



EMPLOYEES' RIGHT TO DISENGAGE

Background

The Employment (Amendment) Bill, 2021 [the 'Bill'] which went through its first reading in the Senate on 2nd December 2021 has recently received a lot of media attention for its proposal on providing employees with the right to disconnect from work and the right of employees to have their personal time and privacy respected.

Following the Covid-19 pandemic, there has been a fundamental attitude shift towards how work is perceived and carried out. Whereas some proposals to the amendment of existing labour laws would previously have been viewed as impractical and unnecessary, they are now becoming increasingly common and essential in order to adapt to the changing work environment. Such proposals include the provisions of the Employment Act (Amendment) Bill, 2019, which we addressed in depth in our previous article [here](#). This bill gives employees the right to apply to their employer for a change in terms and conditions of employment relating to when and where the employee is required to work.

Work-life Balance

With a large group of employees now working from home (either on part-time or full-time basis) on devices that have been issued by the organization they work for, many staff are finding it difficult to switch off and are increasingly working out of hours with the boundary between work life and home life shrinking steadily. Accordingly, the Bill has been mooted as a remedy to this issue and is geared towards providing employees with a greater work-life balance.

The Bill is premised on the concept that each employee has the right to disconnect from work, which it defines as an employee's entitlement not to be contacted by the employer during out of work hours as per the employer's policy.

Employment policy on right to disconnect

To achieve this right, the Bill makes it mandatory for each employer to put in place a policy regarding (i) the circumstances under which an employer may contact an employee during out of work hours; (ii) use of electronic devices to send or receive information, messages or any digital work-related communication during out of work hours; and (iii) circumstances under which the right to disconnect may be waived. Where an organization has more than ten employees, the Bill requires such organization to develop the aforementioned policy in consultation with the employees or the representative trade union (where applicable). The Bill states that an employer may only contact an employee during out of work hours if such contact is necessary for the purpose of addressing an emergency.

The Bill further states that an employee shall not be reprimanded, punished, or subjected to disciplinary action if the employee disregards a work-related communication during out of work hours and that an employer shall specify the nature of compensation for employees who work during out of work hours. The Bill defines out of work hours as hours other than the hours of work agreed upon between an employer and an employee in the contract of employment. When there is no mutually agreed out of work hours, the Bill states that (i) an employee shall not be obliged to respond and shall have the right to disconnect; or (ii) such employee may choose to respond, for which the employee shall be entitled to compensation.

Penalties and exceptions

The Bill states that any person who contravenes the aforementioned provisions is liable, on conviction, to a fine not exceeding five hundred thousand shillings or to imprisonment for a term not exceeding one year or to both. The aforementioned provisions will however not apply to persons who provide essential services under the Labour Relations Act. These services are defined as services, the interruption of which would probably endanger the life of a person or health of the population or any part of the population and include water supply services, hospital services, air traffic control services, civil aviation telecommunication services, fire services of the government or public institutions, post authority and local government authorities and ferry services.

Reception of the Bill

Whereas the bill has good intentions, it has met strong opposition from a section of employers. The Federation of Kenyan Employers (FKE), a representative employers' organization have stated their reservations on the Bill. In its Memorandum dated 7th January 2022, the FKE stated that the Bill fails to recognize that the concept of work, workspace and work hours have changed with the new mechanisms of working placing greater emphasis on output rather than focusing on rigid employment structures. FKE believes that the employer and the employee should be allowed to agree among themselves what arrangements work for them and that the Bill will make it hard for the employer and employee to effectively respond to challenges such as those presented by Covid-19 pandemic.

The right to disconnect in other jurisdictions

Legally, the right to disconnect is a fairly new concept in African jurisdictions but provisions on the same have been considered by various private organizations on the continent. Globally, the concept is gaining traction. In 2017, France became the first country to enact a law concerning the right to disconnect and since then, countries such as Italy, Belgium, the Netherlands, Luxembourg, India, Spain, Australia, the Philippines and Canada have also considered, proposed and/or adopted this right.

Summary

Whereas the Bill has good intentions and is a step in the right direction, many would state that it does not appreciate the flexible nature and intricacies of new working arrangements. Additionally, the Bill does not define what constitutes an emergency and how an employee should be compensated for working out-of-work hours leaving room for contentious disputes.

The above notwithstanding, the Bill has sparked discussion surrounding a very contentious issue that has long been ignored, an employee's right to disconnect. The thin line between work life and personal life is becoming increasingly blurred and now is as apt a time as ever to debate how this issue should be resolved.