or charge any benefit is void. Therefore even on bankruptcy of a beneficiary the benefit

⁶⁴ *Ibid.* s. 44 (a), (b),(c)

⁶⁵ *Ibid.* s.45

⁶⁶ *Ibid.* s. 46

shall not pass to any trustee or other person acting on behalf of creditors. Under section 77 of the NSSF Act, protection against attachment is clearly stipulated to the extent that on the event of bankruptcy of the insured person his contributions to the Fund shall not form part of his assets except in accordance with the terms of the Fund. The sum standing to the credit of an insured person therefore remains to be the property of the Fund until paid out in accordance with the provisions of the Act. It is for this purpose that in the event of his insolvency or bankruptcy they cannot be liable to attachment in satisfaction of his debts.⁶⁷

The benefits are also protected by giving priority for payment of contributions where there has been an order of attachment issued against the property of employer and a subsequent sale of the same. That the proceeds of the sale shall not be distributed to any person entitled thereto until any amount due in respect of contributions payable by the employer under the Act has been settled.⁶⁸

8.0 TIME AND MANNER OF MAKING CLAIMS

Every scheme provides for the time and manner of making claims which must be adhered to by a member of that particular scheme.

Under NSSF Act, 1997

A person entitled to a benefit is required to make a claim to the director general within a prescribed time and in the prescribed manner or in a manner accepted by the director general. He must also produce any necessary document such as certificates, and other evidences for the purpose of determining the right to benefits as the director general may require. He may also be required to attend at such places and at times appointed by the director general.⁶⁹

⁶⁷ *Ibid.* s. 76

⁶⁸ *Ibid.* s. 75

⁶⁹ *Ibid.* s. 49

LECTURE EIGHT

INTERNATIONAL ASPECTS OF LABOUR LAW IN TANZANIA

The International labour standards are regulations by the International Labour Organisation (ILO). The ILO is an agency of the United Nations Organisation which was created in 1919 primarily for the purpose of adopting international standards to cope with the problem of labour conditions involving "injustice, hardship and privation". Therefore its primary function is to formulate the standards for labour and conditions for the realisation of different worker's rights. With the incorporation of the Declaration of Philadelphia into its Constitution in 1944, the Organization's standard setting mandate was broadened to include more general, but related, social policy, human and civil rights matters. Therefore the International labour standards are essentially expressions of international tripartite agreement on these matters. Tanzania became a member of the ILO in 1962 and it since then has adopted several instruments passed by the ILO.

What are the forms of these ILO standards?

The ILO's standards take the form of international labour **Conventions** and **Recommendations**. A convention is defined as an agreement or compact especially an international agreement.⁷⁰ Usually the term apply to agreements preliminary to a formal treaty or to serve as its basis. Thus, the ILO Conventions are international treaties, subject to ratification by ILO member States.

A Recommendation is defined as an advice or counsel.⁷¹ Therefore the ILO Recommendations are non-binding instruments although they typically deal with the same subjects as Conventions. Recommendations set out guidelines which can orient a national policy and action. It should be borne in mind that both forms are intended to have a concrete impact on working conditions and practices in every country of the world.

⁷⁰ Black's Law dictionary

⁷¹ Ibid.

Other Forms

The annual International Labour Conference, as well as other ILO bodies, often agree upon documents less formal than Conventions and Recommendations. These take such forms as **codes of conduct**, **resolutions** and **declarations**. These documents are often intended to have a normative effect but are not referred to as part of the ILO's system of international labour standards. There are a number of important examples of these less formal documents for instance, the Declaration on Fundamental Principles and Rights at Work and its Follow-up.

Their Arrangement

The organization has adopted more than 180 Conventions and 185 Recommendations covering a broad range of subjects to date. The Governing Body of the office has decided that eight Conventions should be considered fundamental to the rights of human beings at work, implemented and ratified by all member States of the organization. These are called Fundamental ILO Conventions. Another four Conventions concerning matters of essential importance to labour institutions and policy have been considered as Priority Conventions. The remaining instruments, spanning a broad range of subjects, have been classified into some 12 categories of Conventions and Recommendations.

Their Characteristics

The ILO's Constitution requires that international labour standards be set with "due regard to those countries in which climatic conditions, the imperfect development of industrial organisation, or other special circumstance make the industrial conditions substantially different." Its mandate to nevertheless set universally applicable standards has resulted in a number of characteristics unique to the ILO's system of international norms.

How can a country adopt such standards?

A country in which the ILO standards apply has to be a member state which has **ratified** the particular convention or has **accessed** a particular convention. Ratification means to confirm, approve or to sanction a previous act done either by the party itself or by other parties in its place.⁷² This in relation to the ILO conventions it happens where a state participated in the formation of a particular convention which it adopts. Therefore a convention under normal circumstances will not bind the state until the same state ratifies it because it is after ratification that a particular convention becomes part of the laws of a particular state.

Accession means the absolute or conditional acceptance by one or several nations of a treaty already concluded between other sovereignties.⁷³ As far as the ILO Conventions are concerned, accession is a method through which a nation that did not participate in the formation of a particular convention it seeks to adopt can become a party. The main reason why this nation did not participate in the formation could probably be that it was not a member state.

Thus for Tanzania both ratification and accession have been the modes through which several ILO conventions have been adopted. This is because Tanzania became a member after its independence in the 1962. Therefore in adopting the ILO conventions which were already passed since the formation of ILO up to 1962 accession was used as a method of becoming part to these conventions. Meanwhile, after becoming a member it proceeded to adopt the ILO Conventions through ratification.

Normally a state is taken to have become a part to a convention after ratifying it or accessing to it but the recent trend after the 1995 ILO session shows that there

⁷² Ibid.

⁷³ Ibid.

have been different weight attached to certain conventions named Fundamental Conventions⁷⁴ which can be enforced against any member state even if such a state has not ratified them. Also the conventions passed at the foundation of ILO can be enforced against any member state even if it has not ratified them.

How many ILO Conventions have been adopted by Tanzania todate?

Tanzania has adopted a total of 45 ILO Conventions out of 184 ILO Conventions⁷⁵ out of which 41 Conventions are still in force while 4 are no longer in force as a result of being denounced following succeeding ratifications.⁷⁶ Before it became a United Republic 10 conventions had been adopted out of which six were adopted by Tanganyika and four by Zanzibar. Since the union Tanzania has ratified 35 Conventions.

Why are these international standards needed?

1. Development Aspect

International labour standards contribute to development. An important body of thought attributes developmental characteristics to an "international labour standards mentality." This may be cited as a reason for and contribution of international labour standards. Any contribution to an environment which respects and rewards the smart use of labour including the contribution at the national level of

⁷⁴ The ILO's Governing Body named eight Conventions as being Fundamental Conventions in May 1995, following its 75th Anniversary and the discussions in the World Summit on Social Development. The campaign for the ratification of these Conventions was launched by its Director-General. These Conventions include the Freedom of Association and Protection of the Right to Organize Convention, 1948 (No. 87), the Right to Organize and Collective Bargaining Convention, 1949 (No. 98), the Forced Labour Convention, 1930 (No.29) the Abolition of Forced Labour Convention, 1957 (No. 105), the Equality Discrimination (Employment and Occupation) Convention, 1958 (No. 111), the Equal Remuneration Convention, 1951 (No. 100), The Elimination of Child Labour Minimum Age Convention, 1973 (No.138) and the Worst Forms of Child Labour Convention, 1999 (No. 182)

⁷⁵ ILO Conference, 91st Session 2003: List of Ratifications by Convention and by Country as of 31st December 2002, Geneva ILO Report 111 (Part 2)

⁷⁶ Those which have been denounced following succeeding ratifications include: the Minimum Age (Trimmers & Stockers) Convention no.15 of 1921 which was ratified on 30.01.1962 (Tanganyika), the Minimum Age (Industry) Convention no. 5 of 1919 ratified on 22.06.1964 (Zanzibar), the Minimum Age (Sea) Convention no. 7 1920 ratified on 22.06.1964 (Zanzibar) all of which were denounced on 16.12.1998 as a result of the ratification of the Minimum Age Convention no. 138 of 1973. Another Convention which is no longer applicable is Protection against Accidents (Dockers) Convention of 1932 which was ratified on 19.11. 1962 and denounced on 30.05.1983 as a result of ratification of Occupational Safety and Health (Dockwork) Convention no. 152 of 1979

international labour standards helps develop the national human resource, improve the possibility of attracting foreign direct investment, and improve the chances of economic growth. Retention of cheap labour practices maintains the nation in a cycle of poverty which relies on low costs and low productivity for maintaining income. The World Bank's World Development Report 1995, namely "Workers in an integrating world" discussed a number of international labour standards matters, pointing out the usefulness of appropriately designed standards.

2. *Humane Aspect*

"...the failure of any nation to adopt humane conditions of labour is an obstacle in the way of other nations which desire to improve the conditions in their own countries;"

These words in the Preamble of the ILO's Constitution were, in 1919, prescient of the concerns expressed in the ILO Director General's 1997 Report on "The ILO, Standards Setting and Globalisation" in which the director argued that:

"Leaving aside the various interpretations which divide the specialists, it is highly likely that public opinion will continue to believe widely that globalisation (the complex phenomenon of economic interdependency resulting from trade in goods and services and capital flows) inevitably implies a downward levelling of pay for jobs of equal (low) skills in a market in which goods and capital can freely circulate.... This liberalization of trade, as a part of globalisation carries the risk, as the Preamble to the Constitution of the ILO warns us, that international competition, by inhibiting the will of certain Members to

introduce progress, might be 'an obstacle in the way of other nations which desire to improve the conditions in their own countries'."

Here, the Director General observed that the effects of international competition which have been argued as tending to be an obstacle to improved conditions of labour are a target of, and reason for, international labour standards. He argued that the ILO's standard setting activities had to meet the challenge posed by globalization first observed by the Constitution's drafters -- by reaffirming the value of social justice and working with member States to strive for it in the context of opportunities created by a vibrant world economy.

3. *Peace Aspect*

"...universal and lasting peace can be established only if it is based on social justice..."

The Preamble of the ILO's Constitution begins with these words. They give a hint to an intention of the founders of the ILO: ie. to establish "social justice" and improve the chances of lasting peace. International labour standards were the first means conceived with the founding of the ILO of helping to establish social justice. Can a system of international law really contribute to lasting peace? The answer is more apparent when the question is inverted:

Can peace be expected to last without a system of international law aimed at securing social justice? The negative answer resounds with a single thought of each and every conflict around the world based in people's powerlessness to voice their opinion in association, poverty, racial or political discrimination, unemployment, economic insecurity, inequitable distribution of wealth to name just a few of the types of social injustice the system of international labour standards hopes to eliminate or reduce. It is this lofty reason perhaps truly foremost among the many reasons given for having a system of international labour standards which rings most convincing in the hearts of every human

being around the world. The framers of the ILO's Declaration of Philadelphia in 1944 noted as much in their assertion at that time that "experience has fully demonstrated the truth of the statement in the Constitution...." The cornerstone of the system of international labour standards is hope for the defeat of social injustice, the cynicism which accepts it as an inevitable part of the human experience, and the possibility that lasting peace is incrementally easier to achieve with each and every defeat anywhere of social injustice.

Where do international labour standards come from?

The setting of international labour standards or where international labour standards come from is a unique legislative process involving governments, as well as employers' and workers' representatives from around the world.

Involvement of employers' and workers' organizations in the adoption of standards

An important part of the viability and credibility of international labour standards comes from the intimate involvement of workers' and employers' representatives in setting them. Employers' and workers' representatives are involved in setting international labour standards from the beginning. For example, the need for an international standard may be perceived by the workers' group. Through its representation in the ILO's Governing Body, the subject can be placed on the agenda of a future International Labour Conference. The employers' group as well has the right to take this initiative. Once the International Labour Office circulates its law and practice report, governments are requested (and obliged under the Standing Orders of the Conference) to consult the most representative organizations of employers and workers before finalizing their replies to the questionnaire which accompanies the report. Employers' and workers' groupings are also free to transmit their comments and ideas directly to the Office. The systematic nature of the adoption process

enables concerned workers' and employers' groups to know the subjects set down for labour standard setting months, even years, in advance. This facilitates their participation. For those countries which have ratified the Tripartite Consultation (International Labour Standards) Convention, 1976 (No. 144), the government is under a legally binding obligation to consult, and aggrieved parties may use regular and special enforcement mechanisms for alleging non-conformity with the requirements of the Convention. At the first discussion as well as any second discussion of the agenda item at the Conference, employers' and workers' groups are intensely involved in the process of proposing texts, making amendments, and considering the ultimate form of the standard. They have equal voting strength with governments in the Committee and have, in practice, a decisive impact on the ultimate form and content of the international labour standards.

After the first discussion, the Office's draft instrument is subject to scrutiny by member States. Here again, governments are expected to consult representative employers' and workers' organizations and reflect their proposed amendments to or comments on the draft to the Office. Once again, employers' and workers' groups at the national level are free to transmit their amendments or comments directly to the Office.

In the ultimate adoption of a labour standard by the full Conference, a two-thirds majority of votes cast by the delegates present must be achieved. The participation by the employers' and workers' groups, as well as their voting in favour of or against a standard, has critical importance. This is not only with respect to the adoption of the instruments concerned, but also for the viability of any Conventions adopted: without the active involvement of all groups governments, employers, and workers, the newly set standard can be challenged in debate at the national level, sometimes undermining chances of wide spread

ratification, and thus the viability of particular international labour standards as well as the international labour standards system.

How are international labour standards enforced?

The ILO's mechanisms for international supervision of international labour standards are acknowledged role model for their effectiveness and efficiency. The results over the years are thousands of documented cases of improvement in situations involving matters ranging from infringements of basic civil rights principles to everyday conditions of work.

The regular system of supervision

This system is based on the ratification of a labour standard and an obligation of regular, periodic reporting on measures taken to give effect to the provisions of the instrument.

The special systems of supervision

These mechanisms involve cases of specific allegations against a member State. Procedures under Article 24 and Article 26 of the ILO Constitution require that the Convention concerned be ratified.

NB: Allegations concerning infringement of freedom of association principles and principles at the foundation of the ILO may be brought against member States even if they have not ratified the Conventions concerned.

Ad hoc mechanisms

Over the years, special supervisory mechanisms have been set up to oversee the effect given to international labour standards in particular circumstances.

THE FUNDAMENTAL ILO CONVENTIONS

Eight ILO Conventions have been identified by the ILO's Governing Body as being fundamental to the rights of human beings at work, irrespective of levels of development of individual member States. These rights are a precondition for all the others in that they provide for the necessary implements to strive freely for the improvement of individual and collective conditions of work. These includes:

Freedom of Association and Protection of the Right to Organize Convention, 1948 (No. 87)

Right to Organize and Collective Bargaining Convention, 1949 (No. 98)

Forced Labour Convention, 1930 (No.29)

Abolition of Forced Labour Convention, 1957 (No. 105)

Equality Discrimination (Employment and Occupation) Convention, 1958 (No. 111)

Equal Remuneration Convention, 1951 (No. 100)

The elimination of child labour Minimum Age Convention, 1973 (No.138)

Worst Forms of Child Labour Convention, 1999 (No. 182)

Ratification of the Fundamental ILO Conventions

In May 1995, following the ILO's 75th Anniversary and the discussions in the World Summit on Social Development, a campaign for the ratification of these Conventions was launched by the Director-General of the ILO. Since then the ILO has registered over 70 ratifications and confirmations of previous obligations concerning the fundamental Conventions. In addition, many countries are currently involved in formal ratification procedures or are in the process of examining or re-examining the appropriateness of ratifying the Organization's seven Fundamental Conventions. The ILO has 175 member States.

International Labour Standards on Freedom of Association

The freedom of association is the most basic of all principles underlying the work of ILO and the activities of those who toil for social justice. In addition to recognition of the principle of freedom of association in the ILO's Constitution and its Declaration of Philadelphia, two Conventions adopted in 1948 and 1949 set out the essential elements of the freedom of association, the right to organise and the importance of collective bargaining.

The Freedom of Association and Protection of the Right to Organize Convention, 1948 (No. 87) on one hand establishes the right of all workers and employers to form and join organizations of their own choosing without prior authorization, and lays down a series of guarantees for the free functioning of organizations without interference by the public authorities.

Summarily this convention provides inter-alia for the following:

Recognition of the right to organize: The right to organize is to be granted to workers and employers, without distinction whatsoever (Article 2). Only the armed forces and the police may be exempted by national laws or regulations (Article 9).

Establishment of organizations: It must be possible for organizations to be established without previous authorization (Article 2).

Free choice of organization: Workers and employers are guaranteed the right to establish and, subject only to the rules of the organization concerned, to join organizations of their own choosing (Article 2).

Functioning of organizations: Organizations shall be free from interference by the public authorities when drawing up their constitutions and rules, electing

their representatives, organizing their administration and activities and formulating their programmes (Article 4).

Dissolution or suspension: Organizations shall not be liable to be dissolved or suspended by administrative authority (Article 4).

Federations and confederations: Organizations shall have the right to establish and join federations and confederations (Article 5); the guarantees provided in Articles 2, 3 and 4 apply to these higher-grade organizations (Article 6).

International affiliation: Organizations, federations and confederations shall have the right to affiliate with international organizations of workers and employers (Article 5).

Legal personality: The acquisition of legal personality by organizations, federations and confederations shall not be made subject to conditions of such a character as to restrict the application of the provisions of Articles 2, 3 and 4 (Article 7).

Organizations and the law: In exercising the rights provided for in the Convention, workers and employers and their respective organizations shall respect the law of the land; however, the law of the land shall not be such as to impair, nor shall it be so applied as to impair, the guarantees provided for in the Convention (Article 8).

The Right to Organize and Collective Bargaining Convention, 1949 (No. 98) on the other hand provides for the protection against anti-union discrimination, for protection of workers' and employers' organizations against acts of interference by each other, and for measures to promote and encourage collective bargaining.

Summarily this convention provides inter-alia for the following:-

Anti-union discrimination: Workers shall enjoy adequate protection against acts of anti-union discrimination in respect of their employment, both at the time of entering employment and during the employment relationship. Such protection shall apply more particularly in respect of acts calculated to make the employment of a worker subject to the condition that he shall not join a union or shall relinquish trade union membership; cause the dismissal of or otherwise prejudice a worker by reason of union membership or because of participation in union activities outside working hours or, with the consent of the employer, within working hours (Article 1).

Acts of interference: Workers' and employers' organisations shall be protected against interference by each other or each other's agents or members. In particular, acts which are designed to promote the establishment of workers' organizations under the domination of employers or employers' organizations, or to support workers' organizations by financial or other means, with the object of placing such organizations under the control of employers or employers' organisations, shall be deemed to constitute acts of interference (Article 2).

Machinery appropriate to national conditions: In view of the importance of the procedural aspect in ensuring the effective application of these standards, the Convention makes it an obligation to establish, where necessary, machinery appropriate to national conditions for the purpose of ensuring respect for these two facets of the right to organize (Article 3).

Collective bargaining: While Convention No. 98 is mainly concerned with the protection of trade unions, it is also the ILO instrument setting forth its basic principles in respect of collective bargaining: The obligation to promote this practice and the voluntary nature of such bargaining. Article 4 requires measures

appropriate to national conditions to be taken, where necessary, to encourage and promote full development and utilization of machinery for voluntary negotiation between employers or employers' organizations and workers' organizations, with a view to the regulation of terms and conditions of employment by means of collective agreements.

Public sector: Unlike Convention No. 87, which applies to workers in both the private and public sectors, without distinction, and accordingly also to public servants, Convention No. 98 does not deal with the position of public servants engaged in the administration of the State (Article 6).

NB: So fundamental is the concept of freedom of association, that ILO member States agreed in 1950 that even non-ratifying States should be susceptible to a special system of supervision for infringement of associational rights.

International Labour Standards On Forced Labour

The simplicity of the concept helps make it fundamental: No one shall be forced to work. Countries which have ratified the Forced Labour Convention undertake "to suppress the use of forced or compulsory labour in all its forms within the shortest possible period." The Committee of Experts, noting global developments and the ascension of human rights amongst the international community's concerns, many years ago understood this obligation to require immediate prohibition and suppression in practice. Hand in hand with this, the Convention has over the years been the most widely ratified of all the Fundamental ILO Conventions. Of the 174 ILO member States 151 had ratified the instrument as of 1 February 2000. One hundred forty five member States have ratified the Abolition of Forced Labour Convention, adopted in 1957 to abolish forced labours for particular purposes. Over the years the Committee of Experts on the Application of Conventions and Recommendations have noted hundreds of specific cases of progress in the fight against forced labour.

The Forced Labour Convention, 1930 (No. 29)

This Convention requires the suppression of forced or compulsory labour in all its forms. Forced labour is "all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily." For the purposes of the Convention, the term "forced labour" does not include such as obligations as military service; work or service which is part of normal civic obligations; work or service exacted as a consequence of a conviction in a court of law, under certain conditions; work exacted in cases of emergencies such as wars, fires, earthquakes, etc.; and minor communal services as defined. The Convention requires "really adequate" and strictly enforced penal penalties at the national level in cases of illegal exaction of forced or compulsory labour.

Abolition of Forced Labour Convention, 1957 (No. 105)

This Convention prohibits the use of any form of forced or compulsory labour as a means of: political coercion or education, or punishment for the expression of political or ideological views, workforce mobilization for purposes of economic development, labour discipline, punishment for participation in strikes, or racial, social, national or religious discrimination.

International Labour Standards and Child Labour

It should be noted that the International labour standards have for 80 years been at the forefront of the fight against child labour. The ILO adopted its first Convention on child labour in 1919, the year of its foundation. Therefore the elimination of child labour is a longstanding major objective of the ILO.

In 1919, the ILO's first Conference adopted a conventions which fixed the minimum age for employment in industry. In 1973, the ILO adopted its

comprehensive Minimum Age Convention (No. 138) which requires states to design and apply national policies to ensure the effective abolition of all forms of child labour and to set the minimum ages for employment. This has proven to be a difficult task confronting much resistance, particularly vested commercial interests and market pressures as well as moral indifference and cultural attitudes. The problem is compounded by unmet development needs that would put parents at work and children in schools.

In 1992, the ILO launched the International Programme on the Elimination of Child Labour (IPEC) to continue the struggle against child labour through practical projects in the field. It counts a number of success in phasing out child labour in specific cases and in providing educational alternatives in many fields, such as football stitching, carpet weaving, tackling sweatshop conditions in the garment industry, withdrawing children from work in mines and quarries and saving young girls from trafficking and sexual exploitation. Above all, the ILO has been at the forefront in creating greater awareness of the urgent need for coordinated action in a targeted manner and that much, much more needs to be done.

This led to the idea of concentrating immediately on the worst forms of child labour as morally abhorrent situations under any circumstance or development condition while pursuing the wider aim of reducing child labour in all its forms. This is the objective of the ILO Convention on the Worst Forms of Child Labour adopted in 1999. It was approved unanimously by governments, workers and employers, reflecting a solid political consensus for action now.

Minimum Age Convention, 1973 (No. 138)

The States that ratify this Convention undertake to pursue a national policy designed to ensure the effective abolition of child labour and to raise

progressively the minimum age for admission to employment or work to a level consistent with the fullest physical and mental development of young persons. One of the principal means to be taken for this purpose is the prohibition of employment or work for children under the duly fixed minimum age. The Convention sets a number of minimum ages depending on the type of employment or work. The first principle is that the minimum age should not be less than the age for completing compulsory schooling and in no event less than age 15. For countries whose economic and educational facilities are insufficiently developed, the age can be set initially at 14. The second principle is that a higher minimum age should be set for hazardous work. This age may not be less than 18. The Convention provides that the types of employment or work deemed to be hazardous shall be determined by national laws or regulations or by the competent authority, leaving it to the individual countries to determine the content of these activities. Finally, in the case of light work, the minimum age can be set at 13 years, or 12 years where the economy and educational facilities are insufficiently developed.

The Convention is supplemented by Recommendation No. 146. Convention No. 138 was not intended as a static instrument prescribing a fixed minimum standard but as a dynamic one aimed at encouraging the progressive improvement of standards and of promoting sustained action to attain the objectives. The number of ratifications of this Convention has been growing since the beginning in May 1995 of the Director-General's initiative to achieve universal ratification of the ILO's fundamental Conventions, although it is still fewer than other fundamental Conventions.

Worst Forms of Child Labour Convention, 1999 (no. 182)

The ILO member States took a decisive step towards liberating scores of millions of children from slavery and debt bondage, prostitution and

pornography, dangerous work and forcible recruitment for armed conflict with the unanimous adoption of the Worst Forms of Child Labour Convention, 1999 (No. 182). The Convention applies to all persons under the age of 18 and calls for "immediate and effective measures to secure the prohibition and elimination of the worst forms of child labour as a matter of urgency." It defines the worst forms of child labour as:

“all forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage, serfdom and forced or compulsory labour; forced or compulsory recruitment of children for use in armed conflict; use of a child for prostitution, production of pornography or pornographic performances; use, procuring or offering of a child for illicit activities, in particular for the production and trafficking of drugs; and, work which is likely to harm the health, safety or morals of children.”⁷⁷

The Convention requires ratifying States to "design and implement programmes of action" to eliminate the worst forms of child labour as a priority and "establish or designate appropriate mechanisms" for monitoring implementation of the Convention, in consultation with employers' and workers' organizations. It also says ratifying States should "provide support for the removal of children from the worst forms of child labour and their rehabilitation; ensure access to free basic education or vocational training for all children removed from the worst forms of child labour; identify children at special risk; and take into account the special situation of girls."

An accompanying Recommendation defines "hazardous work" as:

"work which exposes children to physical, psychological or sexual abuse; work underground, under water, at dangerous heights or in confined spaces; work with dangerous machinery or tools, or which involves heavy loads; work in unhealthy environments which may

⁷⁷ Article 3 of the Convention

expose children to hazardous substances, temperatures, noise or vibrations; and work under particularly difficult conditions such as long hours, during the night or where a child is confined to the premises of the employers." ⁷⁸

The Recommendation urges ratifying States to declare the worst forms of child labour criminal offences and impose penal sanctions on those who would perpetrate them.

International Labour Standards and Equality in Employment

In 1944, the ILO's Constitution and mandate was refreshed by the Declaration of Philadelphia. Among other things, it affirmed that:

"all human beings, irrespective of race, creed or sex, have the right to pursue their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity"

From the very first, the question of the observance of equality of opportunity and treatment has been one of the fundamental objectives of the ILO. The Constitution, as rendered in 1919, said that this principle is among those that are "of special and urgent importance" that should guide the policy of the ILO, and prescribed that:

"the standards set by law in each country with respect to the conditions of labour should have due regard to the equitable economic treatment of all workers...."

Since then, many international labour standards have been imbued with elements aimed at equality of opportunity, naming a variety of reasons for which distinctions should not be made between people in their work, livelihood, education and training. The Governing Body recognized recently again the

⁷⁸ Recommendation 3 of the Worst Forms of Child Labour Recommendations, no. 190 of 1999

continuing essentiality of these principles, in two Fundamental ILO Conventions.

The material conventions on these standards are the Discrimination (Employment and Occupation) Convention, 1958 and the Equal Remuneration Convention, 1951.

Equal Remuneration Convention, 1951 (No. 100)

This convention calls for equal pay for men and women for work of equal value. States having ratified the Convention shall promote and, in so far as is consistent with the methods in operation for determining rates of remuneration, ensure the application to all workers of the principle of equal remuneration for men and women workers for work of equal value. The Convention shall apply to basic wages or salaries and to any additional emoluments whatsoever, payable directly or indirectly, in cash or in kind, by the employer to the worker and arising out of his or her employment. The Convention defines equal remuneration for work of equal value as remuneration established without discrimination based on sex. This principle may be applied by means of national laws or regulations, legal machinery for wage determination, collective agreements or a combination of these various means. One of the means specified for assisting in giving effect to the Convention is the objective appraisal of jobs on the basis of the work to be performed. The Convention provides that governments shall co-operate with employers' and workers' organizations for the purpose of giving effect to its provisions.

Discrimination (Employment and Occupation) Convention, 1958 (No. 111)

This convention calls for a national policy to eliminate discrimination in access to employment, training and working conditions, on grounds of race, colour, sex, religion, political opinion, national extraction or social origin and to promote equality of opportunity and treatment.

The Convention assigns to each State which ratifies it the fundamental aim of promoting equality of opportunity and treatment by declaring and pursuing a national policy aimed at eliminating all forms of discrimination in respect of employment and occupation. Discrimination is defined as:

“any distinction, exclusion or preference based on race, colour, sex, religion, political opinion, national extraction or social origin (or any other motive determined by the State concerned) which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation.”

The scope of the Convention covers access to vocational training, access to employment and to particular occupations, and terms and conditions of employment. Member States having ratified this Convention undertake to repeal any statutory provisions and modify any administrative instructions or practices which are inconsistent with this policy, and to enact legislation and promote educational programmes which favour its acceptance and implementation in co-operation with employers' and workers' organizations. This policy shall be pursued and observed in respect of employment under the direct control of a national authority, and of vocational guidance and training, and placement services under the direction of such an authority.

In its supervision of these instruments, the Committee of Experts on the Application of Conventions and Recommendations has recognized that the achievement of favourable conditions for equality of opportunity and treatment in employment and occupation is a continuing endeavour. In their own terms, these two instruments comprehend this. Nevertheless, the road to equality has over the years been punctuated by stark examples of the need for international action against the infringement at the national level of the basic right to equality. Here, the ILO's standards have been of paramount importance as a rallying point.

THE LIST OF CONVENTIONS RATIFIED BY TANZANIA IN FORCE

1.	NAME OF THE CONVENTION	THE NUMBER AND YEAR OF ISSUING THE CONVENTION	THE DATE OF ACCESS / RATIFICATION
2.	Right of Association (Agriculture) Convention	11 of 1921	19-11-1962
3.	Workmen's Compensation (Agriculture) Convention	12 of 1921	19-11-1962
4.	Medical Examination of Young Persons (Sea) Convention	16 of 1921	30-01-1962
5.	Workmen's Compensation (Accident) Convention	17 of 1925	30-01-1962
6.	Equality of Treatment (Accidents Compensation) Convention	19 of 1925	30-01-1962
7.	Minimum Wage Fixing Machinery Convention	26 of 1928	19-11-1962
8.	Forced Labour Convention	29 of 1930	30-01-1962
9.	Underground Work (Women) Convention	45 of 1935	30-01-1962
10.	Recruiting of Indigenous Workers Convention	50 of 1936	30-01-1962
11.	Convention concerning Statistics of Wages and Hours of Work	63 of 1938	19-11-1962
12.	Penal Sanctions	65 of 1939	30-01-1962

	(Indigenous Workers) Convention		
13.	Labour Inspection Convention	81 of 1947	30-01-1962 (excluding part II)
14.	Contracts of Employment (Indigenous Workers) Convention	86 of 1947	30-01-1962
15.	Freedom of Association and Protection of the Right to Organise Convention	87 of 1948	18-04-2000
16.	Employment Service Convention	88 of 1948	30-01-1962
17.	Protection of Wages Convention	95 of 1949	30-01-1962
18.	Migration for Employment Convention (Revised)	97 of 1949	22-06-1964 (excluded Annex I-II)
19.	Right to Organise and Collective Bargaining Convention	98 of 1949	30-01-1962
20.	Equal Remuneration Convention	100 of 1951	26-02-2002
21.	Holidays with Pay (Agriculture) Convention	101 of 192	30-01-1962
22.	Abolition of Forced Labour Convention	105 of 1957	30-01-1962
23.	Seafarer's Identity	108 of 1958	26-11-1962

	Documents Convention		
24.	Discrimination (Employment and Occupation) Convention	111 of 1958	26-02-2002
25.	Minimum Wage Fixing Convention	131 of 1970	30-05-1983
26.	Worker's Representatives Convention	135 of 1971	19-08-1983
27.	Dock Work Convention	137 of 1973	30-05-1983
28.	Minimum Age Convention	138 of 1973	16-12-1998
29.	Paid Educational Leave Convention	140 of 1974	30-05-1983
30.	Human Resources Development Convention	142 of 1975	30-05-1983
31.	Tripartite Consultation (International Labour Standards) Convention	144 of 1976	30-05-1983
32.	Working Environment (Air Pollution, Noise and Vibration) Convention	148 of 1977	30-05-1983 (Has accepted the obligation of the convention in respect of air pollution only)
33.	Nursing Personnel Convention	149 of 1977	30-05-1983
34.	Occupational Safety & Health (Dock Work) Convention	152 of 1979	30-05-1983
35.	Collective Bargaining	154 of 1981	14-08-1998

	Convention		
36.	Chemical Convention	170 of 1990	15-03-1999
37.	Worst Forms of Child Labour Convention	182 of 1999	12-09-2001

Source: ILO Conference 91 session 2003: List of Ratifications by Convention and by Country as of 31st December 2002. ILO Geneva, Report III (part 2)