NATIONAL OPEN UNIVERSITY OF NIGERIA

LAW 231

Labour Law 1

Module 2

LAW 231 (Labour Law I)
Module 2

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Unit 1 Formation of Contract of Employment and Its Effects

1.0 Introduction

Like every other type of contract, employment contract has its peculiar ways by which such a relationship could be established. The employment contract in this regard is governed by the general principles of law of contract.

2.0 Objectives

At the end of this unit, you should be able to:

- discuss the differences in the mode of establishing an employment contract from all other forms of contracts
- mention the relevant contents of a contract of employment and the effects thereof.

3.0 Main Content

3.1Formation of Contract of Employment

There are five ingredients of a valid contract. The Court of Appeal In *ORIENT BANK V BILANTE INTERNATIONAL LTD (1997) 8 NWLR 515* held that there are five ingredients that must be present in a valid contract. They are offer, acceptances, consideration, intention to create legal relationship and capacity to contract. These ingredients and many more have been treated earlier in this work. However, efforts shall be made to state the peculiar ingredients of a valid contract of employment.

The real issue here is that a contract of service is a relationship entered into between two parties - employer and employee - (or master and servant) whereby the servant agrees to serve the master and to be subject to the control of the master either for fixed terms or a term of indefinite duration in return for a benefit.

In the case of *NIGERIA AIRWAYS V GBAJUMO (1992) 5NWLR 2164 at 735,* the Court of Appeal, Lagos Division, while dismissing the appeal held that the relationship of master and servant is characterized by:

- A contract of service made under seal, oral or inferred from the conduct of the parties.
- Payment of wages and salaries.

Therefore, it is safe to conclude that the basic distinctive features of an employment contract is inferable from the fact that where one party employs another, appoint him to various positions in its establishment, pays him salary and allowances, these acts constitute sufficient fact from which a contract of employment can be inferred.

Unlike other types of contract where the parties involved are at par in terms of decision making regarding the object or substance of the contract, the master rules the servant and dictates the pace in an employment contract. Therefore, the master or employer stands in a position of authority in an employment contract and his orders, if lawful, must be obeyed by the servants.

Another distinctive feature is the payment of wages and salaries by the employer to the employee, and this by implication puts the employee in a disadvantageous position in that he may find it difficult to recover his wages and salaries where the employer dies unexpectedly or the employment is frustrated by natural occurrence. Every other ingredient such as offer, acceptance, consideration, intention to create legal relation and capacity are primary while the discussed issues above are peculiar and secondary in an employment contract.

Self-Assessment Exercise

What are the major ingredients of an employment contract?

3.2Nature of Contract of Employment

The premise for the determination of the nature of a contract of employment could be determined by establishing the particular type of employment contract entered into by the parties. It is essential to argue that the protection offered by the labour legislations (as shall be seen later) is only for those under a contract of service commonly referred to as "employees" and not those under a contract for services often described as "independent contractors or self-employed persons."

Over the years several tests has been propounded by jurists and legal scholars for the purpose of determining the nature of contract of employment entered into by the parties. These tests has been adequately treated in unit 3 of module 1 of this course material, however, a list of these test shall be made for ease of reference.

- The control test
- The integration test
- The multiple test.

It is necessary to remember that no single fact, by itself is conclusive and all relevant circumstances must be taken together and considered. However, in addition to the two broad classifications of independent contractor and an employed person, there are other servants whose tenures are said to be protected by statute. These are public servants who work for the government or in public service and whose appointments are governed and regulated by statutes when such servants have been unlawfully dismissed; the court has always intervened to order reinstatement.

This remedy was applied by the Supreme Court in *SHITTA BEY V FEDERAL PUBLIC SERVICE COMMISSION {1981} 1 S.C.40 and followed in OLANIYAN & ORS V UNIVERSITY OF LAGOS (1985) 2 NWLR 9.*

It should however be clearly understood that not all who work in the public service are so protected. The remedy only applies to those who can establish that the relevant statutory instrument applies to them and they are among the categories of employees who are intended to be protected by the relevant statute.

Self-Assessment Exercise

How do you determine the nature of an employment contract?

3.3Contents of Contract of Employment

The labour act as laid down contains minimum conditions which must be in a standard contract of employment. It generally provides that contract be reduced to writing when it is to last for six months or more, the fixing of hours of work, and the number of days leave to which a worker is entitled, etc.

The law also provides for the periodicity of payment of wages and maximum deduction that can be made from a worker's pay, redundancy and arrangements for negotiations of benefits when workers have to be laid off for redundancy.

Apart from the labour act, there are other legislations which have comprehensive provisions for workers' safety at work. Such laws include the:

- Factories Act Cap 125 LFN 1990.
- Workmen's Compensation Act, Cap. 470 LFN 1990.
- Petroleum Act Cap 350 LFN 1990.
- Federal Environmental Protection Agency Cap 131 LFN 1990.

Converse to the provisions of these statutes, there is not yet any reported case in Nigeria on the protection of employees because it has been observed that since these statutes were not willingly enacted to genuinely guarantee workers' safety, the Nigerian state has turned around to breach them. Even private employers who violate the provisions of the relevant statutes have also been left unchallenged by factory inspectors and other law enforcement agents.

In essence, there is no particular enforcement of these statutes in relation to the contents of a standard contract of service. What we always see is the letter of offer of employment which is usually less instructive apart from the annual take-home income and allowances accruable to the employee and other minor entitlements such as leave and leave bonuses and hours of work. The factory's regulation is rarely given to the employees for fear of enforcement of breached provisions.

Self-Assessment Exercise

Explain the basic contents of a standard contract of service.

3.4Effects of Employment Contract

The major effect of a contract of service is that from the date of the commencement of the contract which is usually expressly stated in the letters of appointment given to the employee, the employee is bound by the terms and conditions of service consented to by him. By this he is subject to the whims and caprices of the employer provided the exercise of control by the said employer is not in violation of any existing law and if the orders and directions are not illegal.

The contents of a contract of employment which forms the basis of the rights, duties and obligations of the parties under the contract usually varies from one organization to another. But generally, there are certain elements which are common in most categories of employment. Some of them are:

1. **Payment of wages**

One of the major effects of a contract of employment is that an obligation as to payment of wages is imputed on the employer and this is usually effected in the forms of remuneration.

By the provision of Section 1 (1) - (3) of the labour act the issues relating to the basic salary of the employee is adequately protected. This also covers housing or housing allowance, leave allowance, end of year bonus, overtime and sick-pay. The statute makes it a duty for the employer to ensure that these issues are adequately taken care of and by that it implies that from the date of the commencement of the contract of employment the employer is answerable to the welfare of the employee.

2. **Area of services**

It is the usual practice for the contractor letter of employment to define the area of operation of the employers work. Therefore, it will be tantamount to a breach of contract and a dismissible offence for the employee to refuse a reasonable request for a transfer to another location, having consented to work for his employers in any part of the country where it operate.

In *BOVZOVRU V OTTOMAN BANK [1930] A.C. 271 DC,* the appellant, a bank employee of 22 years standing refused to accept a transfer to a branch in Turkey on the grounds of his lack of knowledge of Turkish language and the hostile attitude of the civil authority he would have to deal with there. He also maintained that he was not contractually oblige to accept such move but the court held that the respondent were giving a reasonable and lawful order, which the appellant was bound to obey, that is disobedience was justifiably treated by the respondents as *faute grave* under article 5 of the regulations, and that his dismissal was justified.

On the contrary, in *OTTOMAN BANK V CHAKARION [1930] A.C.277,* an employee of the same bank who had variously escaped execution at the hands of the Turkish forces was held entitled to leave Constantinople, which was under Turkish control, despite being ordered by his employer to remain. The effect of a contract of employment as implied by these decisions is that where the order is lawful, the employee is bound to obey while an unlawful order will not be enforced even though the employee consented to it at the time of taking up the employment.

The overall effect of contracts of employment on the parties is that they are bound by the content of the agreement provided the mode or ways by which such obligations are to be executed are not unlawful.

Self-Assessment Exercise

Examine the major effects of a valid contract of employment.

4.0 Conclusion

This unit has exposed you to the concept of termination of contract of employment and has sufficiently demonstrated the fact that there are laid down rules and guidelines for termination of employment contract.

5.0 Summary

Through this unit, we have learned the following:

- formation of a contracts of employment
- nature of a contract of employment
- contents of a contract of employment; and
- effects of contract of employment.

6.0 Self-Assessment Exercise

1. Enumerate and discuss the required elements for the formation of a contract of employment.
2. Nature and contents of a contract of employment is one and the same thing. Discuss.
3. Examine the major effects of a valid contract of employment.

7.0 References/Further Reading

Freeland. (1976). *The Contract of Employment.*

Ganz, G. (1967). *Public Law Principles Applicable to Dismissal from Employment.*

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The Workmen's Compensation Act, Cap 470 LFN 1990.

Trade Disputes Act, Cap 432 LFN 1990.

Trade Unions Act, Cap 437 LFN 1990.

Wages Boards and Industrial Councils Act, Cap 466 LFN 1990.

Winfield and Jolowics on Torts (1984).

Unit 2Freedom of Contract and Restrictions Thereon

1.0Introduction

The coercive nature of the contents of certain contracts, particularly contract of employment, makes it practically impossible for employees to vary the terms and conditions of such contracts bearing in mind the peculiar nature of their environment in relation to the high rate of unemployment situation in the country. Harsh conditions of service are usually accepted by the employees just because of their desire to put food on the table of their family and to take care of immediate family needs. The courses of the acceptance of these harsh and inhuman conditions shall be the focus in this unit.

2.0Objectives

At the end of this unit, you should be able to:

- examine the right of the employee to freely discuss the terms and conditions in a contract of employment with a view to vary the harsh and inhuman ones among them
- highlight and discuss the various factors responsible for the acceptance of these stringent conditions without freewill and their right to have those conditions expunged from the whole content of the contract of employment where it is observed that they are meant to exploit the employee in the name of employment.

3.0Main Content

3.1The Concept of Freedom of Contract

The general rule of law relating to the concept of freedom of contract is to the effect that parties to any type of contract, particularly in an employment contract situation should freely, without any fear of intimidation enters into the contract with the aim of making the most use of it.

However, where the employer dictated the terms and conditions of the contract of employment without the employee's right to vary or reject any unfavorable term or condition, it is said that such employee has not entered into the contract based on his own freewill and therefore the corpus of the concept of freedom of contract is defeated.

It is also noteworthy that labour law rests on individual contract of employment. The rights, duties and obligations of an employee will be regulated and determined by the contract of service entered into between him and his employer. The Nigerian labour law recognizes the right of a worker and the employer to freely enter into a contract of service and to agree upon terms and conditions as they deem fit without any fetters except that such terms and conditions should be within the bounds of legality. As far as the law is concerned, a worker

and an employer are equal parties to a contract of employment; thus, the myth of equality of bargaining powers is promoted by this legal fiction.

Considering the prerogative right of the employer to hire, determine whom to hire, determine the rate and grade of the job and with intimidating powers of dismissal and termination, determine when to fire the job holder, is the employee really of equal bargaining power with the employer?

A typical example of the lack of freedom or freewill to enter into a contract of employment was exhibited in the case of *AFRICAN SONGS LTD V SUNNY ADENIYI [UNREPORTED]* High Court of Lagos State, Dosunmu J. Suit No. LD [1300] 74 where the agreement contained many onerous and harsh terms, and conditions in relation to the defendants. They included the following:

- The defendant was tied to the service of the plaintiff exclusively for five years.
- The plaintiff was given the right to dictate where and when the defendant was to make music recordings.
- The remuneration of the defendant for his service was grossly inadequate, compared to what the plaintiff was to get out of the contract. For example, for the sake of a 12-inch double sided L.P. which cost about N6.00, the defendant was to get 15kobo while the plaintiff would get the remaining N5.85k.
- The plaintiff was assigned the full copyright of all the compositions and recordings of the defendant.
- The plaintiff was entitled to the sole right of production, reproduction, use and performance (including broadcasting) of the defendant's works, throughout the world.
- The defendant was, during the currency of the agreement, prohibited from rendering any performance whatsoever, to him or any company or group of persons.
- The plaintiff had the exclusive right to decide which one and when to commence or discontinue or recommence the production or sale of records and the fixing or alteration of their prices.
- The plaintiff had the option to renew the contract at its expiration for a further two-year term or "for any longer period". The defendant had no such right.
- The plaintiff reserved the right to terminate the contract in the event of the defendant's illness or involvement in an accident, which rendered the defendant incapable of performing.

These terms and conditions are contrary to public policy, onerous and oppressive in their application, hence, they were held only to be capable of being enforced in an oppressive manner.

In essence, it is right to state that even though the law requires that parties should enter into contract freely, the employer and employee are not of equal bargaining power. Rather, the employee is an underdog and it may be deceitful to peddle the myth of equality in employment contract issues.

Self-Assessment Exercise

The concept of freedom of contract is a myth, not a reality. Discuss.

3.2Factors Inhibiting Freedom of Contract

The most decisive factor in this regard is to know what is meant by freedom of contract. Freedom of contract literally means the right of a party to a contract, in this regard, a contract of employment. There is also the right to enter into the contract and renege from it without any reason, for fear of molestation, coercion, undue influence or duress on the part of the other party to the contract.

The following has been identified as factors negating freedom of contract:

Duress

Traditionally, duress in common law means actual violence or threat of violence to the person, or his personal freedom, i.e. threats calculated to produce fear of loss of life or bodily harm, or fear of imprisonment. The subject of such threat must be either the plaintiff himself, or his wife, parent, child or other near relative. In particular reference to labour law, it covers not only threat, but pressures and it extends far beyond threat to the person or to his freedom, to all unconscionable bargains, brought about by the abuse of position, or the oppression of a weaker contracting party.

A good illustration of what the wider and modern concept of duress would accommodate occurred in the case of *NNADOZIE V DIZENGOFF [1967] 1 A. L. R. 255,* where the plaintiff, a former employee of the defendant company whose employment was wrongfully terminated, successfully brought an action to recover, £ 2,000 which he had paid to the defendant as security of his initial employment, and £1, 082 .10s. as damages for wrongful dismissal. The plaintiff alleged that when he arrived at the premises of the defendants to collect the inducement debt, the defendant's manager made the following statement:

Mr.Nnadozie, you are wasting your time doing all this. You succeeded in the East [Eastern Nigeria] because you were able to buy our lawyer and all the judges. Now is the time for me to play my turn in Lagos. I am going to appeal in both cases and I am going to show you that there is no justice in Nigerian courts. All the judges in the Supreme Court are my personal friends. I am going to show you what money is capable of doing in Lagos. The appeals will be discussed at a round table conference between the judges of the Supreme Court and me. Unless you agree to accept your deposit of £2,000 (i.e. whilst giving up the damages of £1,082 10s) you will lose both the deposit and the general damages. In addition, you will be made to pay costs.

The court did not believe this allegation and stating that only a lunatic could say such things, Adedipe J. dismissed the suit. But it is interesting that it was regarded by the court as a case of duress, though in the final resort, not proven.

Undue influence

Mainly as a result of the narrow scope of the traditional doctrine of duress, equity developed its own doctrine of undue influence which is far more comprehensive than duress at common law. It covers cases of coercion, domination, pressure and generally bargains obtained in an unfair manner. It applies where influence is acquired and abused, and confidence is reposed and betrayed.

Apart from the more comprehensive nature of undue influence, the most noticeable distinction between it and duress at common law is that in the latter, the pressure of

coercion tends to be direct, while in the undue influence, pressure tends to be indirect and more subtle.

The boldest and most comprehensive attempt to bring all the disparate threads of the doctrine of undue influence and related doctrines under one coherent umbrella, which he gave the name "*inequality of Bargaining Power,* was made by Denning M. R. *in LLOYD'S BANK LTD V BUNDY [1975] Q.B 326.*

With reference to labour law, the only case in which the issues of restraint of trade and inequality of bargaining power concerning artistes have arisen for consideration before a Nigerian court is the unreported case of *AFRICAN SONGS LTD V SUNNY ADENIYI (Supra)*. In it, the court held that going by the terms of contract of employment subsisting between the plaintiff and defendant, which were very stringent and unfavourable to the latter, there was no good ground to hold that the contract was invalid.

The general rule of law in this regard with particular reference to master/servant relationship, is that where the terms of the contract of employment is onerous on the employee, harsh and oppressive to him, it should be declared as being against public policy. This in effect shows that the party with superior knowledge and much stronger bargaining power used these factors in driving an extremely unconscionable bargain against a hapless and desperate employee.

Self-Assessment Exercise

Duress and undue influence is one and the same thing. Discuss.

3.3 Restrictions on Freedom of Contracts

A restriction on freedom of contracts usually comes by way of the employer's attempt to protect trade secrets and confidential information about his business. By this, he will not allow the employee to dictate any term or condition of service. They often and usually impose restraint of trade clauses in the terms and conditions of service of their employees. Ordinarily, restraint of trade clauses obviate the difficulties of having to decide which information is confidential and therefore deserving of protection and which is not.

As a matter of general principle and in particular reference to labour law, covenants in restraint of trade are unenforceable unless they are considered in their scope, nature and content and having regard to the intents of the parties concerned and of the public. This restraint of trade clause, if enforced against an employee will constitute a restraint upon his right to freely enter into the contract of employment.

The locus classicus on the law as to restraint of trade was the case of *NORDENFELT V MAXIM NORDENFELT CO. [1874] A.C. 535,* where it was held that all covenants in restraint of trade are, in the absence of special circumstances justifying them, void as being contrary to public policy.

In *KOVMOULIS V LEVENTIS MOTORS LTD [1973] 1 ALL N.L.R. (pt. 2) 144,* the objection to the doctrine of restraint of trade is amply illustrated in the decision of the Supreme Court. Delivering the judgement of the Supreme Court in this case, Udoma J.S.C. said:

Generally, all covenants in restraint of trade are prima facie unenforceable at common law. They are enforceable only if they are reasonable with reference to the interests of the parties concerned and of the public.

The covenant in that case was however held reasonable and necessary for the protection of business interest of the respondents and therefore valid and enforceable at law.

However, where the court is of the opinion that the restraint which the employer sought to enforce against the employee is wider than expected to protect the employer's interest, it will be void subject to the possibility that the offending parts of the clause may be severed or removed from the rest so as to render enforceable the narrower past considered reasonable.

In JOHN HOLT & CO [LIVERPOOL] LTD. V CHALMERS [1918] 3 NLR 77, the court held that a restriction which prohibited the employee from conducting business or serving any person in similar business with a wide area after leaving the employer's service without the consent of the employer went beyond that which was necessary to protect the employer's interest and was therefore unreasonable.

As a general rule, in considering the reasonableness of a restraint, its scope and therefore, enforceability, the position in the organization of the employee subject to the restraint may be relevant and this will be taken into account. In *GILFORD MOTOR CO. LTD V HOME [1933] ALL E. R. 109*, the employee who was the company's Managing Director has a restraint imposed on him prohibiting him from dealing with any of the company's customers whether directly or indirectly. This restraint was upheld, although it was not limited in respect of either time or geographical location.

Major, restraints in trade forms the bedrock of restriction on the freedom of contract of an employee under a contract of employment and it has, as has been shown, constituted a clog in the wheel of progress in terms of expression of willingness or otherwise of an employee to accept the terms and conditions in a contract of employment.

The following factors have been considered in deciding on the reasonableness of a restraint of trade clause in an employee's contract:

1. Range of product to be covered by the clause.
2. Length of time for which a restraint is to run.
3. Geographical area of the restraint.

Self-Assessment Exercise

What do you understand by restrictions on freedom of contract?

4.0 Conclusion

From the foregoing it is believed that you know what is meant by freedom of contract and the restrictions thereon. Freedom of contract specifically demands that parties to a contract, particularly contracts of employment are able to express their minds on the various terms and conditions contained therein and also to be able to reject out rightly those that are not in their own interest provided they are not under any duress or undue influence from the other party to the contract.

5.0 Summary

This unit has taught us:

- the basic concept of freedom of contract
- factors inhibiting freedom of contract
- restrictions on freedom of contract.

6.0 Self-Assessment Exercise

1. What do you understand by freedom of contract?
2. Discuss the essential and recognised factors inhibiting against freedom of contract.
3. Discuss, with the aid of decided cases, what you understand by restrictive to freedom of contract.

7.0 References/Further Reading

Freeland, (1976). *The Contract of Employment.*

Ganz, G. (1967). *Public Law Principles Applicable to Dismissal from Employment.*

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Trade Unions Act, Cap 437 LFN 1990.

Wages Boards and Industrial Councils Act, Cap 466 LFN 1990.

Winfield and Jolowics on Torts (1984).

Unit 3 Common Law Implied Terms

1.0 Introduction

There are always terms and condition in every contractual arrangement which the parties thereto are bound to give effect. However, there are other terms and conditions which are not normally expressly stated but are usually implied into the contract based on the nature of such contracts. This common law implied terms and conditions form the bedrock of the discussions in this unit.

2.0 Objectives

At the end of this unit, you should be able to:

- examine the various common laws in implied terms in a contract of service agreement
- discuss the statutory definition of who a worker is
- examine the implied terms of employment.

3.0 Main Content

3.1 Who is a Worker?

According to the definition provided by the labour act a "worker" means any person who has entered into or works under a contract with an employer, whether the contract is for mutual labour or clerical work or is expressed implied or oral or written, and whether it is a contract of service or a contract personally to execute any work or labour but does not includes:

- Any person employed otherwise than for the purposes of the employer's business, or
- Persons exercising administrative, executive, technical or professional functions as public officers or otherwise, or
- Members of the employer's family, or
- Representatives, agents and commercial travelers in so far as their work is carried on outside the permanent work place of the employer's establishment, or
- Any person to whom articles or materials given out to be made up, cleaned, washed, altered, ornamented, finished, repaired or adapted for sale in his own home or any other premises not under the control or management of the person who gave out the articles or the materials, or
- Any person employed in a vessel or aircraft to which the laws regulating merchant shipping of civil aviation apply. "Young person" means a person under the age of 18 years."

Apart from the foregoing, the determination of who is a worker is possible by viewing the essential features of the control, integration and multiple tests which are used to measure

the differences between an employee and an independent contractor. Therefore, any person who falls into the categories of persons mentioned in paragraph (a) to (f) above will not qualify as a worker under the act.

Self-Assessment Exercise

Who is a worker?

3.2 Implied Terms of Employment

By the provisions of section 91 of the labour act and by the definition of a worker given above, it will be seen that a worker's contractual terms may usefully be divided into the following categories:

1. Express terms which includes oral and written
2. Implied terms. This includes:

- Custom and practice terms
- Those implied by statute
- Those implied by the courts into all contracts
- Those implied by the courts into individual contracts.

3. Terms arising from collective agreements with the various industrial unions and the employee trade groups.

By the provision of section 7 of the labour act, employers are required to provide workers with a written statement of terms and conditions of employment not later than three months after the beginning of the workers period of employment, and it has been observed over the years and with available statistics that this may not always contain all the essential elements of the terms and conditions of employment. This in effect means that in order to fully understand the terms and conditions applicable to a particular employment we have to look into some extra-contractual sources, written and unwritten.

To prove the existence of a term implied by custom and practice it will be necessary to show three things about that practice:

Notoriety: It must be shown that the term is well known in the trade, industry, company, etc.

Certainty: The formulation of the term must be certain to constitute a definite offer.

Reasonableness: The scope and operation of the term must not be unduly onerous or operate unequally between those who it applies.

Summarily, the implied terms of contracts include:

- Custom and practice
- Conduct of the parties
- Circumstantial evidence.

In particular reference to implied terms and conditions, in *DANIELS V SHELL BP PETROLEUM DEVELOPMENT (1962) ALL NLR 19,* it was held that period of notice could be determined

from the evidence offered by the servant as to the period of notice offered to staff of similar status and that a custom or trade practice may be presumes to have been incorporated into the terms of employment where no provisions are agreed. The notice of one month was considered reasonable in the case of a Materials Assistant when it was proved that other staffs of equivalent statutes were entitled to one month.

In B. *STABILINI & CO. LTD V OBASA (1997) 9 NWLR (pt. 520) 293,* the Court of Appeal held that contracts need not necessarily be in writing as the conduct of the parties may also create contractual obligations. This is so because a contract may be express or implied from the conduct of the parties.

However, in *BUHARI V TAKUMA (1994) 2 NWLR (pt. 325) 183,* the court held that where there is no written document evidencing contractual relations between the parties, and there is no third party to prove the contractual relationship, the court will fall back to the circumstance surrounding the relationship between the parties as narrated by both of them to determine whether there was such a contract or not.

Also, in IBAMA *V SHELL PETROLEUM CO. NIGERIA LTD (1998) 3 NWLR (pt. 542) 493,* the court lucidly stated that in certain contracts where no such express words are available then implied terms may be incorporated into the contract in so far as they do not contradict the express terms of the particular contract.

Self-Assessment Exercise

Discuss with the aid of decided cases, the various generally implied terms of a contract of employment.

3.3 Terms Implied by the Courts

The basic principle for the enforcement of terms of contracts of employment implied by the courts is that the courts will imply a term into a contract, whether of employment or otherwise where the inclusion of such a term is necessary to give business efficiency to the contract. This is premised on the fact that the courts often take it upon themselves to determine what the parties must have agreed between themselves where this is not expressed or otherwise implied.

1. **The business efficacy test**

The business efficacy "test" developed from the judgment of *BOWEN L.J.* in the case of *THE MOORCOCK (1889) 14 PD 64.* In that case, the defendants who were under a contract with the plaintiffs agreed that the plaintiffs could discharge their cargo at the defendants' jetty. The water by the jetty was tidal and, as both parties realized, if the tide ebbed whilst the cargo was being unloaded, the ship would go around. The defendants had not guaranteed that the tide would not ebb or that it would be safe to unload the cargo at a particular time and since there was no express term of the agreement whether a term could be implied into the agreement that the river's bottom was reasonably safe for the ship whilst it was unloading. BOWEN L.J. said:

I believe that if one were to take all the cases, it will be found that the law is raising an implication from the presumed intention of the parties, with the object of giving the transaction such efficiency as both parties must have intended that at all events it should

have. Such business efficacy must have been intended at all events by both parties who are businessman.

2. **'Oh, of course' test'**

This test was formulated by Mackinnon L.J. in *SHIRLOW V SOUTHERN FOUNDRIES LTD (1939) 2 ALL E.R. 113.* The learned Lord Justice said:

Prima facie that which in any contract is left to be implied and need not be expressed is something so obvious that it goes without saying; so that if while the parties were making their bargain an officious by stander were to suggest some express provisions for it in their agreement, they would testify suppress him with a common 'Oh, of course.

From the foregoing it is clearly evident that these two tests define the limits to both of when a court implies a term into a contract and the extent or scope of that implied term.

The common trend now is that may be of the written form into all types of agreement, including a contract of employment agreement.

Self-Assessment Exercise

Discuss the terms usually implied by the courts into a contract of employment.

4.0 Conclusion

The imputation of various terms and conditions into all types of agreement, particularly a contract of employment cannot be over emphasized when one considers their overall advantage to the parties where conflict arises in terms of interpreting the contents of such terms and conditions. As noted in the analysis in respect of this issue, it is now a common trend to incorporate into the contract of employment most of the terms hitherto implied generally by the courts into the terms and conditions of service under the contract of employment.

5.0 Summary

This unit has exposed you to the fundamental knowledge of who is a worker, the basic elements of an implied term of a contract of employment and the terms usually implied by the courts which are now always parts of the terms and conditions of service in a contract of employment.

6.0 Self-Assessment Exercise

1. What is the statutory definition of a worker under the Nigeria labour law?
2. What implication(s), if any, does an implied term have on a contract of employment?
3. Differentiate between express and implied terms of a contract of employment.
4. The business efficacy 'Oh, of course' tests are relevant to our labour law. Discuss.

7.0 References/Further Reading

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