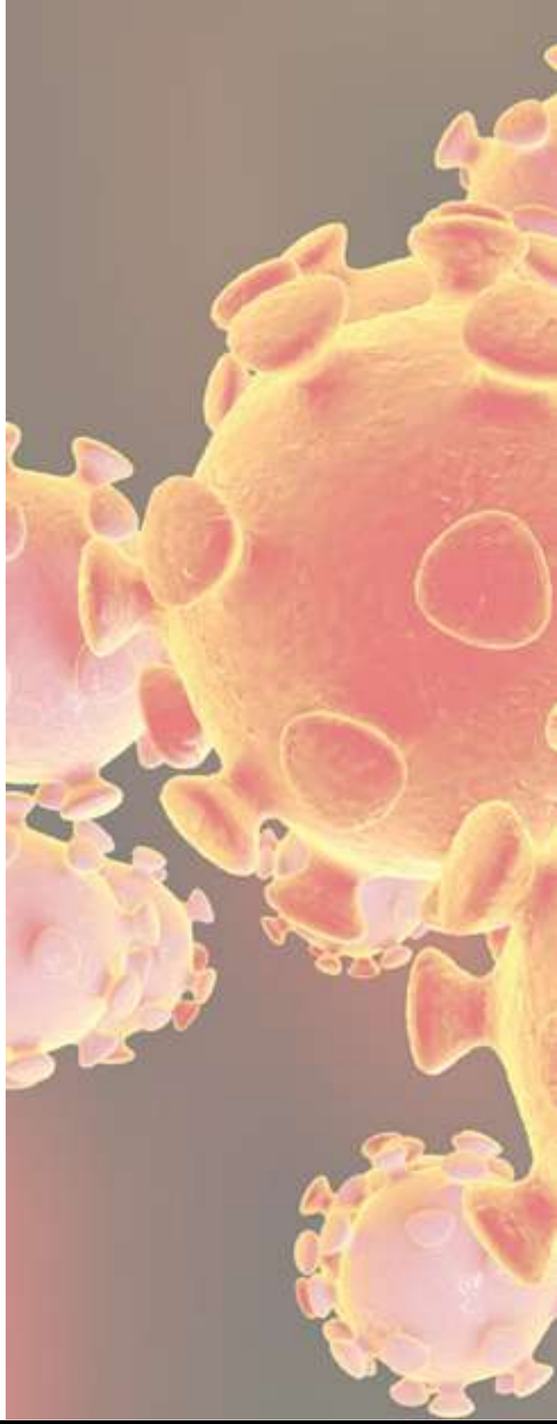
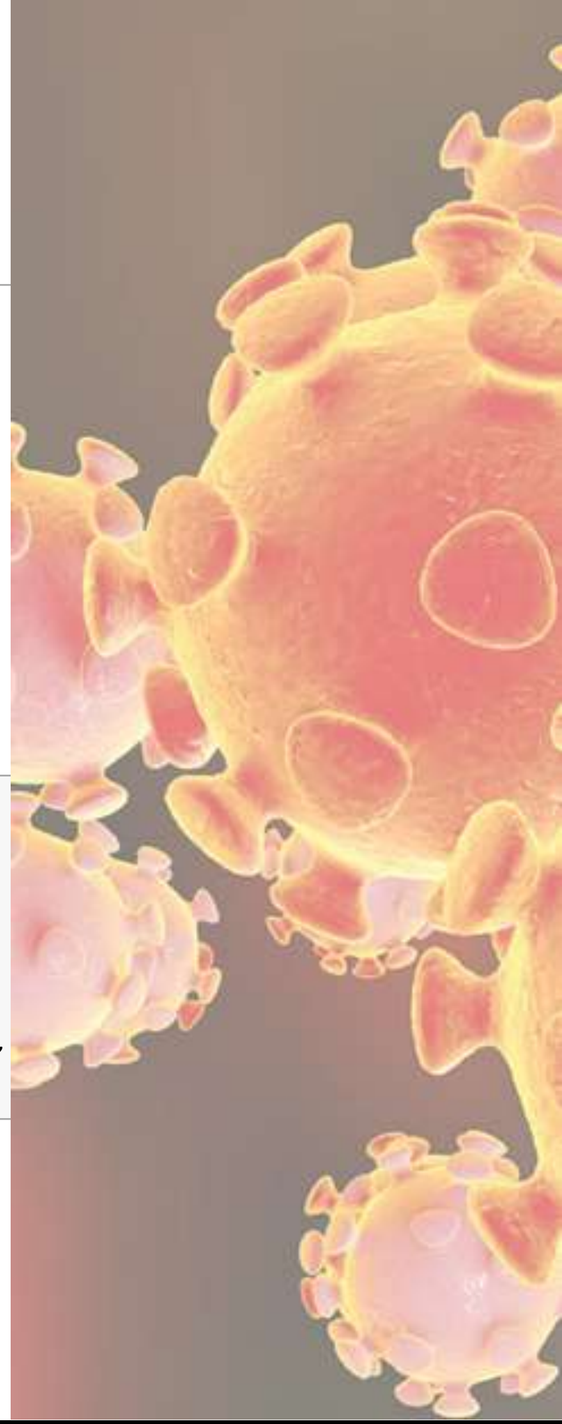
NAVIGATING KEY EMPLOYMENT ISSUES DURING THE COVID-19 PANDEMIC

June 2020



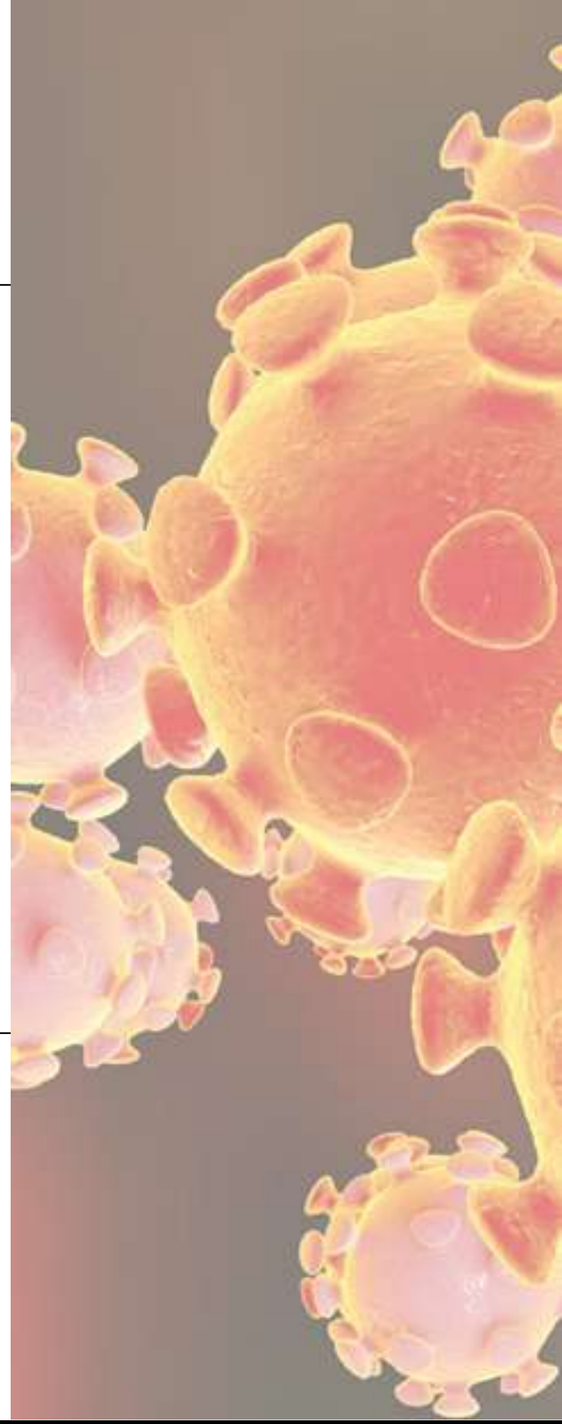
SALARY DEFERRAL AND REDUCTIONS

Is negotiating a salary reduction or deferral an option for Employers whose businesses are struggling financially until the business stabilises?	Yes. Although the Employment act does not specifically address the issue of salary reductions, our courts have provided guidance in several cases on how to proceed. In Christopher ***Okwako & 21 others v Sai Eden Roc Hotel [2014] eKLR***, the court noted that: *"Employers and Employees may agree during times of business crises to have part of the Employees' salary deferred until the business improves. It becomes an acceptable alternative to layoffs. Such arrangements must be in writing. It should not however be assumed that the Employees forfeit their deferred salaries for good, or that in assisting the business to reorganize and keep afloat, they accept review downwards, of their prevailing rates of monthly pay."*
What are the requirements for implementing a salary reduction or deferral?	Yes. In ***Ibrahim Kamasi Amoni v Kenital Solar Limited [2018] eKLR,*** the court stated that: *"For a reduction of salary to be valid, an employer ought to obtain the approval of an employee by communicating the reduction to an employee in a letter and causing the letter to be accepted by the employee. This is because salary is a fundamental term of employment whose reduction has negative impact on an employee's livelihood and should not be done arbitrarily or unilaterally by an employer."*



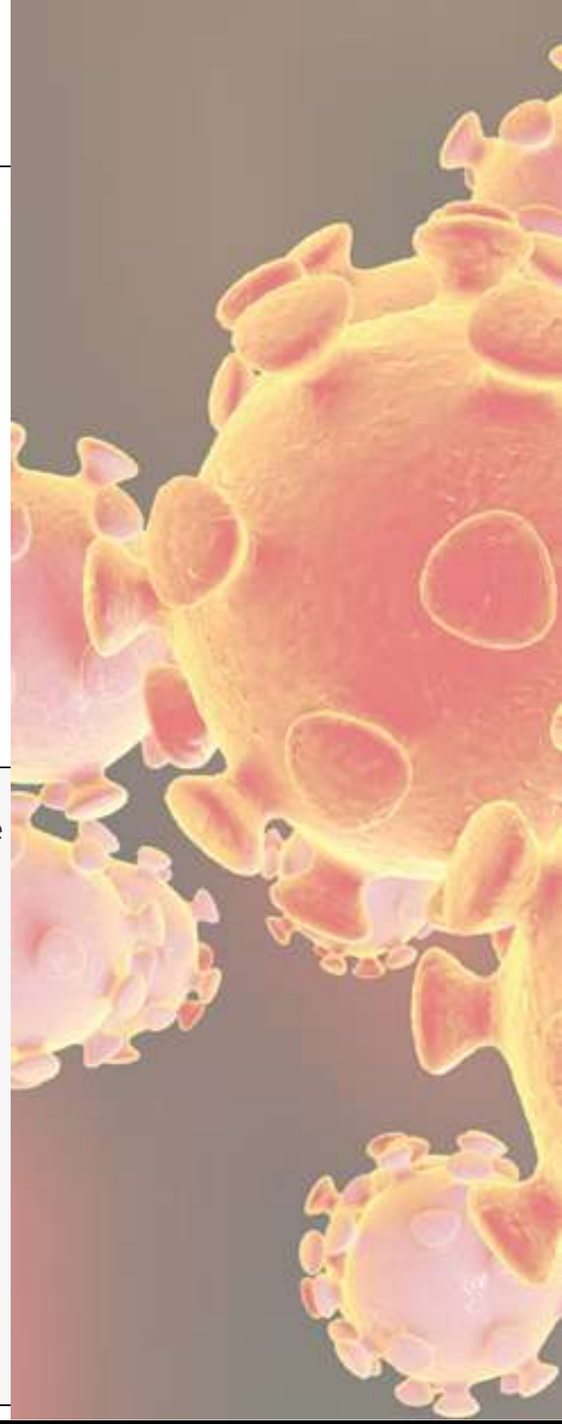
PAYMENT OF SALARY IN KIND

Can Employers Pay a portion of Employees' salaries in kind?	No. ***Section 17(1) of the Employment Act*** states that wages should be paid in the currency of Kenya. This therefore means that salaries may only be paid in monetary form. However, ***Section 17(5) of the Employment Act*** recognizes that pursuant to a contract of service or a collective agreement, a provision may be made for the payment of any allowance in kind to an employee with the employee's consent and the payment may with such consent be made only if, the allowance – (a) is for the personal use and benefit of the employee; and (b) does not consist of or include any intoxicating spirit or noxious drug. It should be noted that payment in kind only applies to ***allowances only*** and such agreement should be provided for in a contract of service or a collective agreement. Payment in kind cannot therefore be made in respect of the main wages.



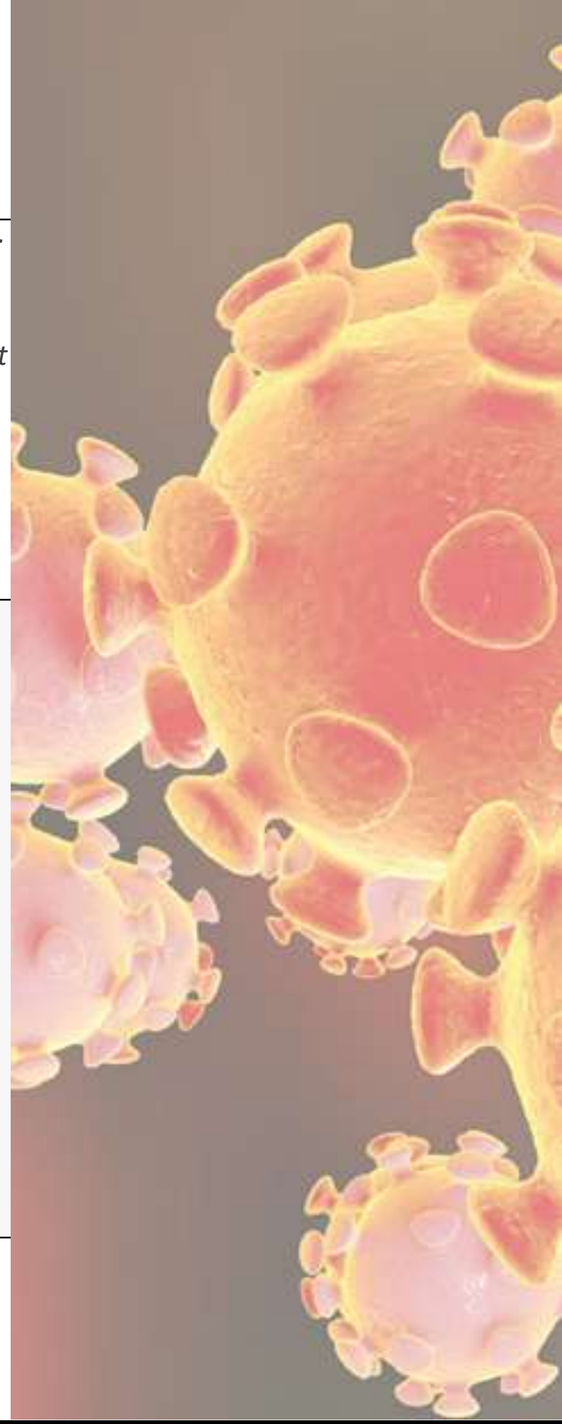
FIXED TERM CONTRACTS

Do Employers with Employees on Fixed Term Contracts have to give them notice of termination if the contract has not expired?	Yes, Employers have to give notice only if they are terminating a fixed term contract before the expiry of the contract. However, there is no requirement to give notice to renew or not to renew a fixed term contract unless the contract requires such notice so Employers can therefore wait for the fixed term contract to run its term without notice. The discretion of an Employer to renew or not renew a fixed term contract can however be challenged on limited grounds. Examples include: (i) Where there is a requirement to notify the employee that the contract will or will not be renewed. In the case of ***Ruth Gathoni Ngotho-Kariuki v. Presbytery Church of East Africa & Another [2012] e-KLR***, the court noted that the contract stipulated the Employee would be given 3 months' notice of non-renewal, which was not given and held she had established legitimate expectation of renewal. (ii) Where the Employer makes the Employee continue working after the fixed term contract has expired. In the case of ***John Ogutu Ragana v. Bandari Sacco Limited [2017] e-KLR,*** the court found that the Employee was entitled to have reasonable expectation of renewal, after he had gone on working, months after his fixed term contract expired.
Is renewal of Fixed Term Contracts Automatic?	No. ***Section 10(3) of the Employment Act*** requires that where the employment is not intended to be for an indefinite period, the contract of employment should indicate the period for which it is expected to continue or, if it is for a fixed term, the date when it is to end. In ***Rajab Barasa & 4 Others v. Kenya Meat Commission [2016] eKLR,*** the Court held that *"… the expectation of the Employees that their fixed term contracts would be renewed had no basis as there was no express, clear and ambiguous promise given by the Employer on renewal. The Employer retains the discretion, even where there is a clause allowing for renewal…"* In the case of ***Teresa Carlo Omondi v Transparency International- Kenya [2017] eKLR,*** the court stated that: *"…the general principle is that fixed term contracts carry no rights, obligations, or expectations beyond the date of expiry…"* *More recently in the case of **Bernard Onyango Oudu v Nakuru Industries Ltd [2019] eKLR**, the court made it clear that "…Upon the end of each contract, there is no requirement for renewal unless the other party has applied for renewal and the same is addressed.*



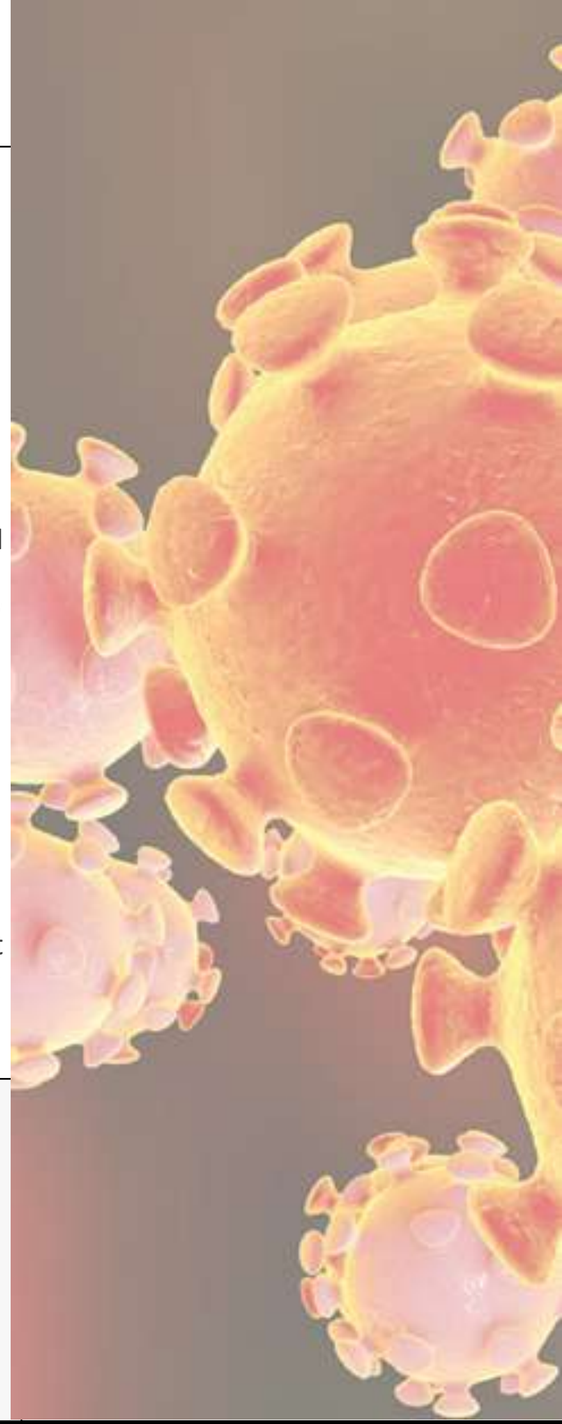
FIXED TERM CONTRACTS …/2

Do Employers Have to Give their Employees reasons for not renewing Fixed Term Contracts?	No. In the case of ***Bernard Wanjohi Muriuki v Kirinyaga Water and Sanitation Company Limited & another [2012] eKLR***, the court held that: *"…there is no obligation on the part of an employer to give reasons to an employee why a fixed-term contract of employment should not be renewed. To require an employer to give reasons why the contract should not be renewed, is the same thing as demanding from an employer to give reasons why, a potential employee should not be employed. The only reason that should be given is that the term has come to an end, and no more. … Reasons, beyond effluxion of time, are not necessary in termination of fixed-term contracts, unless there is a clause in the contract, calling for additional justification for the termination."*
What is the Doctrine of Legitimate Expectation as far as Fixed Term Contracts are concerned?	There is no legislation in Kenya governing the principle of legitimate expectation in renewal of fixed term contracts. In resolving disputes on the subject, the courts have relied largely on decided cases. For example, in the case of ***Teresa Carlo Omondi v Transparency International- Kenya [2017] eKLR,*** the court stated that: *"…The burden of proof, in legitimate expectation claims, is always on the Employee. It must be shown that the Employer, through regular practice, or through an express promise, leads the Employee to legitimately expect there would be renewal. The expectation becomes legally protected, and ought not to be ignored by the Employer, when managerial prerogative on the subject is exercised. Legitimate expectation is not the same thing as anticipation, desire or hope. It is a principle based on a right, grounded on the larger principles of reasonableness and fair dealing between Employers and Employees. The Employee must demonstrate some rational and objective reason, for her expectation. The representation underlying the expectation must be clear and unambiguous. The expectation must be induced by the decision maker. The decision maker must have the authority to renew. Repeated renewals, extended service beyond the period provided for in the fixed term contract, and promise of renewal, are some of the elements that would amount to objective reasons underlying expectation of renewal. The presence of these elements however, is not to be taken as conclusive proof of legitimate expectation…"*



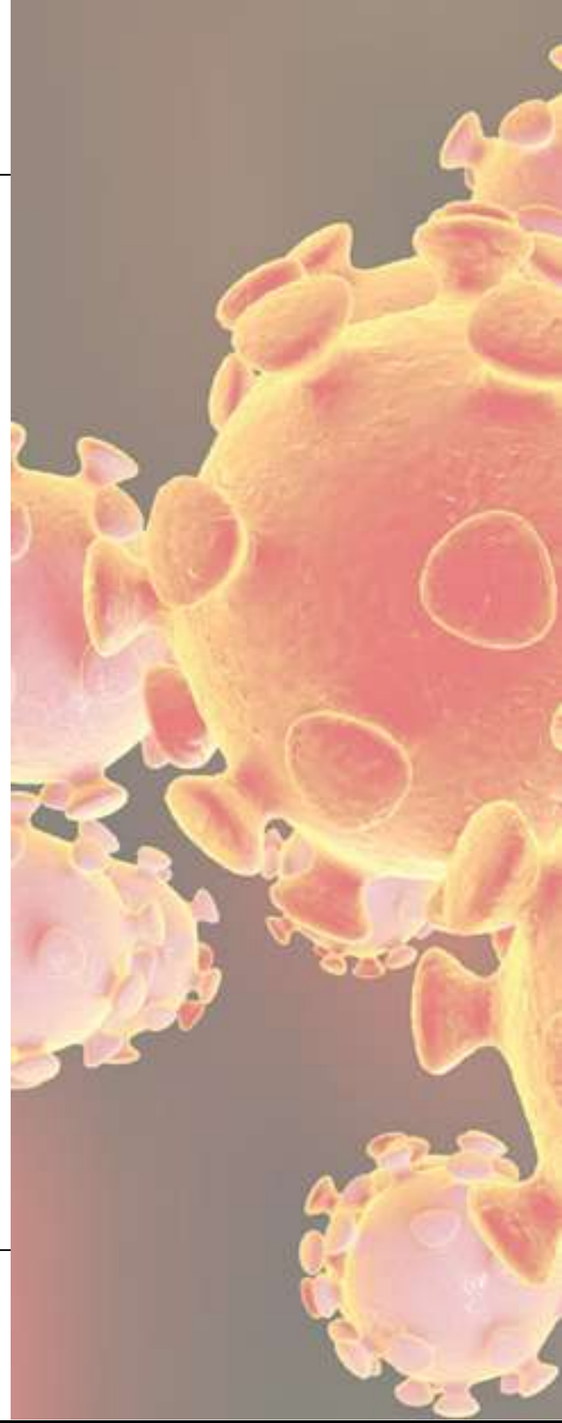
REDUNDANCY

Is redundancy a valid ground for terminating employment?	Yes. ***Section 2 of the Employment Act*** defines "redundancy" as being the loss of employment, occupation, job or career by involuntary means through no fault of an employee, involving termination of employment at the initiative of the employer, where the services of an employee are superfluous and the practices commonly known as abolition of office, job or occupation and loss of employment. Employers can therefore declare employees redundant where their services are no longer needed because the job undertaken or office held by such employee is no longer needed. In **Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others [2014] eKLR**, the court stated that *"… redundancy is a legitimate ground for terminating a contract of employment provided there is a valid and fair reason based on operational requirements of the employer and the termination is in accordance with a fair procedure. As section 43(2) provides, the test of what is a fair reason is subjective. The phrase "based on operational requirements of the employer" must be construed in the context of the statutory definition of redundancy. What the phrase means, in my view, is that while there may be underlying causes leading to a true redundancy situation, such as reorganization, the employer must nevertheless show that the termination is attributable to the redundancy – that is that the services of the employee has been rendered superfluous or that redundancy has resulted in abolition of office, job or loss of employment."* Earlier on in the case of **Tobias Ongaya Auma & 5 Others v Kenya Airways [2007] eKLR** the courts noted that *".. it is not the role of any tribunal to prevent an employer from restructuring or adopting modern technology so long as it observes all relevant regulations".*
Do Employers need to give Employees reasons for declaring such Employees redundant?	Yes. Based on **Section 43(2) of the Employment Act**, the reasons for termination (including termination by redundancy) are those reasons that the Employer genuinely believes to exist at the time of termination. In the case of **Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others [2014] eKLR**, it was noted that "…*termination of employment on account of redundancy is justified if there is substantive justification for declaring* redundancy and there is procedural fairness in the consequent retrenchment…" and further that "…*it is clear that an employer has the right to declare redundancies, where it is convinced that circumstances requiring redundancies have arisen…*".



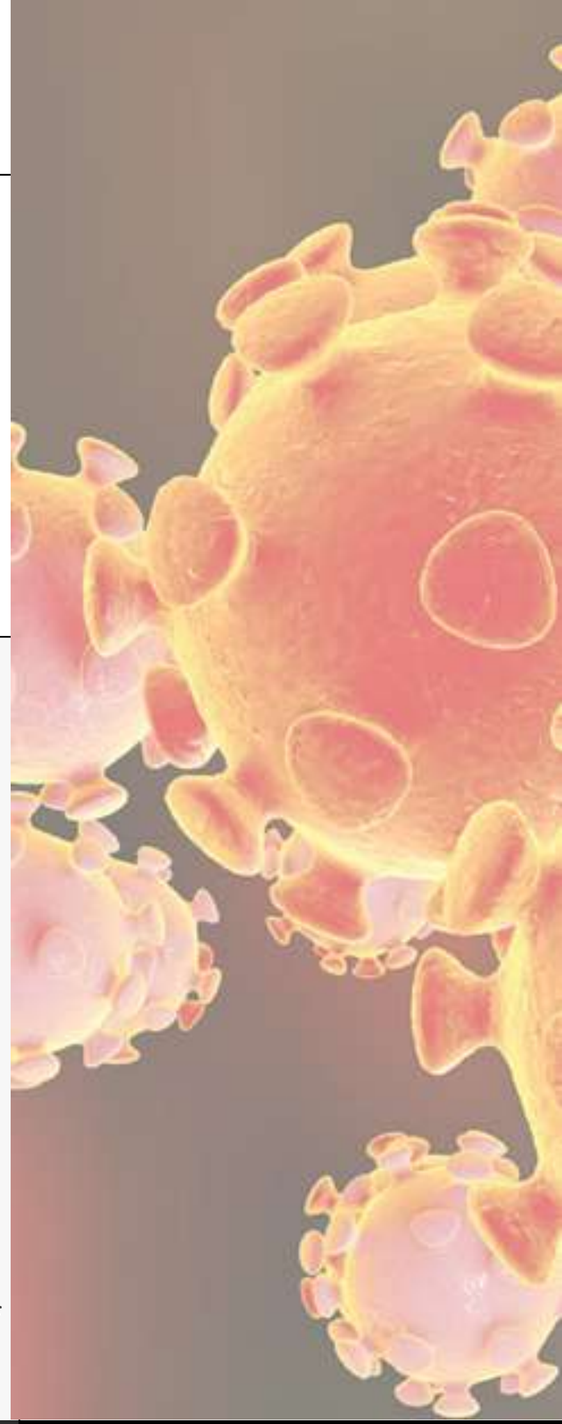
REDUNDANCY …./2

Is there a specific procedure for effecting redundancies?	Yes. ***Section 40(1) of the Employment Act*** stipulates the procedure to be followed by Employers in implementing redundancies. These include: (a) where the employee is a member of a trade union, the employer should notify the union to which the employee is a member and the labour officer in charge of the area where the employee is employed of the reasons for, and the extent of, the intended redundancy not less than a month prior to the date of the intended date of termination on account of redundancy; (b) where an employee is not a member of a trade union, the employer should notify the employee personally in writing and the labour officer; (c) the employer must demonstrate, in the selection of employees to be declared redundant the he/she has had due regard to seniority in time and to the skill, ability and reliability of each employee of the particular class of employees affected by the redundancy; (d) where there is in existence a collective agreement between an employer and a trade union setting out terminal benefits payable upon redundancy; the employer has not placed the employee at a disadvantage for being or not being a member of the trade union; (e) the employer has, where leave is due to an employee who is declared redundant, paid off the leave in cash; (f) the employer has paid an employee declared redundant not less than one month's notice or one month's wages in lieu of notice; and (g) the employer has paid to an employee declared redundant severance pay at the rate of not less than fifteen days' pay for each completed year of service.



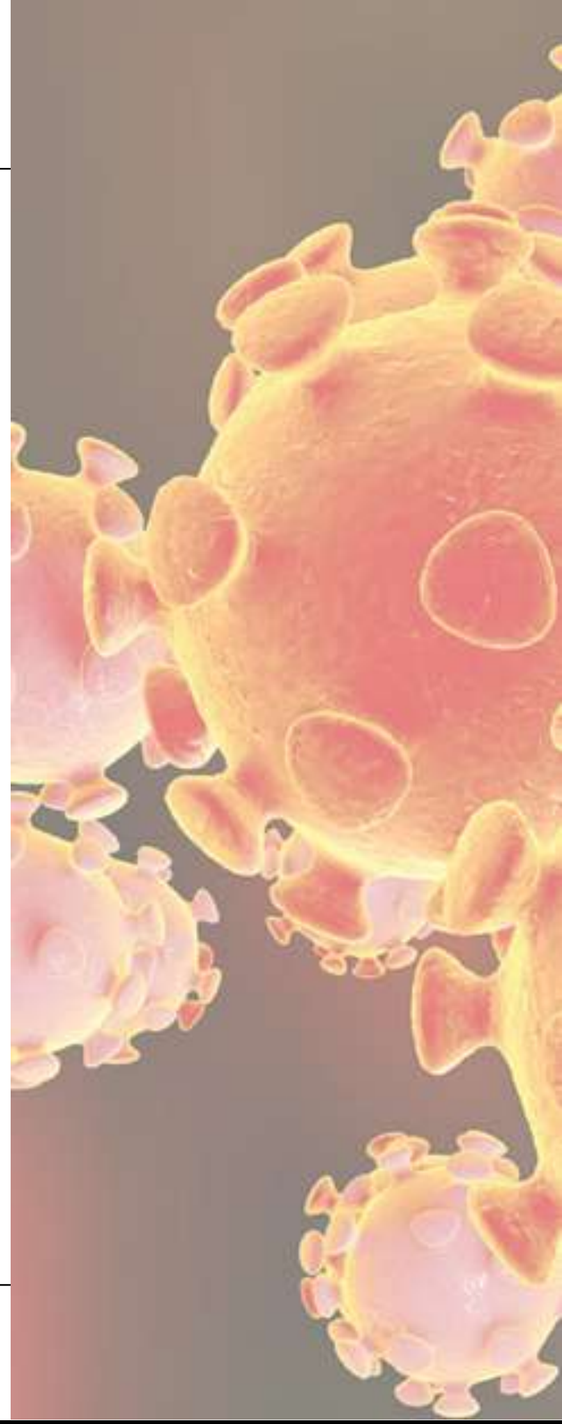
REDUNDANCY …./3

What defences do Employers have against a claim for unfair termination when they declare Employees redundant?	Our courts have noted in ***Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others [2014] eKLR*** that: *"… to establish a valid defence to a claim for unfair termination based on redundancy, an employer has to prove:* *(i) the reasons or reasons for termination.* *(ii) that reason for termination is valid;* *(iii) the reason for termination is fair reason based on the operational requirements of the employer; and* *(iv) that the employment was terminated in accordance with fair procedure."*
Do Employers have to consult with employees before declaring them redundant?	Yes. ***Section 40 of the Employment Act*** requires notices to be issued. While we do not have explicit requirements and guidance in the Act for consultations like other jurisdictions, our courts have held that the requirement of consultation is implicit in the principle of fair play under ***Section 40 of the Employment Act*** and that these notices are not merely for information. In ***Kenya Union of Commercial Food and Allied Workers vs British American Tobacco Cause No. 143 2008,*** the court outlined the manner in which redundancy consultations should be conducted stating that *"…the legal obligation on the parties to consult on the matter is designed to enable the parties to explore ways and means of minimizing the social and economic impact of the loss of jobs. The obligation is primarily imposed on the employer… In our view such consultations must be meaningful and held within the true spirit of collective bargaining… There must be a genuine attempt to resolve the matter through objective consideration of the proposals generated by the parties to mitigate the harsh impact of redundancy…"*



REDUNDANCY …./3

Do Employers have to lay off the newest employees and how does the Last In First Out Principle work?	No. ***Section 40(1) (c) of the Employment Act*** requires that the employer must demonstrate, in the selection of employees to be declared redundant the he/she has had due regard to seniority in time and to the skill, ability and reliability of each employee of the particular class of employees affected by the redundancy. In the case of ***Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others [2014] eKLR ,*** *the court stated that:* *"…it is evident that section 40 (1) (c) requires the employers to apply all the selection criteria specified, with due regard to seniority in time, skill, ability and reliability of each employee. A sole application of LIFO would no doubt, be detrimental to any employer, as continuity and succession planning within the organization could be jeopardized…"* It was also stated that: *"…The employer can use all or any of the criteria in that paragraph. In the present technological age, if the "last-in-first-out" principle is held to be mandatory, it may defeat the employer's objective of employing modern technology to carry out his business because it may be that the last employees to be employed, who according to this principle should be the first to exit, are the ones with the technological know how that the employer requires…"* More recently in the case of ***Ibrahim Kamasi Amoni v Kenital Solar Limited [2018] eKLR****, the court reiterated that:* *"…while selecting the employee to be laid off, the employer must apply the principle of "last in first out". This is what is meant by the expression "regard to seniority in time" under Section 40(1)(c). The employer can only ignore the principle of seniority in time for demonstrated skill, ability and reliability of a particular employee…"*



CONSTRUCTIVE DISMISSAL

Can Employees who have resigned succeed in a claim for constructive dismissal?	Yes. The concept of constructive dismissal is not expressly addressed in the Employment Act but the courts have set out what should be considered as general guidelines on what would constitute constructive dismissal. In ***Collins Githinji Mutaha v Widrups Group Limited & another [2019] eKLR***, the court stated that: "…constructive dismissal occurs where the employee resigns as a result of the employer creating a hostile work environment…" In ***Coca Cola East & Central Africa Limited v Maria Kagai Ligaga [2015] eKLR*** the Court held that constructive dismissal occurs: *"…where an employee is forced to leave his job against his will, because of his employer's conduct. Although there is no actual dismissal, the treatment is sufficiently bad, that the employee regards himself as having been unfairly dismissed…"* Finally, in the ***Coca Cola case***, the court also held that the burden to prove repudiatory breach or constructive dismissal is on the employee because: *"…the issue is primarily the conduct of the employer and not the conduct of the employee unless waiver, estoppel or acquiescence are in issue…*"