



NATIONAL OPEN UNIVERSITY OF NIGERIA

# LAW 231



## Labour Law 1 Module 3

# **LAW 231 (Labour Law I)**

## **Module 3**

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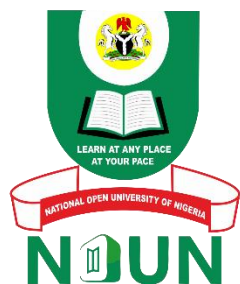
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Published in 2021 by the National Open University of Nigeria

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## Unit I Employer's Vicarious Liability

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### 1.0 Introduction

The corpus of this unit is to evaluate and examine the scope of the employer's vicarious liability in respect of his employee. The doctrine of vicarious liability is one that fixes liability on the employer for the tortious act of the employee committed in the course of employment and causing injury to a third party, without any necessary element of fault on the part of the employer.

### 2.0 Objectives

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

- discuss vicarious liability in relation to labour law
- discuss employer's vicarious liability for the tort of his employees
- mention the situations that will naturally give rise to the vicarious liability of the employer towards the victims of the acts and omissions of his employee and the exceptions thereof.

### 3.0 Main Content

#### 3.1 The Course of Employment

The basic statement of this doctrine is that the master will be vicariously liable for the tortious act of his servants committed in the course of employment. This phrase "course of employment" is a technical legal term and the master will not be responsible unless the act complained of was committed in the course of employment.

*Denny LJ.*In *YOUNG V. BOX & CO. LTD* (1951) T.L.R. 789 AT 793 said as follows:

To make a master liable for the conduct of his servant the first question is to see whether the servant is liable. If the answer is yes, the second question is to see whether the employer must shoulder the servant's liability.

See: *ODEBUNMI V. ABDULLAHI* (1997) 2 NWLR (PT. 489) 526.

However, before the employer will be held liable for the torts committed by his employee, the following conditions must be satisfied.

- The plaintiff must prove that the tortfeasor is an employee.
- Since the employee is the principal of the tortfeasor, to make his employer vicariously liable for his test, the employee must be joined as a co-defendant; otherwise, the vicarious liability of his employer will not arise.

The following considerations may however be taken into account in distinguishing an act which is, from one which is not, a test of vicarious liability.

- The scope of employment – *CANADIAN PACIFIC RAILWAY CO. V LOCKHART* (1942) 2 ALL E.R. 464.
- Unauthorized manner of doing something authorized  
*POPOOLA V. PAN AFRICAN GAS DISTRIBUTORS LTD* (1972) 1 ALL N.L.R. (PT. 2) 395.
- Express prohibitions  
*JARMAKANI TRANSPORT LTD V. MADAM ABEKE* (1963) 1 ALL N.L.R. 180.
- Unauthorized delegation  
*DAWODU V. AGBONAH* (1970) 2 ALL N.L.R. 7.
- Implied authority

### Self-Assessment Exercise

1. Explain the concept of course of employment in vicarious liability of employers to victims of employees' acts and omissions.
2. Examine the various distinguishing factors responsible for the tort of vicarious liability to be fully established.

## 3.2 Employer and Independent Contractor

The law is that an employer is not liable for the negligence of his independent contractor; however, there are occasions when he will be so liable.

Firstly, the employer's personal duty of care for the safety of his workman is non-delegable. Thus, where an employer chooses to discharge the obligations thereby imposed on him through a third party such as an independent contractor, he, nonetheless, remains fully liable for the negligence of the contractor which results in an injury to his workman.

Secondly, where a statute imposes an obligation on employers e.g. the duty of an employer or occupier of a factory, under the factories act to have certain machines securely fenced, liability for non-performance of the obligation is not avoided by delegating its performance to an independent contractor.

There are however, certain activities such as setting fire on open bush land, carrying out of construction work on the highway, which the law regards as extra hazardous, and requires from those who engage in them a special standard of care.

An employer who employs a contractor to carry out such activities on his behalf will be responsible for any negligence of such a contractor, except he stipulates in their contract not only the proper precautions to be taken, but also sees that they are in fact taken.

See: *DAVIES V. NEW MERON BOARD MILLS LTD.* (1959) A.C. 604.

### Self-Assessment Exercise

Examine the responsibilities of an employer and an independent contractor in a vicarious liability situation.

### 3.3 Vehicle Owners and Agent Drivers

The general principal of law in relation to vehicle owners and agent-drivers in a vicarious liability situation is that the mere ownership of a vehicle does not itself impose any liability on the owner for the negligence of driving of others whom he permits the use of his vehicle.

However, under certain circumstances, the law imposes vicarious liability on such an owner for the negligent use of his vehicle, irrespective of the existence of any contract of service between the owner and the driver.

Generally, to make the vehicle-owner vicariously liable for the negligent use of his vehicle, two elements must be proved.

- That the use is authorized, expressly or impliedly; and
- That the driving was either wholly or partly in the execution of a task or purpose on the owner's behalf.

It was held in *HIGBID V. R.C. HAMMERT (1932) 49T.L.R. 104*. That the mere fact that a man has the authority of a vehicle owner to drive his vehicle does not suffice to make the owner liable for his negligent driving, otherwise any man who allows another the use of his vehicle stands in peril while the vehicle is being used.

#### Self-Assessment Exercise

In what circumstances will the owner of a vehicle be held vicariously liable for the wrongs committed by a user of his vehicle?

### 3.4 Presumption in Road Accident Cases

The general rule of law in relation to this point is that where the facts of the relationship between the owner of a vehicle and the driver are not fully known, proof of ownership will give rise to a presumption that the driver was acting or driving as the owner's agent or employee.

However, this presumption is rebuttable where the owner adduces evidence to disprove any connection or relation between him and the driver relevant to the tort of vicarious liability. See *ODEBUNMI V. ABDULLAHI (1997) 2 N.W.L.R. (PT. 489) 526*. *OKEOWO V. SANYAOLU (1986) 2 N.W.L.R. (PT. 23) 471*.

#### Self-Assessment Exercise

What is the basic element in the determination of the liability of owners of vehicle in road accident cases?

### 3.5 The Permanent Employer and the Temporary Employer

Occasionally, there may be questions as to who of two possible employers is vicariously liable. This difficulty often occurs where one employer (normally referred to as the permanent employer) who employs "A" lends the services of 'A' to another employer, 'B' and "A" commits a tort while in the employment of 'B' to whom his services have been sent.

In resolving this issue, what ought to be considered is, has the borrower placed himself in such a position that he, instead of the permanent employer, should bear liability?

In *MERSEY DOCKS AND HABOUR BOARD V. COGGINS AND GRIFFITHS LIMITED* (1947) A.C.I, LORD UTHWATT said:

The workman may remain the employee of his general employer, but at the same time, the result of the arrangement may be that there is vested in the hirer a power of control over the workman's activities sufficient to attach to the hirer responsibility for the workman's acts and defaults and to exempt the general employer from that responsibility.

The above dictum of the learned jurist formed the bedrock of what is today known and referred to as "The Mersey Docks case" which was quoted with approval in the Nigerian case of *ROTIMI V. ADEGUNLE* (1056 – 60)1 N.S.C.C.14.

### **Self-Assessment Exercise**

What is the distinguishing factor between a permanent employer and a temporary one?

## **4.0 Conclusion**

The concept of vicarious liability in respect of labour law vis-à-vis contract of employment has grown over the years, to the extent that most of the previous cases have been overruled and replaced with more profound authorities. However, the basis of this concept is yet to be eroded by the events of modern times. Therefore, like other concepts of law, this principle continues to grow through judicial activism and as a result of the overwhelming influx of exceptions.

## **5.0 Summary**

In this unit, we have learned the following:

- the meaning of the concept of vicarious liability
- the object of and aims of the proponents of this legal concept
- the various grounds upon which an employer will be vicariously liable for the acts and misdeeds of his employee
- the various exceptions to this principle

## **6.0 Self-Assessment Exercise**

1. Examine the concept of vicarious liability, in respect of labour law and particularly contract of employment.
2. Examine the various heads under which a master will be held vicariously liable for the torts or default of his employee alongside the probable exceptions.

## 7.0 References/Further Reading

Munkman. (n.d). *Employer's Liability*. (9th ed.).

Nwazuo, A.N. (2001). *Introduction to Nigeria Labour Law*. (1st ed.). Ago-Iwoye: Department of Public Law & Jurisprudence, Faculty of Law, Olabisi Onabanjo University.

Ogunniyi, O. (2004). *Nigeria Labour and Employment Law in Perspective*. (2nd ed.). Lagos: Folio Publishers Limited.

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 2 Termination of Contract of Employment

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### 1.0 Introduction

This unit is meant to expose the various means by which a contract of employment may be terminated. It will also encompass the solutions to unlawful termination of such contracts.

### 2.0 Objectives

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

- discuss the Nigeria labour law as fashioned after that of the United Kingdom
- examine those various means by which employers of labour both under the common law and equity have determined the contract of employment of their employees over the years.

### 3.0 Main Content

Termination or dismissal is the bringing to an end of the employment relationship. Since a contract of employment is like any other commercial contract, in determining whether a cessation of employment has occurred, one has to look into the contract from which the relationship emanates.

The three possible types of contracts of employment are:

- contract determinable by notice
- contract for a fixed term
- contract which expires by performance or at the happening of a specified event.

#### 3.1 Methods of Termination

There are several ways by which a contract of employment may be determined. These include:

- I. **By the agreement of the parties**, namely:
  - By notice or payment in lieu of notice
  - By expiry of time
  - By subsequent agreement
  - By contractually stipulated causes
  - By the expiry of a general hiring.

## 2. By statutorily prescribed procedure

The general rule since the decision of the Nigerian Supreme Court in *SHITTA BAY V F.P.S.C.* (1981) N.S.C.C. VOL. 12, 19, is that when a statute, or a subsidiary instrument, provides the procedure to be followed in the determination of a contract of employment, a statutory body must comply with it otherwise, the termination will be declared null and void.

## 3. By frustration

A contract is determined by frustration when the law accepts, certain circumstances as terminating the contract, irrespective of the intention of the parties. In other words, the contract is determined by the operation of the law.

The doctrine of frustration, within the context of employment contracts, deals with situations where a supervening external event, not produced by the fault of either the employer or employee, destroys the ability of either the employer to continue to employ, or of the employee to continue to work, under the contract. The legal effect of frustration is that it releases the parties from further obligations under the frustrated contract.

On the other hand, the determination of the fact of whether or not the employer – employee relationship has come to an end by frustration due to the employer's sickness or capacity depends on the following factors:

- The terms of the contract, especially its duration and provision for sick – pay.
- The nature of the employee's work.
- The nature of the employee's sickness or injury
- The period of past-employment.

Finally, the law is that the death of the employer, where the employer runs a one-man enterprise, like the death of the employee, will terminate the contract of employment by frustration.

## Self-Assessment Exercise

1. What do you understand by the term “termination of contracts of employment?”
2. Highlight and discuss the several methods of termination of contract of employment.

## 3.2 Summary Dismissal

Generally, summary dismissal is the right of an employer to dismiss an employee who has committed a repudiatory breach of the employment contract. In other words, the contract was terminated by the repudiator's misconduct of the employee which the employer has accepted as annulling the employment relationship.

Therefore, an employee who has committed a sufficiently fundamental breach of his contract can be dismissed summarily by his employer – in that case, there is an immediate disengagement or separation without notice; thus, the employee loses his entitlement to notice or payment in lieu thereof.

In law, he is deemed to have committed an offence or been involved in an act which strikes at the root of the employment relationship and which amounts to a repudiation of the contract.

The following representative acts of misconduct on the part of the employee may be considered as responsible for summary dismissal:

- Infidelity
- Corruption and the taking of bribe/kickback
- Fighting on duty/assault
- Drunkenness/drug addiction
- Contracting debts and other pecuniary embarrassment
- Gross immorality
- Willful disobedience or insubordination
- Use of bad language at work
- Incapacity
- Professional misconduct.

Also relevant to a valid and total understanding of the concept of summary dismissal are the following:

- Dismissal for incompetence
- Retrospective dismissal.

See: *JOMBO PETROLEUM V. PETROLEUM EQUALISATION FUND* (2001) FWLR (PT. 45) 651.

*ISIEVWORE V. NEPA* (2002) 7 S.C. (PT. 11) 125.

### Self-Assessment Exercise

1. What do you understand by the phrase 'summary dismissal.'
2. Enumerate the various acts of misconduct that may compel an employer to exercise the right of summary dismissal of an employee.

### 3.3 Misconduct

The law is that there is no fixed rule of law defining the degree of misconduct which will justify dismissal. A contract of employment may, sometimes contain express grounds for summary dismissal or confer on the employer a discretion to determine what amounts to misconduct.

See: *OLANREWAJU V. AFRIBANK PLC* (2001) FWLR (PT. 72) 2008. S.C. and

*ANTE V. UNIVERSITY OF CALABAR* (2001) FWLR (PT 41) 1909.

Where, however, there are express grounds as to what would amount to misconduct, it is the duty of the court to construe the contract so as to decide whether the act of misconduct alleged is one of those contractually stipulated.

Where on the other hand, the ground for summary dismissal is subjectively worded so as to reserve to the employer the discretion to determine what amounts to misconduct, the question is "is this contrary to public policy as ousting the jurisdiction of the court?"

In *MOELLER V. MONIER CONSTRUCTION CO (NIG) LTD* (1961) 2 ALLN.L.R.167, it was held by the Nigerian Supreme Court that it was not necessary for the employer to prove that

the conduct, on the basis of which the exercised his discretion to dismiss the employee, actually brought it to disrepute.

There are two major types of misconduct. These are:

### 1. **Antecedent misconduct**

This will arise where an employee had been found guilty of misconduct unknown to his employer, the discovery of that misconduct, if not condoned, would validate an otherwise wrongful dismissal.

### 2. **Misconduct justifying dismissal**

These include:

1. Incompetence and negligence  
*NEW NIGERIAN BANK LTD V. OBEVUDIRI* (1986) 3 NWLR (PT. 29) 387.
2. Crime – *ARINZE V. FIRST BANK PLC* (2004) 5 S.C. (PT.1) 160.
3. Absence from work  
*BRITISH – AMERICAN INSURANCE V. OMOTAYO* (1991) 2 NWLR (PT. 176) 721.
4. Drunkenness
5. Immorality
6. Abusive language.

### **When summary dismissal will be ineffective for breach of applicable procedure**

The general rule is that an employer in summarily, and justifiably dismissing an employee need not follow any procedure. Exceptions to this rule were propounded in the case of *JIRGBAGH V. U.B.N PLC* (2000) F.W.L.R (PT. 26) 1790 at 1807-8 by ChukwumahEneh J.C.A. as follows:

- Where the contract itself, though not regulated by any statute or subsidiary legislation, has made provision for the procedure to be followed when termination is for misconduct, the summary dismissal of the employee in breach of the contractual procedure would render the dismissal wrongful.
- Where a statute or a subsidiary instrument provides the procedure to be followed when the dismissal of an employee is on disciplinary grounds, the requirements of the statute must be complied with when the removal of the employee is for misconduct, otherwise the dismissal would be a nullity.
- Where the employment is public and pensionable, the employer cannot effectively determine the employment on grounds of misconduct without giving the employee a fair hearing, notwithstanding that there is no statute prescribing the procedure to be followed when the employment is to be determined for misconduct. See *OLATUNBOSUN V N.I.S.E.R. COUNCIL* (1988) Vol. 19 N.S.C.C.1025.

### **Self-Assessment Exercise**

1. Examine the major forms of misconduct likely to terminate a contract of employment.
2. Highlight the basic exceptions to termination of contract of employment by summary dismissal as a result of misconduct.

### 3.4 Wrongful Dismissal

Wrongful dismissal is a termination of contract of employment in breach of the express or implied mode, for the determination of employment contract.

Wrongful dismissal entails "... the objective element of the discontinuation of the exchange of work for wages; and the subject element of the intention to end the employment relationship." This form of dismissal occurs where the employer terminates the contract without giving notice, in breach of a provision for notice, or gives a notice which is shorter than the requisite notice.

There will also be wrongful dismissal where the employer terminates a contract for a fixed term before the expiry of its terms, for no justifiable reason.

See: *OSAKWE V. NIGERIAN PAPER MILL LTD.* (1998) 7 S.C. (PT. 11) 108.

#### Self-Assessment Exercise

What do you understand by the phrase *wrongful dismissal*?

#### Place of motive in termination cases

It is trite law that where a contract of employment has been terminated properly the motive or intention which actuated the termination is irrelevant. Thus in *SOGBETUN V. STERLING PRODUCTS LTD.* (1973) N.C.L.R.323, the plaintiff's appointment was validly terminated by one month's salary in lieu of notice. The plaintiff contended that the termination was wrongful since it was motivated by her refusal to succumb to the sexual advances of her employer. *DOSUNMU J*; in reiterating the well-settled law that motive is immaterial when termination is valid said:

Where an employee is lawfully dismissed by being given the notice or payment in lieu of notice stipulated in the contract of employment; the employer's motive in dismissing him is irrelevant, and the fact that the employer has a bad motive or gives an untrue reason does not make dismissal wrongful.

See: *UMENZE V. CHEVROTIN* (2001) FWLR (PT. 75) 595 C.A.

#### Self-Assessment Exercise

What is the effect of prove of motive in the termination of employment contract?

### 4.0 Conclusion

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

## 5.0 Summary

You should now be able to comprehend:

- The meaning of termination of contract of employment.
- A discussion on the various modes of termination of employment contract.
- An elaboration on the various applicable exception thereto.
- The place of motive in employment termination procedure.

## 6.0 Self-Assessment Exercise

1. What do you understand by the concept of termination of employment?
2. Discuss the various methods of termination of contract of employment.
3. Expatriate on the phrase *summary dismissal*.
4. Examine the various acts regarded as misconduct in employment contract termination.
5. Discuss the exceptions laid down by the Nigeria Court of Appeal in *JIRGBAGH V U.B.N. PLC (2000) F.W.L.R. (PT.26) 1790*.
6. What is the place of motive in termination cases?

## 7.0 References/Further Reading

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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 3 Remedies for Wrongful Dismissal

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### 1.0 Introduction

Under the law of contract, the rule generally is that contract of employment will not be specifically enforced. Special circumstances must be shown before the courts will exercise their equitable jurisdiction to specifically enforce the contract in favour of an employee wrongfully dismissed, and its exercise will be at the discretion of the courts.

### 2.0 Objectives

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

- discuss adequate compensation in form of remedies for wrongful dismissal of a valid and subsisting contract of employment
- mention the various means by which an aggrieved and perceived wrongly dismissed employee may seek redress under the law and the possible exceptions thereon.

### 3.0 Main Content

The concept of wrongful dismissal can be defined as the exclusion of an employee from further employment with the intention of severing the relationship of employer and employee while wrongful dismissal is usually the claim of an employee at common law where he contends that his contract has been wrongfully repudiated by the employer or where he feels that his contract has not been brought to an end in accordance with the procedures laid down by the contract.

#### 3.1 Damages

In the law of contract the guiding principle for the assessment of damages is *restitutio in interum*. This literally means that so far as damages are not too remote the plaintiff should be put back, as far as money can do it, on the same position in which he would have been but for the breach.

Therefore, where a servant is wrongfully dismissed, he is entitled, subject to mitigation, to damages equivalent to the wages he would have earned under the contract from the date of dismissal to the end of the contract. *IFETA V. SHELL* (SUPRA).

Thus, a restrictive construction is placed on restitution in the assessment of damages for wrongful dismissal. This restrictive construction was made clear by the Supreme Court in the Nigeria case of *NIGERIA PRODUCE MARKETING BOARD V. ADEWUNMI* (1972] N.S.C.C.662.

Further reading on this point is recommended to you.

### **Self-Assessment Exercise**

Explain the term 'Restitutio in Integrum'.

## **3.2 Mitigation**

The law is that the fact that a plaintiff is entitled to a particular head of damages for breach of contract does not entitle him without more, to compensation. He must show further that he has taken reasonable steps to mitigate his loss. The real meaning of mitigation in the context of employment is that the law requires the plaintiff to seek alternative employment, in the absence of which the law will reduce the plaintiff's measure of damages by the loss which he has avoided through securing alternative employment, and by the loss which the courts think is avoidable had the plaintiff taken reasonable steps in mitigation.

The law further, however, requires that whether there has been a failure on the part of the plaintiff to mitigate is a question of fact and the onus imputed on the defendant to prove it.

### **Self-Assessment Exercise**

Elaborate on the term mitigation of damages.

## **3.3 Deduction from Damages**

Apart from the fact that damages for wrongful dismissal may be reduced or negative by the failure to mitigate, other considerations may further reduce the measure of damages. This was the position of the English House of Lords in *BRITISH TRANSPORT COMMISSION V. GOURLEY* [1956] A.C.185 where the court held for the first time that in every case where damages for loss of earnings fall to be assessed, the measure should be his net earnings after deduction of his estimated income tax, and not his gross earnings before the payment of tax.

However, notwithstanding the strong persuasiveness of decisions of the English House of Lords, it is submitted that Nigerian case law, with regard to the assessment of damages for wrongful dismissal, will take a different approach.

See: Section 3 (1) (b) of the Personal Income Tax Decree, 1993 No.104.

This section defines chargeable income to include:

Any salary, wages, fees, allowance or other gains from employment including gratuities, compensation, bonuses .... Given or granted by any person to an employee ....

The proviso to paragraph (b) thereof excludes from chargeable income, at sub-paragraph (v), "any compensation for loss of employment."

Therefore, it is apposite to say that since damages for wrongful dismissals is a compensation for the unwarranted loss of employment, it is submitted that Nigerian courts will not in any way take income tax into consideration in the assessment of damages for wrongful dismissal.



### Self-Assessment Exercise

Distinguish between the English and Nigerian respective positions on the deduction from damages in cases involving remedies for wrongful dismissal.

### 3.4 Damages and Job Security

Given the application of *restitutio in integrum* to the assessment of damages for wrongful dismissal and the imposed duty on the employee to mitigate his damage, it is submitted that the quantum of damages for wrongful dismissal is generally nominal.

It is neither an adequate satisfaction of the employees' expectations from his contract of employment nor an effective restriction on the employer not to arbitrarily terminate the contract. The remedy of damages is not an effective protection of the employee's right from arbitrary dismissal.

### 3.5 Equitable Remedies

The remedy of damages was the only relief for breach of contract under the common law and this remedy is hardly adequate as compensation to an employee's wrongful dismissal. As a result of the shortfalls of the common law remedies, the principle of specific performances was developed by equity.

The order for specific performances is such where the defendant is directed or compelled by the court to specifically perform the contract in accordance with its terms, wherever this order is made in favour of an employee wrongfully dismissed the effect is that the dismissal is invalid and the employee is reinstated or restored to his employment.

See: *GATEWAY BANK PLC V. ABOSEDE* (2001) FWLR (PT. 79) 1316. C.A.

However, the Court of Appeal held in that case on the issue of whether specific performance of contract of service can be ordered, Per ADEKEYE JCA, that:

It is only in exceptional cases that a court will order specific performance of a contract of employment as that would amount to imposing an employee on an unwilling employer.

Apart from the equitable remedy of specific performance, the other equitable remedies of injunction and declaration may seem as indirect means of appointing reinstatement. Unlike a declaration, specific performance and injunction are coercive orders of the court. The effect of the grant of an order of injunction, whether in its prohibitory or mandatory character against an employer in an action for wrongful dismissal may be that the court is indirectly enforcing specifically a contract for personal services?

The law is that while a plaintiff in an action for wrongful dismissal is entitled to damages once he proves breach of his contract of employment he has no such right to the equitable remedy of specific performance since this is a discretionary remedy.

The following are the circumstances under which the court may justify the enforcement of specific performance of a contract of employment.

- Statutory status. – *CENTRAL BANK OF NIGERIA V. JIDDA* (2001) FWLR (PT. 47) 1066. C.A.
- Termination for misconduct. – *ARINZE V. FIRST BANK OF NIGERIA PLC* (SUPRA)
- Whether the contractual provision is exhaustive on ground for termination.
- The existence of mutual confidence.

### Self-Assessment Exercise

1. Contrast the equitable remedies of specific performance, injunction and declaration to the remedy of damages in relation to wrongful dismissal relating to breach of contract of employment.
2. Highlight the other equitable remedies developed by the courts over the years in respect of wrongful dismissal of an employee.

### 3.6 Equitable Remedies and Job Security

The essential reason behind the grant of the equitable remedy of specific performance is the general inadequacy of damages as a remedy for breach of contract.

The order of specific performance in favour of an employee allows him to 'sit in the sun' and claim arrears of wages as money deducted and all his entitlements from the date of the purported dismissal to the date of judgement or actual resumption of duty, as the case may be, without rendering service, and without the need to mitigate his loss.

While the remedy of specific performance is, under the law of contract, the best safeguard for an employee against arbitrary dismissal, the grant of the decree is subject to several limitations. Some of these are:

1. It is a discretionary remedy.
2. Most of the reported instances are cases of employment with statutory flavour or legal status.
3. Most other cases are ill defined, because, of the uncertainty of what will amount to specific performances. Equity, however, does not prevent the employer from subsequently and validly dismissing the employee by complying with contractual or statutory provisions on termination.

### 3.7 Prerogative Remedies

The common law does not favour the enforcement of contracts by remedies which deny or compel the contract to continue as for instance in issues relating to injunction and specific performance. The general principle in this respect is that specific performance will not be ordered in respect of obligation to perform personal services. This principle is predicated on the fact that equity will not make an order whose performances would require instant supervision.

The reasons for the above are as follows:

- Damages are often adequate as a remedy.
- A contract of employment requires mutual trust and confidence.

In the same vein, administrative or prerogative remedies, in addition to, or apart from, equitable remedies have sometimes been applied to contracts of employment, where the employing authority is a statutory body. These prerogative remedies include, mandamus, certiorari and prohibition. They are instruments of judicial review of administrative actions.

See: *KABELMETAL NIG. LTD. V. ATIVIE* (2001) FWLR (PT. 66) 662.and

*OBO V. COMMISSIONER OF EDUCATION, BENDEL STATE* (2001) FWLR (PT. 38) 1226. S.C.

### **Self-Assessment Exercise**

Examine the various prerogative remedies available to an aggrieved employee wrongfully dismissed.

## **4.0 Conclusion**

This unit deals with remedies available to an aggrieved employee wrongfully dismissed under a contract of employment. You have been exposed to these remedies with their attendant exceptions where applicable.

## **5.0 Summary**

This unit can be summarized as in relation to the expositions emanating there from. By now, you should have:

1. an insight into what remedies are available to an employee who believes that his contract of employment has been wrongfully determined; and
2. an understanding of the following concepts:
  - damages
  - mitigation
  - deduction from damages
  - damages and job security
  - equitable remedies
  - equitable remedies and job security
  - prerogatives remedies.

## **6.0 Self-Assessment Exercise**

1. What is wrongful dismissal?
2. What is the basic concept of remedies for wrongful dismissal from employment?
3. Distinguish between damages, equitable remedies and prerogative remedies.
4. Explain the concept of deduction from damages and the exceptions thereof.

## 7.0 References/Further Reading

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

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Trade Unions Act, Cap 437 LFN 1990.

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

## Unit 4 Collective Bargaining

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### 1.0 Introduction

Collective bargaining may be defined as the process of working out a *modus operandi* between two parties - employer and trade union organisations - in matters pertaining to both parties. It may also be seen as the process of making rules which will govern employment. This is the basis of this unit.

### 2.0 Objectives

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

- discuss the importance of agreements in any employer/employee relationship and by extension, the trade unions to which the employee belongs
- discuss collective bargaining
- mention the three principal methods of regulating labour relations.

### 3.0 Main Content

Collective bargaining is the process through which the antithetical interests of employers and employees are harmonized through discussions and negotiations. It has also been defined as those arrangements under which wages and other conditions of employments are settled by negotiations and agreement between an employer and association of employers and workers' organizations.

One very important aspect of this concept is that the terms of employment are usually contained in those rules which regulate such matters as wages, hours of work, holidays, holiday pay, sick pay, overtime and redundancy. However, the procedural function of this concept has been subdivided into the various heads that form the main body of this unity.

#### 3.1 Recognition Agreement

The fundamental basis of collective agreement is the recognition agreement which deals first and foremost with the recognition by an employer or association of employers of a specific trade union or a group of trade unions, as the sole bargaining agent for the employers within the bargaining unit in relation to terms and conditions of employment.

Conversely, where recognition is not given or is withdrawn, the union will not be able, on behalf of its members, to bargain with an employee or employers association. In Nigeria, the recognition of registered trade union is a matter of statutory obligation for employers, provided that a trade union has more than one of its members in the employment of an employer.

See: *NATIONAL UNION OF GOLD, SILVER AND ALLIED TRADE V. ALBURY BROTHERS LTD* [1929] I.C.R. 84.

In that case, it was held inter alia that, recognition entailed not merely a willingness to discuss but also to negotiate, that is, negotiate with a view to striking a bargain.

However, dispute may arise in the absence of any clear stipulations in the recognition agreement of matters for negotiation and for consultation.

See: *NIGERIAN BREWERIES LTD V NIGERIAN BREWERIES MANAGEMENT ASSOCIATION* [1978-9] N.I.C.R. [H.I] 35

### **Self-Assessment Exercise**

Explain the basis of recognition agreement and its shortfalls, if any.

## **3.2 Procedural Agreement**

Unlike recognition agreement, the procedural agreement otherwise called the disputes procedure provides the procedure or stages which the collective parties to the bargaining must or ought to exhaust before embarking on an industrial action.

Disputes procedures are usually worded as follows:

It is agreed that in the event of any difference arising which cannot be immediately disposed of then whatever practice or agreement existed prior to the difference shall continue to operate pending a settlement or until the agreed procedure has been exhausted.

A clue from the foregoing example points to the fact that the bane of most industrial actions embarked upon by labour leaders in Nigeria through the Nigerian Labour Congress has been as a result of the negotiating parties inability to strike a bargain, thereby exhausting all available means of settling the emerging issues available before an industrial crisis.

### **Self-Assessment Exercise**

Examine the effect of procedural agreement on both the employer's association and trade union.

## **3.3 Parties to a Collective Agreement**

From our preceding comments it is clear that parties to a collective agreement are the trade union of employees and either an employer or an association of employers.

See *HOLLAND V. LONDON SOCIETY OF COMPOSITORS* [1924] 40 T.L. R. 440; and *BURTON GROUP LTD V SMITH* [1977] I.R.L.R. 351.

### 3.4 Legal Status of Collective Agreement

The fundamental question to be asked under that head is 'Are collective agreements legally enforceable contracts or are they only binding in honour'? In other words, can a trade union or either an employer or an employers' association legally enforce a collective agreement to which it is a party?

The answer to this is that, in the absence of statutory imposition of enforceability of collective agreement, it depends on whether the court can find an express intention of the parties to be bound or can, given the climate of opinion prevalent at the time the agreement was made, imply such an intention into the agreement.

Several judicial pronouncements have been made on this issue but the *locus classicus* is *FORD MOTOR CO.LTD V. AMALGAMATED UNION OF ENGINEERING AND FOUNDRY WORKERS* [1968] 2.Q.B.303, where it was held, inter alia, that collective agreements themselves cannot be termed as contracts in law as the parties do not intend to be legally bound. This is also the position in Nigeria.

#### Self-Assessment Exercise

How are collective agreements legally enforceable?

### 3.5 The Impact of Statute on the Enforcement of Collective Agreement

The primary law governing trade disputes in Nigeria is the Trade Unions Act, Cap 437, Law of the Federation of Nigeria, 1990. You are enjoined to read and digest the provision of section 22(1), (2) and (3) of the Trade Union Act, 1990.

However, the general purpose of this provision of the law is that any collective agreement between two trade unions may constitute a valid contract where the parties so intend. Therefore, the basic element to be considered in climates where the question of bindingness and enforceability of agreement between two trade unions arise is that of intention of the parties.

### 3.6 Collective Agreements and Contracts of Employment

The most usually asked question is: Can an employee directly enforce the terms of a collective agreement, though he was not a party of it?

In *U.B.N. LTD V. EDET* [1993] 4. N.W.L.R {OF 287}288, the plaintiff contended that her dismissal was wrongful because it was in breach of a collective agreement between her employer and her trade union, it was held, inter alia, that it is not for an individual employee to found a course of action on the agreement to which he is not a party.

However, the court, in that same case, propounded the three methods of effecting such agreement provided it was incorporated into the contract of employment between the employee and the employers. These are:

- Express incorporation
- Implied incorporation
- Incorporation by statutes.

### **Self-Assessment Exercise**

The general rule is that collective agreement terms are not enforceable, discuss the exceptions thereon.

## **4.0 Conclusion**

The basis of collective bargaining as a concept under the Nigerian labour law has been given an expository approach in this unit and students are better equipped, going by the various discussions here above stated, to easily discern between an enforceable collective agreement and unenforceable agreement.

## **5.0 Summary**

This unit has dealt with the following points:

- required elements for the recognition of an agreement
- procedural effects of an agreement
- recognized parties to a collective agreement
- legal status of collective agreement
- impact of status on the enforcement of collective agreement
- distinguishing factors and exceptions in collective agreements and contracts of employment.

## **6.0 Self-Assessment Exercise**

1. What do you understand by the concept of collective bargaining?
2. Explain the basis of recognition agreement and its shortfalls, if any.
3. What are the effects of procedural agreement on both the employer's association and trade unions?
4. Who are the recognized parties to a collective agreement?
5. Are collective agreements legally enforceable?
6. State and examine the impact of that on the enforcement of collective agreement.
7. Discuss the exceptions to the enforceability of collective agreements by an employee under a 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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