

When love meets labour law

*Legal considerations and policy recommendations
for managing workplace relationships*

26th September 2024

“Employers must leave the Bill and Melinda Gates within their undertakings to grow, and to find themselves in each other, while they continue to be productive to the business.”

-Hon. James Rika-

Introduction

Navigating the balance between personal freedoms and professional conduct at the workplace is an increasingly complex issue in employment law. This issue was the subject of the dispute in **Mark Ngugi Mwaura -versus- G4S Kenya Limited (Cause No. E232 of 2021)**, which was decided by Hon. James Rika of the Employment and Labour Relations Court (ELRC) on 20th September, 2024. The case, which distinguished consensual workplace relationships and sexual harassment involved a Regional Operations Manager, the Claimant who was dismissed from employment following allegations of sexual harassment and misuse of

authority to influence the transfer of a junior employee, with whom he had previously been in a consensual sexual relationship.

The employer argued that the Claimant had violated the company's sexual harassment policy by transferring the junior employee to a more favorable position and allegedly fathering her child, though a DNA test later disproved the paternity claim. The ELRC found that while a sexual relationship had existed, there was insufficient evidence to support the employer's conclusion that it amounted to sexual harassment. Hence the ensuing dismissal of the employee from service on the basis of these allegations was both procedurally and

substantively unfair. The court awarded the Claimant monetary compensation for wrongful dismissal, having established that the junior employee did not perceive the relationship as unwelcome or coercive.

This judgment underscores the importance of the balance that employees must strike in enforcing sexual harassment policies at the workplace and respecting employees' privacy rights, particularly in consensual workplace relationships.

Striking the Balance

The Constitution of Kenya, under Article 31, guarantees the right to privacy, protecting individuals from unreasonable interference in their private affairs, including personal relationships. Similarly, Article 28 upholds the right to dignity, ensuring that every individual is treated with respect. At the workplace, these rights are tested when employees engage in consensual romantic relationships, raising legal questions about the boundaries of privacy and dignity, on the one hand and the even duty that they owe their employers to work within set parameters.

Section 6 of the Employment Act and Section 23 of the Sexual Offences Act No. 3 of 2006 place a duty on employers to protect employees from unwanted sexual advances. The global #MeToo movement has further highlighted how workplace relationships, initially consensual, can evolve into serious legal and ethical concerns when they deteriorate. What starts as a mutual relationship may result in allegations of harassment, coercion, or retaliation, particularly when power dynamics are involved.

This raises a crucial question: How then can employers strike a balance between safeguarding employees from sexual harassment, maintaining workplace productivity, while upholding their rights to privacy and dignity?

Workplace Romance Policies and Mandatory Disclosures

Implementing clear workplace romance policies is one option for organizations aiming to balance productivity, employee privacy, and the prevention of conflicts of interest. Rather than banning relationships outright, progressive companies have established structured guidelines that acknowledge workplace romances while mitigating potential risks. Employers can introduce codes of conduct to manage employee behavior reasonably, ensuring that relationships do not interfere with productivity or create bias.

In countries like the United States, many organizations have adopted policies addressing workplace relationships, ensuring they do not lead to accusations of favoritism or harassment. A notable case is **Robert Barbee v. Household Automotive Finance Corporation (113 Cal.App.4th 525)**, where although the court dismissed the Appellant's case, it affirmed that employees may have the right to engage in consensual workplace relationships, provided they do not negatively impact job performance. By focusing on transparency and fairness, such policies protect both the employer's business interests and employees' privacy rights.

Barring Supervisor-Subordinate Relationships

Supervisor-subordinate relationships present the highest risk among workplace romances, as many sexual harassment claims arise from situations involving power imbalances. Employers may consider reassigning employees to equivalent roles in different departments to avoid such risks and maintain professional boundaries.

For instance, leading companies, known for their robust HR policies, require employees to disclose relationships that could lead to conflicts of interest, particularly between supervisors and subordinates. Such policies discourage relationships where one person has direct authority over the other, and in such

cases, employees may be reassigned to new roles to avoid conflicts of interest.

Sexual Harassment Training Programs

Employers are legally obligated to maintain a workplace free from harassment. To meet this duty, they should provide sexual harassment training and establish clear reporting mechanisms. These proactive measures educate employees on inappropriate conduct, outline the legal ramifications of harassment, and ensure victims have accessible reporting channels. By taking these steps, employers can reduce legal risks, promote a harmonious workplace, and comply with their legal obligation on the prevention and handling of sexual harassment.

Consensual Relationships Agreements

An increasingly popular approach to managing workplace romances is the use of consensual relationship agreements, also known as "love contracts". A love contract is signed by the involved parties and the employer, confirming that the relationship is voluntary and consensual, and that both individuals are aware of the company's anti-harassment and anti-retaliation policies. The agreement affirms that neither person was coerced or threatened into the relationship and outlines expectations for professional conduct during the relationship and after it ends.

Global companies have adopted this practice to promote transparency and prevent potential legal disputes. While not yet widespread in

Kenya, companies in industries such as finance and telecommunications, have introduced similar initiatives to address workplace romances and mitigate risks. In the U.S, such agreements are widely used to manage office relationships proactively without infringing on employees' personal lives. These agreements clarify expectations, reduce the risk of conflicts, and provide a balanced approach to workplace relationships.

Conclusion

Workplace romances exist in a grey area between personal rights and professional conduct. While common, such relationships must be handled with caution to protect both personal and professional interests. By implementing structured workplace romance policies, consensual relationship agreements, restriction on special circumstances and comprehensive sexual harassment training, employers can manage potential conflicts of interest while upholding employees' rights to privacy and dignity.

Global companies have demonstrated that transparent policies and consensual agreements can reduce the likelihood of legal disputes and promote a productive work environment. Kenyan employers may benefit from adopting similar practices to ensure their approach to workplace relationships is legally compliant, supportive of employee well-being, and protective of workplace integrity.

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