



COVID-19, LABOUR & EMPLOYMENT LAW AND THE DILEMMAS OF EMPLOYERS

*By Bimbo Atilola**

1.0 Introduction

1.1 The ongoing Covid-19 pandemic is not only a threat to the mankind, the virus has also infested the global business community, and with implications for labour and employment law and human resources management. Following the outbreak of the Covid-19 pandemic and its cross border wide spread, countries across the world continue to take drastic measures to curtail its spread, including closure of international airports and borders, revocation of Visas and general restrictions on movement of persons and goods. The Nigerian government has also responded to this pandemic by taking different drastic measures including closure of international airports and borders, closure of markets, shops and public offices save for those offering essential services, and a total lockdown in Abuja (FCT), Lagos and Ogun States.

Restrictions on global and local mobility, including closure of non-essential businesses and services have serious implications for businesses including parties obligations under a contract of employment. And because the current generation of businesses and employers of labour have never witnessed a pandemic of this

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magnitude before¹, business owners, employers of labour and their human resources managers are becoming increasingly overwhelmed by the very complex and challenging legal issues thrown up by this global virus.

2.0 Covid-19, Contracts of Employment and Implications for Employers of Labour

2.1 The covid-19 pandemic is having a significant and unsettling impact on businesses and with implications for employers of labour. With the fast declining business fortunes, employers of labour and their human resources advisors are compelled to think outside the box with a view to developing innovative but lawful strategies to manage their exposures, especially the accumulating labour costs.

The pandemic and the consequential measures taken by the relevant State authorities have impacted, and will continue to impact employers' ability to operate their businesses, provide work for employees and pay the salaries agreed under the contracts of employment. Similarly, the pandemic has also impacted on the ability of employees to carry out their contractual obligations of reporting to work and do their work. Since the outbreak of the Covid-19, the worst hit sectors seem to be the aviation, hospitality, sports and entertainment industries, although every sector has had, and still having its own share of the adverse consequences of this pandemic.

2.2 Duty to Provide Work and Employers Obligations to Pay Agreed Salaries

As a general rule², the common law position is that employers have no obligations to provide work so long as agreed salaries are paid³. The employee equally has a

¹. The 1918 influenza pandemic was recorded to be the last severe pandemic in recent history. It was reportedly caused by an H1N1 virus with genes of avian origin.

² The general rule however admits of 2 exceptions in which an employer has a duty to provide work. First is where the employee's wages or salaries depend on the provision of work, for instance, payment on commission basis. The second exception is where failure to provide work would lead to loss of fringe benefits, tips or desired publicity. See *Clayton (Herbert) & Jack Waller Ltd v Oliver* (1930) AC 209, (1930) ALL E.R. Rep. 414, *Yetton v Eastwood Froy Ltd* (1966) 3 ALL ER 353, (1967) 1 W.L.R. 104.

³. See *Collier v Sunday Referee Publishing Co. Ltd* (1940) 21K1B 647, (1940) 4 ALL ER 234.

corresponding duty to work for the employer in consideration of the agreed salaries. The Covid-19 pandemic and the State's measures to curtail its spread presents a situation where the employees are unable to report to work (even where they are willing to do so) on one hand, and the employer's inability to open its premises for work (even where it is willing to do so). It is trite law that a contract of employment continues until same is determined by notice, consent of the parties, expiry of time, frustration, operation of law or other causes recognised in law. And where a contract of employment subsists between parties, contractual obligations continue unless otherwise agreed by the parties. The implication of this general trite principle of law is that the duty of an employer to continue to pay salaries does not cease simply because the employee is suspended or otherwise asked to stay at home. This Covid-19 scenario raises several legal issues in labour and employment law, and to which we shall now turn to.

3.0 Covid-19 and the Dilemmas of Employers of Labour

Since the outbreak of the Covid-19 pandemic and the consequential global, national and local restrictions on movement of persons and goods, employers of labour and their human resources advisors have deployed different orthodox and unorthodox measures to mitigate their financial exposures, and some of which measures are not known to Nigerian labour and employment law.

There have been reported cases where employees have had their contracts of employment 'suspended', or materially altered without their consent or input into the process. Measures being taken by employers of labour across different industries include pay cuts, reduced working hours, leave without pay, declaration of redundancy and force majeure in some extreme cases.

4.0 Legal Reflections

4.1 Whichever option or combination of options every employer of labour is contemplating with a view to reducing or arresting the accumulating labour costs, it is important that these measures are carefully executed within the ambits of the law.

Unless otherwise provided in the contract of employment, a unilateral pay cuts, reduced working hours and leave without pay are not only clear cases of breach of contracts of employment but same may also amount to actionable constructive dismissal.

Constructive dismissal refers to a situation where an employer materially changes the terms and conditions of employment, or otherwise treats an employee in a manner which leaves him or her with no option than to resign or consider himself or herself sacked⁴.

4.2 Apart from possible liability for constructive dismissal, compulsory leave without pay also raises other legal issues in labour and employment law. Leave without pay is customarily at the instance of the employee and not vice versa. Employees do customarily apply for leave without pay to pursue further studies not sponsored by the company, to take up political or professional appointments, to contest for political offices or to attend to other personal matters. The circumstances under which an employee may be considered for leave without pay, including the conditions of grant are customarily defined in the Employee Handbook. Often times, employees who proceed on leave without pay may only be subsequently reabsorbed subject to availability of vacancy. To force or direct employees to proceed on leave without pay against their will may also be held to be an unfair labour practice.

⁴. See *Ilodibia v Nigeria Cement Company* (1997) 53 LRCN, *Olafimihan v Novalay Fintech Ltd* (1998) 4 NWLR (Pt. 547) P. 608.

4.3 Is Covid-19 a Force Majeure Event?

4.3.1 What is a Force Majeure

A force majeure clause is a provision in a contract that allows a party to suspend or terminate the performance of its obligations when certain specific circumstances beyond the control of the parties arise, thereby making performance inadvisable, impossible, commercially impracticable or illegal.

A force majeure clause seeks to protect a party against liabilities arising from the inability to perform an obligation under a contract due to unforeseen circumstances beyond the control of either or both parties. A force majeure clause in itself is a contractual term that defines and limits the qualifying events to those specifically provided in the contract of the parties.

Force Majeure clauses are common features of expatriate contracts of employment, top executives including fixed term contracts. It is however uncommon to have force majeure clauses in regular contracts of employment. A Force Majeure clause may also be found in an Employee Handbook, Expatriate Policy or a Collective Bargaining Agreement. As stated earlier, a force majeure is a contractual term, and thus same may only be invoked where the contract expressly provides for same and the intervening cause is an event that is specifically provided or contemplated in the clause. Thus, where a force majeure clause in a contract of employment specifies “epidemics” as a qualifying cause, pandemic such as Covid-19 may be relied upon by either party to the contract of employment as a qualifying event, and a basis for discharge of the contract or to postpone the obligations therein depending on the agreement of the

parties. Construction of force majeure clauses will also come to play where no specific qualifying event is mentioned, or where same uses expressions that suggest that the list is not exhaustive or where the clause ends with an omnibus clause.

A party who seeks to invoke a force majeure clause must notify the other party of same, and where the force majeure clause sought to be invoked is contained in a Collective Bargaining Agreement, the relevant trade unions must be notified and carried along. A force majeure does not necessarily operate to terminate a contract of employment, the clause may simply postpone the mutual obligations of the parties under the contract.

4.3.2 Labour Act and Force Majeure

The Nigerian Labour Act has some provisions on the effect of force majeure on the employer's duty to pay salaries provided the employee reports to work. Section 17(1) of the Labour Act provides that:

“Except where a collective agreement provides otherwise, every employer shall, unless a worker has broken his contract, provide work suitable to the worker's capacity on everyday (except rest days and public holidays) on which the worker presents himself and is fit for work, and if the employer fails to provide work as aforesaid, he shall pay to the worker in respect of each day on which he has so failed, wages at the same rate as would be payable if the worker had performed a day's work”.

Subsection (a) of the Section however provides a proviso to the effect that:

“Where owing to a temporary emergency or other circumstances beyond employer's control (the period of which shall not exceed one week or such longer period as an authorised labour officer may allow in any particular case), the employer is unable to provide work, the worker shall be entitled to those wages only on the first day of the period in question”.

This subsection incorporates a force majeure clause into contracts of employment of workers in Nigeria. This is called incorporation by reference in law. The force majeure clause in the Labour Act specifies “temporary emergency or other circumstances beyond the employer’s control” as the qualifying event. Epidemics including pandemics such as Covid-19 are clearly within the contemplation of this provision. The subsection discharges an employer from the duty to pay wages and salaries in the event of a force majeure.

The force majeure provisions of the Labour Act however suffer two limitations. First, the employer is only discharged or excused from his duty to pay salaries just for one week unless further extension is authorised by an authorised labour officer. Secondly, the regime of Labour Act generally applies to junior staff and its provisions may not be invoked in respect of persons exercising administrative, executive, technical or professional functions⁵. The implication of this is that employers of labour cannot invoke the force majeure provisions of the Labour Act in respect of their administrative, senior, executive and management staff⁶.

5.0 The Common Law Doctrine of Frustration

A contract of employment is said to be frustrated upon the happening of an unforeseen event but which event renders the continued performance of the contract impossible or illegal. In the absence of a force majeure clause, an employer of labour may invoke the doctrine of frustration and terminate the contract of employment.

6.0 In extreme cases, employers of labour may consider declaration of redundancy in accordance with Section 20 of the Nigerian Labour Act. For senior executives, mutual separation agreement may also be considered. These options should however be the last resort in the unlikely event that the pandemic continues for months. Apart from being

⁵. See Section 91(1) of the Labour Act.

⁶. See *Evans Bros Nigeria Ltd v Falaiye* (2003) 13 NWLR Pt. 838 P.564.

extreme measures with attendant social costs, these options also come with termination costs such as redundancy pay, gratuity and other terminal benefits recognised by the company's policy.

7.0 Conclusion and Recommendations

Although the Covid-19 pandemic has caught everyone unaware and unprepared, corporate organisations should consider the legal, cost and social implications of their intended measures in response to the business disruptions occasioned by this pandemic.

Terminations and redundancies shouldn't be the first thing on the mind of the employers. There are several other mild measures that may be taken by organisations to mitigate the costs of this current global business disruption, Organisations must pay particular attention to the following points.

7.1 Employee Consultation and Engagements

7.1.1 This is central to the successful implementation of any measure intended to be taken by the organisation. Covid-19 is a common enemy which must be fought together.

Where a company is unionised, the relevant trade union must be notified of the intended course of actions, and be carried along in the process.

7.1.2 Where a company is not unionised, there must be other platforms for employees engagement. These include online and virtual meetings. The use of Employees Consultative Forum becomes useful in this regard. Employees Consultative Forum, otherwise called Joint Consultative Committee or workplace forum is a platform for management – employees engagements including feedback system.

7.2 Seek Legal Advice

The Covid-19 pandemic presents novel and complex legal issues in labour and employment law including employee compensation matters. It is important that corporate organisations seek legal advice on every proposed course of action. This is very important otherwise organisations may end up creating more problems than they seek to solve.

7.3 Audit and Review of HR Processes and Documentations

The Covid-19 pandemic has taught business owners, employers of labour and their Human Resources advisors new lessons in business crisis management. It is important that corporate organisations carry out a review of their HR documentations to ensure that appropriate force majeure clauses are incorporated therein. These documentations include template contracts of employment, Employee Handbook, Expatriate Policy, Collective Bargaining Agreements, and Service Level Agreements executed with labour contractors and service providers.

7.4 Mental Health Support for Employees

Despite the everyday hassles of working under pressure including stressful work environment, being gainfully employed, including leaving home for work every working day remains an important factor for sustainable mental health. Covid-19 and its attendant threat to business continuity and gainful employment are risk factors for mental health disorders especially depression and anxiety disorders. The possibility of alcohol and drugs abuse including suicidal thoughts among employees at this stage cannot also be overruled.

Employers of labour should consider critical interventions such as mental health training for employees, especially on essential tips on how to manage psychological distress, common signs of mental health disorders and how to seek help. And because of the peculiarity of the Covid-19 pandemic, all trainings have to be deployed using online and virtual platforms.

7.5 Business Continuity Plan

Covid-19 is not only a threat to mankind, this global virus is also a threat to businesses across the world. Continuity plan is crucial in times of uncertainties such as this. Covid-19 is a real threat to businesses, and as such the importance of resiliency planning at this period cannot be overemphasized.