

LABOUR & EMPLOYMENT LAW

A Practitioner's Guide

BUSINESS PROCESS OUTSOURCING AND THE RIGHT TO JOIN A TRADE UNION





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INTRODUCTION

Outsourcing is a global phenomenon and one of the most discussed business issues of our time¹. Outsourcing occurs anytime one enterprise makes a contract with another enterprise to perform a process that is normally done internally by the first enterprise. Section 40 of the 1999 Constitution of the Federal Republic of Nigeria guarantees the workers right to form and join a trade union, but because business process outsourcing gives rise to close working relationships between two or more enterprises involved in different businesses, the question often arise as to which trade union such outsourced staff are entitled to join. This paper examines the legal issue with reference to decided Nigerian cases. It concludes that what determines the appropriate trade union which employees may join is the business or industry which their primary employer falls under, and not that of the company or organisation which they are outsourced to.

WHAT IS BUSINESS PROCESS OUTSOURCING?

Business Process Outsourcing (BPO) is a business model where a company or organisation contracts a third party service provider to carry out some of its internal business functions or tasks. It's a process by which an organisation contracts out an internal business process or tasks to a third party company that



specialises in that particular task or activity. There is also 'labour outsourcing', a fast growing business model where labour contractors recruit and deploy general personnel to client companies. This is an arrangement where a labour contractor outfit employs staff and deploys them to client/user companies on need basis. Under this arrangement, while there is a contract of employment between the labour contractor company and the staff deployed to client companies, no such contractual relationship exists between those staff and the client companies, even though they work directly for them.

The need to cut costs and remain competitive in the market has fuelled the growth of BPO as a business model. An organisation typically contracts with another organisation to carry out some of its internal processes or tasks which are necessary for its operations, but is not considered part of its core business. The underlining principle of Business Process Outsourcing, therefore, is that organisations should concentrate on their core processes and operations while leaving non-core functions or tasks to external firms that specialise in such operations. Akin to the economic principle of division of labour, it is thought that organisations will work better with cost efficiency when they outsource their non-core processes or tasks to third party companies who specialise in that operation.

Business Process Outsourcing has its roots in the manufacturing industry. Manufacturers do hire external firms and vendors to handle their supply chain processes because it is felt that such vendors could deploy expertise garnered over the years including speed and cost efficiency to those processes than the in-house team. Today, the practice of business process outsourcing has been embraced by most industries including NGOs and public sector agencies. The commonly outsourced tasks and business processes in Nigeria include payroll management, distribution and logistics, security services, catering services, IT, and customer service. The employees of the third party vendor/companies are often deployed to carry out their work at various business and operational locations of the client/user companies that retain the services of the third party vendor. The dynamics of the BPO is such that the employees of both companies work together as a team at the clients' locations. For instance, where an oil



servicing company contracts its security services, and catering services respectively to two different vendors, the employees of the vendors would have to be deployed to the offices of the client/user company to undertake the security and catering services for the benefits of the client company. The dynamics of BPO raises the legal question as to whether the employees of the vendors are entitled to join the same trade union with the employees of the client/user companies.

BPO AND THE RIGHT TO JOIN A TRADE UNION

Section 40 of the 1999 Constitution of the Federal Republic of Nigeria, and the ILO Convention on the Freedom of Association and Protection of the Right to Organise No. 87, both guarantee the workers' right to form and join a trade union and bargain collectively. Nigerian workers of different categories, whether permanent or contract/part-time, outsourced or casual, have the right to organise under a trade union and bargain collectively. Section 1(1) of the Trade Unions Act² recognises the right of every employee, whether permanent, contract, part-time, casual, or outsourced to join a trade union. This position of law received judicial endorsements in *Patovilki Industrial Planners v National Union of Hotels and Personal Services Workers*³, and *Management of Harmony House Furniture Company Ltd v National Union of Furniture, Fixtures & Wood*⁴.

Trade union membership in Nigeria is industry based as defined in the Third Schedule of Part B of the Trade Unions Act. An employee can only join the trade union applicable to his industry as jurisdictional boundary of the trade unions in Nigeria is a question of law⁵. It is not uncommon to see the trade unions operating in the client companies' industry to attempt to organise or 'unionise' the various workers outsourced to the client company by the third party vendors, and this is sometimes a subject of disagreement among the trade unions, client companies and the vendor companies. In the determining the appropriate trade union that such workers should belong to, distinction is often drawn between labour contractors and specific service providers.

² CAP T14 LFN 2004.

³ Unreported Suit No. NIC/12/89.

⁴ NIC/3/86 reported in the Digest of Judgement of the National Industrial Court (NIC) 1978 - 2006, P. 187.



The practice has been that where a third party contractor supplies only general personnel with no specific technical service, such vendors are deemed to be labour contractors. But for all service contracts (Business Process Outsourcing) where third party vendors render specific technical or special services, such employers are treated as service contractors. The law is that while the personnel of the labour contractors deployed to the clients' companies are eligible to join the trade union recognised for that particular client's industry, the personnel of the service contractors (BPO) may only join the trade unions recognised by law (i.e Trade Unions Act) for the industry of their primary employers (service contractors) and not that of the client's industry. Thus, for instance, where an oil and gas service company (client) outsources its catering needs to a catering and hospitality company (vendor), the employees of the vendor company may only join the National Union of Hotel and Personal Services being the trade union recognised by law for the hospitality industry, and not the National Union of Petroleum and Natural Gas Workers (NUPENG) nor the Petroleum and Natural Gas Senior Staff Association of Nigeria (PENGASSAN) both being trade unions recognised for the oil and gas industry in Nigeria. Similarly, where the same oil and gas company outsources its security processes to a security service company (vendor), the outsourced staff deployed by the vendor to the client company to undertake the security service needs of the client may only validly organise themselves under the trade union recognised for the security services industry under the Schedule to the Trade Unions Act, and not NUPENG nor PENGASSAN.

⁵ See **NUPENG v MWUN (2015) 61 NLLR P. 403**. See also **Aghata N. Onuorah v Access Bank (Suit No. NICN/ABJ/30/2011 judgement delivered on December 15, 2014)**, **NUPENG v Maritime Workers Union of Nigeria (2012) 28 NLLR Pt. 80 P. 309**.



DECIDED CASES

Two decisions of the National Industrial Court of Nigeria, and another decision of the Court of Appeal illustrate this principle of law. We shall examine the three decisions.

- **National Union of Petroleum and Natural Gas Workers (NUPENG) v Maritime Workers Union of Nigeria (MWUN)⁶**

In this case, a manning company, GAC Manning Services Ltd, was retained by BW Offshore Ltd, a Norwegian oilfield services company and the owner of a vessel known as “Sendje Berge” operating in Okwori oilfield Terminal in respect of OML 126/137, to supply the latter with crew. The question arose as to which trade union between NUPENG and the Maritime Workers Union of Nigeria (MWUN) had the jurisdiction to organise the employees of the GAC Manning Services Ltd on board the “Sendje Berge”. The National Industrial Court found that the said workers of GAC Manning Services Ltd are crew members on the “Sendje Berge” and the Court accordingly held that the proper union for the said workers was the Maritime Workers Union of Nigeria, since crew members are employed by a company in the maritime business. In arriving at its decision, the Court considered the specific nature of the services rendered by the deployed staff who were crew, even though the user company (client) is an oil and gas company and the vessel “Sendje Berge” carries oil and gas products.

- **NUPENG v Maritime Workers Union of Nigeria (MWUN)⁷**

In this case, a stevedoring contractor, Plomaz Nigeria Ltd, had a contract to supply trained dock workers to Chevron Nigeria Ltd, an oil exploration and production company. The services rendered by the staff of Plomaz Nig. Ltd deployed to Chevron Nig. Ltd was essentially marine services which involved the loading and off-loading of boats and badges at the dock. Again, the question arose as to which of the trade union, between NUPENG and MWUN is entitled to ‘unionise’ the staff of Plomaz Nig. Ltd deployed to Chevron.

⁶ (2015) 61 NLLR P. 403.

⁷ (2012) 28 NLLR 309.



A full panel of the National Industrial Court held that the Maritime Workers Union of Nigeria (MWUN) is the appropriate union in the circumstance, the reason being that the services performed by Plomaz was essentially marine services. It is irrelevant that the user company (Chevron) is an oil and gas company.

This principle of law and the judicial decisions do not only accord with logic, it also takes into consideration practicability, and the reality of modern industrial relations management. Allowing employees outsourced by service providers to join the trade union recognised by law for the client companies would produce unimaginable complexity and other adverse consequences for the service providers as this would mean that every service provider will have to go to collective bargaining tables with different trade unions depending on the industries its numerous clients belong to. Thus, going by the decisions of the National Industrial Court on this matter, if a catering service company, for instance, enters into a contract for the provision of on-site catering services to 4 companies namely; a bank, an oil and gas company, a brewery, and a civil engineering and construction company, the catering service company (vendor) would not need to go to collective bargaining tables with four different trade unions as its staff deployed to the four companies may only organise themselves under the trade union recognised by law for the catering service industry where it belongs.

- **Sea Trucks (Nig.) Ltd. v. Pyne⁸**

In this case, the respondent and his colleagues were employed by the appellant which business fell under water transportation industry but they insisted that they would like to belong to National Union of Petroleum and Natural Gas Workers (NUPENG) instead of Nigeria Union of Seamen and Transport Workers. The Court of Appeal held that the union that adequately and appropriately represents the interest of the appellant's workers is Nigeria Union of Seamen and Transportation Workers, not NUPENG.

⁸ (1999) 6 NWLR (Pt. 607) 514.



His lordship, Salami JCA (as he then was) held interalia as follows;

“The respondent and other employees of the appellant cannot belong to a trade union which is not engaged in the trade or industry of water transportation. To give approval for workers of the appellant, in the circumstance of the present appeal, to be registered in National Union of Petroleum and Natural Gas Workers would do violence to the provisions of Section 37 of the Constitution and would defeat the purpose for which the Constitution is designed to serve. The Constitution is to be interpreted in a manner that would give effect to the intention of the Parliament... to avoid lending support to unrestricted access to associations that please their fancy...”⁹

DOES AN EMPLOYEE HAVE THE RIGHT TO JOIN A TRADE UNION OF HIS OR HER CHOICE?

The argument is often made by the trade unions and their members that section 40 of the Nigerian Constitution and the regime of the Trade Unions Amendment Act (2005) gives workers unfettered and absolute right to join any trade union of their choice regardless of the industry or sector of their employer. This argument is misconceived and erroneous. The law is that voluntarism and the freedom to choose a union to belong to is limited to the union recognised and empowered to operate in that particular industry as defined by the Third Schedule, Part B of the Trade Unions Act. It is not open to an employee to join any trade union that he likes or which catches his fancy. This position of the law has been affirmed by the Courts in *NCSU v ASCSN*¹⁰, *PERESA v SSACGOC*¹¹, and *Osawe v Registrar of Trade Unions*¹².

⁹ *Ibid*, at pp. 536-537.

¹⁰ (2004) 1 NLLR (Pt. 3) 429.

¹¹ (2009) 14 NLLR (Pt. 39) 345.

¹² (1985) 1 NWLR (Pt. 4) 755.



The law is now settled that an employee cannot join the trade union outside the industry of his employer, and it is irrelevant that parties have consented to such unlawful arrangement.

CONCLUSION

Business Process Outsourcing and 'labour outsourcing' models have come to stay. Section 40 of the 1999 Constitution of the Federal Republic of Nigeria guarantees the right of every worker to join a trade union and bargain collectively. Trade union membership in Nigeria is industry based as delineated in the Third Schedule of Part B of the Trade Unions Act. An employee may only join a trade union recognised by law for the industry his employer belongs.

The dynamics of outsourcing often triggers dispute as to the appropriate trade union that outsourced employees may join for the protection of their interests. The practise has been to distinguish between BPO and labour contractor agreement. In service contracts (BPO), outsourced employees may only organise themselves under the trade union recognised by law for the industry their employer belongs and not the trade union existing in the clients companies they are deployed to work. However, for labour contractor agreements, outsourced employees are eligible to organise themselves under the trade union recognised by law for the client companies.