COVID-19

AN EXPOSÉ ON THE DEFICIENCIES OF PRIVATE LABOUR RELATIONSHIPS IN NIGERIA :

A REVIEW THROUGH THE LENS OF THE COVID-19 PANDEMIC AND THE CALL FOR FAIR REGULATIONS

BLACKBURN LEGAL
ATTORNEYS | SOLICITORS

Details at
www.blackburn-legal.com

Abstract—**According to the International Labour Organization, the COVID-19 pandemic has transformed into an economic and labour market shock. Businesses irrespective of size are facing serious challenges such as the threat of significant declines in revenue, insolvencies and job losses in specific sectors. The sustenance of Small and Medium Enterprises (SMEs) is also expected to be particularly difficult. Reports from the International Labour Organization predicts that the pandemic will have far-reaching impacts on labour market outcomes such as a significant rise in unemployment and underemployment. In Nigeria, the reality in its Labour Market is expected to be much worse, owing to the outdated and grossly insufficient provisions of the Nigerian Labour Act of 2004[1] which governs labour matters in Nigeria. This paper calls for fair regulations and/or legislations in Nigeria whilst examining the effects of the COVID-19 pandemic on private labour relationships and exploring the various options available to employers and employees in mitigating the negative effects of the COVID-19 pandemic on a party's exposure to legal liability.**

I. INTRODUCTION

The Labour Act of 2004 offers merely basic and arguably primitive protection to employees in Nigeria such that its provisions are not in tandem with 21st century realities. The inadequacies of the Act have become manifest in light of the realities occasioned by the COVID-19 pandemic. While in more advanced climes, employees can expect some form of protection with respect to job securities and benefits, employees in Nigeria are more or less at the mercy of employers. Worse more is that the minimal provisions as encoded in the Labour Act in Nigeria fails to apply to the entirety of the Nigerian labour market[2].

II. THE CONTRACT OF EMPLOYMENT VIS-À-VIS THE COVID-19 PANDEMIC

The relationship between the employer and the employee is largely a function of the employment contract. As held by the Supreme Court of Nigeria per Muhammad JSC **in Iyere v. Bendel Feed and Flour Mill Ltd**[3]. the legal basis of employment between the employer and the employee is the contract of employment. The effects of the COVID-19 pandemic in Nigeria such as the limitation imposed on movements, closure of non-essential businesses/services and the lockdown pronounced in some states has necessitated an overhaul of the traditional performance of the obligations under the various employment contracts. For example, on the part of the employers, the reduction or outright loss of revenue due to little or no patronage from clients has directly impacted on their ability to sustain their obligations to pay wages to employees; while on the part of employees, the COVID-19 Regulations imposed by the President of Nigeria on March 30, 2020 has through the restrictions on movement, compromised an employee's ability to present his/her self for work when required. Certainly, an employer may be desirous of relying on the employee's inability to show up for work as a reason to extinguish liability for not paying wages. However, technological advancements has provided adjustments which both parties can subscribe to, such as teleconferencing, email correspondence, and use of work-issued computers to enable an employee work from home.

Accordingly, where the adjustments as stated above can be reasonably applied, the issue of ***frustration of contract*** becomes mute. The Nigerian position on frustration of contract, as held by the Supreme Court per Adekeye JSC in **Nwaolisah v. Nwabufoh**[4] is that a contract is frustrated when an unforeseen and unexpected event prevents its performance, with neither party being at fault for having caused the event that led to the frustration of the contract. The court set out examples of such events to include: subsequent legal changes or statutory impossibility and literal impossibility[5].

The answer to the question of whether or not the COVID-19 pandemic will frustrate a contract of employment will definitely be case-specific and subject to an objective test such as the possibility of the business being carried on remotely or the practicability and implementation of the WHO Guidelines in the workplace[6], and whether or not the period of the restrictions caused by the pandemic had an ascertained duration[7]. It is submitted that where the above issues are answered in the affirmative, the contract of employment may not be held to have been frustrated.

Force Majeure clauses[8] can also be invoked to extinguish the obligation on the part of an employer to perform his duties as specified in the contract of employment. However, force majeure clauses are contractual, that is, they must be incorporated into the contract of employment. Section 17(1) of the Labour Act which unfortunately is restricted in its

---

[1] CAP L1 LFN 2004

[2] Section 91 of the Labour Act of 2004 excludes persons exercising administrative, executive, technical or professional functions as public officers or otherwise, among others, from the definition of a worker.

[3] (2008) 12 CLRN 1

[4] [2011] 14 NWLR (Pt. 1268) 600

[5] For a party to successfully rely on a Force Majeure clause in a contract, he or she must show how the Force Majeure event directly affected the performance of his/her obligations under the contract.

[6] For businesses designated as essential businesses under the COVID-19 Regulations in Nigeria where employees have to be at work, the World Health Organization Guidelines on COVID-19 suggest a number of measures that can be taken to assist the employer in his duty to provide a safe place of work. These measures include installation of hand-sanitizers, open-door policy to reduce touching of surfaces, rearrangement of sitting positions to ensure social distancing, provision of areas and equipment designated for hand-washing, among others.

[7] The question of ascertainable duration was raised in *Daps Brown v. HACO Ltd* [1970] 2 ALL NLR 47 and was held to be a valid test in determining whether or not a contract of employment will be deemed to have been frustrated.

[8] A force majeure clause is a contractual clause that alters parties' obligations and/or liabilities under a contract when an extraordinary event or circumstance beyond their control prevents one or all of them from fulfilling those obligations. Depending on its drafting, it may excuse the affected party from performing the contract in whole or in part; it may entitle the party to terminate the contract, or to suspend or claim an extension of time. See https://www.pinsentmasons.com/out-law/guides/ -19-force-majeure-clause

application[9], gives an appearance of statutory flavor to force majeure events by requiring payment of only one-day's wage in the event of a temporary emergency or circumstances beyond the employer's control but subjects it to other limitations. Interestingly, there are a variety of options that can be considered by employers and employees to mitigate the effects of the pandemic. They are discussed in the subsequent paragraphs.

III. TERMINATION OF EMPLOYMENT, LAY-OFFS, UNPAID LEAVE AND SHORT-TERM WORK

By the provisions of the Section 11 of the Labour Act of 2004 and in view of the COVID-19 pandemic, an employer may terminate the contract of employment by notice or by payment of salary in lieu of notice. This can effectively be carried out anytime and without any explanation.[10] The employer can also choose to lay off the employee to avoid or at least postpone redundancies.[11]

Another alternative the employer can explore is Lay off. Laying-off indicates that the employer does not provide the employee with work, with the resultant effect that the employee also does not get paid. It is usually employed for business/economic reasons[12]. A lay-off can be permanent; where permanent, it may likely become subject to the same statutory provisions governing redundancy under the Labour Act or as governed under a contract of employment which may provide for compensation benefits. It can also be temporary, in which case, it is fully subject to the contract of employment entered into by the parties. It is instructive to note that a lay off when permanent is usually the effect of a redundancy exercise; however, redundancy under the Labour Act[13] is defined as the "involuntary and permanent loss of employment caused by an excess of man power". As such, where a lay off occurs which is not the result of excess man power, the Labour Act will not give protection to such an employee as his/her employment shall be governed strictly in line with the contract of employment as negotiated unilaterally by the employer. This leaves the employee at the mercy of the employer as is the case in any master-servant relationship[14].

Where the Lay-off is temporary, it is essentially an unpaid leave. Due to the COVID-19 pandemic, employers and employees may find the option of unpaid leave to be mutually beneficial. The employee is for all intents and purposes, relieved of his duty to work, and is also not entitled to payment for the period of the leave. This may be beneficial because it reduces cost on the part of an already economically-beleaguered employer and ensures job security for the employee. Sadly however, there is no express provision for unpaid leave in Nigeria.[15]

Also, due to the fact that the Labour Act is silent on the issue of when an employee can take his/her annual leave, employers may arbitrarily by agreement as a result of their enormous bargaining power, unfairly require qualified employees to utilise their annual leave during the period of the lockdown. It is however suggested that a fair renegotiated agreement be reached between the employer and the employee such as, reasonably reducing the number of leave days entitled to an employee in the given year of the lockdown. This may be desirable and fair given the circumstances as there is a need to strike a balance towards ensuring that the employee utilises his/her leave when so desired and the employer makes the best of its resources by limiting the influx of employees utilising their annual leave all at the same time when the lock down is over.

Short-Term Work denotes a diminution in work with a corresponding decrease in remuneration. This appears to be a much preferable approach, as both parties still perform their obligations, albeit, on a reduced scale. Lay-offs and short term work are not clearly contemplated by the provisions of the Labour Act and as such, employees are largely left subject to the terms of their respective contracts with the employers[16].

IV. REDUNDANCY

Section 20 of the Labour Act of 2004 defines redundancy as an involuntary and permanent loss of employment caused by an excess of manpower. The section obligates an employer to, in the event of redundancy; inform the trade union or workers' representative concerned of the reason for and the extent of the anticipated redundancy[17]. The principle "last in, first out" is also expected to be applied, subject to all factors of relative merit including skill, ability and reliability; and is also expected to, using his best endeavors, negotiate redundancy payments to any discharged workers who are not protected by any regulations made by the Minister of Employment, Labour and Productivity with respect to redundancy allowance. However, the position of the National Industrial Court as recently expressed in the case of **Urinrin Digun-Aweto v. Ecobank Nigeria Limited**[18] is to the effect that for redundancy to be binding in a private contractual

---

[9] Ibid, 1

[10] This is the current position of the apex Court in Nigeria

[11] See Grunfield, (n2) Chapter 6.

[12] See https://en.wikipedia.org/wiki/Layoff accessed on the 16th April, 2020.

[13] See Section 20 (3) of the Labour Act

[14] See Israel. N. E. Worugji et al at page 27, "Economic Termination of Employment and Some Practices in Employment Relations in Nigeria" (The Gravitas Review of Business & Property Law) September 2017, Vol. 8 No. 3. The writers in this article note that issues lay off are purely issues of contract of employment.

[15] The closest provision is section 17(1) of the Labour Act of 2004 which mandates an employer to pay the worker one day wages when unable to provide work due to a temporary emergency or circumstances beyond the employer's control. Regardless of the dearth of Nigerian legislation on unpaid leave, there are international best practices and labour standards which have been directly incorporated into the Nigerian law and as such, require employers to consider them when taking decisions. This is as contained in Section 254c (1) (f), (h) of the 1999 Constitution of the Federal Republic of Nigeria (Third Alteration) Act No.3 of 2010.

[16] Ibid, 15

17 Not all redundancy arrangement involves trade unions considering the fact that some organizations are not subject to the Labour Act.

[18] **NICN/LA/486/2017, P.17** - Judgment delivered by Hon. Justice P.A. Bassi of the National Industrial Court, Lagos Division on 26th September 2018. A similar position was held in ***Olaniyan v. University of Lagos*** **(1985) 2 NWLR (Pt. 9) P.599.**

relationship, the redundancy policy must be provided for in the contract of employment[19].

V. REDUCTION OF SALARY

Due to the economic effects of the COVID-19 pandemic, most employers have resorted to pay cuts or reduction of the employee's salary. Employers can adopt pay cuts in response to a corresponding decrease in the amount of work given to the employee or while maintaining the status quo on the amount of work done. These options, including the undesirable second option are available to the employer by reason of the insufficient provisions of the Labour Act. Section 7(1) of the Labour Act obligates an employer to within three months of the worker's period of employment; provide the worker with a written statement specifying the name of the employer or group of employers, nature of the employers business, period of notice to be given by party wishing to terminate the employment, rate of wages, manner and periodicity of payment of wages, hours of work, amongst others; and where there is to be a change in either of these, **the employer shall within a month of the change, inform the worker of the nature of the change by a written statement**[20]. The employer does not however, have to comply with the above provision where there is a written contract of employment covering these matters[21]. The reduction will largely be subject to the parties' freedom to contract which in most cases is dependent on the employer's terms.

However, it is imperative to note that, an employer cannot unilaterally reduce an employee's salary. Salary reduction can only be done in compliance with the provisions of Section 7 or where such reduction is already envisaged in the contract of employment vide a hardship clause[22].

VI. RENEGOTIATING THE CONTRACT OF EMPLOYMENT FAIRLY

The basic requirement for the recognition of an employer-employee relationship is the existence of an enforceable contract of employment[23]. To mitigate the effects of the COVID-19 pandemic, it has become necessary for the parties to an employment contract to renegotiate the contractual terms. The need for the employer to protect the continued existence of the business must be weighed alongside the employee's need for job security fairly. Where not already incorporated, the contract should be renegotiated to allow for salary reductions, redundancy packages, short-term work and unpaid leave. It is important to note that these renegotiated contracts are temporary in nature, spanning the duration of the pandemic. Failure to reach a consensus will most certainly lead to termination of employment and/or litigation. This is another area in which the Labour Act of 2004 is grossly insufficient, as employees are subject more or less, to the whims and caprices of employers who have higher bargaining powers.

In the United Kingdom, contracts of employment are governed by the Unfair Contract Terms Act 1977[24] which prevents unreasonable attempts by employers to escape liability by rendering the offending clauses in contracts unenforceable. Therefore, any clause in an employment contract that prevents an employer from performing all or any of his obligations would be unenforceable, unless reasonable and fair. In addition, the employer is not allowed to render any contractual performance different in a substantial manner from that which was reasonably expected of the employee and the employer is also prevented from unreasonably excluding or restricting liability arising from its own breach of contract[25]; and where possible negotiate fair compensation packages with the employee in the given event of a permanent lay off or termination of employment by way of redundancy.

VII. CONCLUSION

There is an urgent need for a Labour Law that is up to date with 21st century realities that protects employees through wide all-encompassing clauses. This will prevent unreasonable reliance on concepts such as frustration of contracts to terminate contracts of employment unfairly.

There is also a need for a statutory flavor in employment contracts to stipulate limitations for contract renegotiation in order to prevent the inclusion of unfair contractual terms and to ensure that employees are not taken advantage of. The Labour Act should also protect the employer's business where necessary, especially in circumstances occasioned by the COVID-19 pandemic. It is therefore submitted that Nigeria should emulate the United Kingdom and put in place, relevant legislations that takes care of the issues as highlighted in this article.

ACKNOWLEDGMENT

I acknowledge the contributions of my colleagues at Blackburn Legal and particularly, the efforts and contribution of the Firm's virtual intern, Daniel Nwosu who is a student of the Nigerian Law School, Enugu Campus.

[19] The National Industrial Court held in the case of ***Hotels & Personal Services Senior Staff Association v. Owena Hotels Ltd*** **(2005) 3 NLLR (Pt 7) 163 at 182-183** that the provisions of the Labour Act with respect to redundancy, for example, giving of notice, must be complied with. However, the Supreme Court in ***E.N. Nwaka v. The Shell Petroleum Dev. Co. Of Nigeria Ltd & Ors*** **(2004) 19 WRN 129** states the current position of the Nigerian Law to the effect that it is an issue of contract and not of law. The import of this is that the existence of any redundancy package or benefits or the justifiability of any redundancy action can only be as determined by the terms of the contract of employment of the respective staff. As the Supreme Court stated, to do otherwise would amount to an unwarranted interference with the Freedom of contract.

[20] See Section 7(2) (a) of the Labour Act.

[21] See Section 7(6) of the Labour Act

[22] Differing opinions have suggested that a reduction of salary is not permissible, however our position as derived from Section 7of the Labour Act is that salary reduction is permissible, subject to agreement by both parties.

[23] C.K. Agomo, *Nigerian Employment and Labour Relations Law and Practice,* (Concept publications: 2011), Ch.2, p.68.

[24] See High Court ruling in *Brigden v. America Express Banks Ltd* [2000] IRLR 94 High Court.

[25] See Section 3 of The Unfair Contract Terms Act; See also https://www.thompsontradeunion.law/news/lelr/weekly-issue-44-march-2000/

Contact person

Ebuka Ekeanyanwu, Esq. MCIArb (UK)

The Author, Ebuka Ekeanyanwu, is the **Principal Partner** of Blackburn Legal (Attorneys & Solicitors). He heads the Dispute Resolution department of the Firm and has vast experience in labour law related issues in Nigeria. He is also a Member of the Chartered Institute of Arbitrators, United Kingdom.

Blackburn Legal

ebuka.e@blackburn-legal.com

07013648875