MANUAL ON LEGAL ASPECTS OF NUSRING

AND MIDWIFERY PROFESSION IN MALAWI

PART ONE: NURSE/ MIDWIFE AS A

PROFESSIONAL

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CHAPTER ONE: THE REGULATORY FRAMEWORK; THE NURSES AND MIDWIVES COUNCIL OF MALAWI

Introduction

Just as most of the professions, the nurses and midwifery profession, is a regulated profession. The law established the Nurses and Midwives Council of Malawi (the Council) as a regulator of the profession. In this chapter we consider the composition, arms and legal mandate of the Council. Part of the mandate has been discussed in details elsewhere under the disciplinary process. There is however, less discussion on composition and election and appointment of members of the Council because as at the time of writing this book, there is already a bill in draft form meant to amend the Nurses and Midwives Act which substantially, changes the composition of the Council.

Composition of the Council

Composition of the Council is provided for under Section 4 of the Nurses and Midwives Act. The Council contains both full time and ex- officio members. The said section provides as follows in full:

> *"(1) The Council shall consist of the following members all of whom shall, save in the case of an ex officio member, be citizens of Malawi—*
>
> *(a) the Secretary for Health and Population who shall be a member ex officio;*
>
> *(b) the Controller of Nursing Services in the Ministry of Health and Population who shall be a member ex officio;*
>
> *(c) the Principal of Kamuzu College of Nursing who shall be a member ex officio;*
>
> *(d) the Chairperson of the National Association of Nurses of Malawi who shall be a member ex officio;*
>
> *(e) one medical practitioner nominated by the Medical Council of Malawi and appointed by the Minister;*
>
> *(f) one member appointed by the Minister from the general public who shall be a person—*
>
> *(i) of good character and good standing in the community;*
>
> *(ii) knowledgeable in consumer health concerns; and*

(iii) with no direct or indirect financial interest in health care services;

(g) five nurses and one nurse technician elected by the National Association of Nurses of Malawi;

(h) the Registrar of the Pharmacy, Medicines and Poisons Board or his duly designated alternate who shall be a member ex officio;

(i) the Executive Secretary of the Christian Hospitals Association of Malawi or his duly designated alternate who shall be a member ex officio;

(j) the Solicitor General or his duly designated alternate who shall be a member ex officio"

Term of office

Except for ex-officio members who hold their positions by virtue of office, all other members term of office is three year with option of re-election or re-appointment just once. Section 3(2) of the Act provides as follows:

"Subject to section 5, a member, of the Council, not being a member ex officio, shall hold office for three years but shall be eligible for re-nomination, re-appointment or re-election, as the case may be, for only one term of office"

Functions of the Council

In general terms, the Council's major functions are to assist in the promotion and improvement of health in Malawi, to control and regulate nursing and midwifery education and to control and regulate nursing and midwifery practice. Within the parameters of its powers, the Council is the only legally mandated body to register recognized nurses and midwifes in Malawi and to approve training institutions. Section 11 of the Nurses and Midwifes Act, puts specific functions in the following words:

"The Council shall be the sole registering authority of all persons required to be registered or licensed under this Act and shall have the following further functions—

(a) to assist in the promotion and improvement of the health of the population in Malawi;

(b) to control and to exercise authority affecting the education, training and practice of persons in, and the performance of, the practices pursued by nurses and nurse technicians.

(c) to exercise disciplinary control over the professional conduct of all persons registered under this Act and practising in Malawi;

(d) to promote liaison of the education and training, and the manner of the exercise of the practices, referred to in paragraph (b) both in Malawi and elsewhere, and to promote the standards of such education and training and the manner of the exercise of such practices in Malawi;

(e) to advise the Minister on any matter falling within the scope of this Act; and

(f) to communicate to the Minister any information acquired by the Council relating to matters of public health."

Powers of the Council

In order for it to achieve its functions, the Nurses and Midwifes Act, gives the Council over area of its jurisdiction. Key to the powers given to the Council is the power to register or de-register and nurse or midwife, power to approve nursing and midwifery schools, power to appoint examiners and moderators, power to set and conduct examinations, power to issue certificates, power conduct inspections of any training institutions and generally, power to do any other act so as to further the objectives of the Nurses and Midwives Act. Section 12 of the Act, outlines the Council's powers in the following words:

"For the better performance of its functions, the Council shall, subject to the provisions of this Act, have power to—

(a) where authorized by this Act, remove from or restore to a register any name;

(b) appoint examiners and moderators, set and conduct examinations and grant certificates;

(c) approve nursing schools in accordance with the prescribed conditions, inspect such schools, or withdraw or suspend approval of any such school if the education or training thereat is not, in the opinion of the Council, satisfactorily carried out, or if any condition imposed has not been complied with:

Provided that the Council shall not refuse to approve, or shall not withdraw or suspend the approval of, any such school without the consent of the Minister;

(d) carry out any inspection it may deem necessary to enable it to consider an application for the approval of a nursing school or any variation of a condition imposed in respect of an approved nursing school;

(e) acquire, hire or dispose of property, borrow money on the security of the assets of the Council, accept any donation or accept and administer any trust;

(f) subject to the prescribed conditions, issue or renew a licence to carry on the business of a nursing agency, inspect the records and accounts, and investigate the activities, of a nursing agency, require any person licensed to carry on the business of a nursing agency to submit to the Council such information as it may deem necessary, and, in the prescribed circumstances, suspend or cancel a licence to carry on the business of a nursing agency;

(g) consider any matter affecting the nursing or midwifery profession, and make representations or take such action in connexion therewith as the Council may deem advisable;

(h) upon application of any person, recognize a qualification held by him (whether such qualification has been obtained in Malawi or elsewhere), as being equal, either wholly or in part, to any prescribed qualification, whereupon such person shall, to the extent to which the qualification has so been recognized, be deemed to hold such prescribed qualification;

(i) require approved nursing schools to submit annual returns of students registered under section 33 and pupils registered under section 34 and such other information as may become necessary at any time;

(j) cause copies of the registers and supplementary lists, and copies thereof, showing all alterations to the registers, to be printed and published;

(k) make extracts from the registers;

(l) perform such other functions as may be prescribed or assigned to the Council by the Minister; and

(m) generally, do all such things as it may deem necessary or expedient to achieve the objects of this Act."

Council committees

In order to run its affairs effectively, the Nurses and Midwifes Act, establishes a number of committees of the Council to assist the Council itself in running the affairs. The committees so established are the Executive Committee, the Education and Examination

Committee, the Investigating Committee, the Disciplinary Committee, the Appointment and Finance Committee and the Professional Practice Committee.
Apart from the six established committees, Section 14(1) of the Act mandates the Council to establish such other committees as the Council may consider expedient and delegate such powers to such committees as the Council may deem fit
By section 14(2), the Chairperson of the Council shall be a member of every committee referred to above and every committee the Council may establish. The Council is given the mandate to appoint a chairperson for each of its committees.
Apart from the members of the Council, each committee is by Section 14(4) allowed to co-opt in persons who are not members of the Council whether such persons are in the public service or not.

Composition and specific functions of the committees

There are a number of committees which the Act has specifically discussed in terms of composition and functions. First is the Executive Committee. By Section 13, the Executive Committee comprises of the Chairperson, Vice Chairperson, Chairpersons established under the Act and any other persons as the Council may designate. By Section 14(2), the Executive Committee may exercise all the powers of the Council except disciplinary powers as provided under Section 61(2). Further, the Executive Committee does not have the powers to set aside or amend any decision of the Council unless otherwise mandated by the Council itself.
Any decision of the Executive Committee shall be in force unless otherwise set aside or amended by the Council at its next meeting.

Another committee established under the Act is the Education and Examination Committee. By Section 45 of the Nurses and Midwifes Act, the Education and Examination Committee shall comprise of one member of the Council appointed by the Council to be its chairperson and six other persons appointed by the Council who may or may not be members of the Council. The general functions of the Committee are to advise the Council on matters relating to training and education requirements of nursing and midwifery, to examine nursing and midwifery curricula in all training institutions.
In terms on powers, the committee is mandated to appoint examiners and perform all other duties as may be required to maintain nursing and midwifery training and education

standards. Section 45(2) and (3) puts specific functions and powers of the committee in the following words:

"(2) Subject to the general direction of the Council, the functions of the Education and Examination Committee shall be—

(a) to advise the Council on all matters relating to the education and training requirements of nursing and related personnel in Malawi;

(b) to satisfy itself and the Council that the curricula in every teaching institution in Malawi in the nursing field are such that graduates will have a sufficient basic knowledge, skills and attitudes for the practice of their profession or calling; and

(c) to satisfy itself and the Council in such other matters as may be vested in it by the Council in relation to the supervision of other aspects of nursing education and training.

(3) For the purpose of carrying out its functions the Education and Examination Committee may, subject to the general direction and guidance of the Council—

(a) on behalf of the Council, appoint inspectors to visit hospitals, or other institutions or premises where examinations are conducted for students who intend to apply for registration under this Act and to evaluate such instructions or examinations;

(b) to submit reports to the Council on the courses and curricula followed at, and examinations conducted by, any institution referred to in paragraph (a); and

(c) perform all such inspectorate functions for the purpose of setting and maintaining the standards of health care in relation to—

(i) premises, equipment and supplies;

(ii) qualifications and credentials of personnel employed at nursing and midwifery establishments;

(iii) courses and curricula followed at any of the institutions referred to in paragraph (a) including the student-teacher ratio;

(iv) human and material resources at any of the institutions referred to in paragraph (a);

(v) such other matters as the Council may deem expedient, and to report its findings to the Council."

Another committee established under the Act is the Investigation Committee. By Section 50(1) of the Act, the Committee shall comprise of five persons appointed by the Council from amongst its members. The Committee shall elect its own chairperson.
In terms of functions and powers of the Investigation committee, the same have been discussed under the disciplinary process of the Council.

Another committee established under the Act is the Disciplinary Committee. By Section 57(1) of the Act, the Disciplinary Committee shall comprise of the Chairperson of the Council who shall also be the Chairperson of the Committee and four other members of the Council appointed from amongst itself. In terms of functions and powers, the same have again been discussed under the disciplinary process.

Another committee established under the Act is the Professional Practice Committee. Under Section 67(1) of the Act, the committee shall comprise of one member of the Council designated by the Council to be its chairperson and four other persons who may or may not be members of the Council.
By Section 67(2) of the Act, the committee's functions are to advise the Council on all maters relating to professional practice, to develop minimum practice standards and to monitor the standards. To achieve its functions, the committee is mandated to appoint inspectors to visit hospitals and institutions. Section 67 (2) and (3) puts the specific functions and powers in the following words:

> *"(2) Subject to the general direction of the Council, the functions of the Professional Practice Committee shall be—*
>
> *(a) to advise the Council on all matters relating to the professional practice of nursing and related personnel in Malawi;*
>
> *(b) to develop minimum nursing practice standards for nursing and related personnel in Malawi; and*
>
> *(c) to monitor nursing practice standards.*
>
> *(3) For the purpose of carrying out its functions the Professional Practice Committee may, subject to the general direction and guidance of the Council—*
>
> *(a) on behalf of the Council, appoint inspectors to visit hospitals, or other institutions or premises where persons registered under this Act conduct their practice and evaluate the standard of practice of nursing and related personnel thereat; and*

(b) perform all such inspectorate functions for the purpose of setting and maintaining professional nursing standards in relation to behaviour and conduct of nursing and related personnel towards patients, clients and guardians, and to report its findings to the Council."

General observations on the membership and functions of the committees

First, it terms of functions, it must be noted that all the committees perform their duties in a delegated capacity on behalf of the Council. Their exercise of the functions and powers are therefore subject to general or special directions of the Council.

In terms of composition, it must be noted that as regards Executive Committee, Investigation Committee and the Disciplinary Committee can only comprise of persons who are members of the Council whilst the other committees can include persons who are not members of the Council.

Registrar of the Council

For better operation of the Council, the law establishes management section which is headed by the Registrar. The office of the Registrar is at the centre of the management part of the Council. In general terms, the duties of the Registrar can be summarized as to operationalise the functions of the Council. The Registrar is the custodian of all the registers of the Council. He is responsible for making any entries or removal from the registers. As regards specific duties of the Registrar, Section 20 of the Act provides as follows:

"(1) All registers shall be kept under the custody of the Registrar at the offices of the Council.

(2) It shall be the duty of the Registrar, under the direction of the Council, to—

(a) enter in any register the particulars required under this Act of every person whom he registers in that register;

(b) make in a register any necessary alterations in the name, address, qualifications and other particulars of a registered person;

(c) erase from a register the name of a registered person who dies; and

(d) when required to do so by or under this Act or in pursuance of an order of a court—

(i) to mark in a register the registration of an applicant or, as the case may be, the suspension from practice of a registered person; and

(ii) to erase from a register the name of a registered person;

(e) generally to comply with the requirements imposed on him by this Act.

(3) Where the Registrar erases from a register the name of a registered person he shall enter in that register a record of the reasons therefor."

Important again, by Section 15(4), the Registrar is the Secretary to the Council and all Council committees. By Section 15(3) of the Act, the Registrar may, after consultation with the Chairperson of the Council, appoint such other officers as may be necessary to assist him.

In terms of appointment, by Section 15(1), the Registrar shall be appointed by the Council on such terms as may be approved by the Minister. The Council may also appoint assistant registrars.

In terms of qualifications, Section 15(2), requires the appointed Registrar to have a degree in nursing and five years experience in nursing practice, education or administration. It is however, work noting that there are no prescribed qualifications for assistant registrars.

Eminent changes

At the time of preparation of this manual, there is, in the making, a bill meant to amend the Nurses and Midwives Act. Amongst the major changes the bill brings is the composition of the Council. As will be noticed from the above discussion on composition of the Council, there is mention of thye Principal of Kamuzu College of Nursing (KC). As at that time, KCN was the only institution of higher learning training nurses and midwives. With the coming in of more institutions, the bill introduces a representative member to represent training institutions rather than allocate the position to one institution. The same is with member elected by Nurses Association of Malawi. The association has since been dissolved and it now operates as a union. Again with a possibility of more representative organizations, the bill again introduces representative members from professional groups rather than allocate the position to one organization.

CHAPTER TWO: ADMINISTRATIVE ACTION PROCEDURE

Introduction

In every set-up where there are power imbalances, there must be a system on the senior or those in authority disciplining those under them. In case of nurses and midwives, they are answerable to a number of institutions. As professionals, they have to account to the Nurses and Midwives Council of Malawi. Those who are members of professional unions or associations such as NONM and AMAIM, they must also account to such bodies. As employees, they are also accountable to their employers. What this entails therefore, is that either of these institutions should be able to discipline their members or employees in case of need.

This chapter looks at the general legal principles governing disciplinary process. Though the details may differ from one institution to the other depending with the nature of the hearing, the general principles are generally the same.

The accepted legal position is that every disciplinary process, must follow rules of natural justice. There are two arms to the rules of natural justice. The first arm is the rule that no person should be condemned unheard popularly known as right to a fair hearing. The second one which is for all purposes an extension of the first one is the rule against bias.

The right to be heard

It is the position of the law that no person can be condemned unheard. In other words, where a there is an accusation against a person, before any decision is to be made against him, such person must be given a chance to defend himself against such accusation. The position of the law however, is that the right to be heard, does not just mean calling a person to present his story. The right to be heard means more than merely inviting an accused person to present himself and do the talking. The right is meant at achieving a result which is to allow a person making the decision to have a true picture of the issues before the verdict is passed. For this, there is need that the person making decision will

not be influenced by irrelevant factors. There is therefore need for impartiality and fairness throughout the process.

For this, the right to be heard, in any area of law it will be considered, carries with it some obligations and elements to be discharged by the hearing party. The key elements are discussed hereunder.

The right to know the charges

One element of the right to be heard is that the accused person must know the charges leveled against him. The requirement of the law is not only that the charges must be known but that they should be set down with sufficient particularities to allow the accused person properly prepare his defence. In **Lameck Moyo vs National Bank of Malawi**[1], the court stated:

> *"As for the procedural fairness it is important that the particulars of the charge should be clearly specified to allow the employee prepare for his defence accordingly. Failure to do this would be unfair labour practice and would lead to miscarriage of procedural justice"*[2].

The right to cross-examine and contradict one's accusers

Generally, at law, there is no requirement that disciplinary hearing must be oral. As long as the accused person has been accorded an opportunity to comment on the allegations leveled against him, even in writing, the obligation would have been discharged. However, where fairness demands an oral hearing and the same is accorded, then the accused person, has a right to confront and cross-examine his accusers. In **Lameck Moyo**

[1] Supra, note 17
[2] See also, Chilumpa, C Labour Law (2004)

vs National Bank of Malawi[3], the court properly stated the principle in the following terms:

> *"Moreover it is trite law that an employee need be given a chance to confront whoever is accusing him of any misconduct. In the present case the applicant was not given this chance, the respondents heard the accuser in the absence of the applicant and he only had a chance to question the accuser in this court".*

Under the right to cross-examine and contradict ones accusers, the accused person, must not necessarily have to ask for it. There is an inherent obligation on the hearing tribunal to embody the right in its procedures. In **Rhoda Jamu vs. The Nurses and Midwives Council of Malawi**[4], Kamwambe, J stated as follows:

> *"This opportunity to correct or contradict any evidence or statements affecting the accused must be demonstrated through creating a situation in which the accused must face and question his or her accuser if she so wants. She must not necessarily ask for it. It must be embodied into the practice of fulfilling principles of natural justice".*

In **Jawadu vs Malawi Revenue Authority**[5] the court emphatically, stressed on the point in the following words:

> *"It was necessary and appropriate for the disciplinary hearing committee to invite and to hear both sides to the disputed facts. Through the applicant's written response it was not a question of whether the applicant would require the accusers to appear at the hearing for confrontation? It was a matter of legal obligation on the part of the respondent to say to the accusers that the applicant is disputing*

[3] Matter No. IRC 257 of 2007
[4] Civil Cause No. 51 of 2009
[5] Supra, note 13

these allegations; therefore you must come to the hearing so that you can say to his face what you allege he did or omitted to do" [6].

Right to sufficient notice

As a component of the right to e heard, it is a requirement that the accused person be given sufficient notice of the hearing to allow him sufficient time for him to prepare his defence. In **R vs Thames Magistrates' Court, ex p Polemis**[7] Lord Widgery CJ commented as follows on the need of sufficient time:

"But of the versions of breach of rules of natural justice with which in this court we are dealing constantly, perhaps the most common today is the allegation that the defence were prejudiced because they were not given a fair and reasonable opportunity to present their case to the court, and of course the opportunity to present a case to the court is not confined to being given an opportunity to stand up and say what you want to say; it necessarily extends to a reasonable opportunity to prepare your case before you are called to on to present it. A mere allocation of court time is of no value if the party in question is deprived of the opportunity of getting his tackle in order and being able to present his case in the fullest serve …….

"In the instant case, on the brief and simple facts that I have related, can it be said that the applicant was given a reasonable opportunity to present his case? It seems to me to be totally unarguable that he was given such a reasonable opportunity. He had no time to take samples, no time to see a report of samples taken by the prosecution, no time to look for witnesses, no time to prepare any supporting evidence supportive to his own, and that too when he was a man with a very rudimentary knowledge of the English language in a country foreign to his own.

[6] At page 404
[7] (1974)2 ALL ER, 1220

When one just looks at those facts it seems to me to be a case I which any suggestion that he had a reasonable chance to prepare his defence is completely unarguable" [8].

The Right to know any implicating evidence

It is a requirement under the right to be heard that where the tribunal is in possession of any statements or evidence against the accused, the same must be disclosed to the accused person prior to the hearing. In **Chakhaza vs Portland Cement Company**[9], at 127, Potani, J quoted with approval the following statement by Lord Denning in **Kanda vs. Government of Malaya** (1962) AC, 322:

"If the right to be heard is to be real which is worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him, and then he must be given a fair opportunity to correct or contradict them"[10].

Practical illustration

All the above principles are well illustrated in the case of **Rhoda Jamu vs. Nurses and Midwives Council of Malawi**. In that case, a nurse was accused of improper conduct. The nurse was based in Blantyre but was called for a disciplinary hearing in Lilongwe. The invitation was not sent to her directly. An official from Nurses and Midwives Council called the matron of the hospital where the nurse was working to inform the nurse that she was required to appear for disciplinary hearing the following day in Lilongwe. No charges were given to her. The nurse travelled the same night and appeared for hearing the following morning. At the hearing, the witnesses that testified against her testified whilst the nurse

[8] At page 1223
[9] Supra, note 9
[10] See also Zodetsa vs Council for the University of Malawi (1994) MLR, 412 and Rhoda Jamu vs. Nurses and Midwives Council of Malawi, supra, note 19

was outside. After hearing the witnesses, the panel then called the nurse to give her side of story. It also transpired that prior to the hearing, the investigations committee of the Nurses and Midwives Council had prepared a report that implicated the nurse. The panel had a copy of the report but the report was never shared to the nurse. Subsequently, the nurse was suspended. The court quashed the suspension on a number of grounds. First, the nurse was not properly given the charges against her. Secondly, she was not given sufficient notice of the hearing. Thirdly, she was not given a chance to examine her accusers i.e. those who testified against her as they testified in her absence and; fourthly, the evidence in form of investigations report that implicated her was hidden from her.

This case, illustrates all the principles of fair hearing discussed above.

Rule against bias

This rule is for all purposes, an extension of the fist rule. It enhances the position that a hearing is not just a matter of a person doing the talking. Hearing is meant to accord the decision maker an opportunity to assess the facts and come up with an objective. This cannot be achieved where the decision maker is already prejudiced against the accused person.

This is the reason the law requires that where there is a decision to be made against a person, the person making the decision must have no interest in the matter. Where it is shown that the decision maker had interest in the matter whether personal or official, the decision will be quashed.

In must be emphasized that in cases of allegation of bias, it is not necessary to prove actual bias. The decision will be quashed where in the circumstances of the case, there are sufficient grounds to show that the decision maker, might not have been objective. It is from this that emanates this common saying that ‘justice must not only be done, but it must be seen to be done’.

In some instances, this rule has been summarized that ‘no man should be a judge in his own cause.’ Put it differently, no person should be a decision maker against another person where the decision maker has interest in the case.

The following statement in the case of **Dimes vs. The Proprietors of Grand Junction Canal**[11] illustrate the fact that actual bias is not necessary. It was said:

> *"No one can suppose that Lord Cottenham could be, in the remotest degree, influenced by the interest that he had in this concern; but, my lords, it is of the last importance that the maxim that no man is to be a judge in his own cause should be held sacred."*

As a matter of illustration, assuming a nurse is accused of being insubordinate to the matron. He is then, called for a disciplinary hearing. The same matron then, sits on the disciplinary committee. Where such nurse if subsequently dismissed, the decision will be quashed even where the matron might not have influenced the outcome of the hearing.

Practical illustration

The above rule was illustrated in the case of Zodetsa vs. Council for the University of Malawi (1994) where a person alleged to have been insulted by the students participated in the disciplinary hearing. The decision was subsequently quashed by the court.

Other aspects of a fair hearing

Apart from the above two major elements of a fair hearing, a court of law will quash a decision where a decision is so unreasonable or where it takes into account irrelevant consideration. The decision is considered unreasonable where in all the circumstances of the case, no fair minded person could have made such a decision. Again, where the decision maker takes into account matters that are no relevant to the case, the decision will be quashed.

Practical illustration

A good practical illustration though emanating from employment case, is the case of **Mwanamanga vs. Malamulo Mission Hospital**.[12] In that case, the Applicant was employed by a Christian institution as a librarian. She was subsequently dismissed for marrying a polygamist. Though the facts do not come pout clearly, what is so clear is that this violated doctrines of the church that is the owner of the hospital. Clearly, this was so irrelevant and unreasonable. Ones marriage arrangements have nothing to do with their

[11] (1852) 3 HLC 759
[12] (2008) MLLR, 457

job as a librarian. It could have been different is the Applicant was employed as a spiritual advisor or something like that, then her marriage life would have been relevant.

Right to fair administrative action; right to be accorded reasons for any administrative action

Apart from the above discussed general principles, the 1994 republican constitution has brought in another arm to fair administrative action. Section 43 of the Constitution provides as follows:

> *"Every person shall have the right to (a) lawful and procedurally fair administrative action which is justifiable in relation to reasons given where his or her rights, freedoms, legitimate expectations or interests are affected and known; (b) be furnished with reasons in writing for administrative action where his or her rights, freedoms, legitimate expectations or interests if those interests are known."*

What this means is that since the inception of the new constitution, every administrative action will be weighed against fairness. It has been stated that it is not enough that the decision is legal. If it is unfair, it will be challenged. Again, without the parameters of this right is the right to be furnished with reasons in writing for any administrative decision affecting a person.

Practical illustration

In the case of …….. vs. Nurses and Midwives Council of Malawi, the court granted an injunction against enhanced sentence of a nurse. ……

Conclusion

In this chapter, we have considered the general principles of fair administrative decisions or actions. The principles discussed herein are general in nature. In some cases, statutes or regulations may provide specific requirements for example on notice required for a hearing. A good example is the disciplinary hearings by the Nurses and Midwives Council of Malawi. The Regulations require at least 7 days notice.[13]

CHAPTER THREE: NURSES AND MIDWIVES COUNCIL DISCIPLINARY PROCESS

[13] Rule 5 of the Nurses and Midwives (Disciplinary Inquiry) Rules

Introduction

The general principles discussed in chapter 4 equally apply to hearings and disciplinary processes by the Nurses and Midwives Council. However, considering that this manual is for nurses and midwives and that there are specific provisions that apply to hearings by the Council, it has been deemed necessary to have a separate short chapter that looks at specific provisions for the hearings by the Council.

Investigation committee and its powers

Section 50 of the Nurses and Midwives Act establishes Investigation Committee which under the Act is mandated to investigate malpractices by nurses or midwives. The committee comprises of five members of the Council. The committee may however, co-opt in any person it considers fit to assist in investigating a particular matter. The committee is mandated to investigate any matter relating to malpractice of nurses and midwives which include negligence, fraud or any unprofessional conduct.

Complaint to the investigation committee

Under section 52 of the Act, any person with sufficient interest may lodge a complaint with the Investigation Committee of the unprofessional conduct by a nurse or midwife. Such persons may include a patient, client or professional colleague.

Upon receipt of such a complaint, the Investigation Committee is under duty to investigate such a complaint unless it considers the complaint trivial, frivolous or in bad faith or that the complaint has rather delayed.

Powers of the Council and Investigation Committee pending determination

Pending conclusion of any investigations, the Council may refuse to register the accused person under investigation and the Investigation Committee has powers to interdict such a person.

Caution however, needs to be taken and that any such exercise of powers should not violate the general principles discussed under fair administrative action.

Disciplinary Committee

Under Section 55 of the Act, where, after investigation, the Investigation Committee is of the opinion that the complaint lacks merit, it has the powers to dismiss the complaint.

However, where the Investigation Committee is the opinion that the complaint has merit, it shall refer the issue to the Disciplinary Committee.

The Disciplinary Committee of the Council is established under Section 57 of the Act. It comprises of the Chairperson of the Council who is also the Chairperson of the Disciplinary Committee and four other members of the Council.

Possible conflict and call for reconsideration

A concern has however, been raised on the position of the Chairperson of the Council also being the chairperson of the Disciplinary Committee. This is so because as it will be seen later, recommendations of the Disciplinary Committee are reffered to the Council or approval, disapproval or variation. It makes no sense and in conflict of fairness therefore for a person who chaired the Disciplinary Committee and made recommendations to again chair the full Council to consider those same recommendations.

It must also be noted that it is not only the chairperson but that even the other four members of the Disciplinary Committee are also members of the full Council. Their presence at the full Council is therefore, likely to influence the outcome of the case. This has the potential to cause serious conflict. This area therefore, requires serious consideration as to whether members of the Disciplinary Committee should also sit on the full Council when the Council is considering disciplinary issues which emanated from themselves.

Put it differently, the current arrangement has the potential of violating the general principles of fair hearing and administrative action earlier discussed.

Functions of the Disciplinary Committee

Put it generally, the Disciplinary Committee is mandated to conduct an inquiry as to whether the accused nurse or midwife is guilty of the misconduct against him/ her. In the conduct of such exercise, the Disciplinary Committee has powers to call any such witnesses it deems fit and necessary in the particular case.

Right to know the charges and within reasonable time

As per discussed under the general principles, the Act and the Rules also require the Disciplinary Committee to serve of the accused nurse the charges levelled against him/ her. Section 58(2)(a) of the Act provides as follows:

"Before Exercising its functions with respect to any person, the Disciplinary Committee shall… cause to be served upon him a notice setting out the allegation against him."

Most importantly, Rules 5 of the Nurses and Midwives (Disciplinary Inquiry) Rules provides as follows on the timing:

"Parties and witnesses shall be given reasonable time to enable them to attend the hearing of the inquiry.

Provided that the notice period shall not be less than seven days from the date of service of the notice."

By Rule 7, it is a requirement that before an inquiry can proceed, there be proof that the accused person was served with the notice of inquiry.

Right to legal representation

Under Section 58(2)(b) of the Nurses and Midwives Act, and accused person has a right to legal representation. The legal representative may cross- examine the witnesses on his behalf. The wording of Section 58(2)(b) however, suggests that the legal representative may not only examine the witnesses and guide the accused person, but even present the whole case for him/ her. The Section provides as follows:

"Before Exercising its functions with respect to any person, the Disciplinary Committee shall… afford him a reasonable opportunity of being heard either by himself or, if he so wishes, by a legal representative."

This suggests that an accused person has an option of being heard either in person or through legal representative. In other words, one can chose not to appear on person but just send legal representative. Whether this is what was intended may be a matter of debate.

The right to legal representation is also highlighted under Rule 10 of the Nurses and Midwives (Disciplinary Inquiry) Rules.

Right to cross- examine the witnesses

As was discussed under the general principles, the Disciplinary Rules, specifically recognise the accused's right to cross- examine witnesses testifying against him/ her. Rule 10 provides as follows:

> "(1) A legal practitioner entitled under the Legal Education and Legal Practitioners Act to *practice before the courts in Malawi shall be entitled to represent a party during the inquiry.*
>
> *(2) A legal practitioner referred to in subrule (1) shall have the right to-*
>
> *(a) examine his client and witnesses in chief*
>
> *(b) cross- examine the other witnesses; and*
>
> *© make submissions before the Disciplinary Committee*

Need to emphasize on the above rights

The above rights are being emphasized because prior to the Rhoda Jamu Case, the Disciplinary Committee had no regard to the rights of the accused nurses. As was the case in the Rhoda Jamu case, the witnesses were being heard separately and in the absence of the accused person who was also being heard separately. Again there was no respect for the right to know the charges. Nurses could be summoned orally as was the case in the Rhoda Jamu case. Again, the right to know the evidence against the accused nurse was never respected. All these formed the basis on which the Rhoda Jamu case was founded.

Right to assistance to secure a witness and evidence

Under Rule 4, an accused person has a right to request the Disciplinary Committee to summon any witness for him. The right also extends to production of documents the accused considers relevant to his/ her defence.

Non-attendance of the accused

Under Rule 11, where an accused fails to attend the inquiry after being dully served, the Disciplinary Committee has three option; it may proceed with the inquiry and make its determination, it may adjourn the inquiry to accord the accused a second chance or it may initiate contempt of court proceedings in the High Court. However, under Rule 12, where a decision was made in the absence of the accused, he may apply to the

Disciplinary Committee to set aside the decision upon showing good cause as to why he failed to attend the inquiry.

Reference of the case to the Council and possible penalties

Where the Disciplinary Committee is of the opinion that a case has been established against the accused person, it shall, refer its findings and recommendations to the Council. The Council may, upon consideration of the recommendations from the Disciplinary Committee impose any of the following penalties or remedial actions; cancellation of the registration, suspension, imposition of conditions to ones practice (such as practicing under supervision), imposition of a fine, order payment of costs and expenses of the inquiry, censure the accused or caution him.

Right to appeal

Under Section 63 of the Act, any person aggrieved by the decision of the Disciplinary Committee of the Council in exercise of its disciplinary powers may within three months appeal against the decision to the High Court. Upon hearing the appeal, the High Court may confirm, vary or set aside any finding. It may also refer the matter back to the Council or Disciplinary Committee for further consideration. The High Court will however, not set aside any finding on account of any irregularity which did not prejudice the accused person.

Publication of inquiry results

Under Section 64 of the Act, the Registrar shall publish in the gazette names of all those nurses and midwives whose registration had been cancelled and those who have been suspended and periods of suspension. It is important to note that the publication must be in the gazette. This is important because previously, the Nurses and Midwives Council used to publish the names in newspapers until such an exercise was challenged. The arguments that were raised in favour of publishing in the newspaper were that the rationale behind publication is to warn the public that the person is no longer entitled to practice as a nurse or midwife and that since the majority of the members of the public may not have access to the gazette, newspapers provide an ideal forum for such warning. Arguments against such practice however were that in the first place, the Council must act within the dictates of the law. The law requires publication in the gazette and no more. A more moral argument however, was that publication in a newspaper may just go

towards ruining a particular nurse/ midwife's carrier as the public image may go on well after service the suspension.

Duty to surrender the licence

A suspended nurse/ midwife is under duty to surrender any licence or certificate issued to him by the Council not later than 14 days from the date the decision was communicated to him.

Conclusion

In this chapter we have considered the general framework of the disciplinary process to be followed by the Nurses and Midwives Council of Malawi. It must be highlighted that this process must be considered together with the general principles of law discussed earlier on. In fact, the Rhoda Jamu case which challenged many aspects of the hearing as was being conducted before, was not premised on the provisions of the Act or Rules but on general principles of law.

CHAPTER FOUR: PROFESSIONAL RESPONSIBILITY

Introduction

Just as any other profession, members of the nursing profession are under duty to take personal responsibility of their decisions. Experience has shown that in many cases, especially at the disciplinary hearings, nurses would push blame to either fellow nurses or other cadres for the decisions they make. However, the Regulations impose responsibility on the individual member of the profession to take responsibility of their decisions and actions.

Regulation 8 of the of the Nurses and Midwives (Scope of Nursing Practice) Regulations provides as follows:

> *"A nurse registered under the Act shall in pursuance of professional responsibility related aspects of the nursing management process—*
>
> *(a) accept responsibility and accountability for professional practice;*
>
> *(b) know the relevant legislation for nursing practice;*
>
> *(c) adhere to ethical standards in the nursing practice;*
>
> *(d) respect the rights of a client, patient, workmate or any other person, as appropriate;*
>
> *(e) collaborate with colleagues and other stakeholders in improving nursing practice;*
>
> *(f) practice nursing in a non-discriminatory and non-judgmental manner;*
>
> *(g) document relevant data related to client or patient care;*
>
> *(h) act as role model for other health care personnel, clients, patients and families;*
>
> *(i) be responsible for self-development;*
>
> *(j) assume responsibility and accountability for carrying out independent, dependent and interdependent nursing functions;*
>
> *(k) be an active member of nursing professional bodies;*
>
> *(l) maintain confidential information relating to clients or patients unless, in the particular circumstances, breach of confidentiality is required; and*

(m) report to an appropriate person where it appears that the health or safety of colleagues is at risk."

What this entails is that a nurse/ midwife cannot push blame for failure to do any of the above to another person. In is incumbent upon every nurse to discharge such obligations.

PART TWO: NURSE/ MIDWIFE AS AN

EMPLOYEE

CHAPTER FIVE: OCCUPATIONAL SAFETY, HEALTH AND WELFARE

Introduction

One of the issues that NONM has constantly handled over the period of time, are issues to do with the safety and welfare of its members. There is a saying that nurses are angels. Within this saying is a concept that the welfare of a patient is paramount to a nurse. In some cases however, this concept has been applied to the extreme to the extent that nurses/ midwives have been made to work or expected to work in such environment that their very safety, health or welfare has been seriously compromised. By the very nature of their job, nurses work in inherently dangerous environment. They work in a place where all sorts of diseases 'assemble'. It is therefore, of paramount importance that the employers put in place systems that mitigate the threat to their safety, health and welfare.

The aspect of occupational safety, health and welfare is very broad and it covers all sorts of occupations. We will therefore, limit ourselves to only those areas we consider vital to nurses and midwives.

General common law duties of the employer

The law is to the effect that every employer is under duty to take reasonable steps to avoid foreseeable risks to his employees. The employer is guilty of negligence if he fails to do so. In **Kapito vs. David Whitehead & Sons (Mal) Ltd, 16(2) MLR, 541,** Mkandawire, J stated at 544:

> *"I now move on to negligence. The employer's duty to his employees was stated in the case of Treiman v Pike (1969)3 All ER 1304 where, at 307, Payne J, said as follows: 'The employer's duty to his servants is to take reasonable care for their safety and this safety extends to the safety of the premises and the plant and to the conduct of the work but is not restricted to those matters. Put in slightly different words his duty is to take reasonable steps to avoid exposing his servants to reasonably foreseeable risk or injury."*

Statutory duties

The Occupational Safety, Health and Welfare Act, imposes various duties on the employer towards his employees. Generally speaking, the employer is under obligation to provide

a working environment which is hazard free towards his employee. The general duties of the employer are provided in Section 13 of the Act. The Section provides as follows in part:

> *"It shall be the duty of every employer to ensure the safety, health and welfare at work of all his employees.*
>
> *(2) Without prejudice to the generality of an employer's duty under subsection (1), the matters to which that duty extends includes in particular—*
>
> *(a) the provision and maintenance of plant and systems of work that are safe and without risks to health;*
>
> *(b) arrangements for ensuring safety and absence of risks to health in connexion with the use, handling, storage and transportation of articles and substances;*
>
> *(c) the provision of information, instruction, training and supervision in accordance with section 65 to ensure the safety and health at work of his employees;*
>
> *(d) as regards any place of work under the employer's control, the provision of maintenance in a manner that is safe and without risks to health, and the provision and maintenance of means of access to and egress from it that are safe and without such risks;*
>
> *(e) the provision and maintenance of a working environment for his employees that is safe, without risks to health, and adequate as regards facilities and arrangements for their welfare at work.*
>
> *(3) Except in such cases as may be prescribed, it shall be the duty of every employer to prepare and as often as may be appropriate, revise a written statement of his general policy with respect to the safety and health at workplace of his employees, and the organization and arrangements for the time being in force for carrying out that policy, and to bring the statement and any revision of it to the notice of all of his employees.*

What comes out of the section is that the employer is under general duty to ensure safety and welfare of his employees.

Apart from this general duty, the Act also has specific provision that addresses specific issues. Part IV of the Act requires general cleanliness, avoidance of over- crowding,

sufficient lighting, provision of sanitary conveniences, provision of seats, change rooms, meal facilities, first aid facilities etc.

Right to withdraw from unsafe working environment

This is one of rights nurses and midwives can use to use to push for their interests. This is so because arguably, nurses and midwives are in essential services which are not allowed to stage an industrial action (this has been discussed in details under dispute resolution).

By this right, it is provided under the law that a person cannot be dismissed for removing himself from unsafe working environment. Section 57(3) of the Employment Act provides in part:

> *"(3) The following reasons do not constitute valid reasons for dismissal or for the imposition of disciplinary action—*
> *;*
> *(d) an employee's exercise or proposed exercise of the right to remove himself from a work situation which he reasonably believes presents an imminent or serious danger to life or health;*

This right is further buttressed by the definition of strike under Section 2 of the Labour Relations Act. The section defines strike as:

> *"concerted action resulting in a cessation of work, a refusal to work or to continue to work by employees, or a slowdown or other concerted activity of employees that is designed to or does limit production or services, <u>but does not include an act or omission required for the safety or health of employees</u>, or a refusal to work under section 52"* (emphasis supplied)

What this entails is that where an employee removes himself from unsafe working environment, he cannot be deemed to be on strike and indeed, he cannot be dismissed for that. This right is vital to nurses and midwives due to environment they usually work. The environment usually poses inherent threat to their health and safety.

Meaning to nurses/ midwives

It must be noted that the duties discussed above, equally apply to nurses and midwives. It has been argued that the duty to employers must even be higher when it comes to nurses and midwives because, as argued before, the very environment in which these people work, exposes them to risk of contacting various diseases. It should therefore, be incumbent upon every employer to provide basic necessities that would avoid nurses/ midwives from contacting such diseases. Certainly, the basic of such provision should be gloves, shoes and aprons. Again, considering the nature of their job, the duty against overcrowding and provision of health amenities ought to be a priority.

Experience has shown that most employers do not provide shoes to nurses/ midwives. We opine that this is a violation of the Act. Certainly, for a nurse/ midwife, shoes should be a safety measure. No one can be expected to enter a ward where there are so many patients without shoes.

Just as it is applicable to all other employees, failure by the employer to provide such amenities would entitle the nurses to withdraw their labour of safety grounds.

Conclusion

It has been constantly argued that nursing is a calling. Be that as it may, it must be noted that nurses/ midwives considered as employees, have the same rights as any other employees. They ought therefore, to be accorded all the rights accruing to all employees including rights to do with safety and welfare. Indeed, this must extend to the right to withdraw labour from unsafe environment.

CHAPTER SIX: COLLECTIVE BARGAINING

Introduction

As alluded to in the introduction chapter, this work has been prepared having unionism at the back of the mind. The work has largely been prepared following experiences learnt during the ten year period of working with the NONM. Collective bargaining is one of the

major tools a trade union can use to influence working conditions for its members. It is therefore, imperative for a trade union to have general knowledge of the concept of collective bargaining. This is more so for nurses trade union considering the environment in which most of their members work.

Definition of collective bargaining

Though the law recognises freedom of contract, in practice, an employee is normally in a weaker position than the employer. This is so largely because it is normally an employer who determines terms of the contract and the employee is given the same as an offer. The employee's option is therefore either to accept the offer of reject it. As has been said elsewhere:

> *"Indeed in the normal employment situation it is the employer who draws up the contract and fills it up with terms of its choice….. The employee ordinarily has no say on such matters. Normally he just accepts and signs."* (Chipeta, J in the case of **Bakasi vs. SUCOMA (2008) MLLR, 112**)

Put it differently, in an employment relationship, it is the employer who determines the terms thereof. For the employee, it is just a matter of accepting them if he wants the job or reject them if he does not want the job.

Recognising this deficiency, the law recognises the doctrine of collective bargaining. Collective bargaining has been defined as:

> *"negotiations between an employer, a group of employers or one or more employers' organisations, on the one hand, and one or more employees' organisations or employees' representatives, on the other for determining working conditions and terms of employment and regulating relations between employers and employees or between employers or their organisations and employees' or employees' organisations."*- **Article 2 of the ILO Collective Bargaining Convention**

Elsewhere, collective bargaining has been defined in a simplified manner as:

> *"the rule-making process by which management, on the one hand, and the representatives of the workforce, on the other in an enterprise or sectors, come together to deal with matters relating to the employment relationship and industrial relations in general"* **- Cassim Chilumpha in his book Labour Law**

Pre- requisites to collective bargaining

By section 25(1) of the Labour Relations Act, where at least 25% of the employees of one employer whether at the same place or different places or 25% of a category or categories thereof are members of a trade union or two or more trade unions acting jointly, such employer shall recognise such trade union or trade unions for the purposes of collective bargaining.

For this purpose, the term employees exclude senior managerial staff. However, by sub-section 3, where the senior managerial staff considered separately also fulfils the above conditions, their trade union or such jointly acting trade unions shall also be recognised by the employer.

By sub- section 6, where the trade union or trade unions so acting jointly has a right to be recognised, either party can give notice of collecting bargaining and the same shall be done within 60 days from the receipt of the notice.

This provision regulates collective bargaining between a trade union and a single employer.

As regards collective bargaining between trade unions and employers' organisations, by section 26(1) and (2), a trade union or more acting jointly representing employees in a particular sector, may request an employers' organisation or more acting jointly in that particular sector to enter in to collective bargaining or vice versa.

By sub- section 3, the party so requested, shall give reply within 60 days.

By sub- sections 4 and 5, where the requesting party (whether as single or acting jointly) has a representation of at least 15% of the employees (in case of trade unions) or 15% of employers (in case of employers' organisation) and the other party does not reply within 60 days or turns down, the request, the requesting party may apply to the minister responsible for the establishment of the industrial council.

Composition, meetings and functions of the industrial council

By section 27, upon the request referred to above, the Minister if satisfied that the above discussed procedure has been complied with, may establish the industrial council and the decision shall be communicated to the parties within 21 days.

By section 28, the council shall comprise of the proposed parties to the collective bargaining and any other interested party (i.e. trade union or employers' organisation within the sector) that may apply and be admitted by the minister.

By section 29, the first meeting of the council shall be convened by the minister within 60 days from the date on the establishment of the council.

At the first meeting, the council must agree on the modalities of the transaction of their business. This includes appointment of the representatives (who must be half from each party), mode of decision making and admission of the new parties.

By sub- section 4 of section 29, the council shall meet once a year unless the parties agree otherwise. What this means is that once the council has been established, it is not an ad hoc council but a permanent one.

By section 30, the functions of the industrial council include negotiating wages and conditions of employment, establishment of dispute resolution machinery and developing the industrial policy of the concerned industry

Terms, enforceability and effect of collective agreements

By section 32, the parties to collective agreement may agree on any terms they deem fit but such agreement must as of mandate include; be in writing and be signed by the parties, contain the date on which it shall take effect, contain procedures for the avoidance and settlement of disputes and, not contain any conditions less favourable than those contained in the Act or any other written law. Presumably, any such provisions would be void.

By section 33, terms of the collective agreements, bind; parties to the same, employees who are or become members of the party trade union to the extent that the agreement relates to them, employers who are or become members of the party employer organisation to the extent that the agreement relates to them.

The major effect of collective agreements is that by section 33(2), the terms of such an agreement are deemed to be incorporated into the employment contract of each employee who is covered by the same.

Further, by section 39, where the business is sold, leased, transferred or in any way disposed of whilst the proceedings are underway, the purchaser, lessee or transferee is bound by the same and where the agreement had already been reached, he is bound by the terms thereof.

Good faith during negotiations

By section 31, each party to the negotiations is under duty to negotiate in good faith and by section 38, where there is collective bargaining, the employer is under duty to supply

to the trade union all the necessary information including where necessary, the employer's financial position so as to help the trade union bargain effectively.

The employer is not however, under obligation to disclose such information as is legally privileged, would invade on any of the employees privacy unless the employee consents and trade or commercial secrets.

Any such information obtained by the trade union shall not be disclosed to third parties without the consent of the employer.

CHAPTER SEVEN: EMPLOYMENT DISPUTE RESOLUTION

Introduction

In every set-up where there are conflicting interests, it is inevitable that disputes are bound to arise. Employment relationship is no exception. Employment relationship is more prone to disputes because inevitably, employers and employees usually have conflicting interests. This is more so in cases of private employers who would want to maximise profits and maximise use of labour and most often at a lower cost. On the other hand, employees will always demand higher wages and at times unrealistic.

Realising this potential conflict, the law has put in place mechanisms to be followed in case of disputes between employers and employees. The need to resolve disputes amicably in the industrial world cannot be over-stated as it is the best way to avoid break-down of the employer's undertaking.

Definition of a dispute

The Labour Relations Act, define a dispute in Section 42. Under the said section, a dispute has been defined as:

> *"any dispute or difference between an employer or employers' organisation and employees or trade union, as to the employment or non- employment, or the terms of employment, or the conditions of labour or the work done or to be done, of any person, or generally regarding the social or economic interests of employees."*

Without necessarily going into the technicalities of the provision, what comes out of the provision is that a dispute may concern general or specific working conditions or social or economic interests. Of importance gain is that a dispute may be actual dispute or mere difference.

Reporting of disputes and conciliation procedure

By section 43(3)(1) of the Labour Relations Act, any dispute, whether existing or imminent may be reported to the Principal Secretary for labour by or on behalf of any of the parties to the dispute. A number of elements arise from section 43(1).

First, the provision uses the word 'may'. This begs a question whether it is mandatory for the parties to seek reconciliation. Secondly, for a dispute to be reports to the Principal Secretary, it need not be actual. It can be imminent.

Thirdly, the reporting can be made by or on behalf of the parties. The provision however does not give clue as to who may act on behalf of the parties. Certainly, where the dispute is between the employer and employee, then the employers' organisation or trade union

may report. There seems however, nothing in principle for any third party to do so. However, since the reporting must be 'on behalf' of a party, the suggestion would be that the reporting must be with the approval of that party.

By section 43(2), every party reporting the dispute must send a copy of the report to the other party and by sub- section3, the Principal Secretary must acknowledge receipt of the report in writing within 7 days.

The conciliation procedure

By section 44(1), where the report dispute has been so reported, the PS or any person appointed by him shall endeavour to reconcile the parties. The PS must however satisfy himself that dispute resolution mechanisms established under collecting agreement (where one exists) have first been exhausted. The parties may however, waive such mechanisms.

By sub- section 2, however, where one of the parties is government including any public authority or commercial enterprise in which the government has a controlling interest, it shall be the parties themselves to agree on the conciliator and not the PS.

Where the parties fail to agree on the conciliator, then any one of them, may apply to the Industrial Relations Court (IRC) and the IRC shall designate (appoint) and independent arbitrator.

Any conciliation whether where the government is involved or not, must be completed within 21 days from the receipt of the report by the PS unless the parties agree to extend time.

Unresolved disputes

By section 44(5) a dispute shall be deemed unresolved where (i) a party fails to attend conciliation proceedings or (ii) the parties after the conciliation proceedings fail to agree.

By section 45, where there is unresolved dispute, then, in cases where the dispute concerns (i) the interpretation or application of any statutory provision or any collective agreement or contract provision or (ii) an essential service, then either party to the dispute or the PS for labour in the second case may apply to the IRC for determination.

Of importance is the definition of essential services. Essential services are defined in section 2 of the Act as:

> *"services, by whomsoever rendered, and whether rendered to Government or to any other person, the interruption of which would endanger life, health or personal safety of the whole or part of the population."*

Arguably, from the definition of essential services, the nursing and midwifery profession, falls within that category. The majority of nurses and midwives work in health delivery institutions and are usually the hands on group. It can reasonably be argued that withdrawal of such services would endanger life or health of their patients. This cannot however, be an omnibus position as each case must be decided on its own facts. Not all nurses are hands on on the patients.

Where the dispute does not fall in the above two categories, then, (i) where the parties agree, the matter may be referred to the IRC for determination or (ii) either or both parties may give notice of intention to strike or lockout. The notice here is regulated by section 46 to be considered under industrial action.

Conciliation agreement

Where after conciliation or arbitration the parties agree, the agreement shall be put into writing and signed by the parties and conciliator or arbitrator as the case may be (section

44(6). Such an agreement shall come into force on the date it is signed unless the parties agree otherwise (section 44(7).

Industrial action

Where parties fail to agree after the conciliation process and the dispute is such that it is not mandatory to refer the matter to the IRC, either party may give a 7 day notice of intention to take out an industrial action. There are two major forms of industrial action namely; strike and lockout. Strike is where employees withdraw their labour to force an employee to meet their demands. Lockout on the other hand is where the employer locks out employees for them to meet the employer's demands.

Pre- conditions for industrial action

The law provides for a number of conditions to be met if before an industrial action can be taken. First, by section 46(1), there can be no industrial action unless where there is unresolved dispute as defined under section 45. Further, by section 46(2) a party cannot take an industrial action unless the conciliation procedures as laid down under section 44 have been complied with. By the same sub- section 2, a party cannot take industrial action where the unresolved dispute has been referred to the IRC for determination under section 45. Again, by section 46(3) a party shall not take an action unless upon giving 7 days notice to the other party and to the Principal Secretary for labour.

Immunity, benefits and rights connected to industrial action

By section 49, no civil proceedings may be brought against an employer, employee, trade union, employers' organisation or a member thereof in respect of any strike in conformity with the Act, or any act not constituting a criminal offence committed by such a person or organisation in furtherance of such strike or lockout.

A number of issues emanate from this provision.

First, the immunity only applies where the strike or lockout is in accordance with the provisions of the Act and not otherwise.

Secondly, the immunity only applies to civil proceedings and not criminal proceedings.

Thirdly and arguably, civil proceedings may still be brought against such person where they are based on an act which is also criminal in nature (No civil proceedings shall be brought ….. or any act not constituting a criminal offence…)

Fourthly, the immunity applies only where the act was done in furtherance of the strike. This would best be determined by looking at the statutory purpose of the strike.

Again, by section 48, terms of any collective agreement and those of individual contracts, shall not be deemed breached by reason only of a party's involvement in the industrial action.

The vital expression here is 'by reason only'. Arguably, this means that if there is more than mere participation, then the contract may be deemed breached. So for example where the employee commits a crime under the pretence of participating in the industrial action, his employment contract may be deemed breached.

Further, by section 50, after the end of the industrial action, the employer is under duty to take back onto the same position the employee who presents himself for work 'unless material changes to the employers' operations have resulted in the abolition of such employment.'

The wording of this provision exposes the employees as in some cases, the employer may refuse to take them back. The protection is to some extent however, provided under sub-section 2. The sub- section provides that nothing in the section exempts an employer from ensuring that the termination complies with the provisions of the Employment Act.

By section 51(1) an employer shall not employ temporal employees to do the work of an employee involved in an industrial action unless such work is necessary to maintain minimum maintenance services.

By sub- section 2, minimum maintenance services are to be defined in the collective agreement but where there is none or the same is not defined, the same shall be those services the interruption of which would result in material damage to a working area or machinery. Certainly, this provision excludes disruption of business.

Further, by section 52, an employee who is himself not involved in an industrial action, has a right to refuse to do any of the works which would ordinarily be done by another employee involved in an industrial action.

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CHAPTER EIGHT: TERMINATION OF EMPLOYMENT BY WAY OF DISMISSAL

Introduction

Over the years of the existence of NONM, one area that has constantly been subject of dispute that NONM has been involved in is the area of termination of employment. Constantly, nurses have been subjected to unfair termination of employment especially by the private employers. This is more so in religiously run institutions which most often want to run the institutions be it hospitals or nursing training institutions based on their religious doctrines. This has often resulted in nurses being dismissed for breach of those religious doctrines rather than breach of employment laws or conditions. In this chapter, we discuss lawful and unlawful dismissal.

Termination of employment other than by dismissal

Just as any other contract, employment, employment contract can be terminated or can come to and end using different modes. First, Section 28 of the Employment Act,

recognises three types employment contracts; those for specific period, those for specific task and those for unspecified period. Contracts for specific period automatically come to and end at the expiry of the period. Similarly, those for specific task come to an end at the completion of the task. No notice is required for such contracts. Again, being a contract, employment can be terminated by mutual agreement of the parties.

There are other modes of termination such as death and insolvency. However, since the focus of this chapter is dismissal, we will not dwell on those other modes of termination.

Dismissal defined

The Employment Act does not define the term dismissal. What is apparent however is that for any claim of dismissal of whatever nature to be sustained, the claimant must prove that there was in fact dismissal. In other words, the claimant must show that the employer did by some other means determine or bring to an end the employment relationship. Because of this, a person cannot claim dismissal of whatever nature whilst he is still in the employ of the respondent.

Again since dismissal presupposes that it is the employer's conduct which brings to an end the employment relationship, an employee cannot claim dismissal where he leaves the employment on his own volition unless the leaving falls with the meaning of constructive dismissal to be discussed latter. Similarly, it will not be dismissal where an employee opts for resignation.

Again it will not be dismissal where the contract comes to an end the lapse of time as in such a case, it is not by the conduct of the employer.

Unfair dismissal

An employee does not have a claim against employer by merely proving dismissal. He should in addition, show that the dismissal was in fact unfair. By **section 58 of the Employment Act,** dismissal is unfair if it does not conform with section 57 or is constructive dismissal within the meaning of section 60. The concept of constructive dismissal will be discussed later.

By sub- section 1 of the said section 57, the employee's employment cannot be terminated unless there is a valid reason connected to the employee's capacity or conduct or based on the operational requirements of the undertaking.

Further, by sub- section 2 of the said section 57, where the reason is connected with the employee's capacity or conduct, the employment shall not be terminated unless the employee is given an opportunity to defend himself unless the employer cannot reasonably be expected to provide the opportunity.

The said section, provides as follows in full:

> *"(1) The employment of an employee shall not be terminated by an employer unless there is a valid reason for such termination connected with the capacity or conduct of the employee or based on the operational requirements of the undertaking.*
> *(2) The employment of an employee shall not be terminated for reasons connected with his capacity or conduct before the employee is provided an opportunity to defend himself against the allegations made, unless the employer cannot reasonably be expected to provide the opportunity."*

The effect of this provision is to completely change the position at common law which was to the effect that the employer can terminate the employment contract for no reason as long as he gives due notice or payment in lieu of notice.

From this provision, has emanated what has been termed procedural fairness and substantive fairness.

Procedural fairness

This emanates from sub- section 2 of section 57. What this means is that even where an employee is guilty of any misconduct, before his employment can be terminated, he must be accorded an opportunity to defend himself. This is what is usually called the right to be heard. Where an employee has not been so accorded the right to be heard, the

dismissal will be deemed unfair even where the employer had a valid reason to dismiss the employee.

Elements of the right to be heard

The right to be heard does not just entail calling the employee to do the talking just for the sake of it. The purpose of the hearing is for the employer to have full facts and enable him make an objective decision. For this, the law recognises a number of elements within the right to be heard that must be complied with. Among these elements is the need for impartiality on the person conducting the hearing, the right by the accused employee to know the charges against him, the right by the accused employee to cross-examine any witnesses against him and the right to be given sufficient time to prepare for his case. These elements and others have been discussed fully under the chapter dealing with administrative action procedure.

However, it should be noted that since an employer is not a court of law, the law does not require strict formalities to be followed. As long as the requirements are met, the employer would have discharged his duties. Again, legally, there seems to be no requirement for an oral hearing since all that is required for an employee is to comment on the allegations levelled against him. So, hearing can be in form of report writing. However, where there are witnesses against the employee, then an oral hearing may be necessary so that the employee is able to cross- examine those witnesses which may not be possible with report writing.

It should however, be noted that the right to be heard under section 57 is not absolute. The employer will not be bound to accord such an opportunity if he cannot reasonably be expected to do so. Whether the employer could not reasonably be expected to accord the opportunity is a matter of fact to be determined on the facts of a particular case. So for example, where the employee absconds himself and cannot be traced after the offence.

Substantive justice

This part goes to the reasons for dismissal and is covered by section 57(1). As earlier on stated, before an employee can be dismissed, there must be a valid reason connected with the employee's capacity or conduct or with the operational requirements of the undertaking.

Employee's capacity or conduct

The act does not define situations that may qualify termination under the expression 'capacity and conduct'. However, what seems to come out clearly is that conduct goes to the behaviour of the employee whilst capacity goes to the ability to discharge duties.

What this means is that the situations need not be self induced (on capacity). So for example, a driver who loses his legs would have lost capacity to perform his job and hence, an employer can terminate the services.

Again in terms of conduct, the Act does not, list which conduct would justify termination. The approach would seem therefore to be the same as the one under common law that where an employee is guilty of such conduct as to take away the continued trust between the two, then the employer is justified in dismissing him. The Act however, gives instances where the employee can be dismissed summarily. This will be discussed later.

Grounds not justifying dismissal

Section 57(3) of the Employment Act, contains reasons which the Acts expressly states that to not constitute valid reason for dismissal. The section provides as follows:

> *"(3) The following reasons do not constitute valid reasons for dismissal or for the imposition of disciplinary action—*
>
> *(a) an employee's race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, property, birth, marital or other status or family responsibilities.*
>
> *(b) an employee's exercise of any of the rights specified in Part II of the Labour Relations Act; Cap. 54:01*

(c) an employee's temporary absence from work because of sickness or injury;

(d) an employee's exercise or proposed exercise of the right to remove himself from a work situation which he reasonably believes presents an imminent or serious danger to life or health;

(e) an employee's participation or proposed participation in industrial action which takes place in conformity with the provisions of Part V of the Labour Relations Act; Cap. 54:01

(f) an employee's refusal to do any work normally done by an employee who is engaged in industrial action; or

(g) the filing of a complaint or the participation in proceedings against an employer involving alleged violations of laws, regulations or collective agreements."

Summary dismissal

By **section 59(1**) of the Employment Act, an employer is entitled to summarily dismiss an employee on the grounds as listed therein. By section 59(2), summary dismissal means dismissal without or with less notice than what the employee would ordinarily have been entitled.

The distinction between summary dismissal and general fair dismissal which complies with section 57 is only on notice. Otherwise, even under section 59, an employee is entitled to the right to be heard.

Again, combining sections 57 and 59, what comes out is that where an employee is guilty of any other misconduct entitling the employee to dismiss him under section 57 but does not qualify under section 59, then an employer can only dismiss him with notice e.g. insulting fellow workers may be valid reason under section 57 entitling an employer to dismiss the employee but may not easily fit under section 59. In such a case, it would seem, an employer can only dismiss the employee with notice or payment in lieu thereof.

The said Section 59(1) provides as follows in full:

"(1) An employer is entitled to dismiss summarily an employee on the following grounds—

(a) where an employee is guilty of serious misconduct inconsistent with the fulfilment of the expressed or implied conditions of his contract of employment such that it would be unreasonable to require the employer to continue the employment relationship;

(b) habitual or substantial neglect of his duties;

(c) lack of skill that the employee expressly or by implication holds himself to possess;

(d) wilful disobedience to lawful orders given by the employer; or

(e) absence from work without permission of the employer and without reasonable excuse.

(2) In subsection (1), "summary dismissal" means termination of the contract of employment by the employer without notice or with less notice than that to which the employee is entitled by any statutory provision or contractual term."

Burden of proof

By section 61 of the Employment Act, the onus is on the employer to show that there was a valid reason to justify dismissal and that where the employer fails to do so, there is conclusive presumption that the dismissal is unfair. In other words, where there is an allegation of unfair dismissal, all the employee needs to do is to prove that there was dismissal. The onus then shifts to the employer to show that he had a valid reason to dismiss the employee. If the employer fails to discharge this onus, there is conclusive presumption that he had no valid reason and the dismissal will be deemed unfair dismissal.

However, section 61(2) of the Employment Act, places further onus on the employer. Apart from showing that he complied with the provisions of section 57 of the Act, the employer must also show that he did in the circumstances act with justice and equity. So even where the employer had valid reasons to dismiss the employee, the dismissal will

still be deemed unfair is in all the circumstances, he did not act with justice. A practical case may be for a person who has worked for the same employer for 40 years without fault and gets dismissed just 6 months before his retirement for mismanaging say K10, 000.00. Clearly that would be unjust.

It must however, be emphasized is that in cases of capacity and conduct, the same must be connected with the employee's employment. Conduct outside employment cannot justify dismissal. As discussed under administrative action, a case is reported of a person working as a librarian in a Christian institution who was dismissed for marrying in a polygamous marriage. The court found such dismissal unfair for lack of valid reasons.

Operational Requirements

By the very section 57 of the Employment Act, an employee need not be given a right to be heard where the termination is based on operational requirements. The Act however, does not define operational requirements. What is envisaged here however, are situations of retrenchment and redundancy. In the case of **Gladys Matiki vs. Cure International, Matter No. IRC 234 of 2004**, the Court stated:

> *"The operational requirements under the Act are retrenchment and redundancy. Retrenchment is workforce reduction due to economic rundown. Redundancy is workforce reduction as a result of technological innovation."*

It has however been observed that unlike in cases of termination due to incapacity and conduct, the Act does not provide safeguards for termination due to operational requirements. The opinion is divided on whether in such cases, employees need to be involved or whether they need to be given due notice. Progressive thinking however, suggests that in accordance with the right to fair labour practices as accorded under Section 31 of the Constitution, it is expected of the employer to engage employees in such cases.

Though termination based on operational requirements seems apparently justifiable and incapable of making a basis of action, the same may be unfair if the employer does not use discernible criteria or uses a subjective or discriminatory criteria. Moreover, such exercise cannot be justified where the affected employees are immediately replaced. Put it differently, a court of law will not allow an employer to dismiss an employee under the disguise of operational requirements when the reasons may have been different.

Constructive dismissal

By section 60 of the Employment Act, an employee is entitled to terminate the employment contract without notice or with less notice than required where the employer's conduct has made it unreasonable to expect the employee to continue the employment relationship.

In such situations, the employer does not expressly or impliedly terminate the contract(which situations may fall under section 57) but just conducts himself in such a manner that employment relationship cannot continue. It is in fact the employee who terminates the contract but at the instigation of the employer.

The section provides as follows:

> *"An employee is entitled to terminate the contract of employment without notice or with less notice than that to which the employer is entitled by any statutory provision or contractual term where the employer's conduct has made it unreasonable to expect the employee to continue the employment relationship."*

The Act does not list the conduct on the part of the employer that may justify claim for constructive dismissal. Each case will therefore be decided on its own facts. Courts have found constructive dismissal where the employer is guilty of breach of a fundamental term of the contract.

By section 61(3) of the Act, the onus is on the employee to show that by the employer's conduct, he could not be reasonably expected to continue with the employment relationship. This is different from ordinary unfair dismissal where the onus to prove a valid reason lies on the employer.

Remedies for unfair dismissal

By section 63 of the Employment Act, an employee who has been unfairly dismissed may be awarded one or more of the following remedies: (i) reinstatement (ii) re-engagement and (ii) compensation. Reinstatement is where an employee is taken back to his position. Re-engagement is where the employee is taken back but to a different position say because by the time the case is concluded, his earlier position has been abolished or it has since been filled. Compensation is monitory remedy.

Suspension pending hearing

Another area that has been subject of dispute is suspension pending hearing. The law allows the employer to suspend the employee whilst investigations are underway. However, a number of issues must be considered here. First is the length of suspension. Suspension pending hearing cannot be indefinite and must be short enough merely to allow the employer conduct the investigations. Prolonged suspensions have in some cases, amounted to constructive dismissal.

Secondly, the current position of the law is that where the employer decides to suspend and employee, he can only do so with the employee getting his full benefits. In other words, the law does not allow suspension without pay or with half pay as is the practice with many employers.

A practical example here is where in 2018, the Phalombe District Assembly suspended three nurses on half pay for alleged misconduct. The court ruled that this was illegal and

ordered restoration of their salary. The same happened when in 2016, the Chiladzulu District Health Officer was suspended without pay. Again, the court reversed this.

Penalties short of dismissal

Apart from dismissal, the law allows the employer to impose lesser penalties on the employee for various wrongs depending with the degree of the wrong. Under Section 56 of the Employment Act, such penalties may include warning, suspension and demotion. The law however, does not allow imposition of a monitory punishment unless it is by way of restitution of the employer's property damaged by the employee. It is for this prohibition that suspension without pay or with half pay is prohibited.

Conclusion

Under this chapter, we have looked at one of the major areas that concern nurses as employees, that is dismissal. The principles discussed herein are applicable not only to nurses but to all employees generally and are of general application.