

Legal Alert for April 2010 ? **Distinction between Termination and Dismissal of Employment Contracts in Nigeria**

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LEGAL ALERT?Dismissal or Termination? Distinction under Nigerian Employment Law

The global recession is contributing to the escalation of employment related litigation in Nigeria. An insufficient appreciation of the difference between a termination of an employment contract with a dismissal of an employee from his employment is also contributing to this escalation as this is deducible from the nature of claims filed and their chances of success at the end of most litigation.

This Alert is our contribution on what a contract of employment entails under Nigerian Labour Law, its general operating parts and the distinction between the termination of a contract of employment and the dismissal of an employee from such a contract of employment.

The Contract of Employment

The principal and most direct legislation on employment matters in Nigeria is the Labour Act which was enacted in 1971. A worker or an employee is described under this Act as a person who enters into a contract of employment with an employer, whether such a contract is a contract of service or a contract to personally execute any work or labour. The Act is however inapplicable to persons exercising administrative, executive, technical or professional functions as public servants, or to any person employed on a vessel or on an aircraft to which the laws regulating merchant shipping or civil aviation already apply, among other classes of persons.

The Labour Act requires that within three (3) months of the engagement of an employee, an employer must give to the employee a written contract of employment which contract must specify among other things, a description of the parties to the contract of employment, the nature of the service or services to be rendered under the contract of employment, the tenure of the contract including its probation period, the remuneration which must be paid in the legal tender of the country where the contract is entered into, the hours of work, mandatory holiday with paid leave, rules with regard to periods of incapacity to work due to sickness or injury, maternity leave, the appropriate period of notice to be served before the contract can be terminated, possible grounds for dismissal of the employee without notice, etc.

The Labour Act also stipulates that no contract of employment shall provide for the payment of wages at intervals exceeding one calendar month unless the written consent of the Governor of the State where the contract is being executed is previously obtained. Also, every employee must be medically examined by a registered medical practitioner as to the suitability of the employee to discharge his or her duties under the employment contract. The cost of the medical practitioner for this examination is borne by the employer.

Employers are vicariously liable for all work undertaken by their employees, on the employer's behalf, should such work cause injury or loss to a third party. For this reason, and to cover negligent conduct outside of the scope of the employee's contract, employers traditionally demand from their employees an acceptable Guarantor's indemnity or Fidelity Guarantee from the employee's Guarantor which indemnity or fidelity bond must cover such vicarious and unauthorised conduct of the employee while remaining bound by the contract of employment. Every employee, who has served his or her employer for a continuous period of twelve (12) months, is entitled to such period of days or few weeks or month as may be agreed, as annual leave or vacation in addition to his full basic salary for the same period of the leave or vacation. While this annual leave or vacation may be deferred for good reason(s), such deferment must not be exceeded during a period of twenty-four (24) calendar months, more than once. The present practice in Nigeria of employers paying their employees not to go on vacation is therefore unlawful.

The freedom of an employee or employees to join a trade union must not be inhibited by an employer either in the contract of employment or in practice, neither must the employee be prejudiced in any way by reason of his association with a trade union or by his trade union membership.

The Labour Act statutorily allows pregnant women to proceed on maternity leave, six weeks before birth provided that a medical certificate is produced. Pregnant women are also entitled to a minimum of fifty per cent (50%) of their wages during the period of their maternity leave. After birth, a nursing mother is also entitled to another six weeks leave. On resumption for work, a nursing mother is entitled to half an hour recess twice in a day to nurse her infant. An employer is however not liable for the medical expenses of an employee incurred during or on account of the employee's pregnancy or confinement during such pregnancy and birth of a child.

Termination of Contracts

Like under the common law, either an employer or its employee may terminate a contract of employment, subject to the terms of the written contract, where the tenure of such a contract expires without a new contract of employment being entered into, either by conduct or in writing.

Another instance where a contract of employment could be terminated constructively is where either party to the contract dies.

The most common method of terminating a contract of employment is by the delivery of a written notice of termination of the contract on the opposite party. Where a notice of termination is served, the contract automatically terminates at the expiration of the period of the notice of termination. Either party could equally elect to pay compensation in lieu of the employee working for the employer during the period of the notice of termination.

In all cases of the termination of a contract of employment, neither party is obligated to provide any reason for terminating the contract. Also, the motive of the party that terminates the employment contract is equally irrelevant provided that the provisions of the employment contract in relation to its termination are complied with by the terminating party. Where for example, the provisions of the contract of employment requires that notice must be served or monetary compensation paid in lieu of such notice of termination, a breach of this term will lead to an otherwise avoidable, protracted and expensive litigation.

Nigerian courts do not grant specific performance of contracts of employment in the private sector because the courts will not impose an employee on an unwilling employer, neither will it impose an employer on an unwillingly employee. The principle of freedom of contract is strictly adhered to in Nigeria.

Dismissal

An employer is entitled to opt for the dismissal of its employee's contract, instead of the termination of a contract of employment, where the conduct of its employee "..... is of some grave and weighty character that it undermines the relationship of confidence which must exist between a master and a servant".

Examples of conduct which could be considered to be of a grave and weighty nature will include cases of stealing, fraud, bribery, corruption, falsification of records, gross insubordination, dereliction of duty, sleeping at work, verbal or physical violence, fighting, assault and battery, working under the influence of illegal drugs, conflict of interest, competition with the employer's business, conversion of company's property for private use without the employer's permission or consent, assault and battery, etc. This is a departure from the old standard which prevented the employer from automatically dismissing his employee without notice where such employee has committed an offence that have a criminal element(s) which criminal offence requires the proof in a court of law, of proof beyond all reasonable doubt.

While the criminal prosecution or otherwise of an employee in a court of law is no longer a sine qua non, i.e. a prerequisite, for summary dismissal, many employers these days, depending on the

circumstance and the facts, elect to serve a notice of termination or pay salary in lieu of notice in order not to provide any explanation or reasons for terminating the contract of employment. If the misconduct or series of misconducts are however grave, prior legal advice is recommended to be obtained before the letter of dismissal is issued and delivered to the employee. In some instances also, where the employee's misconduct is grave and weighty, a dismissal will be preferred to a termination as such will serve as a deterrent to other employees.

Fair Hearing

What determines the wrongfulness or otherwise of the termination or dismissal of any employment contract in Nigeria is not whether there was fair hearing at the time the case of the termination or dismissal occurred but whether the terms and conditions of the written contract of employment was/were adhered to by the parties in effecting the termination or dismissal of the contract of employment. Where there is no written contract of employment, the court will, subject to the general practice of trade or industry relevant to the employment, apply such reasonable trade or industry terms and conditions. This is the reason why many employers prepare a standardised and encompassing contract of employment with an accompanying staff handbook for all their employees.

Breach of employment contracts ? Compensation

The fundamental basis for assessing damages in breach of contract cases is the compensation which the injured party would have been deprived of if the contract was not unlawfully terminated. Thus, in the case of an unlawful termination, the Court will only award as damages the compensation of such period of salary that the terminating party would have been paid in lieu of the giving of the proper notice of termination. For wrongful dismissal without notice, the measure of damages will be the amount the injured party would have earned had he or it continued with the performance of the contract until the contract is lawfully terminated. Nigerian law does not recognise claims for injured feelings, physiological trauma or such similar claims when considering the amount to award as damages for breach of any employment contract. This is particularly as the injured party is required to mitigate whatever loss he or she may have suffered by getting another employment or securing another employee's services.

Conclusion

The Nigerian Labour Act was passed into law in 1971. This law, in the twenty-first century, is restrictive and outdated. Equally correct must be the observation that this Law, like others of its era, have remained unable to promote the much required human capital development in Nigeria. The Nigerian legislature will therefore do well to amend the provisions of this Law to meet the fundamental development requirements of the Nigerian economy.

Also, some Nigerian employers need to reappraise their belief that they have the legal authority to hire and fire at will. This is because such a belief or strategy must inhibit the ability of a serious business owner to engage and retain the best people in a massively aggressive and competitive global business environment.

Lastly, the Nigerian employee needs to review his or her expectation on job retention and security. The best of the latter will only lie in employees continuously equipping themselves by bringing more value to their individual environment, employment and country, in contrast to remaining on a job; this is particular as the common law rule on the freedom of parties to easily enter into and exit from contracts remains one of the basis canons of capitalism.

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