

Employees' right to privacy at the workplace: *Prescription to employers*

1st November 2024

“The conduct of the respondent leading into the investigations of the claimant’s private life in the context of matters ongoing at the workplace is not justified”

Hon. Justice Monica Mbaru.

Introduction

On October 1, 2024, the Employment and Labour Relations Court (ELRC) sitting in Mombasa delivered a judgment which explored the right to privacy of employees within the workplace. The ELRC found that an action by ABSA Bank of engaging a private investigator to monitor its employee’s lifestyle during an on-going disciplinary proceedings concerning the employee was intrusive, and amounted to a violation of the employee’s right to privacy guaranteed under article 31 of the Constitution.

Background

Thomas Macharia Mwangi was employed by ABSA Bank as a branch manager in 2019, and later promoted to a senior branch manager in 2021. In March 2023, he was suspended on allegations of advancing irregular overdraft facilities to two of the bank’s customers. Following an internal investigation, Mwangi was issued with a notice to show cause, participated in a disciplinary hearing, and was subsequently dismissed from his role in May 2023. Aggrieved, he contested his termination before the ELRC citing unfair dismissal, and made a claim for unpaid bonus, and damages for breach of

his constitutional rights, in particular the right to privacy.

The complaint on the right to privacy, according to the claimant was based on the fact that the bank engaged a private investigator to monitor his personal life during his period of suspension, including his activities in public places. The private investigator had, in the course of investigations, also demanded to be supplied by different establishments with information about the claimant, and this was in violation of the claimant's rights.

In its defence, the bank argued that the disciplinary process was conducted in a fair and justifiable manner having followed proper procedures and was based on its employment policy. Regarding the claim on intrusion of the employee's rights, the bank denied these allegations stating that no particulars had been availed and that the court lacked jurisdiction to deal with this aspect of the claim.

Court's rendition

Lady Justice Monica Mbaru who presided over the matter agreed with the bank that the dismissal of the claimant from employment was based on a fair reasons and was procedural. However, with respect to the claim on breach of the claimant's rights to privacy, the court held that the bank had unjustifiably breached the employee's right to privacy as [its] "conduct ... leading into the investigations of the claimant's private life in the context of matters ongoing at the workplace is not justified, [and that] no basis was given for such conduct."

"Even in employment," the judge stated, "protection of the employee's privacy is imperative." Collection of employee's personal data unrelated to employment is

forbidden and where such claims are brought to court for redress, an employer "cannot justify a position that the court lacks jurisdiction" in defence to this. The court was convinced that there was no legal basis for the bank to engage in surveillance over the claimant's life and awarded the claimant Ksh. 5,000,000/= in general damages for this breach.

Prescription to employers

The court's findings on the breach of privacy highlights the need for employers to respect the constitutional rights of employees, even during disciplinary investigations. While employers have the right to investigate cases of misconduct by their employees at the workplace, such investigations must not infringe upon the personal and private lives of employees without lawful justification. Engaging private investigators with a view to obtaining information about employees' private life outside the workplace is an example of an action that may be said to be without legal basis and thus actionable in a court of law.

It is advisable for employers to make formal reports to investigative bodies with investigative authority in the event an employer engages in conduct that is deemed criminal. Alternatively, express consent from employees must be sort for such an exercise to be considered as legally permissive in that regard.

Conclusion

The case *Mwangi v ABSA Bank Kenya PLC* has is subtle reminder to employers on their prescriptive limits with respect to the affairs of their employees. While employers have every right to undertake investigations and subsequently disciplinary proceedings against employees in the event of misconduct, such investigations must be conducted in a manner that does not infringe the employees'

rights to privacy. Engaging private investigators to undertake surveillance activities on employees'

personal lives without any lawful cause has been found by the court to be actionable.

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