

IMPERATIVES OF RAISING THE ANTE OF LEGAL REGULATIONS OF HUMAN RESOURCES PRACTICE IN NIGERIA

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ABSTRACT

This paper is an analysis of the multi-dimensional relationships of the field of Human Resources (HR) practice and the field of law as well as the areas of their inter-twinning intercourse within the statutory and judicial framework of the Nigerian legal system. The contact points between these two fields as identified by this work includes regulations on job placements and vacancy advertisements, terms of job offers, acceptance, capacity to contract and legality or otherwise of employment contracts. The paper found that there is constitutional provision for labour and human resources practices that sufficiently protect the employees and employers but the implementation particularly in small and medium size organizations in a situation of high unemployment ratio is a huge challenge. The paper concludes the challenges are not insurmountable but recommends the imperatives of an increased level of fidelity in the application of extant laws regulating HR practice and management in Nigeria.

INTRODUCTION

The necessity for a distillation of the vast realms of inter-relationships between human resources practice and the field of law cannot be over emphasized. That law regulates human resources practice is not in dispute but the level of fidelity in the application of legal requirements to the management of the inherent complex relationships involved in the employer/employee contracts. This work therefore represents a cursory quest into the vast regime of human resources (HR) practice with particular attention to the regime of legal controls of HR practices.

HR concepts may be universal in nature, as the different relationships that exist between the employer and the employees throw up certain question of rights and duties which arise on account of such relationship are of universal concern. The respective rights and duties between the employers and the employees are regulated by existing laws of municipal regime. Thus, the laws that regulate employment, work conditions, remedies and reliefs of the both parties to a contract of employment. The right to here, the right to fire, the obligations of both parties in such circumstances, terminal benefits, and several ethical questions are regulated by federal, state and local government laws. The different levels of development of such laws are at different levels in several countries. One areas of impact of legal development on human resources practice is the universal explosion in the regime of civil or human rights since the end of the Second World War. Themes like rights to non-discrimination on the basis of race, gender, religious affiliation, colour,

creed and language have been outlawed by the universal declaration of human rights by the United Nations. Such legal developments have not only pervaded the realms of international law but have been domesticated in the municipal laws of several countries that are not only state parties to such international treaties, but the laws now form part of the local laws of such countries. For instance, section 12 of the constitution of Nigeria, 1999 creates an opportunity for the domestication of such laws and international treaties to become part of the local laws of Nigeria.

This work therefore, seeks to draw attention to select features of the legal control of human resources practice, especially within Nigerian legal system. It makes pretensions about the ability to cover the rest of law and human resources practice as that issue is the subject matter of test books on human resources law and practice. For the purpose of this scope and audience, certain stream lines of relevant issues will be necessary before delivery into this vast field to clarify concepts in this topic.

CONCEPTUAL CLARIFICATIONS

Human resources

Human resources (HR) generally refer to the organizational unit in a company or institution saddled with the responsibility of sourcing, managing, and control of employees and their welfare in the organization. The scope of the subject matter covered by HR includes- advertisement or job placements, interviews, recruitments, staff welfare, staff disengagement, procedure and staff benefit, staff terminal, regulations, staff development, promotions, discipline claims for negligence and claims for employers' negligence. The totality of the above subject matter covered by HR practice is not exhaustive of the scope of work covered by human resources.

The field of human resources management is greatly influenced and shaped by the state and federal laws governing employment issues. Indeed, regulations and laws govern all aspects of human resource management—recruitment, placement, development, and compensation.

Legal controls of labour relations

The concept of control is used interchangeably in this respect with the idea of regulation or guidance or direction. In this light, it refers to the application of relevant employment and other related laws regulate the relationships between the employers and the employees.

Generally, labour statutes are only applicable to specific employees to which particular statutes are applicable to or that fall within the ambit or realms of such labour statutes. Each labour statute stipulates the category or type of employees to whom its provisions apply. This is done by providing a definition and by express exclusion.

Thus, although statutory regulation also applies within the common law relationship of employer and employee, it does not follow that a particular labour statute applies to every employee at common law. Each statute determines those employees to whom it would apply. An employee who does not fall within a given definition in a statute or who is expressly excluded by a statute cannot claim a benefit under the statute nor can be made liable under it. In *Union P & T Workers of Nigeria v Attorney General of the Federation*, the plaintiff union sued on behalf of its members, who had staged a 48-hour demonstration, for a declaration that the deductions representing 48-

hour wage made from the member's wages were illegal being in contravention of section 19 and 21 of the Labour Code Act. The court held that it would be improper to make such a declaration in respect of some of the members of the union as it was clear they were not workers within the definition of the term in the Act(Uvieghara, 2001)

The network of state and federal laws that exist to regulate employment and labor relations is extensive. In many cases, rules only apply to firms with a specified minimum number of employees and thus do not regulate small companies. But, other regulations apply to all employee/employer relationships, regardless of enterprise size. So, companies of all sizes must make an effort to stay abreast of legislative and regulatory developments in this area. Trade associations like the Trade Union Congress (TUC) and the umbrella Labour organisations like the Nigerian Labour Congress (NLC) are part of organisations that assist in the enforcement of employment regulations. A classical example is the Labour picketing of corporate organisations in Nigeria with a view to stamping out casualisation of labour.

To have a clear picture of a relationship between the employer and the employee it is expedient at this juncture to undertake an explanation of who an employee really is. For there to be an application of law to regulate employment issues there must exist an employee lawfully employed by an employer and therefore the necessity for the question hereunder.

Who is an employee?

An employee is a person that has entered into a contract of employment with another person be it natural or corporate artificial legal person for the performance of certain specified duties in consideration of a reward referred to as remuneration, salary or emoluments. An employment is capable of arising out of an agreement which is not enforceable in the law courts because it lacks consideration. Consideration is one of the essential ingredients of an enforceable employment or any other kind of contract. For example, any one may offer his services or labour to another for no reward or payment. This work is not concerned with that type of arrangement, which is quite rare today and readily applicable in the realms of family or friendly relationships. The concept of employment in this respect arises from an enforceable agreement between one person who offers his services or labour to another in return for payment.

Employment can however give rise to a number of separate relationships between the employer and the employee. A person may be employed as an employee, an independent contractor or as an agent. Although the relationship of employer and employee bears resemblance to those of both the principal and independent contractor, and the principal and agent relationship, there is no doubt that the former relationship is distinguishable from either of the two latter cognate relationships. Indeed there are some practical reasons why this distinction may sometimes have to be made. In the first place, the common law implies certain duties and rights in the relation of the employer and employee. An employer may be held vicariously liable for a tort committed by his employee in the course of the employee carrying out his duties under his contract of employment. Thirdly, the various labour statutes do not generally apply to those who are not employees at common law(Uvieghara, 2001)

Where the well-known features of an employer-employee relationship are present, it is easy enough to identify the relationship. This is so in the vast majority of cases. Among the common features of a service contract are an obligation by the employer to employ a man, and to pay him as agreed or proper wage, and a right to control his services and the manner in which he performs them, and to dismiss him if reasonable cause is shown; and, on the workman's side, he must obey all reasonable directions, present himself for work at an agreed hour, and continue to work for the agreed period, and will be guilty of contract if he refuses to perform these obligations.

However, difficulties may arise in cases where some of these indices of the relationship are not present. As Denning LJ (as he then was) said in *Stevenson, Jordan and Harrison Ltd v Macdonald and Evans*, “it is often easy to recognize a contract of service when you see it, but difficult to say wherein the difference lies.”

The courts have therefore, over the years, put forward a number of tests for determining whether or not a particular relationship is that of employer-employee.

Is legal Regulation really necessary?

The necessity for employer-employee relationship has been questioned especially as control tends to impede on the freedom of choice by parties in commerce. What are the benefits of regulating the employer? How is the employer regulated? How much can the government or the courts control an employer on how to run its business? Whom it should hire or fire, or how it should treat its employees?

If an employer wants to hire someone to work every other hour every other week, it should be free to do so as long as it can locate an employee who is willing to enter into such an agreement. Or, if an employer requires that all employees wear a red costume throughout the workday, there is no reason why that requirement could not be enforced if the employer can find employees to accept the agreement. The freedom to contract is crucial to freedom of the market; an employee may choose to work for a given employer, and an employer may choose to hire a given applicant.

As a result, though the employment relationship is regulated in some important ways, Government tries to avoid telling employers how to manage their employees or dictating whom the employer should or should not hire. It is unlikely that Government would enact legislation that would require employers to hire certain individuals or groups of individuals (like a pure quota system as suggested by section 14 (3 and 4 of the 1999 constitution of Nigeria), or that would prevent employers and employees from freely negotiating the responsibilities of a given job. For example, employers have historically had the right to discharge an employee whenever they wished to do so.

However, Government has passed employment-related laws where it believes that the employee is not on equal footing with the employer. For example, Government has passed laws that require employers to pay minimum wages and to refrain from using criteria, such as race or gender, in arriving at specific employment decisions. These laws reflect the reality that employers stand in a position of power in the employment relationship. Legal protections granted to employees seek to make the “power relationship” between employer and employee one that is fair and equitable. (Alexander and Hartman (2004)

The benefits of legal controls of human resources practices

From the fore-going, it is clear that there are certain benefits derivable from legal controls of human resources practice. According to Uvieghara, (2001) the laws that govern employment occupy a position of considerable importance in any modern society. This is so because of the tremendous contribution which workers can make to national growth and development as well as the general well-being of the nation's citizenry. Issues of high unemployment, rampant strikes and other forms of industrial conflict, if not properly regulated and managed, may not only adversely affect the national economy but also its political stability. There is no doubt that an unstable political and economic climate discourages investment, especially foreign investment.

Labour law has a vital role to play in the mobilization of the work force for national growth and development. The constitution itself seeks to ensure that the Nigerian worker is able to participate fully in the economic, social and political development of the nation. It provides that the state must direct its policy towards ensuring, *inter alia*, that:

1. All citizens without discrimination on any ground whatsoever have the opportunity for securing adequate means as provided for in section 17 (3) (a) of the 1999 constitution of Nigeria of livelihood as well as adequate opportunities to secure suitable employment;
2. Conditions of work are just and humane as provided for in section 17 (3) (b) of the aforementioned constitution;
3. The health, safety and welfare of all persons in employment are safeguarded and not endangered or abused as provided for in section 17 (3) (c);
4. There is equal pay for equal work without discrimination on account of sex or on any other ground whatsoever as provided for in section 17 (3) (e)

It is the duty and responsibility of all organs of Government and of all authorities and persons exercising legislative, executive or judicial powers to conform to, observe and apply these injunctions. Although these rights if they may be so-called are not justiciable rights, there can be no doubt that they provide a significant yardstick by which the reasonableness, if not the constitutionality, of our labour laws may be measured.

CONSTITUTIONAL POWER TO REGULATE HR PRACTICE VESTED IN FEDERAL GOVERNMENT IN

NIGERIA

Nigeria runs a federal system of government, where powers are constitutionally shared between the central Government and the components administrative units. Certain powers are devolved to the components political units like the states and local Government units while certain powers are exclusively left for the legislative control of the central government. Matters relating to Labour controls is vested exclusively i the central government or national government. Section 4 (2) of the constitution provides as follows:

“The National Assembly shall have power to make Laws for the peace, order and good Government of the Federation or any part thereof with respect to any matter included in the exclusive legislative list set out in part one of the second schedule to this constitution.”

There is an extensive list of 68 subject matters covered by the aforesaid exclusive legislative list. The 34th item on that list is specified as follows:

“Labour, including trade unions industrial relation; conditions, safety and welfare of labour industrial disputes; prescribes a national minimum wage for the Federation or any part thereof; and industrial arbitrations.”

The combined import of the above two sections of the 1999 constitution clearly vests control of labour, employments or HR practices within the exclusive legislative controls of the central Government of Nigeria.

Thus, all labour statutes apply throughout the country unless a particular labour statute provides otherwise. Labour is defined as including trade unions, industrial relations, conditions, safety and welfare of labour; industrial disputes, prescribing a national minimum wage for the Federation or any part of it, and industrial arbitrations. It may be noted that item H 17(a) of the concurrent list also vests powers in government for the Federation to make laws for the Federation or any part of it with respect to the health, safety and welfare of persons employed to work in factories, offices or other premises. This labour and the exclusive power vested in the same government to legislate on the welfare of persons employed to work in factories, offices or other premises, fall within the definition of labour. Item H also provides that the states are not precluded from enacting statutes with respect to the same matters. This again would appear to be in conflict with the exclusive power of the Federal Government to legislate on Labour. However, when there is any inconsistency between any statutes enacted by the Federal and any state government, the Federal law prevails to the extent of the inconsistency.

Incidences of the contract of employment

Employment may take any form whether oral, written or specialty contracts. Employment law forms part of the general principles of the law of contract. To this end it must be subject to the following incidences or requirements:

- a) There must be a definite offer
- b) There must be a clear acceptance

The above two requirements represents the meeting of the minds of the parties to the employment contract, usually couched in the latin phrase, *concensus ad idem*. Where the minds of the parties have met, especially where a corporate body is involved, there must be specific compliance with the statutory requirement of such an artificial corporate personality otherwise, the purported agreement cannot stand the scrutiny of the courts. In **Ajayi-Obe v Executive Secretary, Family Planning Council of Nigeria**. It was held that there was no contract of employment where an acceptance was of an offer of employment made by the chairman of the council instead of by the secretary of the council who had the constitutional duty , under the constitution of the council, to communicate decisions of the council. The other incidences of the contract of employment include:

c) Consideration

Consideration here refers to the price paid or to be paid by the promisor for the promise of the promisee. In this respect, if the promisor is the employer that promises to grant a job with consequential emoluments, then the price paid by the promisee (employee) is to make himself available to discharge the duties as assigned by the employer within a conducive and reasonable work environment.

d) Capacity

This refers to the legal entitlement of the parties to a contract. Ordinarily all persons of full age and sound mind are entitled to enter into contracts with exceptions of

- I. Infants; The common law protects infants i.e those under 21 years of age against disadvantageous contracts except where such contracts are beneficial to the infants, The common law position is that *prima facie*, contract of employment are beneficial and therefore binding on the infants as was held in *De Francisco v Barnum*.
- II. Persons of unsound mind
- III. Aliens; that is persons who are not Nigerian citizens cannot accept employment except with the consent of the Federal or state Government

e) Legality of contracts of employment.

For a contract to be binding and enforceable it must be within the confines of the law. Therefore any contract including the contract of employment which is contrary to an existing legislation or is in conflict with public policy is illegal and void. The courts will usually not assist in the enforcement of such contracts. This was the position in the case of *Lavabre v Excelsior hotel Ltd*, where a foreigner was only authorized to practice as an architect under a construction company, in accordance with the requirement of the Immigration Act, but he practiced on his own instead, the court held that the contract he entered into was illegal. He was therefore, not entitled to sue and recover money for services rendered under the contract, not even on the basis of *quantum meruit*. Similarly, in *Chivers v Davis of America*, where an alien took up employment in defiance of the provision of the Immigration Act, the court refused to lend its assistance in enforcing his claim for damages for wrongful termination of employment. It necessary at this point to streamline the basic obligations of the parties to an employment contract without which the controls of HR practice will be incomplete.

DUTIES OF THE EMPLOYER

The basic duties of the employer include the following:

- a) Duty to pay wages

The most important duty of the employer is the duty to pay wages. The wages or salary represents what the employer has promised to pay to the employee for the employee's time, skills and services. Most of the time this duty is the subject matter of an express term of the contract of employment in fact any contract of employment that has not specified the terms of payment is questionable as to whether it can be said to be a true contract of employment. It must however be observed that at common law a contract maybe implied from the conduct of the parties. In **Parke Higgins v Hopkins** where one party worked on the instruction of another under such circumstances as that it must be presumed that it looks to be paid as a matter of right, the court held that a contract existed, In **Way v Latilla** the court held that a term to pay will be implied in circumstances which clearly indicate that employment was not to be gratuitous. In certain circumstances nothing less than the national minimum wage maybe payable.

b) Duty to provide work

This duty is not really a direct duty of the employer per say. If at some point the employer does not have any duty to give the employee, His only existing obligation continues to be to pay wages of the employee whether he has provided work or not. According to the Honourable Asquith J in **Collier V Sunday Referee Publishing Company**,

“that a contract of employment does not necessarily or perhaps normally, oblige the master to provide the servant with work. Provided I pay my cook her wages regularly she cannot complain if I choose to take any or all of my meals out.”

In the light of the fore-going an employee cannot complain on the basis of the failure of the employer to provide work or that he keeps him idle but pays him the agreed salary.

c) Duty to provide testimonial or reference

This duty can be said to be a duty which cannot be couched in the active term, for an employer cannot be compelled to give a testimonial or character reference in respect of his employee even where such an employee had been of good conduct. However in practice such references or testimonials are routinely given in response to enquiries from interested prospective employers. While there is no rule to compel the employer to give a testimonial or reference in respect of an employee or a former employee, an employer who chooses to furnish such a reference is liable in possible actions for damages which may include any of the following;

- I. An action for deceit where the employer makes a representation which he knows to be false or makes it recklessly not bothered whether or not it is true and from which injury or loss has occurred to the party to whom it was made and who acted upon it as was desired as was held in **Foster v Charles**.
- II. Action for negligent mis-statement The *locus classicus* of **Hedley Byrne & C Ltd v Heller & Partners Ltd** the House of Lords held that it has become possible for an action for negligent mis-statement which causes or results in financial loss to lie.
- III. An action for deformation- This action protects the employee from slanderous or libelous statements from his employer. Any statement which lowers or ridicules the employee in estimation of the right thinking members of the public is actionable against the employer

who makes such a damaging but untrue representation about the character or reputation of the employee. However, Truth or justification is a defence to an action for defamation. Therefore the employee may not be able to recover damages where the reference is damaging but a true representation of the reputation of the employee. It must be noted that mere suspicion or the commission of a crime by an employee is no justification, a conviction by the courts is required before a reference on such allegations can be justified as provided for under the constitution.

Duties of the employee

Duty to obey

The most important duty of the employee is the duty to obey the orders of his employer except where such orders amount to an illegality or a crime. Willful disobedience is sufficient ground for summary dismissal of the referee. An employee is not bound to obey unlawful orders nor an order that will expose him to danger either to his life or health in *Turner v Mason* it was held that although a domestic servant's request for a permission to go and visit her sick mother was refused by her employer, she nonetheless did so and her disobedience was held to be a sufficient ground for her dismissal but Alderson B. said that there "may undoubtedly be cases justifying a willful disobedience of such an order, as where the servant apprehends danger to her life"

Duty of faithful service

This is the obligation to serve the employer in good faith and absolute fidelity. This is the duty to act in the interest of the employer during the pendency of the employment. In other words, this duty admits of no conflict of interest with the employer's business, it also covers the duty of non-disclosure of trade secrets and confidential information obtained by him in the course of and as a result of his employment. In *Robb v Green*, the employee copied a list of all of his employer's customers with the intention of using the list after leaving the employer's service and setting up on his own. The court held it to be a breach of his duty of fidelity.

Discharge of a contract of employment

A discharge of contract refers to the various methods of bringing to an end the contractual relationship between the parties to a contract of employment. This can happen through resignation, termination or dismissal. Where the employee voluntarily resigns from his employment, his duty as employee is to give the employer due notice of his intention to so resign. The length of a notice to be given is usually expressed in the contracts of the employment. It is a right of the employee to resign if he so desires. To hold otherwise is to encourage slavery or servitude. While the employee may resign subject to notice, conversely an employer may terminate the employment of his employee without any reasons. It is agreed in law of contract of employment that he that has power to hire, also has power to fire or terminate. But the same conditions of adequate and contractual notice and terminal benefits must be complied with by the employer. The most contentious of the methods of discharge of contract of employment is dismissal, a dismissal has being defined by Garner, (2004) as "to release or discharge a person from employment". The employer must be careful or avoid allegations of fraud or theft or dishonesty as basis for dismissal of employee. This is because matters of criminality, once alleged can only be proved by a regular court of competent

jurisdiction, as the accused is constitutionally presumed innocent until proved otherwise by the provisions of section 35 of the Nigerian Constitution(Supra)

SUMMARY AND CONCLUSION

Summary:

It is manifestly clear from the above analysis that law occupies a significant position in the regulation or control of human resources and practice in any organization and country. Law sets the frame work for the various inter relationships and multifaceted and criss-crossing obligations and rights that arise between the parties to an employment contract. From the constitutional foundation of section 4 of the constitution of Nigeria 1999 and the second schedule to part 1 of the said constitution is undoubtedly clear that the power to regulate labour relations is vested in the Federal Government of Nigeria as part of the exclusive legislative function of the centre, to the various legal contra-distinctions between a contract of a master-servant relationship and that of a contract for services. Law further be-straddles the realms of the legal requirements for the creation of a valid contract including a contract of employment. Law distills and defines the boundaries of the rights, obligations and privileges existing between the employer and the employee.

Conclusion

In conclusion, the necessity for a faithful application of law to regulate the administration of HR practice, is indispensable not only in Nigeria, but all over the globe. This position is firmly illustrated in a personal experience that this author had with the brakes system of his “*brand new tokunbo*” car. The car was glittering in its beauty and grandeur, but the joy of ownership and use of the same car was completely destroyed when, the brake system completely failed while on a busy Ilisan Remo road. If not for divine intervention, the road that was busy with vehicles, suddenly cleared up and the panicky driver had to endure a torturous 1 kilometer of waiting for the car to halt on its own. HR practice without law is like a machine without brakes.

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