
SUBSIDIARY LEGISLATION

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THE EMPLOYMENT AND LABOUR RELATIONS ACT, 2004

(No. 6 OF 2004)

RULES

Made under section 99(1)

THE EMPLOYMENT AND LABOUR RELATIONS (CODE OF GOOD PRACTICE)
RULES, 2007

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THE EMPLOYMENT AND LABOUR RELATIONS (CODE OF GOOD PRACTICE)
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PART I

PRELIMINARY PROVISIONS

1. These Rules may be cited as the Employment and Labour Relations (Code of Good Practice) Rules, 2007. Citation

2. These Rules shall apply to all employees, employers, trade unions, employer organizations, mediators, arbitrators, assessors, judges and shall include Government officials. Application

PART II

(a) TERMINATION GENERALLY

(i) Forms of Termination and Procedures

3.-(1) For the purposes of these Rules, the termination of employment shall include- Termination of Employment

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

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- (d) failure to allow an employee to resume work after a maternity or paternity leave; and
- (e) failure to re-employ an employee where the employer has terminated the employment of a number of employees for the same or similar reasons and has offered re-employment only to some of those terminated.

(2) A lawful termination of employment under the common law shall be as follows—

- (a) termination of employment by agreement;
- (b) automatic termination;
- (c) termination of employment by the employee; or
- (d) determination of employment by the employee;

(3) The rules regulating the termination of a contract of employment shall depend on the duration of the contract.

(4) The agreed duration shall be applicable where there is—

- (a) an agreement to work for a fixed term in respect of a fixed time or upon completion of a task; or
- (b) an agreement to work without reference to limitation of time or task in accordance to the agreement.

4.—(1) An employer and employee shall agree to terminate the contract in accordance to agreement.

Termination
of
employment
by
Agreement

(2) Where the contract is a fixed term contract, the contract shall terminate automatically when the agreed period expires, unless the contract provided otherwise.

(3) Subject to sub-rule (2), a fixed term contract may be renewed by default if an employee continues to work after the expiry of the fixed term contract and circumstances warrants it.

(4) Subject to sub-rule (3), the failure to renew a fixed-term contract in circumstance where the employee reasonably expects a renewal of the contract may be considered to be an unfair termination.

(5) Where fixed term contract is not renewed and the employee claims a reasonable expectation of renewal, the employee shall demonstrate that there is an objective basis for the expectation such as previous renewals, employer's undertakings to renew.

(6) The provision of this rule shall not apply where—

- (a) the size of the employer may justify a departure;
- (b) the nature of the employment business may require strict adherence to rules than may normally be the case; or
- (c) collective misconduct may justify a departure from the ordinary procedure rules provided that the employees are given a fair opportunity to make representations.

(7) The provision of this rule may be varied by collective agreement.

5.—(1) A contract of employment may be terminated automatically in certain circumstances such as death or loss of profession of the business (sequestration) of the employer.

Automatic
termi-
nation

(2) Subject to sub-rule (1), a person taking over the business in such circumstances, shall first consider the employment of the employees whose employment have been terminated as a result of the death or sequestration, before any other employees are hired.

(3) Unless the contract of employment provides otherwise, a contract of employment may terminate automatically when the employee reaches the agreed or normal age of retirement.

(4) Where there is no agreed retirement age the normal retirement age shall be implied from the employer's practice in the past and the practice in the industry.

(5) Where the employee continues to work after attaining the retirement age, the contract shall be renewed and the normal rules of termination of employment apply, unless the employee and the employer agreed to something different.

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Resignation

6.-(1) Where an employee has agreed to a fixed term contract, that employee may only resign if the employer materially breaches the contract. If there is no breach by the employer, the employee may lawfully terminate the contract before the expiry of the fixed term by getting the employer to agree to an early termination.

(2) Where there is an indefinite contract, the employee may resign-

- (a) by giving a notice of termination; or
- (b) without notice, if the employer has materially breached the contract.

(3) A material breach means a serious breach that goes to the core of the contract.

(4) Conducts which shall amount to a material breach of a contract of employment and that may justify the summary termination of the contract by the employee are-

- (a) the refusal to pay wages;
- (b) verbal or physical abuse or sexual harassment;
- (c) unfair discrimination; or
- (d) any other breach.

(5) Notwithstanding section 41 of the Act, the minimum period of notice to be given by an employee on a lawful termination of contract, an employer and employee may agree to a longer notice.

Constructive termination

7.-(1) Where an employer makes an employment intolerable which may result to the resignation of the employee, that resignation amount to forced resignation or constructive termination.

(2) Subject to sub-rule (1), the following circumstances may be considered as sufficient reasons to justify a forced resignation or constructive termination-

- (a) sexual harassment or the failure to protect an employee from sexual harassment; and

- (b) if an employee has been unfairly dealt with, provided that the employee has utilized the available mechanisms to deal with grievances unless there are good reasons for not doing so.

(3) Where it is established that the employer made employment intolerable as a result of resignation of employee, it shall be legally regarded as termination of employment by the employer.

8.-(1) An employer may terminate the employment of an employee if he-

Termination
by an
employer

- (a) complies with the provisions of the contract relating to termination;
- (b) complies with the provisions of sections 41 to 44 of the Act concerning notice, severance pay, transport to the place of recruitment and payment;
- (c) follows a fair procedure before terminating the contract; and
- (d) has a fair reason to do so as defined in Section 37(2) of the Act.

(2) Compliance with the provisions of the contract relating to termination shall depend on whether the contract is for a fixed term or indefinite in duration. This means that-

- (a) where an employer has employed an employee on a fixed term contract, the employer may only terminate the contract before the expiry of the contract period if the employee materially breaches the contract;
- (b) where there is no breach to terminate the contract lawfully is by getting the employee to agree to early termination;
- (c) where the contract is for an indefinite duration, the employer must have a fair reason to terminate and follow a fair procedure.
- (d) the employer may terminate the contract-
 - (i) by giving notice of termination; or
 - (ii) without notice, if the employee has materially breached the contract.

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(3) Where an employer requires the employee to work the notice and the employee fails to do so, the employer may deduct from any money due to the employee the equivalent of the amount that would have been due to the employee had the employee worked.

(4) The amount of severance pay due to an employee shall be as specified under Rule 25.

Fair
reasons
and fair
procedures

9.-(1) An employer shall follow a fair procedure before terminating an employee's employment which may depend to some extent on the kind of reasons given for such termination.

(2) Notwithstanding the procedures used in these Rules the procedure which may be used in respect of incapacity or inability shall be different.

(3) The burden of proof lies with the employer but it is sufficient for the employer to prove the reason on a balance of probabilities.

(4) The reasons which may justify termination by the employer are as follows-

- (a) conduct;
- (b) capacity;
- (c) compatibility; or
- (d) employer's operational requirements.

(5) The reason shall not only be one of the kinds of reasons considered fair but the reason in a particular case shall be sufficiently serious to justify termination.

Probationary
employees

10.-(1) All employees who are under probationary periods of not less than 6 months, their termination procedure shall be provided under the guidelines.

(2) Terms of probation shall be made known to the employee before the employee commences employment.

(3) The purpose of probation is normally to enable the employer to make an informed assessment of whether the employee is competent to do the job and suitable for employment.

(4) The period of probation should be of a reasonable length of not more than twelve months, having regard to factors such as the nature of the job, the standards required, the custom and practice in the sector.

(5) An employer may, after consultation with the employee, extend the probationary period for a further reasonable period if the employer has not yet been able to properly assess whether the employee is competent to do the job or suitable for employment.

(6) During the period of probation, the employer shall-

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

(7) Where at any stage during the probation period, the employer is concerned that the employee is not performing to standard or may not be suitable for the position the employer shall notify the employee of that concern and give the employee an opportunity to respond or an opportunity to improve.

(8) Subject to sub-rule (1) the employment of a probationary employee shall be terminated if-

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

(9) A probationary employee shall be entitled to be represented in the process referred to in sub-rule (7) by a fellow employee or union representative.

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(ii) *Misconduct*

Managing
conduct

11.-(1) All employers shall implement disciplinary policies and procedures that establish the standard of conduct required of their employees.

(2) The form and content of policies and procedures shall obviously vary according to the size and nature of the employer's business.

(3) An employer's rules in the application of discipline and standards of conduct shall be made available to the employees in a manner that is easily understood.

(4) Subject to sub-rule (3), discipline shall be corrective efforts and be made to correct employee behaviour through a system of graduated disciplinary measures such as counselling and warnings.

(5) The effect of a warning is to notify the employee that a further offence of a similar nature may result in more serious disciplinary action being taken.

(6) Procedures of invoking disciplinary measures specified shall be taken as in the schedule to these Rules.

Fairness
of the
reason

12.-(1) Any employer, arbitrator or judge who is required to decide as to termination for misconduct is unfair shall consider-

- (a) whether or not the employee contravened a rule or standard regulating conduct relating to employment;
- (b) if the rule or standard was contravened, whether or not—
 - (i) it is reasonable;
 - (ii) it is clear and unambiguous;
 - (iii) the employee was aware of it, or could reasonably be expected to have been aware of it;
 - (iv) it has been consistently applied by the employer; and
 - (v) termination is an appropriate sanction for contravening it.

