STUDY PACK

ON

NIGERIAN LABOUR LAW

PROFESSIONAL EXAMINATION II

NIGERIAN LABOUR LAW

PROFESSIONAL EXAMINATION II

FOURTH EDITION

CHARTERED INSTITUTE OF PERSONNEL MANAGEMENT OF NIGERIA

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FOREWORD

This fourth edition of the CIPM study pack is one of the learning resources recommended to persons preparing for certification through professional examinations. It is uniquely prepared to meet the knowledge standards of HR certification bodies and/or degree awarding institutions. The study pack is highly recommended to researchers, people managers and organisations responsible for human capital development in its entirety.

Each chapter in the text has been logically arranged to sufficiently cover all the various sections of this subject as itemised in the CIPM examination syllabus. This is to enhance systematic learning and understanding of the users. The document, a product of in-depth study and research, is practical and original. We have ensured that topics and sub-topics are based on the syllabus and on contemporary HR best practices.

Although concerted effort has been made to ensure that the text is up to date in matters relating to theories and practices of contemporary issues in HR, nevertheless, we advise and encourage students to complement the study text with other study materials recommended in the syllabus. This is to ensure total coverage of the elastic scope and dynamics of the HR profession.

Thank you and do have a productive preparation as you navigate through the process of becoming a seasoned Human Resources Management professional.

Olusegun Mojeed, FCIPM, fnli
President & Chairman of the Governing Council

ACKNOWLEDGEMENT

On behalf of the President and Chairman of the Governing Council, Mr Olusegun Mojeed, FCIPM, fnli and the entire membership of the Chartered Institute of Personnel Management of Nigeria (CIPM), we acknowledge the intellectual prowess of Kehinde Bamiwola Esq. in writing this well-researched text for Nigerian Labour Law. The meticulous work of our reviewer, Dr. Oluseyi Shadare, ACIPM has not gone unnoticed and is hereby acknowledged for the thorough review of this publication.

We also commend and appreciate the efforts of members of the Education Committee of the Institute, under the chairmanship of Mr. Henry Onukwuba, MCIPM for their unflinching support.

Finally, my appreciation goes to my internal project team, led by the Director, Professional Standards and Development, Mr. Gbenga Samuel Odetunde ACIPM, the Team lead, Certification and Licensing, Mr. Samuel Eviewho, ACIPM and Team lead, Professional Examination, Mr. Yinka Oyedere, MCIPM for making this project a success.

Oluwatoyin Naiwo, FCIPM
Registrar/Chief Executive

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AUTHOR'S NOTE:

All relevant authorities, textbooks, journals, manuscripts, internet sourced material, statutes including international treaties and Conventions cited and referred to in this study manual are already contained in the footnotes. The Commissioned Author regrets if there is any Author not properly or adequately referenced and that the doctrine of fair dealing shall apply and that the doctrine shall cover the original owner of the work which is the Chartered Institute of Personnel Management of Nigeria.

Each chapter is designed with learning objectives and practice questions.

APPENDIX

GENERAL INTRODUCTION

Can it be said that industrial relations have reached a state of maturity in Nigeria? It appears many factors have been working against labour-management relations. The social engineering aspect of law has been playing a significant role in shaping the industrial environment in this country. However, a combination of economic fluctuations, inconsistent economic policies, injections, inability of the government to stabilize the exchange rate or allowing the forces of demand and supply to determine exchange rate, low export rate and high import rate, and over-dependence on oil- which has rendered the Nigerian economy monocultural - among other factors, has led to a crisis-oriented labour-management relations scenario.

Nigeria is facing a looming brain drain as medical doctors and health workers are leaving the country almost every day. The Academia have joined the mass movement to western world. In fact, the trending word or concept now is 'Japa' meaning 'run out of the country'. Moreover, Industrial Courts are faced with many cases that border on termination via wrongful dismissal, redundancy and so on. This period has created more challenges for Human Resource Practitioners since their environment majorly influences the behavioral patterns of human beings. Thus, a good HR personnel in this critical period must have good knowledge and understanding of labour law and its application to effectively resolve industrial conflicts. This approach aims to minimize conflicts and thereby reduce the likelihood of unnecessary litigation stemming from such industrial conflicts.

The dynamics of industrial relations accounts for the need to review the current syllabus cum content of the Study Pack of labour law. Within the past four to five years, there have been many changes in the political administration of Nigeria. In fact, many economic policies that affect the nation's economic activities have multiplier effects on hiring and firing. The removal of petroleum product subsidy has also affected the Master-Servant relationship. Thus, some unpalatable experiences such as redundancy, lay-off, retrenchment or downsizing are imminent.

There have been legal innovations and changes in the dynamics of labour law as it relates to human resources and labour relations. Numerous contemporary issues have emerged, including modifications to hiring and firing laws, the significance of training and onboarding for new employees, concerns about sexual harassment and creating a hostile work environment, ensuring data protection and confidentiality, implementing paternity leave, adhering to international treaties and embracing international best practices, understanding the doctrine of restraint of trade and consumer protection, and utilizing fundamental rights enforcement procedures to mitigate arbitrary actions by trade unions. These are just a few examples of the evolving landscape.

The world of work is a complex one. Thus, a Human Resource (HR) personnel or a labour law practitioner must be conversant with the dynamics, which are reflexes of the societal changes. HR practitioners, legal professionals, labor law judges, and candidates taking exams at institutes like

the Chartered Institute of Personnel Management of Nigeria, where Labor Law is a core subject, will benefit from this material. The author, with a blend of practical experience and academic expertise in labor law, has carefully designed this study pack.

The Author has employed the comparative approach, citing examples from the laws of other jurisdictions such as the United States of America, United Kingdom, India, South Africa and other jurisdictions where labour law has metamorphosed to meet the dynamics of the world of work.

CHAPTER ONE
INTRODUCTION, HISTORY AND SOURCES OF LABOUR LAW IN NIGERIA

1.0. Learning Objectives

i. At the end of this Chapter, readers/candidates should be able to appreciate and explain the under-listed concepts and apply them to industrial relations generally. Historical Overview of Labour Law in Nigeria
ii. Sources of Labour Law
iii. The Received Laws
iv. Freedom of Contract / *Pacta Sunt Servanda*
v. Guided Intervention, 1968

1.1. INTRODUCTION

Labour law regulates the relationship that exists between the master and the servant or, better still, using the modern-day phrase, the employer and the employee. The essence of this regulatory operation is to prevent friction and to create a conducive atmosphere for industrial harmony, efficiency of labour, high productivity, profit maximization, socio-economic welfare of workers, economic development, which has the multiplier effect of improving the living standards of the larger society.

The history of the modern-day labour law jurisprudence and labour agitations in Nigeria has a strong link with the colonial administrators who got Nigeria as a share of the Berlin Conference of 1884-1885. Thus, the present Labour law legislation and common law principles applicable to the Nigerian Labour Law jurisprudence have their root cum source in/from the relationship that had existed between Nigeria and the United Kingdom. The Nigerian Labour Act, Trade Union Act, Trade Dispute Act, Trade Union Amendment Act, 2005 and other enactments have English law flavours, either from the established common law principles, doctrines of equity, Statutes (Statutes of General Application popularly called SOGA), or the decisions of the House of Lords now the Supreme Court of England. The British Labour law played a vital role in the development of Nigerian labour law. The developments that took place in England and Wales have in one way or the other sharpened the Nigerian work environment.

Applying Karl Marx's[1] development analysis of movement from communalism to Feudalism and from feudalism to capitalism and the last stage being socialism, one may submit that, the change that occurred from the feudal system in England to capitalism, which deposited the means of production and distribution into the hands of the capitalists, accounted for the struggle between labour and capital. Thus, there has been a struggle between labour and capital. Capitalists want to have the larger part of what is produced, white labour wants to earn what is sustainable. Thus, the need for the regulation of this relationship is paramount to a frictionless industrial environment.

[1]See Marxist Theory of the State on www.spunk.org/texts/pubs/maexon, accessed on the 26th day of January, 2017

According to Roscoe Pound[2], Law, is the instrument of social engineering. Roberto Unger[3] has submitted that, Law is the glue that holds the society together. It is on this note that, Labour aw regulates labour relations in every economy.

Labour law relations focus majorly on how workers are organized and how wages are set, the regulatory role of government, particularly the relations that border on hiring and firing, the benefits and welfare structures including the social security packages such as wellness, occupational safety and health, etc. The operational efficiency of Labour relations variables such as the Political, economic, legal and social frameworks are central to relationship building and development with the multiplier effect of increased organizational performance.

It is an elementary principle of economics that equilibrium level and its attainment is pivotal to a stable operational state; be it price, production, or a peace-level that is required for industrial harmony. Political, economic, legal and social frameworks for labour relations is a function of the political system of the State/National government. Some of us must have observed with disdain, the psychological, emotional and economic torture that workers and organized labour experienced during the different military regimes in Nigeria between 1960 and 1999.

Workers' rights are usually suspended during a tyrannical regime of dictators and we all know that this is unhealthy to labour relations. In a democratic system, organized trade unions should be strong enough to maintain a certain degree of labour market centralization. Unions are effective tools for shaping both the electorate's political consciousness and the character of the political gladiators.

Strong Unions counteract the tendency of politics to become the preserve of the educated upper class in such a way that, political education, socialization and engagement of workers will improve. It is worthy of note that strong unions are the best advocates for a healthy political economy.

Trade unions are also the best mechanism for the implementation of a healthy labour market, where forces of demand and supply are allowed to determine labour market operations. The concept of labour politics is as good as inexistent in Nigeria. Moreover, organized labour unions can reshape the political framework of Nigeria to a more human-friendly political economy where equality/egalitarianism, gender and racial equality would be attained.

The Nigerian Political framework is lopsided. In practice, issues like discrimination whether in form of gender, ethnic/race, wage, age etc. are still prevalent. We have cases of class bias in the Nigerian political framework.

[2] Pound Rosco 'An Introduction to the Philosophy of Law' 1954 (Rev. Ed)

[3] Roberto Unger belongs to a movement in legal theory and a network of leftist legal scholars that emerged in the 1970s in the United States. See Unger, Roberto Mangaabeira; Passion, AR Essay on personality. New York: Free Press 1984.

1.2. HISTORY OF LABOUR LAW IN NIGERIA

Labour law is generally that branch of law that regulates industrial relations, employer-employee relations and all such things that are connected to terms of employment and conditions of work[4]. Labour law is also referred to as employment law or industrial law. However, the law must regulate labour or employment and every matter connected or incidental thereto[5].

The history of industrial relations in Nigeria can be traced to the colonial era when the British established[6] formal and semi-formal employment relations. However, prior to the advent of the colonial masters to the region known as Nigeria today, there had been what looked like employment relationship and which Elias T.O described in his book as cooperative labour system whereby members of cooperative groups are paid in service rather than in monetary value[7].
The advent of industrial revolution of the 18th century and the coming of the Europeans into Nigeria introduced the wage-earning system into Nigeria, and thus, the employer-employee relationship was birthed[8].The British succeeded in conquering Lagos and made it a colony in 1862. Subsequently, the Royal Niger Company was established and headed by Thaubman George Goldie[9]

The British came to Nigeria with its modeled industrial practice and laws such as the common law of England, the doctrines of equity, and some of its legislations known as Statutes of general application (SOGA) It is without doubt that, the British administration introduced the formal labour relations and employment policies. However, the formal policy was not without its shortcomings as the Nigerian economic, social, political and traditional structures were maimed. The struggles between the Nigerian workers and the colonial masters led to the incarceration of Pa

[4]See Agomo C.K. Nigerian employment and Labour Relations Law and Practice (2011) Concepts Publications (Press Division) Lagos, chapter one. The Learned professor of law has submitted that labour law is one of the most dynamic and cross-cutting areas of law. As a distinct legal disciple, if has two comparative-industrial employment relations and collective labour relations. it straddles the frontier of human resource management, economics, sociology, psychology, medicine, and politics among others. See also Shadare Oluseyi and Kehinde Bamiwola. The Legal Environment of Industrial Relations in Nigeria (2015) published by the Faculty of Business Administration University of Lagos, at page 109, the Learned Authors submitted "employment law regulates the relationship between employer and employee(s) or body of employees.

[5]See Section 254C (1) of the Constitution of the Federal Republic of Nigeria, 1999 as altered. The constitution provides "relating to or connected with labour, employment, trade unions, industrial and matters arising from workplace, the conditions of service, including health, safety, welfare of labour, employee, worker and matters incidental thereto or connected therewith: See other sub-provisions under section 254C (1) (a) – (m).

[6]See Agomo C.K., ibid, chapter one; see chapter one of Oladosu Ogunniyi "Nigeria Labour and Employment in Perspective (2004) Folio Publishers Limited, Uvieghera E.O "Labour Law in Nigeria (Malthouse Press Ltd) chapter one.

[7]See Elias T.O. "Nature of African Customary Law (1956) M.U.P, PP 148-149; see also Roper J.I "Labour Problems in West Africa, (1958) penguin, London pg. 12.

[8]Date Otoba (1988) has described the labour policy introduced by the colonial matters as simple and straight forward. See Date Otobo, op.cit, "state and Industrial Relations in Nigeria. (Malthouse Press)

[9]A.I. Charles, Labour law I paper presentation, 2008, National Open University documents, page 3. See also M.A. Adebisi, history and development of Industrial relations in Nigeria vol. 4 No 14, 2013, MCSER Publishing Rome, Italy. Pg. 687.

Michael Imodu. Also noteworthy is the ugly event that happened in 1949 when a coal worker was shot dead at Iva Valley, Enugu just because of agitations for better terms and conditions of their services.

The British administration influenced labour law and movement in Nigeria via some reforms and innovations.[10]

According to Professor Agomo,[11] "Nigerian Labour Law is based on English Common Law. The common of law of England, principles of equity and statutes of general application that were in force in England on January, 1990 were made applicable to Nigeria as a colonial territory of England''[12]. It is without doubt that, the pre-Independence labour movement in Nigeria was influenced by the civil war that broke out in 1967; that provided a platform for the review of the fundamental common law principles of *laissez faire* doctrine of non-interference. Thus, a shift from the strict application of common law principles or rules to provisions of statutes is pertinent in order to meet the needs of the society.[13] The common law principles are still applicable where statutes are silent or inadequate. For instance, the principles of common law in negligence as established in *Donoghue v Stevenso*n[14] are still very useful in determining the level of duty of care that exists between a master and his/her servant.

1.3. SOURCES OF LABOUR LAW[15]

Labour law derives its principles from various sources and is usually built on the legal system of a particular country. Nigerian legal system has several sources outside the common law and legislation. The diversity in its ethnic groups also contributes to the multi-dimensional nature of the sources of employment and Industrial Relations. The applicable laws are functions of practices and proper perception of the legal system of a country.

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[10] For instance, the British administration created the first trade Union in Nigeria in 1912 and later made and ordinance for Trade Unionism in 1938.

[11] Agomo C.K 'Nigerian Employment and Labour Relations Law and Practice (2011) Concept Publications, Pg 50.

[12]See Agomo C.K. op.cit pg 50; the learned Professor and author has submitted that, there was a kind of labour system in Nigeria prior the advert of colonial masters; the system was based on barter system. The system revolved around family and subsistence labour. See Kehinde Bamiwola & others. The Historical Milestones of Labour Movements in England' LL.M seminar paper presented of the Faculty of Law, University of Lagos, 2015, where it was submitted that labour agitations and movements in the U.K greatly informed and influenced labour movements in Nigeria.

[13]See Agomo C.K op.cit pg 51. This paradigm shift from the strict application of common law principles to statutory provisions was made possible by the guided intervention of 1968.

[14] (1932) AC 562, HL

[15] The authors of this sub-head have granted permission; Dr. Seyi Shadare is a senior lecturer in the Department of Industrial Relations and Personnel Management, Faculty of Management Sciences, , University of Lagos. He is also a member of many professional bodies including, Nigeria Bar Association; and Kehinde Hassan Bamiwola Esq, was a former part-time lecturer in Research Methodology at Olabisi Onabanjo University of Consult Service, and was formerly a research Assistant to Prof. Chioma K. Agomo former dean of Law, Faculty of Law, University of Lagos. He holds a degree in Economics, Master of Laws from University of Lagos and at present teaches A' level Cambridge Law of the Loral University Foundation college; He is an Examiner of Labour Law to Professional bodies in Nigeria. He is a member of the Nigerian Bar association and a Practicing Legal Practitioner at **K.H. Bamiwola & Co.**

Sources of any law mean 'the fountain of laws defining or reflecting the general outlook of the legal system.'[16] Sources of Labour law relate to certain ultimate labour principles from which all other labour relations are derived.[17]
The sources of Nigerian Employment/Labour law can be classified as follows:

(a) Principles of common law and doctrines of equity
(b) Nigerian legislation
(c) Judicial precedents
(d) Collective agreements
(e) Rule of work
(f) International treaties
(g) Customary laws/practices
(h) Opinions of text writers.

(a) Principles of Common Law and Doctrines of Equity

Since the advent and departure of the colonial masters into the territory that is known today as Nigeria, English law has been part of the major sources of her laws. After Nigeria got her independence in 1960, it has become practically impossible for her to break the umbilical connection that she has with her colonial masters. Thus, English laws have influenced the entire legal system and its value system. The received English laws as pointed out by the Supreme Court of Nigeria in *Ibidapo v. Lufthansa Airlines*[18], include all the received English laws, multilateral and bilateral agreements concluded and extended to Nigeria, unless, expressly repealed or declared invalid by a court of law or tribunal established by law, remain in force subject to the provision of *section 315(1) of the 1999 constitution* which is in existing laws.[19]

The received English laws consist of common law and doctrine of Equity; common law is that part of the law of England that was formulated, developed or administered by the old common law courts[20]. Common law can be described as "formulation of the majesty" courts based on the prevailing customs and practices of the generality of the people and designed to meet the demand and challenges of changing situations[21].

[16]E.O. Akanki (2007) Commercial Law in Nigerian (University of Lagos Press)p.18 According to J.O. Asein (2005) Introduction to Nigerian legal System (Abba Press Ltd)p.1 "the Nigerian legal system, in this sense, consist of "the totality of the laws or legal rules and the legal rules and the legal machinery which obtain within Nigeria as a sovereign and independant African country", see also C.O. Okonwo ed. Introduction to Nigerian law (London, Sweet & Maxwell, 1980),p.40.
[17]K. Eso "Is there a Nigerian Grundnorm?" (Lecture delivered at the First Justice Idigbe Memorial Lecture, University of Benin, 31st January, 1985) p.5.
[18] [1997]4 NWLR 124
[19]J.O. Asein, op.cit. p.98
[20]The old common law courts comprise; the Court of Exchequer, the Court of Common Pleas and the Court of Kings (or Queen's) Bench.
[21]J.O. Asein op.cit. p.104

The common law employment relations derive its principles from the common law[22]. Thus, it has its operational basis on master and servant relationship[23] In *V.O.M. Ltd v. Duara Ltd*[24], the Court of Appeal held that the common law right of the master to dismiss the servant is a well-established principle that, ordinarily a master is entitled to terminate his servants' employment for good or bad reasons or for no reason at all[25]. However, this is no longer the position of the law, as it has been modified. The details of the modification shall be discussed in Chapter four.

It is a well-established principle that where legislation regulate relationships in industrial and labour relations, common law rules will not prevail. However, in the absence of legislative pronouncements, common law rules apply.

(B) Nigerian Legislation

The Nigerian constitution[26] empowers the National Assembly and State Assembly of each state of the Federation to make laws for the good governance of the state.[27] The National Assembly has passed a number of legislations. These include, the labour Act[28] Trade Dispute Act[29] National Industrial Court Act[30], Workman Compensation Act[31], now repealed by the Employee Compensation Act[32], Trade Union Act[33], and the Pension Reform Act.[34]

Hierarchically, the legislation supersedes all other laws apart from the constitution, which is the *grundnorm.* Thus, employment and industrial relations are mostly governed by some of the above-mentioned enactments.[35]

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[22]See Seyi Shadare and Kehinde Bamiwola; The Legal Environment of Industrial Relations; in Nigerian Journal of Management Studies, Published by the Faculty of Business Administration, University of Lagos, Vol. 13, NO. 1, 2015, Pages 107-118. "There is a distinction between common law employees and statutory employees. The common law employee may be fired for good cause or no cause…"

[23]Plethora of judicial decisions in Nigeria has followed the common law principles; the authorities include Isievwore v. NEPA [2002]13 NWLR (Pt 784)417; L.C.R.I. v. Mohammed [2005]11 NWLR (Pt 935) CA; Omojuyigbe v. NIPOST [2010]24 WRN, CA.

[24] (1996)8 NWLR (Pt.468) 601

[25] See Union Bank V Ogboh

[26]CFRN (as amended) in its section 4, provides for the legislative powers of both the National Assembly and State Assembly

[27]In AG ONDO v AG FED. (2002)6 SCNJ, it was held that, States have been interpreted to mean Federal, States and Local Governments. See Seyi Shadare ed. Op.cit

[28]LFN 1990

[29]LFN 1990

[30]LFN 2006

[31]LFN 1990

[32]ECA 2010

[33]LFN 1990

[34]Pension Reform Act 2004

[35]The following judicial authorities have established the importance of legislation as a source of Labour and Industrial Relations; Olaniyan, University of Lagos [1985'2 NWLR (A 9) 599, Essien v. University of Calabar [1990]3 NWLR (Pt 140) 605; NURTN v. Ogbodo [1998]2 NWLR (Pt 537) 189; Obeta v. Okpe [1996] NWLR (Pt 473) 490; Obanleye v. Afro. Cont Nig. Ltd [1996] 7 NWLR (Pt 458) 29; Akinsanya av. Longman p19976]3 NWLR (Pt 436) 306; Ebo v. NTA [1996]4 NWLR (Pt 442) 312; In Nwalhoba v. Dumez (Nig) Ltd [2004]3 NWLR (Pt 861 461, Section 7(1) Labour

Apart from major labour related legislation, other enactments such as Universities' Acts[36], The Evidence Act[37], and High Court Rules[38] etc.[39]are also part of the legislations that provide guiding principles to industrial and employment relations.

(C) Judicial Precedents

By virtue of section 6 of the 1999 Nigerian constitution[40] as amended, "The judicial powers of the federation shall be vested in the courts to which this section relates, being court established for the federation". Decisions reached by the established courts form precedents. Section 6(5) lists the courts that are considered as superior court of records.[41]

According to Umoh[42], precedent is 'an earlier happening decision, etc., taken as an example or rule for what comes later. Several decided cases of the Supreme Court and Court of Appeal have binding effects on lower courts, which have jurisdiction over labour matters[43].

The National Industrial Court of Nigeria (NICN) has also held that, it will be bound by its previous decision unless such adherence will lead to a miscarriage of justice[44] and that the decision of NICN is final, except, in questions of fundamental rights[45]. However, NICN may depart from its previous decision if a party shows different cause for such departure. The court will only depart from its previous decisions for germane and compelling reasons[46]

Act was considered as the approximate legislation. In Adetona v. Edet [2004] 16 NWLR (Pt 894)338, section 26 of the repealed Workman Compensation Act was considered

[36]University of Lagos Act, 1962; University of Agriculture Act 1992.

[37]Evidence Act, 2011

[38]In Nigeria Tobacco v. Ltd Agunnanna [1995] 4 NWLR (Pt 397 541, Supreme Court in determining the appeal, considered the provision of section 28, and 30 of the High Court Law, Cap 49, Laws of Northern Nigeria, 1963 and order 8, rule 2(6) of the Supreme Court Rules 1985.

[39]In UNTHMB V. Nnoli [1994]8 NWLR (Pt 363)376, section 9(1) of the University of Nigeria Teaching Hospital Management Board Decree No. 10 of 1985 was considered; In Odiase v. Auchi Polytechnic [1998]4 NWLR (Pt 546) 477, The Court of Appeal considered section 26(1) of the Auchi Polytechnic Law, Cap. 11, Laws of defunct Bendel State of Nigeria, applicable in Edo as the statute, which govern the master/servant relationship. In Olanlege's case (supra) section 132(1) of Evident Act was considered.

[40]CFN 1999 as amended

[41]National Industrial Court of Nigeria is now a superior court of record by virtue of the Constitution of the Federal Republic of Nigeria (Third Alteration) Act 2010.

[42]P.U. Umoh precedent in Nigerian Courts (Enugu, Fourth Dimension, 1984), p.5

[43]See Olaniyan's case (supra) Essien's case (supra), Federal Polytechnic Mubi v. Yusuf (1991) 1 NWLR (Pt 165) 81; Shitta-Bey v. Federal Service Commission [1981]1 SC 40; Nitel v. Jattau [1996]1 NWLR (Pt 545)392 CA; SPDCN Ltd v. Nwakwa [2003]6 NWLR (pt 815) 1874; Olatunbosun v. Niser Council [1916]3 NWLR (Pt 29) 435.

[44]In Joy Maskew & Ors v. Tidex Nig. Ltd, unreported Suit No. NIC/IM/98, delivered on June 8, 2009, it has been held that by virtue of section 9(2) of NIC Act 2006, an appeal from NIC shall lie only as of right to the Court of Appeal and only on question of fundamental rights as contained in chapter IV of the Constitution of the Federal Republic of Nigeria 1999; In Association of Senior Civil Servant of Nigeria v. National Orientation Agency& Fed. Ministry of Information [2005]3 NWLR (Pt 7) NIC, it has been held inter-alia that the National Industrial Court is bound by its previous rulings or decision especially when the facts are same.

[45]See Joy Maskew & Ord v. Tidex (supra)

[46]See Association of Senior Civil Servants of Nigeria v. National Orientation Agency & Fed. Min. of Information (supra)

Thus, judicial precedents have for a long time, formed a source of Nigerian labour law. However, distinction must be made between a decision reached in another foreign jurisdiction and one reached under the Nigerian legal system. The former will only have persuasive effect while the latter will have binding effect on lower courts. It is the *ratio decidendi*[47]that is the core factor of judicial precedents.

(D) Collective Agreements

In *Union Bank of Nigeria v. Edet*[48]*and ACB v. Nsibike*[49], it was held that- "collective agreements made between one or more trade unions on the side and one or more employers' association on the other side are not generally intended to create legal relation except in the case of certain public boards or corporation, they are at least, a gentleman's agreement, an extra-legal document totally devoid of sanction. They are products of trade unionists' pressure.

Notwithstanding this judicial pronouncement, it has been observed that collective agreements also regulate industrial and labour relations. A plethora of judicial authorities attest to this principle of collective bargaining.[50]

In *Afribank (Nig) Plc v. Kunle Osisanya*[51] it was held that collective agreements will be enforceable where they have been adopted as forming part of the terms of employment. Furthermore, from all indications, collective agreements appear to be a vital source of Nigerian Industrial and Labour Relations.

(E) Rules of Work/Service Rules

Rules of work contains terms and conditions of employment. In some jurisdictions, the terms are contained in the employee handbooks. Certain relationships are regulated by this rule. For instance, under the Factories Act[52], both the employer, who provides the work-safety oriented environment and the safety apparatus, and the employee, who is duty-bound to adhere to the safety rules and make use of the safety gadgets provided, must comply with the rules of safety.

Rules of work may be contained in several documents. In *Ondo State University v. Folahan*[53], the Supreme Court examined the contract of employment and conditions of service, which are

[47]Legal precedents are built on ration decidendi which literally means reason for the decision; where there is a dissenting judgment, it is the majority and not the dissenting judgment that must be considered as the biding decision or ratio decidendi.

[48][1993]4 NWLR 288

[49][1995]8 NWLR (Pt 416) 725

[50]See the following cases; ACB v Nsibikee (supra) Cooperative & Commercial Bank (Nig) Ltd & Anor v. Kaneth C. Okonkwo [2005]3 NWLR (Pt 7)109 [2001]15 NWLR (Pt 735)114. In Daodu v. UBA [2004] 29 WRN 53, it was held that, if a collective agreement is incorporation, they would be bound by it. See also Abalogu v. Shell PDC [1999]8 NWLR (Pt 613)12 on bindingness of collective agreement.

[51][2000]1 NWLR (Pt 642)598

[52]LFN 1990

[53][1994]7 NWLR (Pt354)1

contained in several documents. In *Iderima v. River State Civil Service Commission*[54], Rule 04107 of Rivers State Civil Service Commission was considered for the dismissal of a civil servant.

Rules of work have been an important source of Labour and Industrial Law[55]. In *Amaonwu v. Ahaofu*[56], it was held that service rules are rules governing the contract of service between the parties thereto (i.e., a particular civil servant and his employer).

(F) International Treaties and Conventions

Nigeria is a signatory to many international treaties and conventions on Labour law and industrial relations[57]. No nation is an island. Thus, labour practices in Nigeria are mostly influenced by international best practices. The above-mentioned conventions/treaties are regarded as laws under international laws[58].

The constitution of the Federal Republic of Nigeria (as amended)[59] has conferred on the National Industrial Court, the power and jurisdictional competence to apply international best labour practices and laws in Nigeria, without necessarily following the argument of ratification and domestication as provided for under Section 12 of the same Constitution[60]. The International Law positivists believe that international law should be based on the concept of *pacta sunt servanda.*[61]

It is noteworthy that the question as to whether international laws supersede domestic laws cannot be answered in a unidirectional reasoning. According to Prof. Akin Oyebode[62], "whenever, International law is invoked before a domestic court, its applicability to the matter in dispute would

[54][2002]1 NWLR (Pt 749) 715

[55]In Udegbunam v. F.C.D.A [2003]1 NWLR (Pt 829), Rule 04202, Federal Civil Service Rules was considered in determining the effect of absent from duty without leave. See also AG Kwara State v. Ojulari [2007]1 NWLR (Pt 1016)551 CA.

[56][1998]9 NWLR (Pt 566) 454

[57]Universal Declaration of Human Rights, 10 December 1948; International Convention on Elimination of all forms of Discrimination against women, 2 Dec. 1965, UN Treaty Series Vol. 660; International Labour Organization (ILO) core convention 1951, 1958, 1964, 1973, 1988, 1997, Termination of employment convention C 158, 1982; Note on convention no. 158 and recommendation no. 166 concerning termination of employment, International Convention on Economic, Social and Cultural Rights (ICESCR) and many other treaties that address labour and Industrial Relations.

[58]Akin Oyebode [2003] International Law and Politics (Bombay Publications, Lagos, Nigeria pp.45-47.

[59]See Third Alternation Act 2010.

[60]See section 254 (C) 2 of the Third Alternation Act 2010, which amends the section 254 of the 1999 constitution. It provides that "Notwithstanding anything to the contrary in this constitution, the NIC shall have the jurisdiction and power to deal with any matter connected with or pertaining to the application of any international convention, treaty or protocol of which Nigeria has ratified relating to labour, employment, workplace, industrial relations or mattes connected therewith", see also Agomo C.K. "An overview of the powers of National Industrial Court as a superior court of record" a paper presented at the One-Day Public Enlightening Symposium on the Status, Power and Jurisdiction conferred on the NIC by the Constitution of Federal Republic of Nigeria (Third Alteration Act) 2010

[61]See Akin Oyebode, 'Treaty Making and Treaty Implementation in Nigeria: An Appraisal. Ph.D. dissertation submitted to the Faculty of Graduate Studies, Osgoode Hall Law School, Toronto, Ontario, Canada, January 1988. Kehinde Bamiwola (2011) Employment Discrimination: A Critical Analysis – a research project submitted to Faculty of Law, University of Lagos, for the Award of the Degree of L.L.B. (Hons). Pg.23.

[62]Ibid

very often depend on the position of international law within the hierarchy of the sources of the state's system". The Supreme Court decision in *Sanni Abacha v. Gani Fawehinmi*[63] appears to be the law on the status of international conventions and treaties in Nigeria. National enactments appear to be superior to international agreements[64]. The position in *Sanni Abacha v Fawehinmi* (supra) is no longer the true position of the law as far as labour matters are concerned.[65]

(G) Customary Laws and Practices

It is doubtful whether one can examine the sources of labour law and industrial relations in Nigeria, without mentioning the influence of customs and practices. Apprenticeship as an aspect of labour relations is governed mostly by customs indigenous to the people of Nigeria. The servant serves the master for an agreed number of years and thereafter, he/she is given freedom to practice the trade or profession in which he/she has been trained[66]. Many artisans which include motor vehicle repairers, popularly known as 'mechanics', tailors, 'hair dressers' and many others, are trained through apprenticeship.

In the eastern part of Nigeria, trades are learnt through a different form of apprenticeship; servants serve masters for a longer period, learning the trade. The master then settles the servant by opening a shop for him/her or providing the servant with initial capital needed for the establishment of his/her trade. This practice is of course, regulated by custom and has been judicially noticed in Nigeria and some parts of Africa.

According to Prof. Adeogun[67], "apprenticeship contracts do not, at common law, constitute contracts of service, and consequently they do not create an employer-employee relationship between the apprentice and the master'. But it is true to say that they partake in some of the incidents of the relationship such as vicarious liability". Prof. Ige Bolodeoku[68] has submitted that- 'a custom is a particular way of behaviour which, because, it has been established or in long usage among members of a social group or tribe, has developed and acquired the force of law'. The social group of people it intends to regulate its conduct must have approved such custom, before it can be said to possess the force of law.[69]

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[63][2001]51 WRN; It appears that international instruments must have been ratified and domesticated as provided for under section 12 of the Nigerian Constitution before such will have a legal effect under our legal system.

[64]International law experts have always been arguing that international agreements should have superior effect over domestic laws. This is anchored on the popular legal practitioner of pacta sunt servanda.

[65] See section 254C (2) of the Third Alteration Act 2010. .

[66] This is common among the Igbo traders of the East part of Nigeria. It looks like contract of apprenticeship, however, if is usually informal and mostly done under family arrangements.

[67]A.A. Adeogun: "Employment Law" in commercial law in Nigeria edited by E.O. Akanki; op.cit p.704; see also Horn v. Hayhoe [1904]1 KB 288 at p.291 per Kennedy J; R. v. Smith [1837]173 ER 4381 R.V. Inhab of Rainham [1801]1 East 531; 102 ER. 205.

[68]I.O. Bolodeoku, the General principles of law-in Commercial Law in Nigeria-edited by E.O. Akanki, op.cit.

[69]Zaidan v. Mahosen [1937]11 F.Sl, Adah [1995]6 NWLR (Pt 552)97; Oyewunmi v. Ogunseun [1990]3 NWLR (132); Oyebisi v. Governor of Oyo State [1998} 4 NWLR (Pt 571) 441.

The Evidence Act[70], by virtue of *section 16*, sees a custom as a matter of evidence and a question of fact, which must be proved or shown to have been judicially noticed.
The Act provides for two major ways by which customary law is proved:

(a) When evidence is real as to its existence before a court of law[71].
(b) When it is shown to have been judicially noticed.

A customary law or practice that has been judicially noticed need not be proved again, as it already has the force of law[72]. The court will frown at any labour or industrial practice that encourages slavery whether or not such practice has customary acceptance[73].

The application of Customary law is subject to tests. These tests are further qualifications for the application of native law and custom. Customs and native laws that are found to be repugnant to natural justice, equity, and good conscience, or incompatible either directly or by its implication with any law for the time being in force,[74] will not be applied by Courts. Public policy is another factor that is considered for the applicability of customary law.[75]

1.4. THE RECEIVED ENGLISH LAWS

It has been stated earlier that, the Nigerian labour law is based on the English common law,[76] which is the common law of England, the principles of Equity[77] and Statutes of general application that were in force in England in January 1, 1900. These statutes were made applicable to Nigeria as a colony[78] or colonial administration of England.[79] The history of labour agitation may not be complete without reference to the feudal system or structure that existed between the masters and

[70]LFN 1990
[71]The Evident Act (EA) 2011
[72]Oba Lipede v. Sonekan [1995]1 NWLR 668' Ekpenga v. Ozogula II [1962]1 SC NLR 423; Mojekwu v. Ejikeme [2005]5 NWLR (Pt 657)402
[73]In RE Effiffong Okon Ata [1930]10 NLR 65, the court displayed its resentment for the prevailing practice of slavery, see also Kodieth v. Affram [1990]1 W.A. C.A 12.
[74]See section 20(1) of the Cross-River State High Court Law; Edet v. Essien [1982]11 NLR 37, Re-Effiong Ata (supra), Adebusokan v. Yunusa [1971] N.N.L.R 77.
[75]See Enderby Town Football Club v. Football Association Ltd [1971]1 Ch. 591 at 606. According to Denning M.R. said "I know that over 300 years age, Hobart, C.J. said that "Public policy is an unruly horse". It has often been repeated since. So unruly is the horse, it is said…" that no judge should ever try to mount on it, less it runs away with him" I agree. With a good man in the saddle, the unruly horse can be kept in control. It can leap fences put up by fiction and come down on the side of justice.
[76] Most common law principles have been modified by statutes, the constitution of Nations, international treaties and conventions and latest judicial pronouncements for instance, the principle that he who hires can fire with or without adducing any reason has been modified by Article 4 of the International Labour Organization Convention (ILO) on termination of Employment, 1958, see also Kehinde H. Bamiwola, 'Human Rights and Employment Discrimination; A Comparative Examination of Equal job opportunities; P(2010) published by the ILO – www.ILO.org.
[77]See section 15 of the National Industrial Court of Nigeria Act, 2006 on the principles of equity
[78]In 1906, the Northern Protectorate the southern Protectorate and Lagos colony were all merged together to became a single unit which was later amalgamated to be known as Nigeria in 1914.
[79]The Berlin Conference of 1884-1885 gave Nigeria, Ghana, Gambia and Sierra-Leone to England for colonialization. Frances, Portugal, Germany and Spain took their colonial territories also

serfs in a typical agrarian economy when farming was the common form of paid employment, in the United Kingdom. Thus, the colonial ties between Nigeria and England helped in developing the Nigerian labour law through most of the received English laws.

John Asein has submitted that Nigeria has a body of English laws imposed on it by its erstwhile colonial masters, which are usually referred to as Received English Law, since it is not all English laws that are necessarily applicable in Nigeria. The first reception clause was contained in Ordinance No.3 of 1863, which enacted that:

> *"All laws and statutes which were enforced within the realm of England on the first day of January, 1900, not being inconsistent with any ordinance in force in the colony, or with any rule made in pursuance of any such ordinance, should be deemed and taken to be in force in the colony and should be applied in the administration of justice, so far as local circumstances would permit.*[80]

The Supreme Court Ordinance of 1876 set a reference date of July 24, 1874. The Protectorate of Northern Nigeria established its reference date in 1900. Additionally, for the colony and Protectorate of Southern Nigeria, English law including the Common Law, Doctrines of Equity, and Statutes in effect on January 1, 1900, were extended to Nigeria as a colonial territory under English rule. The courts were empowered to administer, ascertain and apply those statutes that meet the laid down criteria for application under the general provision.[81]

This group of received English law i.e., Statutes of General Application (herein referred to as SOGA) does not apply in states of old Western region by virtue of the law of England (application) Law of 1959.[82]

According to Professor Akintunde Emiola,[83] "until quite recently, legislation such as Fatal Accident Act 1846-64, the Factory and Workshop Act 1891-95, the Friendly Societies Act 1896, and the Conciliation Act 1895, which shaped the present course of industrial activities in England – were presumed to apply in Nigeria. The basis for this assertion was laid down in the following cases- *Lawal & Ors v. Younan & Ors,*[84] *KONEY V. Union Trading Co.*[85], and *Green v. Owo*[86]

[80]See Asein J.O. "Introduction to Nigerian Legal System (2005) 2nd edition, Ababa Press Ltd; Adeogun A.A. "The Legal framework of Industrial Relation in Nigeria, Nigerian Law Journal (vol.3, 1999 of pg 13.
[81]Asein J.O. op cit
[82]Asein J.O Ibid. See also Commercial Law in Nigeria, Faculty of Law, University of Lagos publication, edited by E.O. Akanki
[83] Akintunde Emiola 'Nigeria Labour Law, (2008) (Emiola Publishers Ltd, Ogbomoso, Nigeria
[84](1961) 1 All N.L.R 245
[85](1957)2 FSC 74
[86] (1997) 4 NWLR 124

It is submitted that the fact cannot be denied that majority of Nigerian legislation have their sources in most English legislation. The case of *Ibidapo v. Lufthansa Airlines*[87] highlighted the importance of received English laws, which encompass both multilateral and bilateral agreements extended to Nigeria. These laws continue to hold sway unless specifically revoked or invalidated by a court or tribunal established by law. This retention of received English law is subject to the guidelines in *section 315(1) of the 1999 Constitution of Nigeria* as amended. This provision recognizes all existing laws prior to the promulgation of the constitution, which is the *grundnorm* of all laws.

It is trite that where there is conflict between the received English laws and local labour legislation, local labour legislation will prevail over received English laws. However, with the new amendment to the 1999 Constitution by the Third Alteration Act 2010, it is doubtful whether International Labour Conventions such as International Labour Organization (ILO) Conventions will not have priority over local legislation[88].

1.5. CONTRACT OF EMPLOYMENT AND FREEDOM OF CONTRACT.

A contract of employment is an agreement, whether oral or written, express or implied whereby one person, usually called the employee, agrees to serve another, called the employer.[89] This definition applies to workers strictly to the exclusion of the management staff.[90]

It is therefore right to state that a contract of employment is just like every other contract that has some vital elements to make it valid: upon being entered into, it binds two or more parties creating obligations (contractual) that are enforceable in law.[91]
The normal test for determining whether the parties have reached an agreement is to ask whether an offer has been made by one party and accepted by the other.[92]

Therefore, a contract of employment is firstly a contract where an offer of employment is given by the employer and subsequently accepted by the employee. The guiding principle when it comes to contracts is the principle of "freedom"; freedom to contract or freedom to enter into a binding contract, free from coercion, duress or undue influence.

It is pertinent to note that the freedom, or succinctly put, the right which an individual exercise when it comes to entering into a contract (in the instant case a contract of employment) is clearly provided for and guaranteed under the Constitution of the Federal Republic of Nigeria 1999 (as amended),[93] where it states that-

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[87]supra
[88]See section 254C (2) of the Constitution of the Federal Republic of Nigeria, 1999 as altered.
[89]Shena Security Co Ltd v. Afropak (Nig) Ltd and 2 Ors (2008) 34 (Pt 2) NSCQR 1287 at 1299, ratio 1, Per I.T. Muhammed JSC
[90]Labour Act (cap. 198) LFN 1990 S. 19 thereof.
[91]Court –room Rapid Reference Handbook vol. 1, 2014 Evergreen Publishers. Mommolu B. at Pg. 250.
[92]Akinyemi v Odu'a Investment Co. Ltd (2007)17 NWLR P.209
[93]S. 34(b)(c) CFRN 1999 (as amended)

No Nigerian citizen shall be held in slavery or servitude or perform forced or compulsory labour.

In essence, nobody should be forced into a contract of service. Therefore, the freedom to contract and freedom to enter into a contract of service/employment is sacrosanct and cannot be violated.

In exercising that freedom of contract, and entering into a contract of service, parties are free to enter into a memorandum of understanding which they wish to guide them subsequently before entering into a binding contract.[94]

In furtherance of such freedom to contract, parties are free to set out their respective terms and conditions in the contract. In a typical contract of employment, such terms are referred to as terms of contract or terms of employment, or conditions of work.

Parties to a contract of employment are free to set out the duration of notice to terminate such employment, duration of leave and leave bonuses, working hours, salary scheme, allowances, etc. Parties are therefore free to enter into a contract of employment on any terms they choose, since parties are the best judges of their own interests, on the assumption that nobody will choose unfavourable terms.[95] Once parties make their decisions regarding the contract, the courts can simply act as umpires byholding parties to their promises. Thus, it is not the role of the courts to ask whether the bargain was fair or not.

However, the courts have moved away from such reluctance, and are now more inclined to intervene in cases where the terms of employment and conditions of work of a contract of service/employment are harsh or unfavourable.[96]

A term of employment or condition of work in a contract of employment which an employee or employer did not freely enter into will not be binding on any party thereto. This is evident in the fact that a collective agreement, standing alone, is not binding on an individual employee or employer unless such a collective agreement is incorporated into the contract of service or adopted as part of the contract or condition of service.[97]

1.6. GUIDED INTERVENTION OF 1968

Prior to the guided intervention of 1968, the doctrine of laissez faire[98]had no place in Nigeria. It was a clear case of strict application of the principles of common law. The labour situations during

[94]S.F & P Ltd v NDIC (2012) 10 NWLR P.522
[95]Cathenne Elliott & Frances Quinn (Contract Law) 9th ed. 20113
[96]Parliament have come up with certain Acts that regulate contracts of employment such of the Labour Act, Factories Act. Workmen Compensation Act, LFN 2004. The UK Unfair Contract Terms Act 1977.
[97]UBN PLC v sources (2012) 11 NWLR p.550, also ACB Nig. Ltd v Nwodika (1996) 4 NWLR (Pt 443)470.
[98]This is also known as freedom of contract or the doctrine of non-interference

the initial stage of the Nigerian Civil War provided a platform for a review of the fundamental common law principles (i.e., the doctrine of laissez faire), through government intervention. There is philosophical basis for government intervention in form of regularly roles through a shift from common law rules in order to meet the needs of the society. This guided intervention brought democratic governance to the work place.[99]

Prior to the 1968 intervention, Trade Dispute (Arbitration and Inquiry) ordinance of 1941 made provision for conciliation, arbitration and inquiry; parties to a dispute were nevertheless bound to adopt any of the means to settle disputes. Awards emanating from those processes were not binding on the parties. The minister charged with the responsibility for labour could only intervene in disputes with the consent of the parties to the disputes.[100]

Government's intervention in 1968 revolutionized Trade Dispute settlement system when it passed the Trade Dispute (Emergency provisions) Decree No. 21 of 1968. The passage of this statute had economic connotations as it was aimed at preventing unnecessary work stoppages and the attendant adverse economic effects when the country was undergoing her civil experience.[101] Thus, it provided for compulsory settlement of trade disputes. Unlike the 1941 provision where a Minister's intervention would be at the instance of the parties giving their consent, the 1968 Decree gave extensive power and responsibilities to the Minister of labour in dispute resolution.

The 1976 Trade Dispute Act later repealed the 1968 Decree. However, the 1976 Act retained the basic features of the 1968 Decree. The 1976 Act was amended in 1992 by the Trade Dispute (Amended) Decree No. 47 to divest the regular courts of jurisdiction to entertain cases on trade disputes. Thus, the National Industrial Court (NIC) was given exclusive jurisdiction and the Court of Appeal, only on the grounds of fundamental rights, will hear appeals. Details on the NIC shall be discussed in Chapter thirteen.

[99]See Agomo C.K. Corporate Governance and International labour standards in Rocheba's Labour Law Manual, (2007) Edited by Enobong Etteh, vol. 1, pg 17 see the 3ed ILO Declaration on Fundamental Principles and right of Work.
[100]See Bamidele Aturu 'A Handbook on Nigerian Labour Laws (2001) Friedrich Ebert Stiftung
[101]See trade Dispute (Emergency Provisions) Decree No. 21 of 1968 which repealed the Trade Dispute (Arbitration and Inquiry) ordinance of 1941

PRACTICE QUESTIONS

(i) Discuss the historical development of labour law in Nigeria.

(ii) Outline and discuss the impact of the Received English Law clauses on the Nigerian Labour law jurisprudence.

(iii) The *locus classicus* case that changed labour law jurisprudence in Nigeria is ……

(a) UNTHMB v. Nnoli
(b) Shitta Bey v. FCSC
(c) Okhomina v. PHMB
(d) Longe v. First Bank

(iv) He who hires can fire with or without reason is a principle of labour law under …….

(a) Equity
(b) Common law
(c) Labour Act
(d) ILO Convention

(v) He who hires can fire with or without reason is no longer the law

(a) Yes
(b) No
(c) Not Sure
(d) I do not know

CHAPTER TWO
INDIVIDUAL CONTRACT OF EMPLOYMENT

2.0. Learning Objectives

At the end of this Chapter, readers/candidates should be able to appreciate and explain the under-listed concepts and apply them to industrial relations generally.

i. Definition and Nature of Contract of Employment
ii. Types of Contracts of Employment
iii. Essential Elements of a Contract of Employment
iv. The Differences between Contract of Service and Contract for Service
v. Test for determining the Existence of Master-Servant Relationship
vi. Rights and obligations of Employers and Employees
vii. The Labour Act and the Regulated Contract of Employment

2.1. Introduction

Wedderburn has submitted that- "The English lawyer does not look first, at the relationship between worker and their employers[102]. His primary concern is the individual contract between the employer and the employee.'' It is vital to point out that individual contract of employment prevails over other agreements including collective agreements or trade union negotiations and compromises[103]. The general law of contract governs a contract of employment. Thus, the existence of offer, acceptance, consideration, capacity to contract, intentions to create legal relations are vital. Prof. Oyewumi[104] has promptly described employer/employee thus, "employer/employee relationship arises from a contractual undertaking between two parties to exchange of wages for services[105].

[102] See Bill Wedderburn, Baron Wedderburn of Charton. He worked at the University of Cambridge and the London School of Economics where he was the Cassel Professor of Commercial law from 1964 until his retirement in 1992. See his book, The worker and the law, (1986) Pengun books Ltd" 3rd Revised edition.

[103]See Agomo C.K. Nigerian Employment and Labour Relations Law and Practice (2011) concept publications Ltd. See pg 58, where the learned Professor submitted "The employment relationship between an employer and an employee is based on contract. There is no common interest as far as individual contract of employment is concerned; see Cooperative & Commerce bank (Nig) Plc V Rose (1998) 4 NWLR (pt 544) 3.7 CA where the Court of Appeal held that, all the affected defendants did not have a common interest. The interest of each was tied to his or her contract of employment with the appellant.

[104]Adejoke O. Oyewumi- Job Security and Nigerian Labour Law: Imperatives for Law Reform in Rocheba'sLabour Law Manual Edited by EnobongEtteh (2007) vol.1 at pg 39

[105]Adejoke O. Oyewumiop.cit, The Learned Prof submitted "this undertaking or agreement, as in the general law of contract, requires a definite offer and an unconditional acceptance where an agreement has been made, it becomes binding and enforceable unless it is vitiated by illegality, mistake, fraud, misrepresentation, incapacity, duress or undue influence

2.1.1. Definition of Contract of Employment

A Contract is an agreement between two parties that is enforceable at law[106]. Enforceability implies that such contract must not be illegal, ambiguous, contrary to public policy and it must have other elements such as certainty of terms and clear intention of contract or intention to create legal relations[107].

According to Bamiwola[108], a contract of employment can simply be defined as agreement between a person known as employer and another person, known as employee, for employment or labour purposes in which a master and servant relationship exists within the boundaries of the terms set out and within applicable laws which govern the relationship.

It is quite appreciable that there can never be one universally accepted definition of a contract of employment. Thus, several writers have defined the phrase "contract of employment" in different ways. However, some tests have been developed to determine whether a relationship of master and servant exists between the parties.

Thus, in *Smith v. General Motor CAB Co*[109], the court held that there was no relationship of master and servant but that of bailor and bailee. The ratio for this decision was that labour law considers master and servant relationship only.

2.2. TYPES OF CONTRACTS OF EMPLOYMENT[110]

According to Roger E. Meiners,[111] employment contracts "exists when a worker (employee) is paid for work by an employer". This contract of employment can be classified into express contract, implied contract and contracts which contain an implied covenant of good faith and fair dealing.

(a) **Express contract:** This exists when both parties (employer and employee agree in employment terms for a certain time. The terms of the employment are what regulate the

[106]See P. Ramanatha Aiya 'The Major Law Lexicon' The Encyclopaedic law dictionary with legal Maxims, Latin Terms and words phrases' 4th Edition 2010. Extensionally Revised and enlarged, pg 1476'. Agreement enforceable by law is contract see also Indian contract Act (9 of 1872) 3.2ch); Contract shall include sub-contract. The same law lexicon, defines contract of employment as "legally binding document that defines the terms and conditions of somebody's job

[107]See Adejoke O.Oyewumi job security and Nigerian labour law op.cit; pg 39

[108]See Kehinde Bamiwola 'Human Rights and Employment Discrimination; A Comparative Examination of Equal job opportunities; (2011) Published by the International Labour Organization (ILO); see also, Seyi Shadare and Kehinde Bamiwola "The Legal Environment of Industrial Relations in Nigeria (2015) published by the Faculty of Business Administration, Nigerian Journal of Management Studies, University of Lagos, at pg 107 particularly of pg 109 where the authors described employment law as " the law that regulates the relationship between employer and employee(s) or body of employees.

[109](1911) A.C. 188

[110]The analysis of types of contract of employment, who is an employee, etc are taken from the work of the author of this book i.e. Kehinde Bamiwola Esq, and the joint author Dr. Seyi Shadare "The Legal environment of Industrial Relations, (2015) published by Nigerian Journal of Management, University of Lagos, pp 111-113

[111](2006) The Legal environment of Business, Ninth Edition, Thomson West p.405

relationship of the parties. Any other dealings by either of the parties outside the contractual terms will be *ultra vires.*

(b) **Implied contract:** In most cases, implied contracts are inferred from relationship between the parties. The inferences are usually drawn by courts whenever disputes arise out of the relationship. For example, the Supreme Court of Connecticut found that an implied contract was breached in *COECHO v. Posiseak International*[112] when an employee was fired without good cause, despite statements by the company president that the plaintiff had job security. The court stated that there was sufficient evidence to permit the jury to find that the parties had an implied agreement that, so long as he (plaintiff) performed his job properly, the plaintiff's employment would not be terminated. For emphasis, implied contracts are mostly inferred by courts out of the relationship and conducts of parties.

(c) **Contracts that contain an implied covenant of good faith and fair dealing.**
This type of contract can also be extended to employment contracts. In *Flanigan v. Prudential Federal Savings & Loan*[113], the Montana Supreme Court took that position when it upheld a jury verdict of $1.5million for a bank employee dismissed after twenty-eight years of service. No good cause for the discharge was provided; it was found to be a breach of the implied covenant of good faith in employment dealings.

2.3. ESSENTIAL ELEMENTS OF A VALID CONTRACT OF EMPLOYMENT

According to Chitty[114], the decided cases merely indicate a number of factors which are relevant to a finding that a particular contract is one of employment or a contract service. The dichotomy between the two is that for contract of employment, emphasis is placed on the power of the employer to control the work of the employee and for contract of service which has the involvement of independent contractor; the principal (employer) can merely direct what work is to be done by his agent. Sometimes, he may direct how the work is to be done. Thus, forced labour will not fit into contract of employment that is governed by freedom of contract.

Traditionally, the components of any contract must include offer and acceptance, consideration; agreement based on consensus ad idem, capacity, and intention to create legal relations.

2.3.1. Offer and Acceptance

An offer is a promise given by the promisor that upon the acceptance of that promise by the promisee, the promisor would be bound by the terms of the promise. In *Paul Wenegeieme v. Roofco*[115] *(Nig) Ltd,* the court held that an offer must be communicated before it can be accepted.

[112]544 A.2d 170 see Rogers e. Meiners et al p.406
[113]720 P.2d 257
[114]Chitty on Contracts: 32nd Edition, Vol 1 & 2 Carswell
[115](1986)2 FNR 244

According to Agomo[116], acceptance is the 'mirror image' of offer. It must be straightforward, unqualified, firm, definite and unequivocal. Thus, the same principles that govern offer must govern acceptance. So, when it is not direct like offer, it will not be considered as acceptance.

It is the law that, counter-offer is a new offer; this is the principle of law established in *Hyde v Wrench*[117]. In *Ajayi Obe v. Secretary*, Family Planning of Nigeria[118], the Supreme Court, per Elias CJN, said, "One of the most elementary rules of the law of contract is that there must be a definite offer by the offeror and a definite acceptance by the offeree.'' See the following cases- *Afolabi v. Polymera Industries Ltd*[119]; *Federal Government of Nigeria &Ors v. Zebra Energy Ltd*[120].

The processes leading up to the offer of a binding contract of employment may include written tests, personal and/or telephone interviews, and medical examinations. These may be followed by request for and provision of references, and in some cases, letters of indemnity or guarantee. A purported acceptance of an offer of employment will not bind the employer unless and until all the stipulated conditions are fulfilled.

2.3.2. Consideration

Consideration is the exchange of promise(s) for performance. The employer undertakes to pay wages for service rendered. The justification for the wages is the service rendered or else consideration will not be furnished. Consideration may be executed or executor *Curie v. Misa*[121]; *Ajayi v. R.T. Buscoe (Nig) Ltd*[122]. *In Jimoh Ogun v. Owolabi*[123], the Court of Appeal stated that consideration is of essence in any contract.

It is the law that consideration must not be past, as laid down in *AG of Bendel State v. Okwumabua*[124]. In this case, the court held that a promise made subsequent to the acceptance of employment and assumption of duty cannot create an enforceable and binding legal obligation without fresh consideration. Consideration must be at the point or during the course of negotiation. Thus, job interviewers will always ask the interviewees- 'what do you think that we should pay you?' Although some interviewees see this question as a technical one or a question in negotiating the consideration of the contract of employment peradventure the applicant is selected[125].

2.3.3. Capacity[126]

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[116]Law of Contract class, Faculty of Law University of Lagos 2006; See Agomo C.K., Nigeria Employment and Labour Relations Law and Practice op.cit at pg 69, the Learned author wrote "a purported acceptance of an offer of employment will not bind the employer unless and until all the stipulated conditions are fulfilled.
[117]49 ER. 132. (1840) 3 Beav. 334.
[118](1975)1 All NLR 90
[119](1967) 1 All NLR 144 at 147
[120](2002) 18 NWLR (Pt 798) 162, 211
[121](1871) 1 A.C 554
[122](1962) 1 All NLR 673
[123](1988) 1 NWLR (Pt 68) 128
[124](1980) FNR 435
[125]Nig. National Supply Col Ltd v Agricor Inc. of U.S.A. (1994) 3 NWLR (Pt 332) 329 CA
[126]See section 91 of the Labour Act which defines young person to mean 'a person under the age of eighteen years

It is a trite common law principle that an infant cannot enter into an enforceable contract. Such an infant can avoid the contract if there be any such. However, even at common law, there are exceptions to this. Some of these exceptions include the fact that the infant may avoid the contract upon attaining the age of majority. In *Labinjoh v. Abake*[127], age of majority was considered to be 21. The court will also enforce a contract if it is for the infant's benefit, as laid down in *Doyle v. White City Stadium Ltd*[128]. In *Olsen v. Corry* and *Cravesend Aviation Ltd*[129], the court considered as void, a contract of apprenticeship involving a boy of seventeen years because the contract contained a term exempting the master from all liabilities for injuries no matter how they were sustained.

The contractual age under common law is twenty-one (21) years[130], while under the customary law, it is puberty. However, the Labour Act has modified the common law principle as regards the capacity of an infant. Thus, Section 59(1) (a) provides for the employment of an infant of twelve years[131], but such infant must not be employed in underground work or on a machine if he is less than sixteen years of age. Majority age in Nigeria appears to be eighteen (18) years[132] notwithstanding the decision in Labinjoh's case. Section 59(2) prohibits an infant under the age of fifteen years from being employed or allowed to work in an industrial undertaking[133]. The principles are contained in section 59-61 of The Labour Act[134].

2.4. The Contract of Employment and "Decent Work".

According to Professor Agomo,[135] in drafting employment contracts, it is now important to reflect on the ILO's concept of 'decent work.' The concept advocates the provision of equal opportunity for access to work for all persons, under terms and conditions that promote freedom of association, equity and equality of treatment at work, security, and human dignity. Consequently, every contract of employment should reflect the concept of decent work. Some of these conditions will include respect for individual peculiarities, collaboration, flexibility, equality, non-discrimination, opportunity for growth, fair and transparent methods for determining promotion and career advancement, respect for freedom of association and collective bargaining, provision of fair and timely opportunity for resolving disputes, and respect for institutional processes, including those institutions for the resolution of industrial disputes[136].

2.5. The Form of a Contract of Employment

[127](1924) 5 NLR 79
[128](1934) 4 All ER Rep 259
[129](1936) 3 All ER 241
[130]See Labinjoh v Abake (supra)
[131]See section 59 of the Labour Act, LFN, 2004
[132]See section 91 of the Labour Act, LFN, 2004
[133] See sections 59-61 of the Labour Act
[134]CFN, 2004
[135]AgomoC.K. Nigerian Employment and Labour Relation Law and Practice (2011) op.cit
[136]See Agomo C.K 'Corporate Governance and International Labour Standards' in Rocheba's Labour Law Manual edited by Enobong Etteh, vol 1, 2007, Rocheba's Law Publishers, pg 6

The form of a contract of employment is governed by the common law. It may be in writing, oral, partly in writing, partly oral, or by deed. An oral contract is as valid as a written contract though an oral contract presents a greater problem of proof. There is no standard form for contract of employment. It may take any form, See *Adetoba v. Godwin World-wide Ltd*[137]. The exceptions to this are: contract for employment of a seaman, S. 22 (1) Merchant Shipping Act[138]and contract of an apprentice, Section 18(1) The Labour Act. Thus, apart from contract of seamanship or of apprenticeship, no contract is expressly required to be in writing. However, Section 7 of the Labour Act[139] provides that where a contract is not a written contract, its particulars must be delivered by the employer to the worker within three months of the commencement of the employment.

2.6. Contract of Employment and Employee's Handbooks

Terms of contract of employment are central to the relationship between employers and employees. Employees' handbooks contain the expressed terms of contract. It often discusses grounds for discipline and dismissal. Some of these terms are basically policy issues of the employer. Some employee handbooks explain policy about how discipline and dismissal will be handled; some assert that employees will be dismissed only for "good cause" and that certain dismissal safeguards exist such as review by a committee or managerial supervisor[140]. Courts do construe these handbooks to create implied contracts that limit the presumption of employment at will.

In *Foley v. Interactive Data*[141], the Supreme court of California noted "breach of written 'termination guidelines' implying self-imposed limitations on employer's power to discharge at will may be sufficient to state a cause of action for breach of employment contract". Using the California case as a basis for inferring express or implied terms as contained in the Employees' Handbook, courts will look at employment practices, including statements in a handbook as limits on dismissal at will.

In practice, the best that Employee Handbooks can represent in the relationship between employer and employees is that of employer's will over the employee, since it is the former that issues it to the latter. Thus, the issuer who is the employer, will be estopped to act contrary to the contents of the Handbook.[142]

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[137](1982) OGSCR 160-L
[138]Merchant Shopping Act, 1962, Cap MX, LFN, 2004
[139]Labour Act, LFN, 2004
[140]See Meiners et al, op.cit pg409
[141]765 p.2d 373.
[142]See Guz v. Bechtel National Inc. Sup. Ct.24 cal. 4th, 317, 8p.3d 1089, 100 cal. RPTR. 2d 352 (2000). In this case, Bechtel's written personal documents are the sole source of any contractual limits on Bechtel's rights to terminate Guz.

CASE STUDY

EVANS BROS V FALAIYE (2005) 4 NLLR (PT9) 108 CA

TOPIC – CONTRACT OF EMPLOYMENT

Issues

1. Whether by virtue of the respondent's employment being pensionable, the appellant was contractually bound to retain the respondent in its employment until he attained the retirement age of 60 years (i.e. was his employment guaranteed until age 60?)
2. Whether by issuing the letter of termination (Exhibit h, the respondent validly and effectively terminated the respondent's employment.
3. If the answer to (ii) is in the negative, whether the court was correct to have awarded the reliefs (i - iv) and (vi)
4. Whether having awarded reliefs (i)- (iv), the court was correct to grant (vi) in addition.

Facts

The respondent, then plaintiff was first employed by the Appellant's company as a Trainee Editor in 1981 and placed on the company's salary Group 5. He was with the company until 1983 when he resigned his appointment to pursue a postgraduate course abroad. The respondent however rejoined the company in 1985 and his new appointment was communicated to him in a letter from the company dated November 13, 1985. The respondent accepted the offer of appointment made to him and resumed duties with the company. His appointment was later confirmed and this was communicated to him.

In the process of time, the respondent's designation of Deputy General Manager (Publishing) was later changed to Controller of Publishing Services. However, the relationship between the respondent and his employers remained, for all purposes, very cordial. This was the position until late 1995 when the plaintiff had to proceed on vacation. While on leave, he received a house memorandum from the company's Managing Director informing him of an extension of his leave. The respondent continued his vacation as directed in the house memorandum and while he was still on his vacation leave, he received a letter from the Managing Director terminating his appointment with effect from March 18, 1996.

The respondent sued, praying the High Court for a declaration that the purported termination of his appointment with the appellant company was unlawful, invalid, null and void; declaration that he is entitled to remain in the appellant's employment until he attains the age of 60 years; declaration that he is still in the employment of the appellant. As an alternative to an order of reinstatement, he claimed the salaries and allowances payable to him for a total period of 21 years remaining for him before altering the retiring age of 60 years.

The learned trial judge granted the declarations sought, set aside the termination order and awarded a total sum of N5,320,557 respectively the salaries and other entitlements which the respondent would have earned had he continued working in the company until he attained the retiring age of 60 years.

The appellant was aggrieved and entered this appeal.

Held (unanimously allowing the appeal)

It was held that the appellant was not in breach of any of the provisions of the terms of the contract it entered into with the respondent. The only omission discovered is its omission to include the entitlement accruable to the respondent in that his appointment was terminated as a result of re-organization, which amounts to one year's salary. The respondent's employment was rightly terminated by the appellant. The awards of the lower court were set aside, the appellant was ordered to amend the entitlements payable to the respondent as set out on the form for final payment attached to the letter of termination of the respondent's appointment.

2.7. WHO IS AN EMPLOYEE?

According to Harvey,[143] "the law knows various categories of workers". The rights of employers and employees will be determined by the category which the worker belongs. The word "worker" and employee" are mostly used interchangeably. However, modern legal literature appears to be moving towards total adoption of 'employee' as a substitute for 'worker'. Thus, 'worker' appears to have a junior employee connotation. The Author will use both terms "worker"[144] and employee" interchangeably.

The expressions 'employer' and 'employee' have been described as having no precise meaning in law apart from their context. The common law understands the term master and servant[145]. 'Employer' and 'employee' appear to be a modern translation of master and servants.

The term "servant''[146] has raised legal issues in industrial law. "The definition of "servant" has proved elusive[147]. A servant serves another in the sense that he puts himself/herself and his/her labour at the disposal of another (called his/her master), in return for remuneration in cash or kind[148]. The contract between both is called contract of service. Defining the degree of submission appears to be a difficult task. Thus, degree of submission may be one of the criteria for determining whether everyone who serves is necessarily a servant in the strict legal sense.

Another vital question is whether a person under industrial attachment can be called a servant. This has been resolved by the Court of Appeal in *Moronkeji v Osun State Polytechnic*[149], where it

[143]Harvey on Industrial Relations [1993] issue 04 Butter worths; A/1
[144]See section 90 of Labour Act LFN 1990; section 48 trade Dispute Act LFN, 1990
[145]There has been a shift from the so-called master-servant relationship as recognized by the common law. Employment relations are being governed mostly by statutes, and international best practices. Thus, constitutional and statutory provisions are superior to the common law.
[146]See Union Bank v. Ajaga (1990)1 NWLR (Pt 126)328 CA, Baba v. NCATC (1991)5 NWLR (PT 192) 385.Sc, UNTMB v. NNOLI (1994)8 NWLR (Pt 363)376 Sc,
[147]Harvey, op.cit.
[148]Ibid
[149] (1998) 11 NWLR (Pt. 572) 146 C.A

was held that, a person on industrial attachment with an establishment does not qualify to be called a servant, agent or privy of that establishment. Consequently, the establishment is not bound by his actions in any form whatsoever, unless, there is direct evidence establishing a contractual relationship.

It appears this may not be applicable to Corps members from the National Youth Service Corps. This may not be unconnected with the fact that there is a term in the acceptance document from the N.Y.S.C, which states that Corps members should be treated as staff of the Establishment to which they are posted[150].

Another class of worker, whose degree of submission to the employer is not as deep as expected is that of independent contractors. Simplifying the differences between a servant and an independent contractor; one sells his labour (servant) and the other sells the product of his labour (independent contractor). In the first case, the employer buys the man and, in the latter, the employer buys the job[151]. Thus, servants are governed by contract of services while independent contractors are governed by contract for services.

2.8. CONTRACT OF SERVICE VERSUS CONTRACT FOR SERVICE

Among the common features of a contract of service are an obligation by the employer to employ a man, and to pay him an 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. On the other hand, the workman must obey all reasonable directions and present himself for work at an agreed hour. Difficulties may arise where some of the indices of the relationship are not present. *Denning L.J., in Stevenson Jordan and Harrison Ltd v. MacDonald & Evans*[152] said, "It is often easy to recognize a contract of service[153] when you see it, but difficult to say wherein the difference lies" The courts have over the years put forward a number of tests for determining whether or not a particular relationship is that of employer-employee. However, how do the courts distinguish between the two types of contracts?

The issue was addressed by the Supreme Court in the case of *Shena Security Ltd v. Afropak (Nig) Ltd and 2 Ors*[154].

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[150] This first term of acceptance of Corps members into an establishment provides that, Corps Member should be regarded as Staff of your establishment and be given adequate job assignment and positions of responsibility commensurate with their qualification, training and experience.

[151]Prof. C.K. Agomo has used the dichotomy between a chauffeur and a taxi-driver to illustrate the difference between a servant strictosenso and an independant contractor, a Chauffeur sells his labour while a taxi-driver sells the end product of his labour. One is under contract of service and the other under contract for service

[152](1952) 1 T.L.R. 101

[153]In John Holt Ventures Ltd v. Oputa (1996)9 NWLR (Pt 470) 101. CA, It was held in this case that a contract of service can be subject to both statutory and common law rules under the common law, the master can terminate the contract of service with his servant at any time for any reason or no reason at all. It must be noted that this common law position has been modified in the modern jurisprudence of labour law.

[154](2008) 6 CLRN 1

1. The Supreme Court stated that, "where there is a dispute as to which kind of contract the parties enter, there are factors which usually guide a court to arrive at a right conclusion. For example:
   (a) If the payments are made by way of "wages" or "salaries", this indicates that the contract is one of service. If it is for service, the independent contractor gets his payment by way of "fees". In addition, where the payment is by way of commission only or on the completion of the job, that indicates that the contract is for service.
   (b) Where the employer supplies the tools and other capital equipment, there is a strong likelihood that the contract is that of employment or of service. However, where the person engaged has to invest and provide capital for the work to progress, this indicates that it is a contract for service.
   (c) In a contract of service/employment, it is with the terms of the contract for an employee to delegate his duties under the contract.
   (d) Thus, where the contract allows a person to delegate his duties thereunder, it becomes a contract for service.
   (e) Where the hours of work are not fixed, it is not a contract of employment/of service.
   (f) Where a contract allows the work to be carried outside the employer's premises, it is more likely to be a contract for service.

2.9. TESTS AND CRITERIA FOR DISTINGUISHING CONTRACT OF SERVICE FROM CONTRACT FOR SERVICE

Legal writers and jurists have identified various tests used in determining the existence of employer-employee relations. The tests include:

(a) **Personal service**

The operative phrase here is "personal service". The servant must have entered into the contract to undertake and provide personal service to his master. He cannot delegate his service and cannot equally send a substitute as often practicable by contractors.

In *Ready-Mixed Concrete (South East) Ltd v. Minister of Pensions and National Insurance*[155], Latimer drove a concrete mixing lorry for ready-mixed concrete. He was buying the lorry from the company on hire purchase. However, he had to wear the company's uniform. He had to drive it exclusively for the company and he agreed to submit to all reasonable orders, as if he were an employee. It was held by Mckenna J., that he was not a servant but an independent contractor. The ratio for the judgment, inter-alia, was that he was not required to drive the lorry personally as he was free to employ and pay a substitute driver. Thus, the operative clause for this test is whether the servant can be substituted. If the answer is yes, then, he is not a servant but an independent contractor.

[155][1998]2 QB 497; [1968]1 All ER 433.

(b) **The "Control Test"**

No one has pronounced any test as the conclusive measure for determining the formal existence of a contract of service. . Service means *inter-alia*, submission to the will of another person and it includes a right of the master to give orders with a correlative duty[156] of the servant to carry the orders out. The servant, in doing this, is therefore subject to a significantly greater degree of control than the independent contractor is. The master has power over what is done, how it is done, where it is done, and for whom it is done. A servant is a person subject to the command of his master as to the manner in which he shall do his work[157].

However, it has been noted that this test is not conclusive as an independent contractor can also agree to submit himself to the same degree of control as a servant without actually becoming a servant[158]. See Scholars[159] have observed that control test as earlier pointed out is not conclusive. Thus, a medical doctor cannot in most cases, wait for the control of his master in carrying out his/her duties/obligation under the Hippocratic Oath taken upon being inducted into his profession

(c) **The "Economic Reality Test"**

This approach is called ''economic reality'' or "business reality" test. The test suggests that, in addition to degree of control, "the opportunities of profit or loss, the degree to which the worker was required to invest in the job in the way of provision of tools or equipment, the skill he required for the allegedly independent work, and the degree of permanency of the relationship be equally examined. The legal questions to ask under this test include:

(i) Who is providing the tools or equipment needed for the work?
(ii) What is the duration of the relationship?
(iii) Who is to benefit or suffer from the profit or loss of the venture respectively?
(iv) Whether the worker was a small businessperson or an employee?[160] and
(v) Was the worker his own boss?[161]

(d) The "Organization or Integration Test"

[156] On jural postulates, see Holfedian analysis on correlative duty on www.google.com.
[157]*Yewens v. [1880]6 QBD 530 per BramwellCy.*
[158] See also Ready-mixed concrete (South East) Ltd v. Minister of Pensions and National Insurance (supra). Latimer agreed to be controlled by the terms of contract, yet he was held not to be a servant.
[159]See Agomo C.K. op.cit
[160] See Market Investigation Ltd v. Minister of Security [1969]2 QB 173, Werner Holidays Ltd v. Secretary of State for Social Services [1983]1 CR 440
[161] See also Morgan v. Master [1948]1 RLR., 207 EAT. See also Lee v. Chung and Shun Construction & Engineering Co. Ltd (1990)1 RLR 236.

Lord Denning in *Stevenson Jordan and Harrison Ltd v. MacDonald and Evans*[162] suggested this test to avoid some of the problems of control test as demonstrated by Ready-Mixed Concrete Case[163]. He called this test "integration test"

Denning LJ said:

> *'Under the contract of service, a man is employed as part of the business. Whereas under the contract for service, his work, although done for the business, is not integrated into it but only accessory as being too vague, ambiguous, it has been observed that organizational test provides easy answer to the question; would the ordinary man say that the worker was part and parcel of the organization than the question; would the ordinary man say this was a contract of service?'.*

It is the opinion of these writers that organization test appears to be relevant as the "control test has been reported to have failed in determining the existence of contract of service between employer and employee under certain employment relations. It is doubtful whether a less qualified employer can control a surgeon[164].

(e) **The "Multiple Test"**

The essence of the multiple tests is to avoid the problems any of the identified tests may pose. The multiple tests will look at important features of various tests enumerated earlier. The questions to raise here include- whether or not the worker undertakes to provide his own work and skills in return for remuneration; whether or not there is sufficient control to enable the worker or employer to be called a servant; whether or not the worker can be said to be an integral part of the employer's business and whether or not there are any other factors inconsistent with the existence of control of service. The combination of all of these tests will metamorphose into the multiple tests[165].

2.10. Employees as 'Servants' and 'Agents' under Vicarious Liability

Traditionally, servants cannot be agents of their masters and were not in a position to act on behalf of the master or employer when dealing with outsiders or third parties. When an employee does not possess the authority to act or represent the employer in any dealings (business or otherwise), no agency relationship exists. The best of the relationship is that of master-servant. However, many employees can now act as agents and servants. In this case, their employers are principals. For example, sales representatives who are employees at auto dealership, and authorized to sell cars within certain price ranges without supervision of a supervisor (i.e., who exercise control), are employees with specified or certain agency powers to act for their employer. The test for determining this type of agency relationship is based on the legal authority or responsibility which exists when questions arise about the validity of a contract or when the employee commits a tort.

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[162] [1952]1 TLR 101 CA

[163] Supra

[164] See Casidy v. Minister of Health [1951]2 KB 343; [1951]1 All ER 474 C.A. See also Lindsey country Council v. Marshal [1937]2 KB 293

[165]See Ready-mixed concrete's case (supra) [1974]16 KIR 158; Div ct.

Thus, the concept of vicarious liability applies, as the employee will be seen as the agent of the employer.

The rule of vicarious liability implies that a principal or employer can be liable for the unauthorized torts (whether intentional or negligent) of agents or employees who were acting within the scope of the employment. The scope is always determined by the clause 'in the course of the employment'[166]

Courts consider some of these factors in determining whether the act that led to the tort was committed in the course of the employment. These include whether the act was of the same general nature as those authorized by the principal or employer, whether the employee was authorized to be where he was at the time the act occurred; whether the agent was serving the employer's interest at the time of the act[167]. The rule of law imposing various liability upon an innocent employer, or principal, is respondent superior (let the master answer). The justification for this rule is based on the doctrine that the principal is in a better position to protect third parties or members of the public from such torts, by controlling the actions of its agents or employees and to compensate those injured as a result of the tortuous act. Thus, employers may be liable for torts of employees immediately the outlined tests have been carried out successfully[168].

CASE STUDY

1. **STEYER (NIG) LTD V GADZAMA (1995) 7 NWLR (PT 407) 305 CA**
   TOPIC – MASTER & SERVANT RELATIONSHIP AND THE ATTITUDE OF COURTS IN INTERPRETING THE LAW

Facts

The respondents in this appeal who were plaintiffs at the High Court, commenced an action jointly and severally against the appellant who was the first defendant, and two others, Alhaji Isa Tahir and Peter Heubach, Chairman and Managing Director respectively for the appellant's company.

The 1st and 2nd respondents were top management employers of the company (Steyer Nigeria ltd) a limited liability company, based at Bauchi in Bauchi State. The 1st and 2nd respondents were employed as Marketing Manager (commercial) and Deputy Financial Controller respectively.

[166] See Obi v. BiwaterShellabear Nig. Ltd [1997] 1 NWLR (Pt 484) 722 CA; NBN Ltd v. T. A. S. A Ltd [1996]8 NWLR (Pt 468); Yahaya v Oparinde, [1997]10 NWLR (Pt 523) 126 C.A; Olubunmi v. Adbulahi [1997]2 NWLR (Pt 489) 526 SC.
[167] See Chukwuemeka v. Iwerumoh [1996] NWLR (Pt 472) 327 CA; Akinsanya v. Longman [1996] NWLR (Pt 436) 306 CA
[168] See Roger E. Meiners (op.cit) p.392; see also Reed v. Scott Fetzer Company 990 S.W. 2d 732 (1998)

Both respondents were invited to a meeting of the top management staff of the company on 5/12/88 without any agenda. The respondents arrived at the venue and armed policemen who were already deployed at the factory.

Alhaji Isa Tahid and Peter Heiback, Chairman and Managing Director, summoned the respondents one after another respectively. They informed the respondents individually that board of directors had decided to dispense with their services. Both respondents were given ultimatum to resign their appointments by signing a pre-typed, dated letter of resignation, or be terminated. Intimidated, the respondents, each involuntarily in the circumstances signed the pre- typed letters of resignation dated 6/12/88. Immediately, Peter Heibach handed in the respondents, letters of acceptance of their resignation dated 6/12/88 to which were attached redundancy papers also dated 6/12/88.

Thereafter, the respondents investigated and found that there was no resolution or decision of the Board of Directors of the company to dispense with their services. The 1st and the 2nd respondents had respectively put in 9 and 7 years in the service of the Company. Both respondents then brought this action.

The appellant's workers handbook setting out the various conditions, rules and regulations between the company and its workers was admitted as Exhibit 'D'

Article 27 paragraphs 27.1 and 27.2 of Exhibit 'D' deals with Redundancy and state as follows

27 **REDUNDANCY**

27.1 The company makes every effort to absorb staff surplus to the requirements of one department in another section of its business. No employee's services are declared redundant until a full investigation has been made by the company.

27:2 When management is compelled to reduce staff, the principle of last in first out will be applied subject to the following.

"Efficiency, length of service, diligence, loyalty and health. As long as a notice is given to employees who are to be declared redundant. At the end of the trial, the learned trial judge entered judgment in favor of the respondent against the appellant granting their claims except the one for N1,000,000:00: or damages which was dismissed. It also dismissed the appellant's counter-claim.

Aggrieved, the appellant appealed to the court of appeal.

In resolving the appeal, the Court of appeal considered the provisions of Order 3 rule 2(2) court of Appeal Rules, 1981, as amended, which provides that:

"2(2) *if the ground of appeal is alleged misdirection or error in law, the particulars and the nature of the misdirection or error shall be clearly stated"*

HELD (Unanimously dismissing the appeal)

On the attitude of Nigerian courts on master and servant relationship: It has not been the attitude of court in Nigeria to foist a servant on an unwilling master, unless such as an employee is qualified by employment to a permanent and pensionable position. In the instant case, the respondents who are both top management employees of the appellant were permanent and pensionable staff of the appellant company. They could, on good and reasonable grounds, be reinstated to their employment. However, the respondents made no such prayer and it is not the duty of court to make a case for the parties which they have not asked for: - Olatunbosun v Niser Council (1986) 3NWLR (29) 435 CA. The Court further held in **STEYER (NIG) LTD V GADZAMA (supra)** as follows:

1. That the purported resignation / termination of the 1st and 2nd respondents on grounds of Redundancy was wrongful and without authority
2. The award of 15% interest on the judgment debt until liquidated made by the learned trial judge in favor of 1st and 2nd respondents is disallowed and hereby set aside
3. The appellant shall pay to the respondents:
    a. One-year consolidated salary of ₦13,556.56k and ₦23,196:00 respectively.
    b. In lieu of unconditional leave to 1988 at 35 working days ₦3,041.00 and ₦2,680:00 respectively.
    c. Immediately release of the respective full pension right of 1st and 2nd respondents admitted by the appellant in the respective sum of ₦18,323.66k and ₦9,502.70kk or any sum due in … thereof.

CASE STUDY 2

N.B.N LTD V T.A.S.A LTD (1996) 8 NWLR (PT 468) C.A
TOPIC – VICARIOUS LIABILITY

Facts

The respondent, as plaintiff, sued one of the appellant's servants and the appellant, as 1st and 2nd defendant claiming the sum of ₦300,000:00 being proceeds of a cheque issued in favour of the respondent but negligently received by the appellant and paid to some unknown persons.

Someone forged a letter bearing the respondent's name, to the appellant, informing it that it had appointed it as its bankers. This was only to the respondent. The bank opened an account with account No. 0000051 in the respondent's name without satisfying and complying with many of its regulations, with unknown persons as signatories to the said respondent's account. On various dates, cheques were drawn by persons unknown to the respondent on the account after a cheque for ₦300,000 payable to the employee, called Friday Essien. According to the respondent, the appellant is thus accountable to the respondent for the whole sum of ₦300,000 being proceeds of the cheque, for reasons of the appellant's negligence in its failure to verify, investigate and comply with banking regulations.

The appellant denied that it acted negligently in opening the said account and allowing it to be operated by persons unknown to the respondent and consequently resulting in the respondent's loss of ₦300,000:00.

At the conclusion of the trial, the learned trial judge found the respondent's case proved and judgment was given in its favor. The appellant was dissatisfied with the decision and appealed to the court of appeal.

Held (Unanimously dismissing the Appeal)

1. On vicarious liability of bank for negligence acts of its servant: -
   A bank is vicariously liable vide its servant where there has been non – compliance and failure to strictly adhere to the banking regulations and rules regulating to the procedure and documents required for the opening of a bank account by a corporate body as such amounts to negligence
2. The general rule is that the principal is liable to a third person for an act of its agent that is carried out negligently. The evidence available had shown that the respondent did not contribute to the negligence of the appellant and its servant's action.
3. The whole appeal failed in its entirety and was thus dismissed.

2.11. RIGHTS AND OBLIGATIONS OF EMPLOYER AND EMPLOYEE

The word 'right[169]' here is used loosely to mean duties and obligations of one person that are to be carried out by him which becomes rights to the other party. In jurisprudence, the words- rights, duties, obligations and privileges mean different things[170]. According to Agomo, the rights and duties of the parties to a contract of employment are primarily found in the contract of employment itself where written[171], or established by evidence were oral. Regardless of the express terms, implied terms to a large extent determine the obligations of the parties. An express term refers to those terms which the parties expressly agreed upon, and may be contained in one or more documents such as the employee's handbook, collective agreements, and arbitration awards which become incorporated into the individual contract. The National Industrial Court[172] has original jurisdiction to interpret collective agreements between unions and employers.

[169] The word 'right' has numerous meanings. It falls within the polytechnic class. However, according to Salmond, right is an interest, respect for which is a duty and disregard of which is a wrong. Black's law dictionary defines right as something that is due to a person by just claim, legal guarantee or moral principle. See Black's law Dictionary, Eight Edition at pg 1347; see Attorney General of Lagos State v. Attorney General of the Federation (2005)2 WRN pg 1 at pp 107-108 per Niki Tobi JSC where right was defined as a 'legal right cognizable in law it means right recognized by the law and capable of being enforced and protected by a rule of laws violation of which would be a legal wrong….

[170] See Holfedian Theory of Right and Its Correlatives.

[171] Agomo C.K. Nigerian Employment and Labour Relations Law and Practice op.cit.

[172] See section 254C of the Constitution of the Federal Republic of Nigeria, 1999 as altered on the exclusive jurisdiction conferred on the National Industrial Court of Nigeria by virtue of the Third Alteration Act, 2010 which altered the Nigerian Constitution.

Some terms may also be implied into the contract of employment in order to give it a business efficacy. A term proved by custom may also be implied into a contract[173]. For a custom to be a source of law, it has to be notorious, reasonable and certain. A term may also be implied by statute[174]. A term may also be implied if it goes contrary to the express terms; and a custom may not be proved if it would be inconsistent with either an express term or an implied term.

We shall consider duties of employees and employers under this topic and shall examine 'rights' *stricto senso* under Trade Unions Laws and breach of contract of employment.

According to Akintunde Emiola[175], duties of the worker are usually spelt out in the terms of the contract. Some of them are expressly provided for while some are implied.

2.12. DUTIES OF AN EMPLOYER TO AN EMPLOYEE

(i) Duty to pay wages

This is the consideration/compensation received by the employee for working for an employer. It is settled law that the duty to pay will always be on an employer. Furthermore, it is the law that the duty to pay should be expressly provided for in the employment contract. However, the duty to pay can be implied at common law from the contractual terms of the parties. A term to pay will be implied in circumstances which indicate that employment was not to be gratuitous. Once the duty to pay wages or salary exists, then the employer must continue to pay such remuneration to an employee who is ready, able and willing to work, whether or not the employer provides work for the employee. . See the case of *Way v. Lattila*[176]**.** A '*quantum meruit*' is only available where there is no term of the contract, express or implied, dealing with the question of remuneration. '*Quantum meruit'* will also be appropriate where the contract is, for some reason, invalid, but not when it is illegal. See the case of *Bryant v. Flight*[177]. It has been submitted that, where duty to pay wages is not expressly provided for, the prescribed national minimum wage will be the appropriate wages payable. It is the law that an employee who takes part in a strike is not entitled to any wages or salary or any remuneration for the period of the strike. However, in lock-out by an employer, the employees are entitled to be paid their entitlements which include wages and salary for the lock-out period. Section 15 of the Labour Act[178] emphasizes this important duty.

The duty to pay remuneration may cease in the following instances:

(a) Sickness (depending on the terms of the contract)
(b) Lay-off

[173]See Meiners et al. The Legal Environment of Business op. cit see full citation in chapter one.
[174] See the Nigerian Labour Act, LFN, 2004
[175]AkintundeEmiola Nigerian Labour Law (2005) fourth /edition (Emiola Publishers Ltd Ogbomoso Nigeria.
[176] (1937)3 All ER 759, 763
[177] (1889)5 M & N 114
[178] The Nigerian Labour Act, LFN, 2004

(c) Suspension of contract
(d) A fundamental breach by the employee accepted by the employer or vice versa.

(ii) Duty to provide work

Section 17 of the Labour Act[179] provides for this duty. Moreover, this duty is subject to collective agreement provisions. "Except where a collective agreement provides otherwise, every employer shall, unless a worker has broken his contract, provide work suitable to the worker's capacity.'' In *Collier v. Sunday* Referee Publishing Co. Ltd[180], Asquith J expressed the common law rule which provides thus: "provided I pay my cook her wages regularly, she cannot complain if I choose to take any or all my meals out". See also *Turner v. Sawdon*[181].

However, the common law has made certain exceptions, where opportunity, for actual work is of the essence of the contract of employment. For example, in contracts of apprenticeship, the employer must undertake to train or cause the apprentice to be trained or be instructed in the trade or skill or employment in which he is apprenticed. A duty also exists to offer work where remuneration depends wholly or perhaps partially on commission or piece rate, or in the contract of employment of actors and actresses, the need to gain publicity and enhance reputation[182].

(iii) Duty to provide a safe system of work

This duty deals with ensuring that an employee carries out his/her work, operations, in a safe manner. According to Oladosu Ogunniyi,[183]it deals with supervision and safety precautions which the employer uses in his operations. Section 65 and 66 of the Labour Act[184] provide that the Minister of Employment may make regulations providing for good and healthy work environment.

(iv) Duty to provide a safe place of work

This duty is to ensure that the employee carries out his duties/operation in a safe manner. The duty is deemed to arise whenever the employee is doing his work within the scope of his employment. In *Bradford v. Rentals Ltd*[185], the plaintiff, a 56-year-old employee of the defendant company, was sent on a long journey in an unheated van during winter in England. The employee had severe frostbite and suffered great injury as a result. The Court held that the defendant company was liable. This duty does not

[179]Ibid
[180](1940) KB 647
[181] (1901)2 K.B, 2653
[182] See Clayton v Oliver (1930) A.C 209
[183]Oladosu Ogunniyi 'Nigerian Labour and Employment Law in perspective (2004) Folio Publishers Ltd
[184] LFN 2004
[185] (1967)1 All E.R 267

only exist as a common law duty, but also has statutory backing. It also deals with supervision and safety precautions, which the employer uses in his operation[186].

(v) Duty of Care

It is the duty of an employer to take reasonable care of the safety of all employees in the course of their employment[187]. This duty is personal to each employee, and cannot be discharged by delegation. Furthermore, the peculiarities of each employee must be taken into consideration in determining the standard of care required to discharge that duty. The scope of this duty includes the provision of a safe place of work, safe working system, competent staff and a conductive working environment.

The Supreme Court reiterated this in the case of *Iyere v. Bendel Feed and Flour Mill Ltd*[188]. In this case, the defendant employed the plaintiff as a silo attendant. While on duty, he was asked by the duty manager to clear the conveyor to stop the frequent stoppage of materials by the conveyor. Whilst the plaintiff was still at the mill below clearing the blockage, the switch operator restarted the machine without waiting for feedback from the plaintiff. The plaintiff's right arm was caught in the machine, and was badly damaged. The employer thereafter terminated his employment. He brought an action against the employer for negligence. However, the trial court dismissed the action. The Court of Appeal affirmed the decision. The plaintiff appealed to the Supreme Court, and the appeal was granted.

(vi) Duty to Provide Testimonial or Reference

There is no obligation on an employer to supply character reference in respect of his employee, either during the employee's employment or at the termination of the employment relationship. If a reference is defamatory, the defamed employee may bring an action against the employer. See *Ayoola v. Olajire*[189]. A person who acts in reliance on a reference, which is issued negligently, may sue the issuer of the reference for damages for loss suffered in consequence of the negligence[190].

(vii) Duty to Provide Indemnity

An employer is entitled to an indemnity from an employer in respect of expenses reasonably incurred in the course of the execution of his lawful duties. The employer

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[186] See sections 66 & 67, Labour Act, LFN 2004

[187] 'In the course of employment' has been defined by 'case laws' see IfeanyiChukwu (Osondu) Co Ltd v SolehBonah (Nig) Ltd (2000)12 WRN 1. According to Prof. C.K. Agomo, 'whether an employee is in the course of employment, is a question of fact in each case. In C. S Adeleke v Kenneth Rhard & Brisise Helicopters (unreported) See Agomo C. K op.cit pg 139, the1st plaintiff was said to be in the course of his duty while driving negligently and caused an accident in which the appellant sustained serious injuries. In IKO v John Holt Ltd (1957) 2FSC50, A drug who has involved in an accident while he was on his way to eat food in the course of his doing overtime was held to have been acting in the course of his duty.

[188] (2008)12 CLRN 1

[189] Unreported

[190]See Hedley Byrne v Heller & Partners Ltd (1994) AC 465

is also liable for the fraud perpetuated by his employee in the course of his duty. In *UAC vs. Saka Owoade*[191], the employer of a clerk and a driver who collected goods on his behalf and appropriated them was held liable to for the cost of the goods. However, a discerning employer could take an Employer's liability insurance to mitigate the effect of any loss suffered in this regard.

(viii) Vicarious Liability

An employer is vicariously liable for the tort of the employee, provided it is a tort in respect of which an action could be brought against a private individual, and the person by whom the tort was committed was acting in the course of his or her employment, and within the scope of his authority.[192]Moreover, in *Chukwuemeka v. Iweramor*[193], there is a presumption that where someone is driving a vehicle other than the owner, the driver is the servant or agent of the owner. The burden is on the owner of the vehicle to prove that the driver was not his servant or agent, or that he was on a frolic of his own.

2.12.1. Other duties

Apart from the duties mentioned above, the employer is duty bound to employ competent staff. According to Akintunde Emiola[194], an incompetent worker is a danger to his fellow workers. This duty was developed in response to the doctrine of common employment, which states that a master was not liable for any injury sustained by a worker arising from the normal course of his duty if such injury was caused by the servant's fellow-worker. However, the doctrine of common employment has been abolished in Nigeria[195]. The following laws have the above principles of the law of tort well specified. They are Law Reform (Tort) Law[196], Eastern Nigeria Torts Law[197]; S.4 (1) Western Nigeria Torts Law 1958. By inference, the duties of an employer are the corresponding rights of the employee.

2.13. DUTIES OF AN EMPLOYEE

The duties of the employee are summarized by Agomo[198]as follows:

(a) Duty to offer personal service
(b) Duty to be ready and willing to work

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[191] 13 W.A. C.A, 2007
[192]See Iko v John Holts Ltd (1957) 2 FSC 50, where a driver who was involved in an accident while on his way to have a meal in the course of his overtime duty was held to be acting in the course of duty.
[193] (1996)9 NWLR 327
[194]Akintunde Emiolaop.cit
[195]See Law Reform (Tort) Law
[196] Law Reforms (Tort) Law (1961) Section 3(1)
[197] Eastern Nigeria Torts Law (1962) Section 4; Western Nigerian torts Law (1958)
[198]Agomo C.K. (2011) op.cit

(c) Duty not to willfully disrupt the employer's undertaking i.e., duty to co-operate with the employer.
(d) Duty to obey reasonable or lawful orders
(e) Duty to give exclusive service, i.e., to work only for the employer in the employer's time
(f) Duty to account for profits received
(g) Duty to respect the employer's trade secrets
(h) Duty to take reasonable care of the employer's property and to exercise reasonable care and skill in the employer's service.

(i) Duty to Obey Orders

An employee is to obey all lawful and reasonable orders of his employer. However, such orders must not be contrary to public policy. In Pepper v. Webb[199], the Court held that an employee's act of gross disobedience and insolence justified his dismissal. This is further espoused in the case of *Nicol v. Electricity Corporation of Nigeria*[200]. Thus, dismissal upon disobedience will only be justified after considering the lawfulness of the order disobeyed. See also the cases of *Eaton v. Western*[201], *Wilson v. Racer*[202].

An isolated act of obedience may not automatically justify a dismissal unless the act of disobedience amounts to a repudiation of the fundamental condition of the contract or the nature of the act is of sufficient magnitude.

The National Industrial Court [203](NIC) has held that a worker has no right to vary any part of the lawful instruction without prior approval of the boss; this constitutes disobedience of a lawful order, which is an act of misconduct.

(ii) Duty to Exercise Care and Skill

A term is implied into every contract of employment that an employee who accepts a particular job or post possesses the necessary skill required for the effective and efficient performance of the job with due diligence and reasonable care. An employee is duty bound to exhibit diligence, skill and reasonable care in the performance of his duties. In *Jupiter Insurance v. Schroff*[204], Lord Maugham described the standards of reasonableness expected from an employee in a working situation to be "the standards of men, and not of angels.'' He must take care of his employer's property and must not cause willful damage to the machine and plants under his care." Thus, in

[199] (1969)2 All ER 216
[200] (1965) LLR 261
[201] (1982) QB 636
[202] (1974)1CR 428
[203]See judgment of the Natural Industrial especially unreported Suit No NICN/LA/153/2014 where His Lordship Hon Justice O.O.Oyewumi referred to Shuaibu v N.A..B (1998) 4 SCNJ 109 at 129 on definition of misconduct as any act outside the scope of an employments duties in his employer's establishment which is prejudicial to the later's interest, is willful misconduct, considering the nature of the business and service in which his master is bound to provide to the customers. See also Nwobosi v A>C>B Ltd (1995)6 NWLR (Pt 404)658
[204] (1937) AC

Lister v. Romford Ice and Storage Co.[205], negligent manner which caused injury to a fellow employee who happened to be his father, was held liable in damages to the employer.

(iii) Duty of Good Faith

This duty is based on the concept of absolute loyalty as expressed in *Abomeli v. Nigerian Railway Corporation*[206]. This duty includes the duty not to make secret profit. See *Maja v. Stocco*[207], Boston Deed Sea Fishing and *Ice Co. v. Ansell*[208]; the duty to work for the master during employer's time. This is espoused in *Hivac Ltd v. Park Royal Scientific Instruments Ltd*[209]; and a duty to protect the employer's confidential information including the marketing plans and business strategies, financial plans industrial relations strategy or production formulae. In *Robb v. Green*[210], the employee copied a list of his employer's customers and their addresses with the intention of using the list after leaving the employer's service and setting up his own. This was held to be a breach of fidelity. See also *Alperton Rubber v. Manning*[211]. An employee must not be in competition with the employer. Employers do impose restraint of trade clauses to protect trade secrets and confidential information. See *Nordenfelt v. Maxim Nordenfelt Co*[212].

It is hereby submitted that the duties of employees will constitute rights of the employer. According to Professor Holfield[213], where a duty exists, a corresponding right exists. Where a duty is breached, the other party can enforce his right or what he stands to benefit if the duty had been carried out. It is the law that rights are not absolute. There are qualifications or allowable exceptions.

2.14. THE LABOUR ACT AND REGULATED CONTRACTUAL RELATIONSHIP VIS-À-VIS THE DEFAULT PROVISION OF THE ACT

2.14.1. The Labour Act

The Act is a consideration of the laws relating to labour particularly the Labour Code Act[214]. It commenced its operation on August 1, 1971 and since then has witnessed some amendments. It protects workers and contains terms of contract of employment that may not have been envisaged by a worker for his inequality of bargaining power.

[205] (1957) AC 555
[206] (1995)1 NWLR 372, 451 at 457
[207] (1968) All NLR 141
[208] (1883)39 CLD 339
[209] (1946) CH 169
[210](1995)2 QB 315
[211] (1917)86 CJ CH
[212] (1874) AC 535
[213]Holfield "Fundamental Legal Conceptions 1919 'Summonds cited by Funso Adaramola op. cit pg 147
[214] LFN, 2004

The Act does not extend to persons exercising administrative, executive, technical or professional functions as public officers[215]; persons employed in a vessel or air craft to which laws of merchant shipping or civil aviation apply[216]; persons to whom articles or materials are given to be made up or cleaned or required in their own premises. Members of the employer's family and persons employed otherwise than for the purpose of the employer's business do not come within the contemplation of the Act[217].

The features of the Act include codification of the common law principles that contract of employment may be either contract for an indefinite period or for a fixed term or fixed amount of work, which may expire according to its terms. In cases of termination of employment, common employment is not a defence; terms and conditions of employment are all provided for in the individual contract of employment[218]. The default provisions can be modified by parties to a contract of employment based on the terms and conditions of employment. An example is section 11 of the Act on the requirement of notice for termination.

The relevant provisions are contained in section 54 to 56 of the Labour Act[219]. Section 54 deals with maternity protection; section 55 with night work, and section 56 deals with underground work. Section 54(1) (c) makes provision for maternity pay and section 56(1) prohibits engaging women in underground work. Note that female workers in the Public Service of the Federation are now entitled to sixteen weeks maternity leave with full pay. By virtue of section 54 (4), a woman on maternity leave should not be dismissed from her employment while on maternity, or given notice of termination during her absence. Section 91 of the Act defines a 'worker' as "any person who has entered into or works under a contract with an employer, whether the contract is for manual labour or clerical work or is expressed or implied or oral or written, and whether it is a contract of service or a contract personally to execute any work or labour[220]… The exceptions to the section (i.e., persons not considered as workers) are itemized under subsections (a)-(f)[221].

Section 7 of the Labour Act[222] applies to anyone who falls within the definition of "worker", all other workers are governed by the terms of their contracts of employment or any applicable instrument. The section states, inter alia[223]:

(1) Not later than 3 months after the beginning of a worker's period of employment with an employer, the employer shall give to the worker a written statement specifying-

[215] See section 91 of the Labour Act, LFN 2004
[216] See section 91 of the Act, Ibid
[217] See section 91, Ibid
[218] See section 11 of the Act, Ibid
[219] LFN, 2004
[220] See section 91 of the Act, Ibid
[221] See section 91 "worker" (a-f)
[222] LFN, 2004
[223] See section 7(1) (a-g) the Labour Act, LFN 2004.

(a) The name of the employer or group of employers, and where appropriate, the name of the undertaking by which the worker is employed;
(b) The name and address of the worker, and the place and date of his engagement;
(c) If the contract is for a fixed term, the date when the contract expires;
(d) The appropriate period of notice to be given by the party wishing to terminate the contract;
(e) The rates of wages and method of calculation thereof, and the manner and period of payment;
(f) Any terms and conditions relating to:
    i. Hours of work, or
    ii. Holidays and holiday pays, or
    iii. Incapacity for work due to sickness or injury

PRACTICE QUESTIONS

1. Distinguish between Contract of service and Contract for service.

2. Discuss the types of contracts of employment known to you.

3. Identify and expatiate on the elements of a valid contract of employment

4. Identify the legal issues in the case of **Evans Bros v. Falaiye**

5. What are the tests for distinguishing contract of service from contract of service?

6. Discuss the legal implications of the case of **Steyer Nig. Ltd v. Gadzam**

7. Sources of Nigerian labour law include the following **SAVE**.....

   a. Received English Law
   b. Nigerian agreements
   c. Judicial Precedents
   d. International treaties
   [COM]

8. In redundancy, the principle that is applicable subject to merit and other qualifications is.....

   a. FIFO
   b. LIFO
   c. FOLI
   d. FOFI
   [COM]

9. Legal right can be described as.....

   a. a right cognizable in law
   b. b a right that is social-economic in nature
   c. a right not capable of been enforced
   d. any right that is called right

CHAPTER THREE
THE CONCEPT OF LABOUR RIGHTS

3.0. Learning Objective

At the end of this Chapter, readers/candidates should be able to appreciate and explain the under-listed concepts and apply them to industrial relations generally.

(i) The concept called 'Right'
(ii) Right to work
(iii) Right at work
(iv) Right to strike in Nigeria
(v) Unfair labour practice and job security
(vi) Pension Reform Act, 2014 and social security of employees
(vii) The Concept of Employees' Welfarism/Social Security
(viii) Scope of Employees' Welfarism/Social Security
(ix) Legal Framework on Employees' Welfarism /Social Security as itemized under
    a) ECA 2010
    b) PRA 2014
    c) Labour Act
(x) Compensatory regime as itemized under
    a) ECA 2010
    b) PRA 2014
    c) Labour Act
    d) The Rule of Law established in Donoghue and Stevenson
(xi) Leave and Holidays

3.1. INTRODUCTION[224]

There has been a dichotomy between Rights generally[225] and Fundamental Human Rights[226]. Human Rights are classified into two, namely enforceable rights and the non- enforceable rights[227]. The issues of workers' rights have global dimensions and protections. No nation can operate contrary to international best practices without being labelled an unfriendly labour community.

[224] This Chapter is an extract from the work of the Commissioned Author, see Kehinde Bamiwola 'Labour Rights in Nigeria; an Overview of Nigerian Legislation and International Labour Organization Conventions in his (Master of Law) LL.M Thesis titled Right to Work; A Myth or Reality? The research work was submitted to the faculty of law. University of Lagos, Akoka Yaba. Lagos

[225] Chapter II of the Nigerian Constitution, 1999 as amended contains some Rights; these rights are headed with the caption Fundamental Objectives and Directives Principles of State Policy. Sections 13-18. They further classified as Political Rights/Objectives, Economics Rights, Social Rights, Cultural Rights and Educational Rights.

[226] Fundamental Human Rights are those contained in the chapter IV of the Nigerian Constitutions 1999 as altered; some other international instruments such as the African charter on Human and Peoples' Right; adopted in Nairobi June 27, 1981; universal Declaration of Human Rights 1948. The Preamble to the Fundamental Rights Enforcement procedure Rules, 2009 provides under Preamble 3(a) that "The Constitution"

[227] See Kehinde H. Bamiwola (2011) Human Rights and Employment Discrimination; A Comparative examination of equal Job Opportunities Problems by the International Labour Organization. www.ilo.Org' See also K.M Mowoe (2008) Constitutional Law in Nigeria (Malthouse).

Certain Labour rights such as Right to work[228], Right at work[229], Right to freedom of association[230], Right against employment discrimination[231], Right to equal pay[232], Right to collective bargaining[233], Protection of children and youngpersons from forced labour and abuse[234]; in addition, right to Social Security[235] opportunities are central to labour rights. Local and International instruments provide for, and guarantee these rights. There is no way in which these rights can be examined without discussing other employment law issues such as occupational safety and some basic Fundamental Rights such as Right to Life,[236] which must not be jeopardized by any labour activities.

[228] See Article 23.1 of the Universal Declaration of Human Rights, 1948; Articles 6.1; 811 International Covenant on Economic and Social Rights; Article 15 of the African Charter on Human and Peoples Rights and Section 17(3) (a) of the Nigerian Constitution, 1999 as amended.

[229] See ILO Declaration of Fundamental Principles and Right at Work, 1998, Freedom of Association and Protection of the Right to organize convention No.87 of 1948 which came into force on 4th July, 1950 and ratified by Nigeria on 17th October, 1960; Right to organize and collective Bargaining Convention No.98 of 1949 which came into force on 18th July, 1951 and ratified by Nigeria on 17th October, 1960; Forced Labour convention No. 29 of ratified by Nigeria on 17th October, 1960; Abolition of Forced Labour Convention No.105 of 1957 which came into force on 17th January, 1959 and was ratified by Nigeria on 17th October, 1960;

[230] See Section 40 of the Nigerian Constitution, 1999 as amended; Article 20, Universal Declaration of Human Rights, 1948; Article 10 of the African Charter on Human and Peoples Rights; ILO Conventions 87 of 1948, and convention 98 of 1949. See also Osawe &Ors v The Registrar of Trade Union (1985) INWLR (pt 4)755

[231] See Section 42 of the Constitution of Nigeria, 1999 as amended; section 16(2) of the same Nigerian Constitution; Americans civil Rights Act, 1964, European Convention for the Protection of National minorities 1995; Article 3& 14 African Charter on Human and Peoples' rights 1981, OAU Dec. CAB /LOG/ 67/3 rev.5. The European Convention on Human Rights and Law, 1983; International Labour Organization convention 111 of 1958; see Hoffman v South Airways (2001) 38 WRN 147 CC; see also Americans with Disabilities Act, 1990 (ADA) and the United States Pregnancy Discrimination Act, 1976.

[232] See Pollis V The New York School for Social Research, 132 F, 3D, 115 (2nd GR 1997), Kehinde Bamiwola, Human Rights and Employment Discrimination; A comparative Examination of Equal job Opportunities, op. cit; U.k's Equal Pay Act, 1963; ILO Convention 100, (Equal Remuneration) of 1951 adopted on 29th June, 1951 at Genera, 34th ILO Session, came into force on 23rd May, 1953 and was ratified by Nigeria on 8th May, 1974

[233] See International Labour Organization Convention 98 of 1949 which came into force on 18th July, 1951 and was ratified by Nigeria on 17th October, 1960; see also Seyi A Shadare and Kehinde Bamiwola, The Legal Environment of Industrial Relations in Nigeria. Nigerian Journal of Industrial Relations, vol.13 No.1, 2015, published by the Faculty of Business Administration, University of Lagos.

[234] See Forced Labour Convention No. 29 of 1930 encompassing Compulsory Labour, it came into force on 1st May, 1932 and was ratified by Nigeria on 17th October, 1960; Abolition of Forced Labour Convention No. 105 of 1957 which came into force on 17th January, 1959 and was ratified by Nigeria on 17th October, 1960; minimum Age Convention for admission to Employment No. 138 of 1973, adopted on 26t June, 1973 at Genera, 58th ILO Session which was ratified by Nigeria on 2nd October, 2002; Worst Forms of Child Labour Convention No. 182 of 1999 adopted at Genera, 87th ILO session of 17th June 1999 which came into force on 19th November, 2000 and was ratified by Nigeria on 2nd October, 2002; Convention on the Right of the Child of 20th November, 1989 ratified by Nigeria on 19th April, 1991.

[235] See Social Protection, ILO available at LLHP://www.ilo.org/global/about-the-ilo/decent-work accessed on the 4th August, 2015; section 14(2) of the Nigerian Constitution, 1999 as altered; section 5(a)(1) National Health Insurance Scheme Act; Section 17 N41S Act, Pension Reform Act, 2014; Employee Compensation Act, 2010; ILO Convention No.155 of 1981 on Occupational Safety and Health;

[236] See section 33, Constitution of the Federal Republic of Nigeria; 1999 as amended, see also Kehinde H. Bamiwola Esq, Human Rights in Nigeria, Chapter 11 on Right to Life (yet to be published).

The importance of labour rights cannot be over-emphasized. Every worker thinks of job security,[237] improved conditions of work; good remuneration; friendly work environment as against a hostile one;[238] regular promotions and opportunities for on-job trainings in form of attending seminars, symposiums and even on-job scholarships for further studies; protection from unlawful or wrongful termination of employment;[239] just to mention a few. Both the employers and the state[240] have duties[241] that are incidental to the operations and enforcement of these labour rights;

Labour rights are not one sided, the employers of labour have rights that are customarily and statutorily protected; for a balanced legal environment[242] of the work world, there must be a meeting point for both the employees' rights and the employers' rights. This meeting point is what this writer termed the "Industrial Harmony Equilibrium" (IHE).[243] Any shift in this equilibrium

[237] According to Prof. C.K Agomo "The fundamental question which continues to be asked each time a case come before the Courts on wrongful termination of employment is whether an employee or worker can be said to have security of tenure in his or her job" see Agomo C.K (2011) Nigerian Employment and Labour Relations Law and Practice" (concept Publications Limited, at page 156; At common law, security of tenure of employment of employees is govern by the terms contained in the contract of employment. See Abukogbo V African Timber & Plywood Ltd 1966(2 All NLR 87; Daniels V Shell B.P Petroleum Development Co. Nig. Ltd (1962) 1 All NLR 19; See also Agomo C.K Op.cit page 157; The terms under common law may include the requirement of notice; statutory employments are governed by the laid down procedures and statutes; see Olaniyan and Ors V University of Lagos & Anor 5J.PP.L 113-114

[238] Hostile work environment can be influenced by many factors which include discrimination, sexual harassment related cases, and gender. See Harris V Forklift 510 US 17, 114 S Ct 367 (1993); Oncale V Sundowner offshore service, 118 S. Ct 1998, the two cases are reported in K.H Bamiwola, Human Rights and Employment discrimination; A comparative examination of Equal job opportunities- www.ilo.org.

[239] See ILO Convention 158 on Termination of Employment; see Nwoke Rachael Nnennaya V Union Bank Plc Unreported suit No NICN/LA/153/2014 delivered on 2nd June, 2015 by Hon. Justice Oyewunmi O.O of the National Industrial Court, Lagos Judicial Division

[240] The State here refers to the Federal Republic of Nigeria. See section 4 of the Nigerian Constitutions 1999 as amended on the Legislative power of the National Assembly to legislate on the Exclusive Legislative List of the 2nd Schedule to the Constitution. Labour and productivity is on item 34 of the list.

[241] The duties of employees and employers are correlative and complimentary. The Employee duties are central to the Master-servant relationship that exists between him/her master. The master reciprocatively owes the employee certain duties some of these duties have been coded and those that are not coded are either made available by express terms of the contract, or common law or may be inferred by Court whenever a dispute arises as to the breach of these duties. That of the employee include duty to offer personal service, duty to be ready to work, duty to cooperate with the employer; duty to obey reasonable and lawful orders; duty to give exclusive service to the employer; duty not to make secret profit; duty to respect and keep employer's trade secrets and the duty of exercising reasonable care and skill in carrying out his/her functions. Employers are duty bound to pay Remuneration provide safety work-place, duty of care etc. see Agomo C, K op.cit PP 119-141.

[242] See Seyi A. Shadare and Kehinde H Bamiwola Esq "The Legal environment of Industrial Relations" Nigerian Journal of Management, published by the Faculty of Business Administration, University of Lagos Vol. 13, No. 1, 2015 PP 107-118.

[243]**IHE**- 'Industrial Harmony Equilibrium'- These writers are of the view that when all Employees rights are respected and given favourable work environment to operate with a corresponding respect for the employer's rights; the employee will not over-demand for inconsiderable and Irrational work conditions and remuneration, the employer on its part will not infringe on the employee's rights or do anything that will put the employee at a risk of his life and benefits or over-maximize the employee for selfish reasons and purposes; there will be peace. This peace point is the 'Industrial Harmony Equilibrium'. At this expected point, the rights, duties and obligations of both parties are respected and enforced without necessarily invoking any sanctions. At **IHE**, Industrial actions are near no existence.

level either to the left or to the right will cause disharmony, disutility, disunity of purpose,[244] and conflict of economic interest. In the words of Bamiwola,[245] an economy or society that allows this type of disequilibrium of any form in its socio-economic struggles or political development may be ridden by poverty, chaos, injustice, inequality, disutility, disunity and conflict of its political will.[246]

Industrial Harmony Equilibrium (IHE) cannot be attained without considering other variables that are incidental to any contract of employment. One of these variables is the tool of collective bargaining and the product thereof[247] which is collective agreement. For instance, the employee's right to strike,[248] and the employer's lock-out and no-work-no-pay rules, are extra factors that play major roles in the attainment of 'IHE'.

This Author intends to critically look at the labour rights under various local (Nigeria) Legislation and international instruments and suggest via conclusion, legal, social, political and economic ways of attaining Industrial Harmony Equilibrium (IHE) under various labour rights.

3.2. THE CONCEPT CALLED 'RIGHT'

'Right' has been defined by many jurists[249] from different schools of thoughts[250]. Black's Law dictionary defines a right as 'something that is due to a person by just claim, legal guarantee or moral principle[251]. For a right to be enforceable, such right must be legal. In *Attorney General of Lagos State v Attorney General of Federation*,[252] Niki Tobi JSC answered the question; 'what is a legal right?'

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[244] See Kehinde Hassan Bamiwola "Human Rights and Employment Discrimination; A Comparative Examination of Equal Job Opportunities- www.ilo.org;"

[245] K. H Bamiwola Op. cit page 3; see also Kehinde Bamiwola, The paradoxes of Employees Rights; An overview of Trade Union Laws and the Nigerian Labour Act, De Quintessence, Maiden Editions, 2010

[246] See K.H Bamiwola, Human Rights and Employment Discrimination; A comparative … www.ilo.org, pg 3

[247] See Seyi A. Shadare & K. H Bamiwola; The Legal environment of Industrial Relations' in Nigeria. Op.cit.

[248] See Agomo C. K. The Right to work and the Right to strike in Nigeria; A paper presented at the 21st Annual Conference of Law Teachers, 1983; see also Convention No. 87 (1948) on Freedom of Association and the protection of the right to organize; convention No. 98 (1949) on the principles of Right to Organize and to Bargain collectively. See also B. Hepple "The Right to strike in International Context, Lecture delivered at the University of Toronto on 5th December, 2009, cited by Agomo C.K in Nigerian Employment and Labour Relations Law and Practice, op.cit pages 297-298."

[249] See Salmond, Jurisprudence (Granville Williams 11thed) Salmond defines right as an interest for which is a duty and disregard of which is a wrong. Right according to the Nill theory (the exponents of the Nill theory are Austin, Holland, Pollock and Vinogradoff) is a Vinogradoff, when a man claims something as his right, he claims of his own as due to him. Justice Holmes in American Bank & Trust C v Federal Reserve Bank of Atlanta, 256 U.S 350 (41 S. Ct.499, 65, LED 983) held that, there can be no right without a duty and vice versa.

[250]School like the Positivists, *naturalis*, new-classical, moralist the contemporary school of thought sociologists, utilitarian's etc; see Funso Aderamola (2008) a jurisprudence (Lexis Nexis) PPI-143, see also Fundamental Legal conceptions 1919 C.F simmonds; A Restatement of Hohfeld' (1938) Harvard Law Reviews 51. Hohfeld adopted the term 'claim instead of 'right'. Hohfeld Postulated that the correlative of right is duty and the Jural opposite of right is no right "no claim".

[251] Black's Law dictionary, Eight Edition, Page 1347.

[252] (2005) 2 WRN pg. 1 at PP 107-108, Lines 45-10

"What is a Legal right? A legal right in my views is a right cognizable in law. It means a right recognized by the law and capable of being enforced by the plaintiff. It is a right of a party recognized and protected by a rule of Law, violation of which would be a legal wrong done to the interest of the plaintiff, even though no action is taken. The determination of the existence of a legal right is not whether the action donates such a right by reference to the enabling law in respect of commencement of the action."

It is clear without equivocation that for a right to be enforceable, it must be cognizable in law[253]. Thus, the labour rights that are of concern to the Author are those contained in laws- whether common law, statutory law or international laws/instruments[254]. The word 'Labour' can only be defined within the context of its usage. Labour as used in this paper refers to a class of persons who work for wages[255] and not for profits. It also refers to workers considered as economic unit[256]. By 'Labour Rights', we are concerned with workers' rights[257] that are cognizable in Law and equally enforceable at law. However, employers' right such as the right to hire and fire'; summary dismissal for misconduct on the part of a worker, are right within this paper.

The labour rights that are central to the subject matter of this paper are rights to both workers and would be workers; the rights which are post-contract of employment can only be exercised after a master-servant relationship has been established. The International Labour Organization is saddled with the responsibility of setting standards for effective and efficient industrial and labour relations[258]; these standards are referred to as International Labour Standard (ILS). ILS comprises the Conventions and Recommendations adopted by members after an exhaustive procedure by the

[253] A.G Lagos V A G Federation(supra)
[254] See Section 254C (2) of the constitution of the federal Republic of Nigeria, 1999 as amended.
[255] See Black's law dictionary, Op. cit. 890
[256] Ibid
[257] The court in Dantata & Sawoc Constitution company Nigeria limited v Peter Egbe (1993) 4 NWLR (287) 335 at P.345 emphasized the importance of a legal right when it held "The Court, particularly an appellate court cannot stand aloof and watch insensitivity the legal right of the parties being plunged into a quagmire or grounded in a state of impasse. That will surely be injustice which a court of equity must denounce.
[258] See various ILO convention such as ILO convention 29 of 1930, Geneva on forced labour; ILO convention 87 freedom of association and protection of the right to organize, 1948 San Francisco; ILO convention 98 Right to organize and collective Bargaining 1949, Geneva; ILO convention 100 Equal remuneration 1951, Geneva; ILO convention 105 Abolition of forced labour 1957 Geneva; ILO convention 111 Discrimination (Employment and Occupation) 1958, Geneva, ILO convention 138 Minimum age convention 1973 Geneva, ILO convention 182 Elimination of the Worst forms of child labour 1999, Geneva etc.

International Labour Conference"[259]. The international labour organization has four core standards, which all the conventions, protocol and Declarations revolve round[260]. They are[261]

(a) Freedom of association and the effective recognition of the right to collective bargaining.
(b) The elimination of all forms of forces or compulsory labour.
(c) The effective abolition of child labour, and,
(d) The elimination of discrimination in respect of employment and occupation.

In this chapter, the Author will look at the following; the right to work and the right at work which will include- *Right to form and join trade union; Right to Strike; Right against discrimination and right against unlawful & wrongful or unfair termination of employment; Right of retirees under the Pension Reform Act, 2014, and unfair labour practice and job security.

3.3. RIGHT TO WORK

In the opinion of Professor Agomo,[262] the concept of 'right to work is wider than its semantic or phrasal connotation'; the learned professor asked:

> *"... What exactly is meant by this concept of the right to work? Does it mean the right of the worker to work at his trade to the best of his ability without let or hindrance by others? Or does it mean the right of the worker to force himself upon an employer whether or not that employer wishes to engage the particular worker?"*[263]

Keith Ewing[264] had submitted that the citizen is born into a world where if rationally organized, he can live only by the sweat of his brow, society owes him the occasion to perform his function. To leave him without access to the means of existence is to deprive him of that which makes possible the realization of his personality. But not only does the citizen have a right to work; he or she also has right in work'[265]. This Author intends providing answers to some of the questions raised by Professor Agomo.

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[259] See Agomo C.K. Corporate Governance and International Labour standards. (2007) published in Rocheba's labour law manual, Edited by Enobong Etteh (Rocheba Law Publishers) at page3. They are also subsidiary standards (CEACR) see Agomo C.K Ibid.

[260] The ILO is the constitutionally mandated international organization and the competent body to set and deal with international labour standards. See Agomo C.K Ibid page6.

[261] See the ILO convention earlier identified and listed especially convention 87, of 1948; 98 of 1949, 29 of 1930, No. 105 of 1957; No. 138 of 1973; No 182 of 1999; No. 100 of 1951 and No 111 of 1958. These conventions address the four-core standard of the ILO.

[262] Agomo C.K. the Right to work and the right to strike in Nigeria, a paper delivered at the 21st Annual Conference of law Teachers, 1983, page 4

[263] Agomo C.K Ibid

[264] Keith Ewing 'Citizenship and Employment in Rights of Citizenship, edited by Robert Blackburn; (1993) (Mansell Publishing Limited) at page We Work (1981) 10 ILJ 65

[265] Keith Ewing, ibid; see also C.F, B Hepple, the Right to work (1981) 10 ILJ 65

According to Kehinde Bamiwola,[266] "There exists nexus between human rights and employment opportunities, thus; right to life, movement, peaceful assembly, and association, privacy and human dignity, liberty, property and other classes of human rights will only be functional per excellence when a person's source of livelihood is unhindered" … He further submitted that-

"Thus, right to life and property will only be of utmost advantage to humanity when the main source of sustainability which is employment has not been hindered"[267]

It appears there are questions to ask and answer: if there exists right to work, who is to provide the work? Is the state bound to provide employment for all her citizens? Can a willing employee be forced on an unwilling employer? Can an employer use a discriminatory selection method that can be unfair to a job seeker and finally, how can a job applicant or citizen enforce the so-called right to work? These questions can only be answered using constitutional, statutory and international Instrument provisions with decided case laws to provide answers.

The Constitution of the Federal; Republic of Nigeria, 1999 as amended, provides in section 17(3)[268] that:

"*The State shall direct its policy towards ensuring that –*

> *a. All citizens, without discrimination on any group whatsoever, have the opportunity for securing adequate means of livelihood as well as adequate opportunity to secure suitable employment"*

The provision of the Universal Declaration of Human Rights 1948 suggests from all legal Implication that the right to work is a human right. Article 23:1[269] provides

"Everyone has the right to work, to free choice of employment to just and favourable conditions of work and to protection against unemployment."

Apart from UDHR 1948, the International Convention on Economic, Social and Cultural Rights (ICESCR)[270] provides for right to work as including the right of everyone to the opportunity to earn his living by work which he freely chooses or accepts. Article II of ICESCR[271] makes

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[266] K.H Bamiwola Human rights and Employment Discrimination: A comparative examination to Equal job opportunities. www.ilo.org, last accessed 26th May, 2015 at pages 1 & 21

[267] K.H Bamiwola Ibid, PP 1 & 21

[268] CFRN 1999 as amended

[269]Universal Declaration of Human Rights. 1948. The language of Article 23:1 of this Instrument makes right to work a fundamental right; however, the right is contained under chapter ii of the Nigerian Constitution which is non-justiciable by virtue of section 6(6)(c) of the same Constitution.

[270] Article 6 of the ICESCR

[271] Internal Covenant on Economic, Social and Cultural Rights

provision for right to an adequate standard of living that is unconditional, which does not depend on work.

The African Charter on Human and Peoples' Rights[272] equally provides for right to work. Article 15 provides:[273]

"Every Individual shall have right to work under equitable and satisfactory conditions and shall receive equal pay for equal pay."[274]

It is without doubt that these provisions in the international instruments provides for right to work and makes it a fundamental right. However, under the Nigerian Constitution, the provision is under a non-justiciable chapter of the Constitution.[275] The argument is whether a citizen of Nigeria can enforce this right and whether Nigeria is duty bound to provide work for its citizens and equally protect this right. The Author will answer these questions in the affirmative notwithstanding the attitude of the Nigerian Courts to the enforcement of the rights contained in Chapter II of the Constitution.

According to Keith Ewing[276], 'in the political arena, rights of citizenship find formal expression and protection in both international law and constitutional law'. In international law, there is both UN protection in the shape of UN Declaration of Human Rights and Regional Protection …"[277]. It is submitted that, the right to work of every citizen is enforceable. For instance, the preamble to the Fundamental Rights Enforcement Procedure Rules 2009 Provides in its preamble 3(a)

"The overriding objectives of these Rules are as follows (a) the constitution especially chapter IV as well as the African charter, shall be expensively and purposely interpreted and applied with a view to advancing and realizing the rights and freedoms contained in them and affording the protection intended by them"[278]

[272] African Charter on Human and Peoples' Rights, 1981, OAU Dec. CAB/LOG/67/3 rev.5
[273]AFHPR, 1981 Ibid.
[274] See ILO Convention 100, Equal remuneration Convention, 1951;
[275] See chapter II of the Nigerian Constitution 1999 as amended.
[276] Keith Ewing Citizenship and Employment, Ibid
[277] See the African Charter on Human and Peoples Rights 1981, European Convention on Human Rights; Council of Europe's European Social Charter, EC Charter of the Fundamental Social Right of Workers etc
[278] Enforcement Procedure Rules, 2009 which provides that … the Court shall respect municipal, regional and international bills of rights cited to it or brought to its attention or of which the Court is aware, whether these bills constitute instruments in themselves or form part of larger documents like constitutions, such bill include: the African charter on Human and Peoples Rights …, The Universal Declaration of Human Rights and other instruments (including Protocols) in the United Nations Human Rights System.

It is legally logical and coherent to conclude that notwithstanding the non-justiciable nature of right to work under the Nigerian Constitution,[279] right to work is justiciable under international law and thus enforceable.[280] This position or argument finds solace in the same Constitution of the Federal Republic of Nigeria, 1999 as altered under its section 254 C (2) which provides-

"Notwithstanding anything to the contrary in this Constitution, the National Industrial Court shall have the jurisdiction and power to deal with any matter connected with or pertaining to the application of any international Convention, treaty or protocol of which Nigeria has ratified relating to Labour, Employment, Workplace, Industrial relations or matters connected therewith"[281].

Although, one cannot approbate and reprobate a state of affairs which he/she has created or assented to. It appears the common law rule of law that a willing employee cannot be forced on an unwilling employer has many implications to this right. The fact remains that right to work can be denied on the ground that an employer can still exercise its power of selecting whosoever it wants although, such employer must display fairness and non-discriminatory tendencies towards the would-be-employee[282]. Additionally, right to work cannot be denied on the basis of disability[283] and Health Challenges[284].

3.4. RIGHT AT WORK

[279] Relying on section 17(3) of the Nigerian Constitution, there exists no right to work since the provision is non-justiciable. It is important to emphasize the point that non-justiciable provisions in other nations/jurisdictions have been made justiciable once there exists a nexus between these rights and other fundamental Rights; see the following cases; Koolwal V Rajas, Memetha. V Union of India (1987) A.I.R 1086; Rural Litigation V Uttah Pradesh (1966) A.I.R.S.C 1057; Joseph Kessy V Daresalem; Minos Oposa V Secretary of the Development of Environmental and Natural Resource, 33 LLM 173 (1999)

[280] On hierarchy of the Nigerian Constitution vis-a vis international laws; see Fawehinmi V Abacha (2001) 51 WRN.

[281] It is crystal clear that as far as labour rights are concerned, the law as laid down by the supreme Court of Nigeria in AbachaV Fawehinmi (2000) FWLR (pt. 4) 533 and R.T. N. A. C. H. P. N. V M & H N. U. N (2008)2 NWLR (pt 1072) 575 which was based on the provision of section 12 of the Nigerian Constitution is no more the law or labour/employment matters. Once Nigeria ratifies an international instrument, domestication via National Assembly passing it into law before such can have the force of law is no more applicable to labour and or Industrial relation matters. This is in line with international best practices.

[282] See K.H Bamiwola, Human Rights and Employment discrimination … www, ilo.org. see also section 42 of the Nigerian Constitution 1999 as altered; section 17(3)(e) of the same constitution; Osisanya V Afribank accessed on www.nigeria-law.org accessed on 11th August, 2015; Chukwumah V Shell PDC Nig Ltd (1993) 4 NWLR (pt 289) 512; Olanrewaju V AfriBank Nig. Plc (2001) 13 NWLR (pt 731) 691.

[283] See Dada Oluseyi; Akintunde and Odewenwa Oludare Joseph 'Advocating for implementation of Rights of persons with special needs in Nigeria, paper presented at the 25th NASET Annual Conference/Workshop held at Umuahia, Abia State on 21st-25th of October, 2013 accessed on www.researchgate-net on 11th August, 2015.

[284] See Hoffman V South African Airways (2001) 38 WRN 147 CC where the South African Court held that denial of employment to an applicant on the grounds that he has H.I.V positive amounted to unfair discrimination.

Right at work arises after a person has been employed or engaged either on contract of employment at common law[285]or on employment with statutory flavour[286]. The rights include Right against Employment Discrimination as guaranteed by the Nigerian Constitution[287]. Right from employment discrimination is wider than the scope envisaged by the constitution: The ILO convention C111 of 1958 forbids discrimination of any kind[288]. Male and female Employees are presumed to be equal before the law[289]. Thus, any discrimination based on sex, race, skin colour, religion etc. would be considered as labour unfriendly and acts that contravene international best practices. It is submitted that section 42 of the Nigerian Constitution can be expansively argued to cover work-place discrimination. Thus, a system that follows selective treatment of Employees when it comes to promotion or termination is discriminatory. In *Rachael Nwoke v Union Bank Plc*[290], the Court held per Hon. Justice Oyewumi O.O.:

"This Court by virtue of section 254(1)(f)(g) and (h) has exclusive jurisdiction to decide on issues bordering on unfair labour practice or international best practices in labour and or disputes arising from discrimination at work place"[291].

The Court in frowning at discrimination held in its final judgment thus:

"It is declared that the dismissal of the claimant by the defendant is wrongful, harsh and discriminatory and accordingly set aside"[292]

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[285] Contract of employment is based on the terms of the agreement. In Union Bank v. Ogbor (1995) 2 NWLR (Pt 380) the Court held that any other employment outside the statute is governed by the terms under which the parties agreed to be bound as master and servant: see also Shuaibu v UBN (1995) 4 NWLR 173 CA; IBIEVNORE v NEPA (2004) NLLR (pt SC: Yusuf v Volkswagen (1996) 7 NWLR (Pt 463) 746 CA. See K.H. Bamiwola "The paradoxes of Employees" Rights' (2010) published in the Edition PP 92-97

[286] Employment with statutory flavor is the type in which there are laid down procedures for hiring of the employee and the termination of the employee's appointment. According to Bamiwola (2010) op.cit, 'The beauty of employment with statutory flavor has been emphasized in plethora of cases' see ShittaBey v Federal Public Service Commissioner for Education, Bendel State (1995) 8 NWLR (Pt 411) 69 CA.

[287] See section 42 of the Constitution of the Federal Republic of Nigeria, 1999 as amended.

[288] See section 16(2) of the Nigeria Constitution of 1999 as altered; see also American Civil Rights Act, 1964; Articles 13 & 14 of the African Charter on Human & Peoples Rights 1981, OAU, Dec. CAB/LOG/67/3 rev.5. For further research, read, K.H. Bamiwola (2011) Human Rights and Employment Discrimination; A comparative Examination o Equal Job Opportunities published by the International Labour Organization (ILO).

[289] See the case of Pollis v The New York School for Social Research, 132F, 3D 115 (2nd GR 1997) which illustrates wage discrimination.

[290]Unreported Suit No NICN/LA/153/2014 judgment delivered on the 2nd day of June, 2015 before Hon. Justice Oyewumi O.O

[291] Ibid, page 27 paragraph 2 per O.O. Oyewumi J.

[292] Ibid. pg 20; The facts of the case revealed that the Claimant was wrongfully dismissed for an alleged fraud that occurred at the Defendant's branch of Idimu-axis; The names of three staffs, the Claimant, Chuks Elue and Musa Zubair featured in the Bank's inquiry that the fraudsters used the password belonging to one of them to defraud the Bank of #61, Million. The suspects were later arrested, they made some refund and were later handed over to the police. The employment of the Claimant was dismissed while that of the other two staff were terminated with severance payments. The Defendant claimed that the Claimant compromised her password to the fraudsters without any evidence, whereas it was the Defendant's E-server/system that was porous, slack and accessible to the fraudsters; the Court held the Defendant liable and set aside the dismissal to termination with severance payment.

It is trite that whenever it can be evidentially sustained that discrimination occurs at the work place, the Court will not hesitate to find the Defendant liable[293].
Employment discrimination could take different forms such as Gender/Sex discrimination[294], wage discrimination[295], Race/Colour discrimination, [296] etc.
Right at work includes right to equal pay or remuneration for equal job of equal weight. This right has been coded into international instrument with the International Labour Organization (ILO) convention 100 (C100) titled Equal remuneration of 1951[297]. Equal remuneration for men and women workers for work of Equal value refers to remuneration established without discrimination based on sex[298] covers promotion at work[299].

Dignity of human person as a fundamental right is extended to labour and work-environment generally[300]. It is trite that no employee can be forced to do a job contrary to what is contained in his terms of employment. Thus, forced labour can be used as a means of labour discipline or as a punishment for having participated in strikes or as a means of racial, social, national or religious discrimination[301].

Every Worker/Employee or employer of labour has the right to form, join or partake in trade union activities. This includes the right to organize without any formal authorization. This is a fundamental right to freedom of association[302]. The ILO Convention 87 titled "Freedom of Association and Protection of the Right to Organize" of 1948 ILO Convention 98 'titled Right to Organize and Collective Bargaining, of 1949 guarantee the right to join or form trade unions[303]. Thus, no employee can be sanctioned for exercising this fundamental right to freedom of association.

[293] See K.H. Bamiwola "Employment Discrimination"; A Critical Analysis (2011) Research work submitted to the faculty of law, University of Lagos Akoka, Yaba, Lagos.
[294] See Applins v Race Relations Board (1976) AC 285 at 298 per Lord summons; Cray v Boren, 429, US 190, 975 Ct 451 (1976); See also Agomo C.K. "The Legal Framework for Gender, Equity in Nigeria, in paradox of inequality in Nigerian Politics (Lai Olorode (ed) 2004, Concept Publications, Lagos; Muller V Oregon, 208 US 412 (1908)
[295]Pollis v The New School for Social Research (supra) see UK Equal Pay Act, 1970
[296] In Kamanakao and Others v AG Other (2002) AHRLR 35 (B W H C) 2001, the Court frowned at discrimination on the basis of tribe which has the resultant effect of unjust or preferential treatment.
[297] See Article 1 of the Convention which defines the term 'remuneration' to include ordinary, basic or minimum wage or salary and any additional emoluments whatsoever, payable directly or indirectly, whether in cash or in kind by the employer to the worker and arising out of the worker's employment.
[298] See Article 1(b) of the C100 of 1951
[299] See Article 2(b) of the convention
[300] See section 34 of the Constitution of Nigeria, 1999 as altered
[301] See ILO convention 105, Absolution of Forced Labour 1957; ILO convention 29 Forced Labour of 1930
[302] Section 40 of the Nigerian Constitution guarantees this right, although, associations contemplated must be lawful. The provision does not cover association like secret societies.
[303] See section 12 of the Trade Union Act, 1976 and the Trade Union Amendment Act, 2005

It must be pointed out that the right to freedom of Association is not absolute as certain classes of workers are exempted by statute. For instance, Section 3(3) of the Trade Union Act[304] excludes employees who are in the projection of the management from union membership. The law establishing the Nigerian Army, Navy, Air Force, the Nigeria Police, Customs & Excise, the Immigration Department, the Prison Service, the Nigerian Security Printing and the Minting Company Limited, the Central Bank of Nigeria, the Nigerian External Telecommunication Limited and any Federal or State Government establishment forbids the employees of these organizations from forming or joining trade unions. Thus, it is humbly submitted that this exclusion is unconstitutional as it contravenes section 40 of the Constitution of the Federal Republic of Nigeria, 1999 as altered. In fact, section 11 of the Trade Unions Act[305] empowers the Minister of Labour and productivity to specify by order any such establishment from time to time[306]

It is submitted that any law that violates the freedom of association of citizens is inconsistent with the Constitution[307]. Section 1(3) of the Nigerian Constitution provides:

"If any other law is inconsistent with the provisions of this constitution, this constitution shall prevail and that other law shall to the extent of the inconsistency be void".

It must be emphasized that the rights contained under Chapter IV of the Nigerian Constitution are equally applicable to labour relations. Thus, an employee or employer of labour has right to life[308], dignity of human person[309], fair-hearing[310], movement[311], association[312], religion[313], property right[314] and liberty[315]. These rights are inalienable; no work-environment can deny their exercise. They are equally labour rights as they are inherent in every employee.

[304] LFN, 2004
[305] LFN, 2004
[306] By virtue of Trade Union (Prohibition) Federal Fire Service Order, LON 42 of 1976 members of the Nigerian Fire Service are prohibit
[307] Section 1(3) of the Constitution of the Federal Republic of Nigeria provides
[308]See section 33 of the CFRN 1999 as altered
[309] See section 34 of the CFRN 1999 as altered
[310] See section 36 of the CFRN 1999 as altered
[311] See section 41 of the CFRN 1999 as altered
[312] See section 40 of the CFRN 1999 as altered
[313] See section 38 of the CFRN 1999 as altered
[314] See section 43 of the CFRN 1999 as altered
[315] See section 35 of the CFRN 1999 as altered

3.5. RIGHT TO STRIKE IN NIGERIA

As earlier observed that workers/employees and employers have fundamental rights to freedom of expression,[316] movement,[317] and right to peaceful assembly and association[318]; these three rights cannot be fully exercised without a corresponding exercise of the right of organized labour to use pressure, picket or threats of strike to curry favours to their side. According to Chris Wigwe[319] 'the right to strike is perhaps next in importance to the right to life'. Right to strike has become a powerful tool for industrial negotiation worldwide, though, some have submitted that it should be the last option. It has been observed that improved working conditions have often been achieved through the exercise of this right.

The organization goal of every employer of labour is profits maximization. Economists believe that, one of the ways to maximize profit is to minimize costs. Wages and salaries paid to employees are computed into the cost of production. Thus, minimizing these costs implies that, if employers of labour have their way, they will bargain for the least wage, *ceteris paribus*. Disputes may arise as a result of agitations of employees for improved working conditions[320].

In the United Kingdom, the Peasant's Revolt of 1389 was the first struggle between capital and labour. There were general protests about the living conditions of the peasants who took the brunt of the villeinage/serfdom system[321]. Craftsmen and journey men began to help each other in negotiating for improved conditions of work notably in Agriculture. That led to the combination Act 1799/1800. Strikes and Industrial actions started on a rough ground of struggles, imprisonment and even tortuous liabilities. Strike action was found unlawful in the popular case of *TAFF VALE RAILWAY COMPANY LTD v ALMAGAMATED SOCIETY OF RAILWAY SERVANTS*[322]where the court found trade unions liable to the sum of £23,000 (Pounds) for damages. The labour union reacted to *Taff Vale's* case with outrage. The U.K Trade Dispute (Amended) Act, 1927 made two types of strike illegal, which were sympathetic strike and strike or lock down designed to coerce. The 1927 Act was repealed by the Trade Dispute and Trade Union Act of 1946.

In Nigeria, the Nigerian Labour Congress (NLC) and the Trade Union Congress (TUC) which are the two central labour organizations, championed, organized and led Nigerian work force on

[316] Section 39 CFRN 1999 as altered
[317] Section 41 CFRN 1999 as altered
[318] Section 40 CFRN 1999 as altered
[319] Chris C. Wigwe 'The extent of the right to strike in Nigeria Labour Law
[320]The history of trade unionism in the U.K. between 1292 to 1305 showed that form workers collaborated and made agitations for improved working conditions that necessitated the ordinance of conspirators, 1292, 1300 and 1305 which criminalized any combinations or concerted actions among workers. The combinators ordinance was followed by the statute of labourers, 1349, 1350 and 1351 which introduced the Regulation of labour conditions and empowered justices of the peace to fix piece and work rates.
[321]See Kehinde H. Bamiwola &Ors 'Historical Milestones of Trade Union in the United Kingdom' seminar paper submitted to the faculty of law, university of Lagos, 2015, LL.M seminar a
[322] (1900) A.C 406

strikes times without number over matters considered to be of public concern[323]. It has been observed with due respect to labour unions, that sometimes strikes are embarked upon for matters of frivolities or striking for political reasons as against using 'strike' as the last resort after all other means specified in the statute had been exhausted.

The Trade Dispute Act[324] stipulates the steps to be taken, such as the workers and the management of the organization entering into collective bargaining toward resolving conflict internally[325]. It is upon the failure of the attempt to settle the dispute that parties shall within 7 (seven) days of the failure meet either as a whole or through their representatives under the presidency of a mediator mutually agreed upon and appointed by or on behalf of the parties with a view to amicable resolution of the dispute[326]. It is provided also, that if within seven days of the date in which a mediator is appointed, the dispute has not been resolved, the dispute shall be reported to the Minister of Labour and Productivity by or on behalf of either of the parties within 3 (three) days of the end of the seven days[327]. The Minister of Labour and Productivity is empowered by the statute to give time to the parties to the dispute within which any particular step must be taken in compliance with sections 4 and 8 of the Act[328]. If the mediator fails, the issue should be taken to a conciliator appointed by the Minister to resolve the dispute between the parties[329]. If the dispute is not resolved, the conciliator shall within seven days forward his report to the Minister, intimating the Minister of the development[330]. The Minister shall therefore within 14 days of the receipt of such, refer the dispute for settlement to the Industrial Arbitration Panel (IAP) where an award shall be given[331]. The Act further provide that if an issue arises as to the interpretation of the award, the minister or any party to the award may make an application to the National Industrial Court for a decision[332].

In some jurisdiction, strike actions are considered as breach of the contract of employment. Thus, when a trade union is calling for a strike, such by inference is calling for a breach of the contract of employment[333].

[323] In July 2011, NUT called of that six weeks nationwide which kept children in public schools at home. Prior to this, members of the National Union of Petroleum and National Gas Employees (NUPRNG) embarked on a strike that was aborted on the third day;
[324] TDA, T8 LFN, 2010
[325] Section 4(1) TDA, T8, LFN 2010
[326] Section 4(2) TDA, T8, LFN 2010
[327] Section 6(1) TDA, T8, LFN 2010
[328]See Section 7 TDA, , LFN 2010
[329] Section 8 TDA, LFN 2010
[330] Section 8 (5) TDA, LFN 2010
[331] Section 9 TDA, LFN 2010
[332]Section 17 TDA, LFN 2010. The decision of the Court is final: see section 15(2) of the TDA
[333] This is the position under the common law of England where contract of employment is seen as that which is between the employee and the employer; no third party (i.e. trade unions) is a privity to it.

In view of the above observation, it appears, strike as an industrial relation tool for negotiation or expression is anti-contract of service. However, in a constitutional democracy, where right to peaceful assembly, association, and expression is guaranteed[334], it will sound paradoxical to submit that strike is unlawful cum illegal. In fact, the constitution makes a right so fundamental, that no statute can remove, modify or qualify such right except the constitution that provides for such right[335].

The modern-day jurisprudents on labour rights cannot be fully discussed without examining the right of workers to strike. Chris Wigwe rightly submitted:

"*Strike as a right is a very important weapon in the harmony of organized labour…, the right has now been accepted as an indispensable part of a democratic society and a fundamental human right[336]"*

In the words of Lord Wright:

'Where the rights of labour are concerned the rights of the employers are conditioned by the right of man to give or withhold their services. The right of workman to strike is an essential element in the principle of collective bargaining. It is, in other words, essential element not only of the union's bargaining process itself, it is also a necessary sanction for enforcing agreed rules[337].

3.5.1 Definition of Strike

Lord Denning MR *in Tramp Shipping Corporation v Greenwich Marine Inc[338]* defined a strike action as:

'A concerted stoppage of work by men done with a view of improving their wages or conditions of employment or giving rent to a grievance or making a protest about something or the other or supporting or sympathizing with other workers in such endevours. It is distinct from stoppage brought about by external event such as a bomb scare or by apprehension of danger'

The Trade Dispute Act of Nigeria in its section 48 defines strike to mean:

[334] See the Constitution of the Federal Republic of Nigeria, 1999 as altered (CFRN)
[335]See section 1(3) CFRN, 1999 as altered.
[336] Chris Wigwe op cit, pg 4; see also O. Kahnfreud and B.Hepple, Laws against strikes, Fabian Research series, 1972 pg 4.
[337]Croffer Hand Woven Harris Tireed Co v Veiteh(1942)1 All E.R 142 at pp 158-159
[338](1975) All E.R 898 at pg 990

"The cessation of work by a body of person employees acting in combination or a concerted refusal under a common understanding of any member of persons employed to continue to work for an employer in consequence of a dispute, done as a means of compelling their employee or person or body of persons employed, to accept or not to accept terms of employment and physical condition of work."[339]

The Act defines, Cessation of work to include "deliberately working at less than usual speed or with less than usual efficiency[340]. The Act further defines refusal to continue to work to include "refusal to work at usual speed or with less than usual efficiency".

Applying the definition given by Lord Denning "with the use of concerted stoppage with the phrase" body of persons' used by the Act, it goes without saying that a single employee cannot go on strike in law. It is trite also that when an external event makes a group of persons to stop work, that cannot amount to a strike[341] where such external event or force came from bomb scare, apprehension of danger from terrorists, or any life-threatening situation. It must be pointed out that any dispute that does not fall within the definition of a 'trade dispute' cannot lead to a strike.

Although, right of organized labour to embark on, organize or participate in strike sounds more academic in view of statutory bottlenecks that must be removed before a strike can take place; it is trite that right to strike is fundamental, constitutional and has the backing of judicial pronouncements[342]. Section 43(1) of the Trade Union Act provides:

"It shall be lawful for one or more persons, acting on their own behalf or on behalf of a trade union or registered Federation of trade union or of an individual employer or firm in contemplation or furtherance of a trade dispute, to attempt at or near a house or place where a person resides or works or carries on business or happens to be, if they so attend merely for the purpose of peacefully persuading any person to work or abstain from working".

It must be stressed that, the same constitution that guarantees the right to association, or freedom of expression to individuals or group of individuals gives same rights to any person who may decide not to join trade unions or partake in strike actions or share same philosophy with any unionist; where any person disagrees with any labour union's view or decision to embark on

[339]See section 48, TDA, LFN 2010
[340]See section 48(1)b
[341]See Tramp Shipping Corporation v Greenwich
[342]See section 39, 40 & 41 CFRN, 1999 at altered. See also the dictum of Lord Wright in Crofter Harris Tweed Co v Veitch (supra). See Article 10 & 15 African Charter on Human and Peoples' Right; Article 8(1)(d) of the International Covenant on Economic; Social and Cultural Right, which recognizes right of trade union to embark on strike.

industrial action, such person's right is equally guaranteed and cannot be intimidated for not joining strike or industrial action.

No law will permit or aid criminality; as such, anytime trade unionists pass their constitutional boundary by engaging in criminality; such acts shall be punished by the appropriate law and authority enforcing the law via the verdict of a court of competent jurisdiction. This position was summarized by Lord Halsbury in *Mogul Steamship Co Ltd v McGregor, Gow & Company thus:*[343]

"Intimidation, violence, molestation or the procurement of people to break their contracts are all of them unlawful acts; and I entertain no doubt that a combination to procure people to do such act is a conspiracy and unlawful"

Of importance is subsection 2 of section 43 of the Trade Union Act, which provides:

"Accordingly, the doing of anything declared by subsection 1 of this section to be lawful shall not constitute an offence under any law in force in Nigeria or any part thereof and in particular shall not constitute an offence under section 366 of the criminal code or any corresponding enactment in any part of Nigeria."[344]

This provision has been considered a "trade union immunity" provision. However, some conditions must be met for the subsection to apply. The picketing must be in contemplation or furtherance of a trade dispute and it must be merely for the purpose of peacefully obtaining information or peacefully persuading any person to work or abstaining from work[345]. Thus, it is legal and logical to conclude that once the picketing is not in contemplation of a trade dispute and the persuasion or demands have no nexus with a trade dispute, any crime committed shall not be immune from prosecution. In *Piddington v Bates*[346] the picketer who gently pushed aside a police officer was charged with obstructing a police officer in the lawful discharge of his duties. The Court convicted the picketer that, what he did came within the contemplation of the definition of 'obstructing' a police officer. On appeal, the appellate Court held that the police officer was perfectly doing his lawful duties when he directed that only two persons should picket per door because the officer had suspected a likely breach of the peace if many persons were allowed to picket per door[347].

[343](1892) A.C 25 at pg 37
[344]Section 43(2) Trade Union Act, 1976, LFN 2010
[345]See section 43(1) TUA
[346](1960)3 All E.R 60
[347]The case of Garba v University of Maiduguri (1986) 1 NSCC 245 has established the law that students should not came together under the cover of unionism to engage in criminal acts of arson, looting, hooliganism and assault. The Supreme Court set aside the judgment of the lower Court on the ground that the disciplinary board that tried and convicted the students was incompetent to do so, since the acts committed by the students are criminal which ought to have been tried by a court of competent jurisdiction.

On the civil liability on act done by a person in contemplation or furtherance of a trade dispute, this shall not be actionable in tort on any one or more of the following grounds only; that it induces some other person to breach a contract of employment; or that it is an interference with the trade, business or employment of some other person or with the right of some other person to dispose of capital or his labour as he wishes; or that it consists in his threatening, that a contract of employment (whether one to which he is a party or not will be broken; or that it consists in his threatening, that he will induce some other person to break a contract of employment to which that other party is a party[348]. Any ground not mentioned in subsection 1 of section 44, Trade Union Act, shall be actionable in tort[349].

Section 24 of the Trade Union Act provides:

"An action against a trade union (whether of workers or employers) in respect of any tortuous act alleged to have been committed by or on behalf of the trade union in contemplation of or in furtherance of a trade union dispute, shall not be entertained in any Court in Nigeria"[350]

Section 43 of the Trade Union Act and section 44 of the same Act differ in principle. The word 'peacefully' was used in section 43, while the word was omitted in section 44, which covers civil liability. The legal implication is that, even if force is applied in furtherance of picketing in a trade dispute, an action in tort shall not lie against the person(s) or unionists who committed that civil wrong. Thus, section 44 is more lenient to unionists and picketers. It must be pointed out that section 24 and 44 of the Trade Union Act have rendered nugatory some English Court decisions[351]on the tortuous liability of trade unions and their personnel.

In conclusion, no employee can terminate the employment of any person for exercising his or her right to join trade union or participate in picketing[352] or strike that falls within the definition of strike under section 48(1) of the Trade Dispute Act.

[348]See section 44(1) (a)-(d) Trade Union Act (TUA)
[349]See section 44(2) Trade Union Act (TUA)
[350]Section 24, TUA, subsection 2 provides that, subsection 1 of this section applies both to an action against a trade union in its registered name and to an action against one or more person as representatives of a trade union
[351]See Rokes v Bernord (1964) A.C 129; Tarquary Hotel Ltd v Cousins (1969)2 Ch. 106; Daily Mirror Newspapers Ltd v Gardror (1968) Q.B 768. However, note that decisions in Strafford v Lindley (1965) A.C 304 which held that, acts of picketing that are permitted by statutes, even if, they are manifestly unlawful, are not tortuous or actionable
[352]In Habbord v Pitt (1976) Q.B 142 per Lord Denning, the word picket was examined thus 'the word 'picket' is used, no doubt, because of the example shown by workers who, in a trade dispute, picket in support of their demands…picketing a person's premises (even if done with a view to compel or persuade) is not unlawful unless it is associated with other conduct (of) a nuisance in itself. Nor is it a nuisance for people to obtain or to communicate information….it does not become a nuisance unless, it is associated with obstruction, violence, intimidation, molestation or threats.

3.6. UNFAIR LABOUR PRACTICES AND JOB SECURITY

The phrase 'unfair labour practice' is wider in scope as it has international measurement standards. The Constitution of the Federal Republic of Nigeria, being the *grundnorm* where other laws derive their potency, provides against unfair labour practices[353].

The National Industrial Court of Nigeria has exclusive jurisdiction over all labour and employment matters and more importantly, on matters relating to or connected with unfair labour practice or international best practices in labour, employment and industrial relations matters[354]. However, no statute has been able to define what unfair labour practice is. It appears, whatsoever violates international best practices will be unfair labour practice. The next question is; how do we measure international best practices? It is our humble opinion that one of the ways in which international best practices can be determined is by checking through international instruments such as Universal Declaration of Human Rights, 1948; African Charter on Human and Peoples' Rights; several International Labour Organizations Conventions and Protocols including labour oriented judicial decisions where unfair labour practices haves been frowned at. Detailed discussion on these international instruments shall be dealt with in chapter ten.

The concept of 'job security' connotes security of tenure in some senses, as it relates to the terms contained in the contract of employment. Prof Agomo has queried[355], does the law allow an employee to grow old on his or her job, and in so doing make projections about economic future of his family based on job expectations? It is trite that security of tenure is governed by the nature of the employment and the length of notice required before the employment can be lawfully terminated[356] Prof Agomo submitted[357]. "An employment described as permanent or pensionable does not mean that it continues until the employee reaches the retirement age or drops dead on the job.[358] .

3.7. PENSION REFORM ACT, 2014 AND SOCIAL SECURITY OF EMPLOYEES

The concept of Labour Rights cannot be discussed fully without examining the Pension Reform Act, 2014, which is a social security statute. Social security or social protection includes the preventing, managing and overcoming situations that adversely affect the wellbeing of people. In this context, social security will consist of policies and programmes aimed at the reduction of poverty. Protection of the vulnerable groups via the promotion of efficient labour market interactions to acquire equilibrium of labour market forces and more importantly, enhancing

[353] See section 254C (1)(f)
[354] See section 254C (1)(f)
[355] See Agomo C.K. Nigerian Employment and Labour Relations Law and Practice (2011) op. cit, pg 156
[356]See Evans Bros v. Falaiye (2005) 4 NLLR (pt 9) 108 CA
[357]Agomo C.K. op. cit. pg 157.
[358] Detailed discussion on termination of employment whether common law employment or employment with statutory flavour shall be dealt with in chapter four

people's capacity to manage economic and social risks such as unemployment, sickness, disability as a result of work-place accidents or industrial harms and old age[359].

The International Labour Organizations in its Convention No 102[360], defines Nine (9) branches of social security[361]. Three main forms of social security have been identified and they include:

i. labour market interventions;
ii. social insurance and
iii. social assistance labour market intervention centres on policies and programmes.

All these are aimed at promoting employment, the efficient operation of labour markets and the protection of employees' labour market interventions on its active part, designs policies, that are used to help the unemployed and the most vulnerable groups find employments through its policies. Thus, the earning capacities of people and workers are enhanced. It must be emphasized that active labour programmes include rendering employment services such as counseling, placement, job matching, labour exchanges and so on; job training such as vocational training and re-training for the employed, unemployed, workers in mass layoffs and youths in order to boost the supply of labour; and direct employment generation through the promotion of small and medium enterprises[362].

Passive labour market intervention includes unemployment insurance, income support, maternity benefits, injury compensation, minimum wage and provision for safe working conditions and environment[363].

Social insurance is a government sponsored programme; the benefits, eligibility requirements, operation of a trust fund with a clear provision on income and expenses; and its finding through taxes and premium paid by or on behalf of the participants and the design of the programme to serve a defined or targeted population are functions of a good government policy.

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[359]See social protection–http//www.Ilo.org/global about-the-ILO/decent-work-agenda/social protections accessed on the 9th day of January, 2017

[360] See social security Minimum Standard & Convention (1952) No. 102

[361] Old age pensions-meant to cover survival beyond a prescribed age; Survivorship benefit-to cover the loss of support suffered by a widow or child as the result of the death of the breadwinner; family benefits-responsible for the maintenance of children; medical care-the treatment of any morbid condition (including pregnancy), whatever its cause; maternity benefits-to cater, for suspension of earnings due to pregnancy and confinement and their consequence; unemployment benefit – to cover suspension of earnings due to an inability to obtain suitable employment for protected persons who are capable of and available for work; sickness leave benefits – to cover suspension of earnings due to an incapacity for work resulting from a morbid condition; invalidity/disability benefits – which concerns permanent or persistent inability to engage in any gainful activity; employment injuries benefit – to mitigate the costs and losses involved in medical care, sickness leave, invalidity and death of the breadwinner due to an occupational accident or disease.

[362] See www.ilo.org-social protection op.cit

[363] The major business of governments is employment of any nation's government through changes in labour legislation. The policies such as setting the minimum wage and safe work-environment are policies of the regulatory bodies; see The Factories Act; 1987.

The third aspect is the Social Assistance Schemes which are programmes designed to help the vulnerable groups such as single parents, victims of natural disasters, physically-challenged people, the poor or destitute households and communities[364] in order to improve living standards[365]

Constitutional provision for social security and protection rights in Nigeria is covered by the Chapter II of the Nigerian Constitution, which is titled 'Fundamental Objectives and Directive Principles of the State Policy'[366]. However, right to pension for public servants is constitutional as it is provided for under Section 173 of the Constitution of the Federal Republic of Nigeria, 1999 as altered. Thus the legal framework for social security in Nigeria includes the Constitution of the Federal Republic of Nigeria, 1999 as altered, National Health Insurance Scheme Act, Employees Compensation Act, 2010, Pension Reform Act, 2014.

3.7.1. PENSION REFORM ACT, 2014

Pension caters for the welfare of retirees. It is a periodic income or annuity[367] payment made upon retirement or after retirement to employees who have become eligible to the benefits through age, earnings and length of service. Black's Law dictionary defines it as a fixed sum paid regularly to a person or to the person's beneficiaries especially by an employer as a retirement benefit[368]. Pension is different from gratuity[369].

3.7.2. HISTORICAL BACKGROUND OF PENSION LEGISLATION IN NIGERIA

The history of Pension in Nigeria is traceable to the prolonged battle between workers and employers of labour. The 1951 Pension Ordinance was the first legislation to introduce pension in Nigeria. This was followed by the establishment of the National Provident Fund (NPF) in 1961 to see to the well-being of Pensions generally in the private sector. The Pension Act No 102 of 1979 was enacted, followed by the Armed Forces Pension Act No. 103 of 1979. In 1987, the Police Force and other Government Agencies Pension Scheme were established by the Pension Act, No.75 of 1987. 1987 witnessed another enactment which was the Local Government Staff Pension Board to see to pension matters among local government employees. It has been observed that, these legal regimes were with pronounced shortcomings which accounted for the Introduction of

[364] These are social security programmes in civilized societies; upon the assumption of office by President Muhammed Buhari/Prof. Yemi Osinbajo, he was a promise of social assistance schemes which is yet to yield expected executor results.

[365] See www.ilo.org/social security op.cit

[366] See section 14(2)(b) of the Constitution of the Federal Republic of Nigeria, 1999 as altered. It is trite that, provisions under this chapter are non-justifiable. See also the report of the constitution Drafting Committee containing the Drafting Constitution vol. 1 of 1976, parag 3. 1-3. 2; section 6(6)C of the CFRN 1999 as altered; Archbishop Okogie v AG Lagos State (1981)2 NCLR, 625 HC

[367] Section 120 of the Pension Reform Act, 2014 defines annuity to mean a right to receive periodic payment, usually fixed in size for lite or a term of years.

[368]Ayegba Ojonugwa 'An evaluation of Pension Administration in Nigeria' British Journal of Arts and Social Sciences, Vol. 15 No II, 2013, Pg 98; see Black's Law Dictionary, Eight Edition, Thompson West, pg 1170.

[369] Gratuity is a lump sum paid (in addition to pension a retiring employee especially under civil service – see P. Ramanathat Aiyenr, The major law lexicon, 4th Edition 2010, Lexis Nexis, Butterworths

the National Social Insurance Trust Fund (NSITF) in 1993 to see to all pension and retirement matters in the private sector.

Pension in Nigeria had suffered many setbacks as a result of poor funding from the budgetary allocations. It was purely non-contributory when it was introduced. Thus, untimely death after retirement was witnessed as a result of delay in payments of pensions after retirement[370], inability to effectively implement budgets and make adequate pensions to cover the eligible pensioners[371] and other shortcomings led to the reforms of 2004 that introduced Contributory Pension Scheme (CPS). Thus, there was a shift from the old 'Defined Benefit Scheme (DBS) to Contributory Pension Scheme (CPS).

The Pension Reform Act, 2004 introduced a system that was designed to be sustainable with an ultimate goal of providing a predictable, adequate and stable income for retirees. Thus, the introduction of Contributory Pension Scheme that ought to be fully funded; privately administered or managed with respect to individual's pension account for both the private and public sectors' employees in Nigeria. It was the 2004 Act that established the National Pension Commission (Pencom) to play the regulatory and supervisory role on all pension matters in Nigeria. The 2004 Act was repealed by the Pension Reform Act, 2014[372].

3.8. PENSION REFORM ACT 2014

The Act has fifteen parts. Part I contains the objectives and application of the Act. The objective of the Act is to establish a uniform set of rules, regulations and standards for the administration and payment of retirement benefits for the public services of the federation including the Federal Capital Territory, State Governments, Local Government Councils as well as the private sectors[373]. The Act provides that the Act shall apply to any employment in the public service of the Federation including the FCT, State Governments, Local Government Councils and the private sectors[374]. The Act shall not apply to any private organization with less than fifteen (15) employees. However, employees of organization with less than three employees as well as self-employed persons shall be entitled to participate under the scheme in accordance with guidelines by the commission[375].

[370]Several hardships were occasional to retired employees; retires queuing up for days for screening; dying while waiting to be paid as a result of uncoordinated administration, inadequate funding, diversion of allocated funds and provision of pension for 'ghost workers' and ineligible pensioners on the pension pay-roll. See Dewale Adeleye Adekoyejo 'Pensions in Nigeria, (2006) Crescent Law Publishing

[371] See Okechukwu Innocent Ene 'Pension Reform Act, 2014 and the future of Pension Administration in Nigeria' Arabian Journal of Business and Management Review (OM AN chapter) vol. 4, No.2, 2014, pg 157

[372] The Explanatory memorandum to the Pension Reform Act provides "The Act repeals the Pension Reform Act, 2014 to continue to govern and regulate the administration of the uniform contributory pension scheme for both the public and private sectors in Nigeria.

[373] See section 1(a) PRA, 2014

[374] See section 2(1) of the Act. The Act here refers to the Pension Reform Act, 2014

[375]See section 2(2) & (3) of the Act. The commission is established by virtue of section 17 of the Act.

Part II of the Act[376]introduced Contributory Pension Scheme for payment of retirement benefit of employees to whom the schemes apply under the Act[377]. The Act specifies the minimum contribution by the employer to be Ten percent and a minimum of Eight percent to be contributed by the employee. The percentage to the scheme can only be reviewed upward[378]. An employee to whom the Act applies may make voluntary contribution to his retirement savings account[379]. In addition to the rate specified, every employer shall maintain a group life insurance policy in favour of each employee for a minimum of three times the annual total emolument of the employee and premium shall be paid not later than the date of commencement of the cover[380].

The Act excludes certain categories of pension from the Contributory Pension Scheme. These are persons mentioned in Section 291 of the Constitution[381], members of the Armed forces, the intelligence and secret services of the federation[382] and any employee who is entitled to retirement benefits under the pension scheme existing before the 25th day of June, 2014[383].

Part III of the Act deals with retirement benefits. A holder of retirement saving account shall upon retirement or attainment of the age of 50 years, whenever is later, utilize the amount credited to his retirement saving account either for withdrawal of a lump sum from the total amount credited to his retirement saving account provided the amount left after the lump sum withdrawal shall be sufficient to process a programmed fund withdrawals or annuity for life in accordance with extant guidelines issued by the commission from time to time[384]. University professors are covered by the Universities (Miscellaneous Provisions Amendment) Act, 2012 pursuant to the university Act. Employees who die while in service or get missing and not found within a period of one year from the date he was declared missing and upon the findings of a board of enquiry that the employee is presumed dead, section 8 of the Act shall apply[385].

Part IV deals with Retirement Saving account (RSA) which shall be maintained by every employee. Such account shall be opened or operated with a Pension Fund Administrator of the Employee's Choice[386]. It is the obligation of the Employee to notify the Employer of the Pension Fund Administrator chosen and the details of Retirement Saving Account. Deductions and remittance of the deductions are to be made to the Pension Fund Administrators upon being supervised by the commission.

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[376] Pension Reform Act, 2014
[377] See section 3 of the Act. PRA 2014
[378] See section 4(1) B(2) of the Act
[379] Section 4(3) of the Act
[380] Section 4(5) of the Act
[381] Constitution of the Federal Republic of Nigeria, 1999 as altered
[382] Ibid
[383] See section 5(1) of the Act; 25th day of the June, 2004 was the commencement date of the Pension Reform Act, 2004 which introduced Contributory Pension Scheme
[384] Section 7(1)(b)
[385] Sections 8 and 9 of the Act; PRA 2014
[386]Section 11 of the PRA, 2014

Part V of the Act deals with the National Pension Commission[387], its composition, objects[388], the Governing Board[389]. Part VI deals with functions and powers of the commission[390]. The primary function of the commission is to regulate and supervise the scheme established under the Act; issue guidelines, rules and regulations; approve, license and supervise pension fund administrators, custodians and other institutions relating to pension matters; establish standards, benchmarks, guidelines, procedures, rules and regulation for the management of the pension funds under the Act. The functions also include creation of national awareness and education on the establishment operations and management of the scheme, among others[391]. The commission has power to formulate, direct and oversee the overall policy on pension matters. Part VII deals with management and staff of the commission[392].

Part VIII of the Act deals with financial provisions which includes fund of the commission, its management, how proceeds of the funds established under the Act[393] are applied and the need to prepare annual estimate of its income and expenditure not later than 30th day of September of each year or any such time as may be required by the Financial Regulations[394]. The Act mandates the commission to submit to the President and the Public Account Committee of the National Assembly a report on the activities and administration of the commission during the immediately preceding year[395].

Part IX has transitional provisions for public sector. The Central Bank of Nigeria is empowered to establish, invest and manage a fund to known as the Federal Government Retirement Benefit Board Redemption Fund also known as 'Redemption Fund',[396] which shall be for Federal Public Service. The Federal Government is under an obligation to pay an amount not less than five percent of the total monthly wage payable to employees in the public service of the federation. Furthermore, the commission shall by the end of every calendar year, determine the adequacy of the Redemption Fund against the projected liability of the Government arising from voluntary and mandatory retirements, death of employees in service and the rights of Pensioners to pension review in line with section 173(3) of the Constitution[397].

[387] Section 17 PRA, 2014
[388] Section 18 PRA, 2014
[389] Section 19 PRA, 2014
[390] See section 23 PRA, 2014
[391] Section 23(a) – (j) PRA, 2014
[392] See section 26-31, PRA, 2014
[393] Sections 32 and 33 PRA, 2014
[394] Section 34 PRA, 2014. Financial year of the commission shall start on the 1st day of January of each year and end on the 31st day of December of the same year; see also section 35, PRA, 2014
[395] Section 36 PRA, 2014
[396] Section 39 PRA, 2014
[397] Section 173(3) of CFRN as altered provides, pension shall be reviewed every five years or together with any Federal Civil Service salary reviews, whichever is earlier. See Section 39 of the PRA, 2014

The Act also established the Federal Government Pension Transitional Arrangements Directorate referred to as Pension Transitional Arrangement Directorate (PTAD), which shall be an extra Ministerial Department under the Federal Ministry of Finance with management team to be appointed by the Minister[398].The Federal Capital Territory (FCT) has its Pension Transitional Arrangements Directorate known as FCT Pension Transitional Arrangement Directorates[399]. Both the PTAD and the FCTPTAD shall determine and cause to be paid, gratuity and pension to the pensioners in the category of officers exempted under section 5(1)(b) of the Act[400]. It must be noted that the Commission[401] has both regulatory and supervisory roles over PTAD and FCTPTAD.

Part X of the Act has transitional provisions for private sector. The Act specifically provides that: 'Notwithstanding any other provisions of the Act, any pension scheme in the private sector existing before the commencement of this Act may continue to exist, provided that the existing scheme is fully funded and that contributions in favour of each employee including the attributable income shall be computed and credited to a retirement saving account opened for the employee[402]

Part XI has provisions for Pension Fund Administrators and Pension Fund custodians. The Act makes it mandatory for all Pension Fund Administrators to be licensed by the commission. The functions of the Pension Administrators include opening of Retirement Saving Account for all employees with Personal Identity Number (PIN) attached to the RSA; invest and manage Pension Funds and assets in accordance with the Act. All the activities of the Administrators shall be kept in books of account which shall contain all transactions relating to Pension Fund; provide regular information on investment strategy, market returns and other performance indicators to the commission, and employees or beneficiaries of the retirement savings account. The Pension Administrators shall also be responsible for all calculations in relation to retirement benefits[403].

Pension Fund and Assets are to be kept by Pension Fund custodians licensed by the commission[404]. The custodian shall, among other things, receive the total contributions received by the employer under Section 11 of the Act on behalf of the Pension Fund Administrators and credit the account

[398] Section 42 of the PRA, 2014
[399] Section 44 of the PRA, 2014
[400] Section 46 PRA, 2014. Section 5(1)(b) of the Act, exempts any employee who is entitled to retirement benefits under any pension scheme existing before the 25th day of June, 2004, which as at that date has 3 or less years to retire.
[401] Also known as PENCOM
[402]Section 50 PRA, 2014. It must be pointed out that the Defined Contribution Scheme (DCS) has not be abolished by the Act for private sectors. An organization may opt out of the CPS provided contributions in favour of each employee and attributable income are computed and credited to the employee's retirement saving account opened for the employee. However, such pension funds and assets of the organization (private sector) shall be fully segregated from the funds and assets of the company see section 50(1)(b). The pension funds and assets shall be held by a custodian. See also section 50(1)(d) which gives option of an employee having the freedom to exercise the option of coming under the scheme (CPS) established by the Act.
[403] Sections 54 and 55 (a)-(h) PRA, 2014
[404] Sections 56 PRA, 2014

of the Pension Fund Administrators immediately; the custodian shall also notify the Pension Fund Administrators within 24 hours of the receipt of the contributions from any employer and shall hold pension fund and assets in safe custody on trust for the employee and beneficiaries of the retirement saving account[405]. It is mandatory for the commission to publish the list of Pension Fund Administrators and Pension Fund Custodians at the end of each calendar year[406] in such manner as it considers necessary[407]. Both the Pension Fund Administrators and Pension Fund Custodians are under obligation to manage pension funds properly and in accordance with regulations and guidelines issued or made or even as a directive given by the commission[408]. The Pension Fund Custodian has specific obligation of maintaining all funds and assets in its custody to the exclusive order of the relevant Pension Fund Administrator and the commission[409]

In order to ensure proper and safe administration cum custody of pension funds, the Act criminalizes non-compliance with the provisions of the Act especially Sections 73, 74 and 75 of the Act with a penalty of N1,000,000 (One Million) Naira to the commission on every violation[410].

Part XII of the Act provides for investment of pension fund; all contribution made under the Act shall be invested by the Pension Fund Administrators with the objective of safety and maintenance of fair return on amount invested[411] in accordance with regulations and guidelines issued by the commission from time to time[412]. Some restrictions are placed on the types of investments or who to investment in its business or stocks[413].

Part XIII has provisions for supervision and examination, which is primarily the duty of commission. The Bodies to supervise include- the Pension Fund Administrators; Pension Fund Custodians; Federal Pension Transitional Arrangement Directorate (PTAD) and the Federal

[405] Sections 57 (a)-(h) PRA, 2014
[406] Sections 65 PRA, 2014
[407]The publication may be in printed material, newspapers, electronic media or any form as the Act provides for any such manner as it considers necessary.
[408] See section 69PRA, 2014.
[409] See section 70 PRA, 2014.
[410] Section 76 PRA, 2014; section 73 provides for report of any fraud, forgery or theft in any Pension Fund Administrator or Pension Fund Custodian to the Commission. Section 74 provides for the notification to the commission of any dismissed staff or an appointment terminated or retires or resigns on the ground of fraud, misconduct or dishonesty. Section 75 of the Act provides that a Pension Fund Administrator or Pension Fund Custodian shall not employ any person whose name is on the list maintained by the commission under section 74(2) of the Act unless the commission gives approval
[411] Section 85(1) of the PRA, 2014
[412] Section 85(2) PRA, 2014. The mode of investment is provided for section 86 of the Act. Section 87 provides that such investment can be done outside Nigeria but most be within the categories of investments set out in section 86 such as bonds, bills and other securities issued or guaranteed by the Federal Government and the Central Bank of Nigeria; bonds, bills and other securities issued by the state and local governments' bonds, debentures, redeemable preference shares and other debt instruments issued by corporate entities and listed in a stock exchange registered under the investment and securities Act; ordinary share of public limited companies listed on a securities exchange registered under the Investment and securities Act; bank deposits and bank securities; real estate development investment; see section 56 (a)-(g)
[413] Section 89 &90 PRA, 2014

Capital Territorial Pension Transitional Arrangement Directorate (FCTPTAD) for the purpose of ensuring compliance with the provisions of the Act[414]. Examiners may be appointed to carry out these duties[415].

Part XIV provides for offences, penalties and enforcement powers. In order words, the Act criminalizes the contravention of any of the provisions of the Act with penalties ranging from fines to terms of imprisonment. Some offences carry as high as N10,000,000 (Ten Million) Naira as penalty[416]. The Act provides for the prosecution of the offenders at a Court of competent jurisdiction[417].

Part XV provides for miscellaneous such as dispute[418] resolution, Arbitration and arbitral awards[419], and the application of the public officers' protection Act to the employees of the commission[420]. The Act sets out the limitation periods for the commencement of action against the commission[421]. Section 120 of the Act defines all necessary terms, words, phrases, and bodies concerned with the administration of the Act.

3.9. THE CONCEPT OF EMPLOYEES' WELFARISM/SOCIAL SECURITY

Employees' welfare is otherwise known as social security. However, since we have examined Employees Compensation Act (ECA) 2010; and the Pension Reforms Act 2014, the discussion here shall be limited to the scope of employees' welfarism. Furthermore, critical legal issues shall be raised, such as the existence of social security in Nigeria. The legal framework for social

[414] Section 92 PRA, 2014

[415] Section 93 PRA, 2014 see also section 94-98

[416]Section 99 PRA, 2014. See also section 101 which provides that a Pension Fund Custodian who contravenes the provision of section 70 (using pension fund to meet the custodian's own financial obligations to any person whatsoever) of the Act commits an offence and is liable in conviction to a term of not less than #10,000,000 and each of its director or principal offices is liable to a fine of not less than#5,000,000 or a term not less than 5 years imprisonment or to both such fine and imprisonment. This is a good law; it will aid financial prudency and accountability.

[417] Section 105 PRA, 2014; however, section 120 defines a Court of competent jurisdiction to mean Federal High Court, High Court of the Federal Capital Territory High Court of a state and the National Industrial Court. With due respect to the drafters of the legislation, and the National Assembly, the Court of Competent jurisdiction is the National Industrial Court and not any other court. The Pension Reform Act, 2014 cannot override the constitution. The National Industrial Court has exclusive jurisdiction to the exclusion of all other Courts as far as labour, employment or industrial relation matters are concerned. This is the spirit of section 254C (1) of the Constitution of the Federal Republic of Nigeria, 1999 as altered. Apply the rule of law enshrined in section 1 (3) of the same constitution to section 120 of the PRA, 2014, the provision of the PRA, 2014 is inconsistent with the constitution as such it is null and void to the extent of its inconsistency. See K.H. Bamiwola. National and the changing face of labour law in Nigeria, seminar paper presented to the Faculty of Law, University of Law.

[418] Section 106 PRA, 2014

[419] Section 107 PRA, 2014

[420] Section 108 PRA, 2014

[421] See section 109(1) PRA, 2014 practitioners should be aware of the need for 'Pre-action Notice' before any action can be commenced against the commission service of process is by delivery to the Director-General, Secretary or any principal offer our by sending it by registered post addressed to the Director-General or secretary of the headquarters of the commission. See section 10 of the PRA, 2014.

security in Nigeria, are ECA 2010 and PRA 2014; other international treaties address social security such as, the Social Security (Minimum Standards) Convention 102 of 1952. Unfortunately, Nigeria has not ratified the Convention. However, legal ingenuity can aid any Labour law expert relying on this convention to come under section 254C (2) of the Constitution of the Federal Republic of Nigeria, 1999 as altered in 2010. What is needed is to plead international best practices and unfair labour practice for the applicability of the convention; the case of **Modise v Steve Spar Blackheath (JA29/99) 2000 ZALAC 1** a South African case, is a classic example. See the case under the applicability of international treaties in Nigeria, in the last chapter of this text.

3.10. SCOPE OF EMPLOYEES' WELFARISM/SOCIAL SECURITY

The scope of social security (welfare) benefits covers nine (9) principal branches which are; see detailed discussion under health and safety and the analysis of the Employees' Compensation Act, 2010.

i. Medical care
ii. Sickness
iii. Unemployment
iv. Old age
v. Employment injury
vi. Family
vii. Maternity
viii. Invalidity, and
ix. Survivor's benefits

In today's labour law jurisprudence and right at work, paternity leave has become a major topic for debate. Fathers need leave to help their partners, their families and even themselves, during childbirth. The Nigerian government has approved 14-working day paternity leave which is to commence for all Federal civil servants. The former Head of service of the Federation, Dr. Folasade Yemi-Esan under the Buhari administration made the announcement on the 25th day of November, 2022 in a circular with reference number: **HCSF/SPSO/ODD/NCE/RR/650309/3** titled 'Computation of leave based on Working days and Approval of Paternity Leave in the Public Service'. This was said to be in line with Public Service Rule, 2021 Edition. The statement read thus:

> *"Paternity leave for serving male officers whose spouse delivers a baby; the period of leave shall be fourteen working days. The leave shall not be more than once in two years and for maximum of four children"*
>
> *"Where the family of a male officer adopts a child under four months old, the officer will similarly enjoy paternity leave for a period of fourteen working days."*

It is our submission that, this is a welcome development as it addresses another form of discrimination in the work place. The male gender should be able to enjoy what the female gender enjoys too.

3.11. COMPENSATORY REGIME

The legal framework for compensation and benefit is wide. Common law compensation is covered by the law of tort, especially the rule of law in ***Donoghue v Stevenson (1932) AC 562***. However, the statutory compensation is in almost all the enactments such as the Labour Act, the Employees Compensation Act 2010, Pensions Reform Act, 2014, Trade Union Act, Trade Dispute Act. In fact, the *grundnorm* which is the constitution; the organic law that gives life to all other laws has its compensation regime. The rule of law is always ***ubi jus, ubi remedium***; which translates thus- where there is a violation of one's right, there is always a remedy or compensation.

It must be pointed out that the terms and conditions contained in offer of employment mostly contain benefits that are accruable to an employee. Thus, there must be care in the drafting and perusal of letters of appointments, to mitigate avoidable loses for the employers of labour. Human Resource personnel should be forward looking in harmonizing terms and conditions in letter of appointments for employees. The use of express terms will save the management from avoidable embarrassments.

3.12. LEAVE AND HOLIDAYS

We cannot discuss employees' welfare without examining the provision for leave and holidays; mental capacity and development is a function of many things; friendly working environment, high motivation, incentives, commensurate wages, relaxation period, leave and holidays are among many factors that aid efficiency of labour and optimum productivity. (See Henry Fayol's theory of management). Employees should have periods created for relaxation and rejuvenation. Thus, the Labour Act provides in Sections 18 and 19 thus:

> *"18. 1. Every worker shall be entitled after twelve months continuous service to a holiday with full pay of*
>
> *a) At least six working days; or*
> *b) In the case of persons under the age of sixteen years (including apprentices), at least twelve working days.*
>
> *2. The holiday mentioned in subsection (1) of this section may be deferred by agreement between the employer and the worker.*
>
> *Provided that the holiday-earning period shall not thereby be increased beyond twenty-four months continuous service.*

3. *It shall be unlawful for employer to pay wages in lieu of the holiday mentioned in subsection (1) of this section to a worker whose contract has not been terminated.*
4. *A person who ceases to be employed after having completed-*
   a) *Less than twelve months but not less than six months in the continuous employment of an employer; or*
   b) *Not less than six months in the continuous employment of an employer since last qualified for a holiday under subsection (1) of this section,*
   shall be paid with respect to that period of employment an amount bearing the same proportion to full pat for one week at his normal rate as that period bears to twelve months."

"19. In the calculation of leave pay and sickness benefits only that part of his wages which a worker receives in money (excluding overtime and other allowances) shall be taken into account."

PRACTICE QUESTIONS

1. What are the dichotomies between right to work and right at work?
2. X-ray the provisions of Pension Reforms Act, 2014
3. Employee's welfarism is a myth in Nigeria. Discuss
4. Strikes and lockouts are over-used in Nigeria. Do you agree?
5. Examine the scope of leave and holidays available to workers in Nigeria.
6. *Donoghue v. Stevenson* is known for
    (a) Duty of Workers
    (b) Duty of Employees
    (c) Duty of Care
    (d) Duty of regulators of employment
7. *Novus actus interviniens* means
    (a) New act intervenes
    (b) Negligent act intervenes
    (c) Noble act intervenes
    d) None of the above

CHAPTER FOUR
TERMINATION OF EMPLOYMENT

4.0. Learning Objectives

At the end of this Chapter, readers/candidates should be able to appreciate and explain the under-listed concepts and apply them to industrial relations generally.

(i) Concept of termination of employment
(ii) Differences ways of terminating contracts of employment
(iii) Termination by operation of law
(iv) Common law termination of employment
(v) Termination of employment with statutory flavour
(vi) Modification of the Common law rule of 'He who hires can fire'

4.1. INTRODUCTION

Contracts of employment, whether private or public, create a relationship between an employer called master and an employee otherwise known as servant.

4.2. CONCEPT OF TERMINATION OF EMPLOYMENT

The bringing to an end of the relationship between an employer and employee is what is known as termination of employment. There are several ways by which a contract of employment can be brought to an end. The bringing to an end of an employment relationship is a function of the type of employment involved.

In *Faponle v. U.I.T.H.M.B,*[422] the Court of Appeal identified four categories of employment, and they include:

(i) Contract under the common law in which case, based on the terms contained in the contract of employment, the employment can be terminated by either of the parties by the giving of the requisite notices or a payment in lieu of notice.
(ii) Where the contract is in writing, the Court has the obligation of interpreting the contract and confines itself to the terms of the written contract.
(iii) Where the contract is covered by statute[423].
(iv) Where the employment is that of servants covered by the civil service rules and the constitution[424].

It must be emphasized that these four classifications have been reduced to two. The 1st and the 2nd are considered as common law employment or employment by government by the terms and conditions contained in the contract. The 3rd and 4th types are known as employment with statutory

[422] (1991) 4 NWLR (pt 183 pg 43 at pg 6
[423] See Olaniyan v. University of Lagos (1985) 2 NWLR (pt 9) pg 559
[424] See ShittaBay v. Federal Public Service Commission (1981) ISC pg 40

flavour: employment with statutory flavour is a situation in which the laid down rules, regulations, and procedures for terminating must be strictly followed before such an employment can be validly terminated. In most cases, the constitutional requirement of fair hearing must be followed. Any termination outside these procedures will be a nullity[425].

4.3. Ways of Terminating a Contract of Employment

There are six ways of terminating a contract of employment. They are:

(i) Termination by Notice
(ii) Termination by Performance
(iii) Termination by Death
(iv) Dismissal/Summary Dismissal
(v) Termination by Operation of Law
(vi) Repudiatory Breach

4.3.1. Termination by Notice

(i) The Labour Act provides that:

"A contract of employment shall be terminated by notice in accordance with section 11 of the Act or in any other way in which a contract is legally terminable or held to be terminated[426]."

This type of termination is common to all common law employments. The contract would have provided that either of the parties may terminate the relationship by giving a requisite period of notice or payment of salary in lieu of notice[427]. It is customarily the practice of employers to give salary in lieu of notice. The provision for notice in the Labour Act is default in nature as against mandatory provisions that cannot be modified by parties. Thus, where parties have not agreed as to the length of period of notice required for termination, then, the Labour Act will apply. Section 11 (1) of the Act[428] provides:

> *"Either party to a contract of employment may terminate the contract on the expiration of notice given by him to the other party of his intention to do so."*

[425]See ShittaBey's case (supra) Olaniyan's case (supra). In Imoloame v. WAEC (1992) 2 NSCC 374 at pg 383 Karibi – whyte JSC held 'It is now accepted that were the contract of service is governed by the provisions of statute or where the conditions of service are contained in regulations derived from statutory provisions, they invest the employees with a legal statue higher than the ordinary one of master servant. They accordingly enjoy statutory flavor. See also Fakuade v. OAUTH (1993) 5 NWLR (pt 291)47; UNTHMB v. NNOLI (1994)8 NWLR (Pt 363)376.

[426]See section 9(7) of the Labour Act, LFN, 2004

[427]See section 11 of the Labour Act, LFN, 2004

[428]Labour Act, LFN, 2004. There is a clear difference between 30 days and one month. In Adeniyan Adeyemo v. Oyo State public service commission (1978)2 LRN 268, the contract of employment provided for a notice of one month for its termination. It was held of there is a difference 30 days and one month's notice. Fakayode C.J held "that notice of termination of the plaintiff's appointment by means of 30 days' notice was ineffective".

(ii) (2) *the notice to be given for the purpose of subsection (1) of this section shall be:*

(a) One day where the contract has continued for a period of three months or less;

(b) One week, where the contract has continued for more than three months but less than two years;

(c) Two weeks, where the contract has continued for a period of two years but less than five years; and

(d) *One month, where the contract has continued for five years or more*

It must be emphasized that the period stated above does not include the day in which the notice is served on the other party.[429] Any notice for a period of one week or more shall be in writing[430]. In other words, a verbal notice is a nullity. The right to notice is waive-able; so also, the right to salary in lieu of notice can be waived[431]. Any employee who has accepted salary in lieu of notice cannot later challenge his termination based on non-issuance of notice[432].
Legal Practitioners should take note of the trite law that, in the absence of any clause on notice, the court may construe the common law principle of reasonable notice should be inferred by the Court.[433]

4.3.2. Termination by Performance

Where a contract of employment is for a specific task or period of time, it is trite that upon the performance of the task or expiration of the period contained in the contractual agreement, the contract will be deemed to have been terminated. Section 9(7) of the Act[434] provides:

"A contract of employment shall be terminated by

[429]See section 11(4) of the Labour Act, LFN, 2004
[430]See section 11(3) of the Labour Act, LFN, 2004
[431]Section 11(6) of the Act
[432]Agomo v. Guinness (Nig) Ltd (1995)2 NWLR (pt 380) pg 672; Morohunfola v. Kwara State College of Technology (1990) 4 NWLR (pt 145) pg 506; Odiase v. Auchi Polytechnic (1998) 4 NWLR (pt 54777) pg 477 at 490; Union Bank v. Ogboh (1995) 2 NWLR (pt 380) pg 647 at 664 Nigeria Airways Ltd v. Ahmadu (1991)6 NWLR (pt 198) 492
[433]In Honika Sawmill (Nig) Ltd v. Mary Okojie (1992) 4 NWLR (pt 238), 673 at 682 per Adio JCA, as he then was, it was held "where there is no express or specifically implied provision for the termination of an appointment by notice, the common law will imply a presumption that the appointment is terminable by reasonable notice being given to either party. The length of notice that may be regarded as reasonable depends on the intention of the parties as revealed by the provision of the contract. All the circumstances of the case, such as the type of employment, the intervals at which the remuneration is paid or the period in relation to which the remuneration is stated have to be considered.
[434]Nigeria Labour Act, LFN, 2004

(a) The expiration of the period for which it was made;

'Contract staff' employment is common in some private sectors like the banking, where duration of the employment is clearly stated. Once the period expires, the contract is terminated by effluxion of time. The other part of it is situations in which the task or job to be performed is clearly stated. Once the job has been performed satisfactorily, the appointment is terminated.

4.3.3. Termination by Death

Section 9(7)(b) of the Labour Act provides that a contract of employment shall be terminated by the death of the worker before the expiry of that period.

Death is inevitable and it is mandatory for all mankind. The Labour Act contemplates a situation in which an employee may die while his period of service has not elapsed either by expiration of the period[435] or by performance, or by retirement. In that case, death of the employee will naturally terminate the employment relationship. However, the Act[436] further protects the late employee by providing for service security benefits for his/her dependants. Thus, section 9(8) of the Act provides:

"The termination of a contract by death of a worker shall be without prejudice to the legal claims of his personal representatives or dependents[437].

Section 17 of the Employees' Compensation Act, 2010 provides for scale of compensation where death results from the injury of an employee. Here compensation shall be paid to the dependants of the deceased[438].

4.3.4. Dismissal/Summary Dismissal

According to Black's Law dictionary,[439] to dismiss means 'to release or discharge a person from employment while 'dismissal' is termination of an action or claim without further hearing especially before the trial of the issues involved. Applying this definition to dismissal of an employee, no right of audience is given to such an employee. Thus, Labour law scholars have considered 'dismissal' of an employee by an employer as a right exercisable when the employee is involved in acts considered as a misconduct. Where this right is exercised without any notice whatsoever, it is called "summary dismissal"[440].

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[435]Section 9(7)(a) of the Labour Act LFN, 2004
[436]The Labour Act, LFN, 2004
[437]See section 17 of the Employees Compensation Act, 2010
[438]See detailed scale of compensation in the ECA 2010; section 17(1)(a)-(g)
[439]Black's Law Dictionary, Eight Edition, Thomson West, pg 502.
[440]See Maja v Stocco (1998) NWLR, 372 at 379

Summary dismissal is used based on conduct of a grave and weighty character[441]. It arises from situations where an employee continues to disobey the lawful orders of his employer. Thus, where such employers exercise the right of dismissing the employee summarily, such master will be justified. The continuous disobedience to employer's instructions may include refusal to perform his/her duties as an employee[442]. In *Callo v Brounder*[443], Peter J said, 'if there was any moral misconduct either pecuniary or otherwise, willful disobedience or habitual neglect, the defendant should be at liberty to part with the plaintiff.' In *Union Bank V. Chukwuelo Charles Ogboh*[444], the dismissal of the employee was affirmed as his claim for wrongful dismissal failed.

The right of the employer to dismiss summarily was also affirmed in *Abomeli v. Nrc*[445]. Here, the Court of Appeal held that there is general power to dismiss for misconduct of any kind that can justify dismissal[446]. In *Omojuyigbe v. NIPOST*[447], it was held that an employer is not bound to give reasons for terminating the appointment of an employee, but where the employer dismisses the employee on account of gross misconduct, the onus is on the employer to satisfy the Court that the employee's dismissal is justifiable.

Other acts of an employee that may constitute misconduct includes negligence[448]. Unlawful dismissal or wrongful dismissal may arise where the terms of the contract of employment specifically lay down some procedures to be followed for dismissal and such procedures are jettisoned[449]. Summary dismissal will be unlawful where its exercise by the employer fails to be in accordance with law whether statutory or common law; it will be wrongful where the dismissal fails to follow the laid down procedures for the exercise of the right to dismiss summarily.

4.3.4 (a) What Constitutes Misconduct

It is customary to have a list of acts that constitute misconduct. Sometimes, the acts are contained in the employees' Handbook or staff manual. It must be pointed that the list is not exhaustive. It varies, depending on the establishment, organization or jurisdiction. The word 'misconduct' has not been defined by any statute. Sometimes, misconduct may mean what the employer calls misconduct. However, the test for determining misconduct is objective and not subjective. Some of the acts that constitute misconduct have been identified to include; infidelity; dishonesty; insubordination; bribery; corruption; making secret profits; revealing trade secrets; willful

[441]See Union Bank v. Ogboh (1995)2 NWLR (pt 380)
[442]Spain v. Arnoh (1917) 2 Stacke 256
[443](1831) ER 307
[444]Supra
[445](1995) 1 NWLR (pt 372) 451
[446]See Ante v. University of Calabar (2001) 3 NWLR (pt 700) 239
[447](2010) 239
[448]See Damisa v. U.B.A (2005) 9 NWLR (pt 931) 536; see also ACB Plc v. Odukwe (2005) 3 NWLR (pt 911); Babatunde v. Osogbo Steel Rolling Co. Ltd (2005) 2 NLLR (pt 5) 284
[449]See Abenga v. BSJSC (2006) 14 NWLR (pt 1000) 610

disobedience to lawful orders; dereliction of duty; connection upon being tried for a criminal offence; negligence; incompetence; etc. The list is open-ended.

A single act of misconduct may justify summary dismissal. In *Ajayi v Texaco Nig. Ltd*[450], it was held that, there is no fixed rule of law defining the degree of misconduct, which would justify dismissal. It is enough that the conduct of the servant is of grave and weighty character as to undermine the confidence which would exist between a servant and his master[451].

The common law employment differs from the statutory employment in the sense that, under the common law, wrongful dismissal attracts only award of damages and not reinstatement[452]. However, under statutory employment, unlawful dismissal attracts both damages and reinstatement[453].

4.3.4 (b) Dismissal and the Rule of Natural Justice

Fair hearing is a constitutional right that is provided for under Section 36 of the Constitution of the Federal Republic of Nigeria, 1999 as amended[454]. It encompasses the twin pillars of *Nemo judex in causa sua* and *Audi Alterem partem*, meaning- you cannot be a judge in your cause and you must hear the other party, respectively. At common law, the rule is that, employer is not bound to hear the employee in allegation of misconduct before the employee can be sacked. In *Udemah v. Nigeria Coal Corporation*[455], the Court of Appeal made a statement that painted a clear picture of the applicability of rule of natural justice.

"Natural justice of *audi alterem partem* is not a sleepless and restless ombudsman or an ever-weeping Jeremiah prying into or pleading over every private arrangement between parties for it to be modified in its implementation in order to achieve a particular result. When a valid and lawful contract has been entered between parties, there can be no room for invoking or inviting natural justice to intervene if there are no particular rules and regulations in support of that course; if there are no special occasions making a hearing or indeed, that make the observance of the rules of natural justice imperative. The performance and obedience of such contract may well depend entirely on its terms and conditions; not on the intervention of natural justice, as some hope, descended in white robes through the clouds as an arbiter".

In employment with statutory flavour, it is settled law that the rules of natural justice must be followed when an allegation of crime or misconduct is involved. In *Sodiq v. Bundi*[456], the

[450](1987) 3 NWLR, 63
[451]See Oyedele v. University of Ife Teaching Hospital (1990) 6 NWLR (pt 155) at pg 194
[452]Ridge v Badwin (1964) AC 40-62
[453]ShittaBey v. FPSC (supra); Olaniyan v. University of Lagos (supra)
[454]CFRN 1999 as altered
[455](1991)
[456](1991) 8 NWLR (pt 210) 443

Courtheld that the body vested with quasi-judicial powers exercising power of dismissal need to conform to rules of natural justice. In *Afribank (Nig) Plc v. Nwanze*[457], it was held that, before an employer can dispense with the services of his employee, all he needs is to afford the employee an opportunity of being heard before exercising his power to terminate the appointment even where the allegation for which the employee is being removed involves accusation of crime[458].

CASE STUDY

BAMGBOYE V UNIVERSITY OF ILORIN (2005)4 NLLR (PT 9) 15.SC
Topic- WHAT CONSTITUTES 'GROSS MISCONDUCT'.

Issues

1. Whether the learned justices of the Court of Appeal were right in their view that the guilt of the appellant on charges of examination malpractices was justifiable in the trial court and going further to affirm that guilt. And further, whether the learned justices of the Court of Appeal erred in holding that the issues of criminal jurisdiction of the governing council did not arise in the High Court, or Court of Appeal (Grounds 1,2,4,5 and 8)
2. Whether the first respondent and its agencies/agents gave the appellant fair hearing; to what extent did he delegate its powers to those agencies/agents and how binding were the perverse/*ultra vires* decisions the appellants arrived at? (Ground 3,9,10,11,12,13,14,15,16,17,18,19,20,21 and 22).
3. Whether the consideration and determination on issues 4,5,6,7 and 8 in its appellant's brief in the Court of Appeal, would have determined the appeal in his (appellant's) favour.
4. Whether or not all the 23 grounds of appeal and the issues (numbered 13 in all) based on them and consequently the appeal should be struck out on the ground of incompetence as the Supreme Court has no jurisdiction to entertain them since the appellant did not obtain leave from the Court of Appeal to the Supreme Court on grounds of facts or mixed law and fact pursuant to section 213 (3) of the Constitution of the federal Republic of Nigeria (1990)and section 27 (2)(b) of the Supreme Court Act cap. 424, Laws of the Federation of Nigeria (1990).
5. Alternatively to issue (4) above, whether or not the Court of Appeal was correct in dismissing the appellant's appeal by holding that the second respondent who wrote Exhibit P3 which the lower court held to be premature and invalid was not an agent of the 1st defendant/respondent and that SSD and AC, (whether or not a delegate of the first defendant/respondent) could not bind the council and that Exhibit P7 written by the 2nd defendant/respondent could not bind the Council and that Exhibit P7 written by the second defendant/respondent on the directive of the Council was not *ultra vires* the provisions of the University Act, and the appellant was given a fair hearing by the Council of the 1st respondent.

[457](supra)
[458]See University of Agriculture Markudi v. Jack (2000) 1 NWLR (pt 679) 658; JSC v. Omo (1990)6 NWLR (pt 157) 407 at 490

Facts

The plaintiff, now appellant, was a reader in the 1st defendant/respondent's department of chemistry. In February 1987, whilst the appellant was on sabbatical leave in the United Kingdom, the 1st semester examination of the 1st respondent was conducted in his absence. In 1988, Professor Mesubi, who was appointed a new reader during the appellant's sabbatical leave, was looking for the chemistry examination scripts of two female students, Miss Madumere and Miss Kuye and he had to break open the door of the office of the appellant as the key to the office was not found. It was therein that two chemistry examination scripts of one Miss Madumere, one obviously written under examination condition and the other well – written in a more leisurely and relaxed condition, were recovered. Several markings from low to high marked appeared on the first script. On the second script, appeared very high marks. The scripts of Miss Kuye were similarly discovered in the appellant's office, with alterations of examination marks from low to very high marks. Following these discoveries, the appellant was invited to appear before a three-man departmental investigation panel headed by Professor M. Adeniran Mesubi to probe irregularities observed in the 1987 February examination. At the conclusion of its investigation, the Mesubi Panel submitted its report to the Dean of the Faculty of Science, the latter who proceeded to set up a Faculty Panel to investigate the alleged examination malpractices. This Panel was headed by Professor D.K Bamgboye, for its part, took evidence from students and staff alike at a time, according to the appellant, he was away in the United Kingdom. The Bamgboye Panel was later re-constituted under the Chairmanship of Professor S.O Oyewole to which the appellant, on invitation, made a written submission. As a result of the report of the investigation panels, the appellant was invited to appear before the Senior Staff Disciplinary and Appeals Committee (referred to shortly as SSD& AC) to defend himself against specific charges of examination malpractices. By another letter of the same date vide Exhibit P2, the appellant was suspended from duty pending the disposal of the charges against him. He appeared and defended himself before the SSD & AC, chaired by the Vice – Chancellor, Professor Adeoye Adeniyi. Consequent upon the findings of the SSD &AC, the second respondent informed the appellant in writing that he had been found not guilty on charges of examination malpractices and accordingly his suspension was revoked and his full emoluments were restored.

Therefore, the appellant wrote a letter to the 1st respondent seeking a transfer of his services to Ondo State University, Ado Ekiti, where he had been offered the post of a professor in the Department of Chemistry. However, on November 18, 1988, the 2nd respondent wrote to the appellant asking him to appear before the Governing Council of the first respondent to defend himself ostensibly over the same charges from which he had been exonerated by the SSD &AC and that, this he did on November 21, 1988.

The Governing Council made the following observations:

I. That with regard to the first charge, it was felt that Miss Madumere's examination script marked by another lecturer was assessed 0 out of 50, but later Dr. Bamgboye assisted her to write paper which he, Dr. Bamgboye, marked and awarded 45 out of 50 marks.
II. That all the marks recorded by Dr. Bamgboye in respect of Miss Madumere were falsified.
III. That in one quarter, Dr. Bamgboye awarded Miss Madumere 51 marks out of 50.
IV. That on the basis of the foregoing evidence (I -iii) Dr. T T Bamgboye was found guilty of alteration and falsification of results of Miss Madumere.
V. That Dr. Bamgboye was liable to explain why Kuye's marks were altered in a way that enabled her to earn a predetermined percentage.
VI. That Dr. Bamgboye was found guilty of maintaining unnecessarily close intimacy with a student, an association described as being beyond normal teacher/student relationship and
VII. That on the strength of the evidence before it, Professor Yoloye should be requested to answer disciplinary charges on this case.

Due to the foregoing findings, the Council summarily dismissed the appellant. The trial judge dismissed the appellant's case; the appellant appealed to the Court of Appeal which also dismissed the appellant's appeal, hence this appeal to the Supreme Court.

Held (overruling the respondent's preliminary objection and dismissing the appeal)
The appeal was dismissed for lack of merit from issue 1 to issue 5. (Dr. T T Bamgboye was given fair hearing and that the issue of criminal jurisdiction did not arise in the trial court).

In *Igwilo v. CBN*[459], it was held that the essence of fair hearing is that 'no man should be condemned unheard or without being given an opportunity to be heard as this is one of the pillars of justice based on the rule of law[460].

4.3.4 (c)Remedies for Wrongful Dismissal

The long-settled position of law on measure of damages for wrongful termination of employment is that the employee is only entitled to salaries and benefits he would have earned within the period of notice as contained in the contract of employment i.e., the salary and benefits for the contractual notice period[461].

The damages recoverable may, however, include legitimate entitlements such as allowances, commission, bonus, pension and gratuity which have accrued at the time of the wrongful termination of the contract[462].

[459](2005) 2 NCLR (pt 6) 377
[460]See Amokeodov.IGP (2005)3 NCLR (Pt 7) 28.
[461]See Western Nigeria Dec. Corporation v. Jimoh Abimbola (1996) NMLR 381; Nig. Produce Marketing Board v. Adewumi (1972) 1 All NLR 433.
[462]See UTC v. Nwokoruku (1993) 3 NWLR (Pt 281) 295; Chekwuman v. Shell (1993) 4 NWLR (Pt 289)

As earlier observed, order of specific performance cannot be given against a master that has ended the master/servant relationship with his employee[463].

The general rule is that, measure of damages is the amount the employee would have earned under the contract for the period until the employer could validly have terminated it, less the amount the employee could reasonably be expected to earn in other suitable employments because the dismissed employee, like any innocent party following a breach of contract by the other party, must take reasonable steps to minimize his loss[464].

However, the long-settled principle of law is that a wrongfully dismissed employee cannot recover damages for loss of reputation and injury to feelings[465].

On whether or not specific performance will be ordered against an employer or master who ended the master/servant relationship wrongfully, in *Onwuneme v. ACB Plc*[466], it was held that specific performance of contract of service will not be ordered by the Court where the master-servant relationship has ended, because to do so would be tantamount to forcing a willing employee on an unwilling master. The Court would not make an order it could not enforce[467].There is a special remedy applicable in contacts of employment with statutory flavor[468].

It is difficult for the Court to order reinstatement in private sector employment relationship. However, it is instructive to note that for the first time, the Supreme Court made an order of re-instatement in the private sector in the case of *Longe v. First Bank of Nigeria Plc* (Supra), and laid down clearly the procedure for removal of Chief Executive Officers as contained in section 266(3) of the repealed CAMA[469]. It appears this cannot be a general precedent for reinstatement in private sector employment relations.

4.3.5 Termination by Operation of Law

A contract is determined by operation of the law if any given set of facts or events evoked legal provisions or principles which effectively terminate the contract without the intentional acts of the parties. At common law, frustration can therefore, determine contract of employment. Frustrating circumstances are those occurrences, which makes the performance of the contract impossible by any of the parties. They include an outbreak of war as seen in *Brown v. Haco Ltd*[470], where the

[463]See Onwuneme v. ACB Plc (1997)12 NWLR (Pt 53) 150, the appropriate remedy for wrongful dismissal is damages.
[464] See NBC v. Adeyemi, unreported Appeal No. SC/45/1969
[465] See Addis v. Gramaphone Co. Ltd (1909) AC 488; Shell v. Lawson Jack (1998) 4 NWLR Pt. 545
[466](1997)12 NWLR (Pt 53) 150
[467] See Okenla v. Beckley (1971)2 All ER 174, Shell PDC v. Ifeta (2001)11 NWLR (Pt 724)473
[468]See Imoloame v. WAEC (1992) 3 NSCC 374; Bamogboye v. Unilorin (1999) 10 NWLR (Pt 622); Federal Civil Service Commission v. Laoye (1989) 2 NWLR (Pt 106).
[469]See Companies and Allied Matters Act, LFN, 2004, thIs Act has been repealed with the Companies and Allied Matters Act, 2020. See section 292 of CAMA 2020.
[470](1970 2 All NLR 47

plaintiff traveled to the East and the civil war caught up with him by the time he found his way back to the Nigerian side. Here, it was held that the contract had been frustrated. Change in the law, death of either party, or sickness does not necessarily bring a contract of employment to an end. Facts to consider under sickness are- duration and nature of the sickness, length of service of the employee, position occupied by the employee.in some judicial authorities, it has been held that, illness covering a period of one or two years has been held not to have frustrated a contract; while another lasting about one year was held to have frustrated it.

4.3.6 Repudiatory Breach

The doctrine of repudiatory contract is to the effect that a unilateral breach of the fundamental term of the contract by one party in such a way that the party who is in breach shows an intention that he is no longer bound or to be bound by the terms of the contract is legally capable enough of terminating employment contract. It is doubtful whether this concept applies to contract of employment. Thus, if an employee breaches the terms of the contract of employment, can the employee rely on such breach and say that he is no more under the control of the employer? According to Oladosu Ogunniyi[471], "it now appears clear for all practical purposes that a contract of employment cannot effectively be determined by a unilateral repudiatory breach; in fact, this right is hardly exercised in practice[472]"

4.4. THE DICHOTOMY BETWEEN TERMINATION OF COMMON LAW EMPLOYMENT AND EMPLOYMENT WITH STATUTORY FLAVOUR

4.4.1. Termination of Common Law Employment

The rule of law here is 'he who hires can fire". In *Maiduguri Flour Mills v. Abba*[473], it was held that at common law, a master may terminate a contract of employment with or without notice and without ascribing any reason for the termination[474].

The power to fire is subject to the contractual terms such as "requirements of notice and right to be heard". The dual-pillar of *Audi alteram partem* meaning- 'hear the other party', and *Nemo judex in causa sua* meaning- 'no one can be judge in his own cause', cut across all aspects of law, whether contract, administrative or labour relations. Thus, the court will apply strict rule of interpretation of the terms[475].

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[471]Op.cit

[472]See Gunton v. London Borough of Richmond-on-Ihames (1980) IRLR 116. London Transport Executive Clarke (1981) IRLR 166.

[473](1996) 9 NWLR (Pt 483) 506

[474] See the following cases on this principle. John Holt Ventures Ltd Oputa (1996) 9 NWLR (Pt 470 101; Maja v. Stocco (1969) 1 All NLR 141 at 161; Ajayi v. Texaco Nig Ltd (1987) 3 NWER 577.

[475]See Nfor v. Ashaka Cement Co. Ltd (1994)2 NWLR (Pt 319) 222. See also Honika Sawmill Ltd v. Hoff (1992)4 NWLR (Pt 238) 673 on reasonable notice.

In *Union Bank v. Ogboh*[476], the court has held that any other employment outside the statute is governed by the terms under which the parties agreed to be bound as master and servant.

The pivot of maintaining equilibrium between both the employer and the employee when terminating the relationship is the terms of the agreement. In *Katto v. CBN*[477], it was held that courts may not look outside the terms of the agreement when deciding on matters that are central to the terms of the agreement or contract of employment especially master/servant relationship. In *Uwagbanebi v. NPPB*[478], it was held that power to terminate appointment is reserved for the master and that ground for termination, when stated in the condition of service, must be strictly adhered to[479].

Employment can be terminated at any time including during probation[480]. Another fundamental question could be raised is that- Can an employment for a fixed term be lawfully terminated before the expiration of the contract? In *Swiss Nigeria Wood Industries Ltd v. Bogo*[481], the respondent was engaged for a fixed period of 2 years, but had his contract terminated after 6 months. The Supreme Court held that the company is liable to pay the respondent the full salary he would have earned for the unexpired period of 14 months[482]. It is trite law that any termination outside the agreed terms will be considered as wrongful dismissal. We shall discuss wrongful dismissal in this chapter.

4.4.2. Termination of Employment with Statutory Flavour

A contract of employment is said to be with statutory flavor where same is a creation of statute. This is usually employment in the public sector. However, see the recent Supreme Court decision in *Longe v. First Bank*[483].

CASE STUDY

5. ODIASE V AUCHI POLYTECHNIC, (1998) 4 NWLR (PT 546) 477 C.A
TOPIC- EMPLOYMENT WITH STATUTORY FLAVOUR

FACTS

The appellant sued the respondent challenging termination of his appointment as a lecturer in the respondent's institution. The appellant claimed, inter-alia, a declaration that the purported termination of his appointment was ultra vires the state government and alternatively the sum of N297,396:00 being the accumulation of his salaries and allowances

[476] (1998)4 NWLR (Pt 547) 608
[477] (1996)6 NWLR (Pt 607) 390
[478](1986) 3 NLWR (Pt 29) 489
[479]See British American Ins. Co. v. Omolaye. (1991)2 NWLR (Pt 187) 65

[480] See Wayo v. Benue State Judicial Service Commission (2006) All FWLR 66
[481] (1970) 1 UILR 337
[482] See also NPA v. Banjo (1972)2 SC 175; Adejumo v. UCHMB (1972) UILR 145. It is trite law that any
[483](2010) 6 NWLR (Pt 1189).

he would have been entitled to on his voluntary retirement at the age of 60 years or the sum of N1million damages for premature and wrongful termination of appointment.
The case of the appellant was that the termination of his appointment was directed by the then Bendel State Government and not the visitation panel of the respondent's institution. He contended that his appointment was governed by the Auchi Polytechnic, Law, Laws of Bendel State Government.
The respondent on the other hand contented that the appointment of the appellant was terminated in accordance with his conditions of service and that since the appellant had received 3 months' salary in lieu of notice, the appellant could no longer sue for reliefs for wrongful termination of appointment.

At trial, the letters of appointment and termination were tendered as Exhibits D and H respectively. The letter of appointment which provided for 3 months' salary in lieu of notice from either side clearly showed that the appointment of the appellant was done by the respondent and not Bendel State Government and the letter of termination showed that the respondent terminated the appointment of the appellant upon consideration of a government white paper on the report of the visitation panel on the respondent's institution, the visitation which was carried out on the Bendel State Government's directive.

At the conclusion of the trial, the Court in a considered judgment dismissed the appellant's case in its entirety. Being dissatisfied with the judgment, the appellant appealed to the Court of Appeal. In resolving the appeal, the Court of Appeal considered sSection 26(1) of the Auchi Polytechnic, Law cap. 11 laws of Bendel State of Nigeria, applicable in Edo which provides section 26(1) – 'if it appears to the Board of Governors that there are reasons for believing that the Secretary or any other person employed as a member of the academic or administrative staff of the polytechnic should be removed from his office or employment on the ground of misconduct or inability to perform the functions of his office or employment, the Board of Governors shall ... take the step: set out in section 26 (1) a – b 26 (2) and before such a staff can be removed.

Held (Unanimously dismissing the appeal)

1. **On effect of dismissing servant summarily where a notice is required**. If a master who is entitled to dismiss the servant fails to give the required notice or give less than 3 months' notice, where three months is required to be given to the servant; failure upon which, it would be wrongful to dismiss the servant summarily, the dismissal being wrongful is a nullity.
2. **On measure of damages recovered by servant dismissed summarily where 3 months' notice is required**. A servant who is purportedly dismissed summarily by master where a notice of not less than 3 months is required can recover as damages for breach of contract, 3 months remuneration and no more.
3. **On whether servant who accepted salary in lieu of which can thereafter challenge his termination as being wrongful**. A servant who has accepted his salary in lieu of notice he is entitled to on termination of his appointment cannot thereafter be heard to complain that his contract of employment was not validly or properly determined. Such a contract renders the determination mutual.

4. **On effect of refusal of salary in lieu of notice by servant** – if a servant rejects the salary in lieu of notice of termination of his appointment, the unilateral reputation of his contract of service by his master cannot operate to determine the contract. See **Olaniyan v University of Lagos (supra)**
5. **On when a dismissed servant is entitled to reinstatement** --- where a servant's employment is one with statutory flavor as in the instant case, and the servant's employment is not terminated in accordance with the procedure laid down in the relevant laws and regulations, he would be entitled to automatic reinstatement – Olaniyan's case, and Laoye's case reported on page. Finally, it was held that the "respondent have nevertheless adhered to the terms for the terminations of contract of employment in this case hence they cannot be held liable"

Termination of employment with statutory flavour is governed by the laid down procedure for termination. This type of employment protects the rights of employees against discriminatory termination, unlawful dismissal and redundancy. Employees may only be validly dismissed by complying strictly with the procedure prescribed in the enabling law or statute. Failure to do so will render the purported dismissal as unlawful, null and void and the employee will be entitled to be reinstated.

In *Shitta Bey v. Federal Public Service Commission*[484], the Supreme Court of Nigeria held that civil servants were not employed at the pleasure of the Federal Government and that civil service rules invest in these public servants a legal status and they can be legally and properly removed only by and as provided in the said rules. In *Ofomaja v. Commissioner of Education, Edo State*[485], the court found in favour of the employee that he was wrongfully dismissed and was held to still be in the service of Edo Civil Service because laid down procedures for termination were not followed and that the employee was not given fair hearing.

A plethora of judicial authorities have supported the principle of law that employment with statutory flavor guarantees job security to some extent[486], where it was held that termination of the employment of the employee must comply with the procedure laid down under Section 9(1) of the University of Nigeria Teaching Hospital Management Board Decree No 10 of 1985.

CASE STUDY

ABOMELI V NRC (NIG- RAILWAY CORPORATION) (1995) INWLR (pf 372)451 C.A

TOPIC- DISMISSAL OF EMPLOYEE.

[484](1981)1 SC 40 at 57-58

[485] (1995)8 NWLR (Pt 411) 69

[486]See Olaniyan v. University of Lagos (1885)2 NWLR (Pt 9) 598; Olatunbosun v. NISER (1996) 3 NWLR (Pt 29 435; Baba v. Civil Aviation (1986)5 NWLR (Pt 42) 514 CA; See also UNTHMB v. Nnoli (1992)6 NWLR (Pt 250) 752, (1994)8 NWLR (Pt 363) 576.

Issues

1. Whether the charges of fraudulent acts against the appellant for which he was dismissed by the respondent were criminal offences.
2. If the answer to issue No.1 is in the affirmative, whether the Nigerian Railway Corporation Act invests in the Respondents power to investigate and try an officer accused of such malfeasances
3. Whether it was proper for appellant to have commenced his action via the Fundamental Rights (Enforcement Procedure) Rules,1979.

Facts

The appellant was an employee of the respondent. He was employed by the respondent on October 2, 1984 as a Principal Mechanical/Engineer. The appellant was stationed in Ibadan in charge of maintenance of mechanical plant of the respondent. In the course of the appellant's employment, the respondent claimed to have discovered some fraudulent practices in the appellant's division and set up an investigating panel under its Standard Condition of Service Rules. All members of staff, including the appellant, who were involved in the said fraud, were invited and each made written statement and answer questions from members of the panel. At the end of the enquiry, the panel issued a comprehensive 61-page report containing records of oral questions and answers of those who testified. The report greatly indicted the appellant. Consequently, the appellant was dismissed from the services of the respondent.

Upon dismissal, the appellant applied to the High Court under FHR (Enforcement procedure)Rules 1979 and sought against the respondent, a declaration that the decision of the respondent dismissing him from the respondent's services contained in a letter dated October 22,1987 was unconstitutional , illegal, null and void;a declaration that the findings of the Panel of Inquiry set up by the respondent was unconstitutional, null and void; an order quashing the said reports; an order reinstating the appellant to his post and an order directing the respondent to pay the appellant all his salaries, allowances and his entitlements.

The contention of the appellant was that, the manner and method of his dismissal infringed his FHR (fundamental human rights) in that the respondent did not give him a fair hearing but rather constituted itself into a court of law.

After the hearing the appellant on the application, the learned trial judge struck out the application. Dissatisfied with the decision the appellant appealed to the Court of Appeal.

Held – (Unanimously dismissing the appeal)

1. **Whether the charges of fraudulent acts against the appellant for which he was dismissed by the respondent were criminal offences** – the dismissal has been attributed to acts of misconduct. There is a general power to dismiss for misconduct of any kind that can justify dismissal and to terminate the plaintiff's employment or give him a month's salary in lieu of notice. The respondent may have done what he could not really do to bind the appellant with the quilt of crimes. It can allege crimes against the employee and even attempt to prove it without taking steps to have him prosecuted.

2. **On issue 2, Order 403 of the standard conditions of service (offices) made pursuant to section 48 of the Nigerian Railway Corporation Act 1955 provides** –

   'Subject to order 410, an officer may be dismissed by the General Manager, if he is held to have been guilty of gross neglect or misconduct of so grave a nature...**'**
3. **On issue 3 – was it proper for the appellant to have commenced his action under FHR (Enforcement Rule) 1979:** - the learned trial judge was right to have refused those reliefs and struck out the application brought under FHR for wrong reasons.

Section 11 of the Labout Act[487] provides for a notice to be given to either party (employer or employee) before an employment governed by statute can be terminated. *In Okhomina v. Psychiatric Hospital Management Board*[488], the Court of Appeal laid down the conditions in which a person seeking a declaration that the termination of his employment is a nullity. These conditions are called material facts required to be pleaded; they are:

(i) that he is an employee of the defendant
(ii) he must show how he is appointed and the terms and conditions of his appointment;
(iii) he must establish who can appoint and remove him;
(iv) he must establish the circumstances under which his appointment can be terminated; and
(v) that his appointment can only be terminated by a person or authority other than the defendant.[489]

In *Achimugu v. Minister of Federal Capital Territory*[490], a public officer who was compulsorily retired at the age of forty-two before attaining the minimum age of forty-five (45) prescribed for compulsory retirement of servants was awarded salaries for the three years he was denied. The court considered Section 3(2) and (b); 4(2) at 24 of the Pension Act[491] as ratio for reaching its decision.

It is trite that where no special procedure is contained in the conditions of service of a public servant, the employer may still be able to determine the employment with or without notice and may be liable to pay only the arrears of salary which might have become due to the servant as at the date of termination.[492]Requirement of notice by either party is a condition precedent;

[487] LFN, 2004
[488] (1997 (2 NWLR (Pt 485) 75
[489]See Morohunfola v. Kwara State College of Education of Technology (1990)4 NWLR (pt. 566) 534
[490] (1998) 11 NWLR (Pt 574)467
[491]Cap 346 LFN, 1990
[492]Fakunle v. Obafemi Awolowo Teaching Hospital Management Board (1993)5 NWLR (Pt 291) 47

failure to give notice will render the termination a nullity in law and equity[493]. Thus, any termination that violates the principles espoused above will be set aside by the Court.

4.5. MODIFICATION OF TERMINATION OF EMPLOYMENT: ILO CONVENTION NO. 158 OF 1982

The common law position in termination of employment has always been 'He who hires can fire with or without giving any reason". This is supported by the principle of law that a willing employee cannot be forced on an unwilling employer. However, the International Labour Organization has been setting standards to regulate this common law position mostly in favour of the employee who is always at the receiving end. One of these standards is the ILO Recommendation No.119 of 1963, which prescribes that[494]:

> *"Termination of employment should not take place unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or services.''*

In cases of redundancy, protection is given to workers who have spent more years on the job; this may not be unconnected with the fact that age may not work in favour of a worker who is older, competing with younger applicants for job. Thus, Section 20 of the Nigerian Labour Act[495] provides that, in the event of redundancy, the employer shall inform the trade union or workers representatives concerned of the reasons for and the extent of the anticipated redundancy; the principle of last in, first out (LIFO) shall be adopted in the discharge of the particular categories of workers affected, subject to all factors of relative merit, including skill, ability and reliability[496].

Article 4 of the ILO Convention No.158 of 1982 reproduced the recommendation in the ILO Recommendation N0.119 of 1963.The Convention[497] provides:

> *"The employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirement of the undertaking, establishment or service".*

This is a verbatim reproduction of the ILO Recommendation of 1963. Thus, this convention has changed the common law position of 'he who hires can fire without adducing any reason'. Although Nigeria has not ratified this Convention; it is submitted, once the provision of the

[493]See Bernard OjeiforLonge v. First Bank (2010)2 CLRN 21.
[494]See ILO Recommendation N0.119 of 1963
[495]LFN, 2004
[496]Agomo V. Guinness (1995)2 NWLR (Pt 380) 627 SC.
[497]See Article 4 of the ILO Convention No.158 of 1982

convention on termination of employment is brought or cited before the court[498] under international best practices, the National Industrial Court of Nigeria will definitely apply the provision since the Court has exclusive jurisdiction over international best practices and unfair labour practices[499].

The ILO C158 of 1982, though not ratified by South Africa, however, the South African Labour Appeal Court in *Modese & ors v. Steve's Spar*[500] by a majority decision gave proper application of convention to the case. The court succinctly held:

> *"The audi approach is in keeping with international standards. This cannot be said of the no audi approach. I say this because, quite clearly, the ILO convention on Termination of Employment No.158 of 1982 contains a general rule that an employer must not dismiss a worker for reasons based on conduct or work performance without having first given such worker an opportunity to defend himself against the allegations made against him. In this regard, the Convention does not say this does not apply to cases where workers are dismissed for striking. On the contrary, it should apply also to the dismissal of strikers because those would fall under dismissal for reasons based on the employee's conduct. The Convention makes provision for one exception which is broad enough to refer to all the exceptions that normally apply to the audi rule. The convention or at least it is inconsistent with it".*

The decision in this case falls in line with Section 36 of the Nigeria Constitution of 1999which gives every worker/employee the right to be heard especially when the employer intends to fire under the right to exercise summary dismissal or when the worker was alleged to have participated in an illegal strike.

[498] National Industrial Court of Nigeria

[499]See section 254C (1)(f). See also, the Concept of Labour Rights in Nigeria, the work of this commissioner Author earlier cited in chapter three of this book.

[500]Case No J.A. 29/99 decided on 15th March, 2000 cited by J.E.O. Abugu op.cit. pg 39

PRACTICE QUESTIONS

1. Study **Faponle V U.I.T.H.M.B** and answer the following questions
   a. Summarize the facts
   b. Identify the legal issues
   c. List the principles of law applicable to the case
   d. Render legal opinion based on the principles of law.

2. Study **Bamgboye V University of Ilorin** and answer the following questions
   a. Summarize the facts
   b. Identify the legal issues
   c. List the principles of law applicable to the case
   d. Render legal opinion based on the principles of law.

3. Study **Odiase V Auchi Polytechnic** and answer the following questions
   a. Summarize the facts
   b. Identify the legal issues
   c. List the principles of law applicable to the case
   d. Render legal opinion based on the principles of law.

4. Study **Abomeli V NRC** and answer the following questions
   a. Summarize the facts
   b. Identify the legal issues
   c. List the principles of law applicable to the case
   d. Render legal opinion based on the principles of law.

CHAPTER FIVE
REDUNDANCY

5.0. LEARNING OBJECTIVES

At the end of this Chapter, readers/candidates should be able to appreciate and explain the under-listed concepts and apply them to Industrial Relations generally.

(i) Meaning of Redundancy
(ii) Dichotomy between Redundancy and Retrenchment
(iii) Statutory framework for Redundancy in Nigeria
(iv) Redundancy Negotiation
(v) Redundancy benefits and calculations
(vi) Qualifications for Redundancy payment
(vii) Pre-Redundancy Proceeding

5.1. INTRODUCTION

The dynamics and fluctuations in the production and distribution of goods and services could on many occasions cause economic hardship, to the extent that organizations may not break-even. Another salient factor is the negative aspect of technology as machines are replacing manpower every day. In fact, modern technologies have introduced robots; the multiplier effect of this on the labour market and labour economy includes lay off, retrenchment, untimely retirement as demonstrated in Achimugu's case[501] and redundancy.

Our focus here shall be on redundancy, even though many confuse the trio of lay off, retrenchment and redundancy together, or use them interchangeably.

5.2. MEANING OF REDUNDANCY

Redundancy has been defined by the Labour Act in its Section 20 (3) thus-

> "An involuntary and permanent loss of employment caused by an excess of manpower''

In the words of Lord Denning in *Llyod v. Brassey*[502]; the concept and the essence of redundancy payment was amplified as trite law; Lord Denning held,

> "As this is one of our first cases on the Redundancy Payments Act 1965, it is as well to remind ourselves of the policy of this legislation. As I read the Act, a worker of long standing is now recognized as having an accrued right in his job; and his rights gain in value with the years. So much so that if the job is shut down, he is entitled to compensation for loss of his job – just as a director gets compensation for loss of office. The director gets

[501] See case study 1 below
[502] (1969) 2 QB 98, CA

a golden handshake. The worker gets a redundancy payment. It is not unemployment payment. I repeat 'not'. Even if he gets another job straightaway, he nevertheless is entitled to a full redundancy payment. It is, in a real sense compensation for long service. No man gets it unless he has been employed for at least two years by the employer; and then the amount of it depends solely upon his age and length of service…"

5.3. DICHOTOMY BETWEEN REDUNDANCY AND RETRENCHMENT

As earlier pointed out under Section 20(3) of the Labour Act, redundancy means a state of being not or no longer needed or useful; it is a state of being no longer in employment because there is no more work available. Apart from the general meaning of redundancy, organizations do in most cases provide for redundancy in their Employees' Handbook, specifying the approach to adopt in redundancy; in South Africa and Australia, there is no much difference between redundancy and retrenchment; However, retrenchment has to do with working towards the reduction of costs of production; thus, minimizing costs of labour to increase profit maximization goal. Retrenchment is always associated with economic hardship. This may not necessarily be applicable to redundancy as the introduction of some machines or technologies may occasion redundancy. Redundancy flows from the fact that; one or more employees are no longer necessary.

5.4. STATUTORY FRAMEWORK FOR REDUNDANCY IN NIGERIA.

Section 20 of the Labour Act provides

1. In the event of redundancy-
    (a) The employer shall inform the Trade Union or workers' representative concerned of the reasons for and the extent of the anticipated redundancy.
    (b) The principle of "last in", "first out" shall be adopted in the discharge of the particular category of workers affected, subject to all factors of relative merit, including skills, ability and reliability; and
    (c) The employer shall use his best endeavours to negotiate redundancy payments to any discharged workers who are not protected by regulations made under subsection (2) of this section.
2. The Minister may make regulations providing, generally or in particular cases, for the compulsory payment of redundancy allowances on the termination of a worker's employment because of his redundancy.

5.5. REDUNDANCY NEGOTIATIONS

The Employer of labour is expected to have negotiation with the Labour Union; This may not be unconnected with the fact that, collective agreement which is the end product of collective bargaining is becoming a strong weapon of wage and better employment conditions negotiations. The Labour Act provides in Section 20 (1)(a):

> *"The employer shall inform the trade union or workers' representative concerned of the reasons for and the extent of the anticipated redundancy."*

In order to prevent arbitrariness, the reason for redundancy must be stated. This suggests that, reasons that, are inequitable shall not be welcomed by the Trade Union or the workers' representatives. Again, the Labour Act contemplates skill, ability and reliability. The essence of LIFO approach is to protect the length of service concept since it is hard for aged job seekers to find jobs. See the chapter on discrimination and the negative effect of age discrimination.

5.6. REDUNDANCY BENEFITS AND CALCULATIONS

Redundancy renders the employees jobless at the time of redundancy; however, during this period, the question is, how would the employee survive? Thus, the need for redundancy payment and calculations; the rule of law is that, the employer shall use his best endeavour to negotiate redundancy payments to any discharged workers who are not protected by regulations made by the Minister of Labour and Employment.
Section 20(2) provides

> *"The Minister may make regulations providing, generally or in particular cases, for the compulsory payment of redundancy allowances on the termination of a worker's employment because of his redundancy".*

It is instructive for an employee who intends to benefit under redundancy scheme of the organization he works to peruse the Employees' Handbook on the mode of calculating the redundancy benefits.

5.7. QUALIFICATIONS FOR REDUNDANCY PAYMENTS

For any person to qualify for redundancy benefits, such one must within the meaning of the word "Employee." Unfortunately, the Labour Act has restricted definition of the word "worker" or "Employee." However, the Employees' Compensation Act has elaborate definition of a worker or employee, which includes casual workers. It must be stated that the law on redundancy never contemplated casual workers.[503]

Another salient point is that an employee who is still in the service of the employing – organization cannot lay claim to redundancy benefits. He/she must have been terminated from employment via redundancy; Thus, not just termination, but redundancy solely must be the reason for the termination.

5.8. PRE-REDUNDANCY PROCEEDING

Under the English Legal System, there are laid down procedures for redundancy. The Employment Rights Act, 1996 make elaborate provisions for procedures before redundancy can

[503] See discussion on individual contract of employment in previous chapters.

take place. However, under the Nigeria labour law jurisprudence, there are no special procedures for redundancy, apart from the requirement of the law for consultation with the Trade Union or Workers' representatives; In the view of this, the Commissioned Author submits that, Nigeria has a long way to go as redundancy is done arbitrarily, not even minding the "Last in", "First out" option provided by the Labour Act. The case of *Olayiwola V Nigerdock*[504], though settled out of Court is a classic example of not following LIFO.

5.9. CASE STUDIES

CASE STUDY 1

ACHIMUGU V MINISTER FCT (998) 11 NWLR (PT 574) 467 CA

TOPIC- PREMATURE RETIREMENT

Facts

The appellant, a public officer, was employed by the 1st respondent on July 4, 1979. On the July 27, 1994, when he was 42 years old and had not reached the minimum retirement age of 45 years, his appointment was terminated.

Consequently, he filed an action at the high court against the respondents by way of originating summons, mainly seeking the resolution of the question whether he was entitled to pension and whether the termination of his employment could be compensated for in damages as an alternative to reinstatement.

The learned trial Judge held that the appellant was compulsorily retired at the age of 42 years before attaining the minimum age of 45 years prescribed for the compulsory retirement of civil servant. It awarded him damages equivalent to his salary for the period of 3 years he was denied due to the premature retirement. A certain sum was also awarded to the appellant as gratuity.

In spite of contradicted averments to the effect that the appellant had served the 1st respondent for 15 years, the trial court held that he served only for 14 years. On this ground it refused to grant the appellant for the award of pension

Dissatisfied with the decision of the trial court on the issue of pension, the appellant appealed at the court of Appeal. The second ground of appeal had subjoined to it as declaratory statement (a) and (b) which were not identified as forming part of the ground. It was contended that once the trial court had deemed the appellant to have been retired at the age of 45, it was illogical to hold that he served for only 14 years at the same time.

On the other hand, the first respondent who did not join issue with the appellant with regard to his pleading that he served for 15 years argued that the burden of proving that fact lay on the appellant.

[504] (unreported) Suit No. NICN/LA/152/2014,

In resolving the appeal, the court of appeal considered the provisions of section 3(2) (a) and (b) 4 (2) and 24 of the pensions Act, cap, 346, laws of the Federation of Nigeria, 1990 which respectively state as follows: -

3(2) when an officer retires after 1st April 1977 pursuant to subsection (1) of the section.

(a) if he has completed ten years, but not up to fifteen years' service, he shall be entitled only to a gratuity.
(b) If he has served for not less than fifteen years, he shall be entitled to pension.

4(2) the minister may require an officer to retire from the service at any time after he has attained the age of forty-five years subject to three months' notice in writing of such requirement been given"

"24 officer means a person employed in the established grades of the public service but does not include officers on temporary or contract appointment.

"Pensionable service" means service in an established post in the public service or any approved service which be taken into account in computing an officer's pension under this Act.

"Qualifying service' means service in the public service or any approved service which may be taken into account in determining whether an officer is eligible by length of service for a pension or gratuity.

Held (Unanimously dismissing the appeal).

On when a public servant is entitled to pension.

By virtue of the provisions of sections 3(2)a & (b) and 4(2) of the Pensions Act, cap 346, Laws of the Federation of Nigeria, 1990, for a public servant to qualify for pension he must have been in the service for 15 years and aged 45 years at the time of his retirement. In the instant case, the appellant was 42 years old when his employment was terminated by the 1st respondent, he cannot be awarded pension under the provisions of the pension Act.

CASE STUDY 2

AGOMA V GUINESS (NIG) PLC LTD
(1995) 2 NWLR (PT 380) 672SC.
TOPIC –PRINCIPLES OF LAST IN FIRST OUT

Issues:

1. Whether Exhibit is not an offer (a representation, a proposal by the respondent company to any member of a class (to wit; the class of the retrenched employees) which proposed any member of that class, to wit; appellant may by word or act accept and that in so accepting a valid contract is created between the appellant and the respondent.

2. Whether there were any special circumstances that gave the Court of Appeal any competence to interfere with the trial court's finding of fact.
3. Whether before Exhibit 'G' was delivered, these was a compromise agreement between the parties effective in law to create contractual relationship between them.

Facts

The appellant, as plaintiff, sued the respondent as defendant in the high court of the former Bendel State claiming a declaration that, at all the material times, the Company is bound by the rule and practice of LIFO. (Last in, first out). The appellant was employed by the respondent on May 21, 1979 as a Staff Nurse, having qualified as a State Registered Nurse and a State Certified Midwife in the United Kingdom. She discharged her duty very well and without any query throughout the period of her employment. On 7-7-84 her departmental head, Mr. Omozee (D.W.4) called a meeting in the defendant's clinic which she attended. At the meeting D.W.4 told the workers that the respondent would soon retire some of them temporarily because of the inability of the respondent to cope with the wage bills of its employees. On 14th of the same month, she got a letter from the respondent terminating her employment.

She collected all her entitlements and left the service of the respondent even though she protested the unfair retirement in that some employees who were employed after her, were not retrenched. It was her case that three months after, the respondent's Managing Director issued a policy circular (Exhibit B) in which it was directed that those who were retrenched should be reabsorbed into the respondent's establishment. Upon learning of this policy directive, she went to the office of the respondent to register herself as still interested in working for the respondent as directed in a radio announcement made to the effect by the respondent. She afterwards received a letter on 16-5-86 from the Personnel Department of the Respondent requesting her to come to its office for a chat. She reported to the Manager of that Department and after their discussions, she claimed that she was told that a letter would be forwarded to her later. She did not receive any letter as promised; instead, she was surprised to read in newspaper (observer) of 9-10-1986 an advertisement when the respondent requested persons interested in being employed as staff Nurses to apply. She was unhappy and wrote a letter to the defendant and when she could not get a reply, she asked her solicitor to write exhibit E. On failing to get any reply to the two letters, she commenced these proceedings.

After hearing the case, the trial court entered judgment in favor of the appellant, hence, the respondent appealed to the Court of Appeal which unanimously allowed the appeal and dismissed the appellant's action. The appellant then appealed to the supreme court contending that the Court of Appeal was wrong in holding that Exhibit '6' was not an offer to the appellant; that the Court of Appeal wrongfully interfered with the findings of the trial court and that there was compromise agreement between the parties which created a contractual relationship between them.

THE LABOUR ACT CAP 198 LAWS of the Federation of Nigeria 1990, section 20(1)(b) which the supreme court considered provides;

20 (1) In the event of redundancy-

(b) the principle of "Last in, first out" shall be adopted in the discharge of the particular category of workers affected, subject to all factors of relative merit, including skill, ability and reliability.

Held – unanimously dismissing the appeal

1. **On whether Exhibit B is not an offer** – In the instant case, no offer was made to the appellant in the Exhibit which she could accept in the circumstances, no contractual relationship existed between her and the respondent as a result of exhibit B.
2. On the application and principle of LIFO in labour law – By virtue of section 20(1)(b) of "last in first out ". In the instant case, from the evidence of DW 2; it is clear that the respondent company complied with the provision.

On the issue, no merit in the appeal, the appeal fails and therefore dismissed.

PRACTICE QUESTIONS

1. What are the procedures involved in redundancy?

2. Expatiate on the advantages of the principle of LIFO

3. Identify the statutory framework for redundancy in Nigeria.

4. Study **Agoma V Guiness Nig PLC**. and answer the following questions.
    a. Summarize the facts
    b. Identify the legal issues
    c. List the principles of law applicable to the case
    d. Render legal opinion based on the principles of law.

5. Study **Achimugu V Minister FCT** and answer the following questions.
    a. Summarize the facts
    b. Identify the legal issues
    c. List the principles of law applicable to the case
    d. Render legal opinion based on the principles of law.

CHAPTER SIX
EMPLOYMENT DISCRIMINATION

6.0. Learning Objectives

At the end of this Chapter, readers/candidates should be able to appreciate and explain the under-listed concepts and apply them to industrial relations generally.

(i) Meaning of Discrimination
(ii) Types of Discrimination
(iii) Employment Discrimination and Victimization
(iv) Gender Discrimination in the workplace
(v) Liability for Discrimination

6.1. INTRODUCTION

Criteria for selection which are not based on merit may result to discriminatory selection of applicants for a job, promotion and remuneration. According to McConnell and Brue[505], employment discrimination has been described as inferior treatment in hiring, promotions, work assignments, and such for a particular group of employees. Kehinde Bamiwola had submitted somewhere that, employment discrimination is known as "labour market discrimination"[506], a term which is more appropriate in economics and has its equivalent in law as 'employment discrimination'.

It is submitted, simplifying the phrase "employment discrimination" it may mean unjust treatment of persons who ought to have equal chances as regards job selection/hiring, promotion, remuneration and general treatment of employees in the work place. The factors that may influence such unjust treatment include but not limited to factors that shall be discussed below in the following cases.[507]

6.2. MEANING OF DISCRIMINATION

In *Baker v. California Land Title Co*[508], discrimination has been defined as "the effect of statute or established practice which confers particular privileges on a class arbitrarily selected from a large number of persons, all of whom stand in the same relation to privileges, and between whom and those not favoured no reasonable distinction can be found; unfair treatment or denial of normal privileges to persons because of race, age, nationality or religion; a failure to treat all persons

[505] (1999) Economics (Irvin McGraw-Hill)
[506] See K. H bamiwola 'Human Rights and employment Discrimination: A Comparative Examination of Equal Job Opportunities' published by the International Labour Organization. (2010)
[507] McDonald v. Santa Fe Trial Transportation 96, S. ct 2574; p on Rule; Winston v Marine Tech. College System 631 A. 2d &0 on sex; Reeves v Sanderson Plumbing Products Inc. 530 US !33, 120 S. ct 2097 (2000) on age; Hoffman v South African Airways on Disability; Poff v Caro on Disability; Clvatier v Cots co, 60 311 F. supp 2d 190 (2004) on Religion.
[508] D C Cal, 349, F Supp. 235 cited in Black's Law Dictionary 5th edition

equally where no reasonable distinction can be found between those favoured and those not favoured". ILO CIII Convention of 1958 defines discrimination to include any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction, social origin which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation.
The following factors may be responsible for employment discrimination; and also form the types of discrimination; some of these were highlighted in *Apllins v Race Relations Board*[509]**.**

6.3. TYPES OF DISCRIMINATION

6.3.1. Gender/Sex Discrimination

It has been said that it is not difficult to discriminate on the basis of gender if one is not sensitive to the issues involved. It has often been erroneously over emphasized that gender discrimination affects women or females only; however, gender discrimination covers both males and females. However, it is the females who feel the effect of gender discrimination in the workplace more so than men. In United States of America, the vast majority of EEOC gender claims are filled by women.
The Black's Law Dictionary equates sex discrimination with gender discrimination; it defines sex discrimination as discrimination based on gender especially against women. Although, it is rebuttable, gender discrimination appears to be the type of discrimination that is so common in the work place. Thus, gender discrimination can be used interchangeably with sex discrimination.

Gender discrimination also includes sexual harassment. This has been defined as unwelcome and persistent sexual advances, request for sexual favours and other verbal or physical of sexual nature[510]**.** See details on sexual harassment in Chapter Seven. Discrimination on the basis of gender is illegal and not in keeping with good business practices of efficiency and maximizing resources. It has many manifestations which include discrimination in hiring, firing, compensation, training, foetal protection policies[511].

6.3.2. Wage Discrimination and Equal Pay

In *Pollis v The New School for Social Research*[512], prima facie case on discrimination was established where a female professor had discrepancies between her salary and salaries of male professors; the American Court of Appeal upheld the jury's decision which was in her favour. In UK, the Equal Pay Act 1970 (EPA) is the governing legislation bringing into effect the provisions of the Equal Pay Directive and Article 119 of the Treaty of Rome. The principle is that men and women should receive equal pay for work, being either the same work or work which an equal

[509] (1976) Ac 295 at 2986 per Lord Simmons.
[510] Equal Employment Opportunities Commission (EEOC) US Civil code of Federal Regulation
[511] UAW v Johnson Controls, Inc. 499 US 187 (1991), where a group of employees challenged the employer's policy barring all women except those whose infertility was medically documented from jobs involving actual or potential lead exposure exceeding Occupational Safety and Health Administration (OSHA) standard. The court found the policy to be illegal gender discrimination.
[512] 132 F. 3d 115 (2nd Cir. 1997)

value is attributed. Equal pay principles give to a person who is into contract of employment, an 'equal cause' entitling that person to equal terms and conditions of employment to those of fellow employees of the opposite sex for doing the same sort of work, work rated as equivalent or work of equal value.

In practice, anytime a person receives less than his/her colleagues of same qualification, work equivalent or work value, such a person is said to have been discriminated against in wage or salary. However, there may be variations but such must be justified. It is noteworthy that, an equality clause does not operate in relation to a variation between a woman's contract and a man's contract, if the employer provides that the variation is genuinely due to a material factor which is not the difference of sex[513].

6.3.3. Race/Colour Discrimination

Discrimination on the basis of race includes factors such as nationality, colour, ethnicity, origin, and national origin. "Except, where it is necessary to choose a particular type of person for a dramatic performance or as a model or to work in a particular place such as Chinese Restaurant"[514]. In the absence of the exception, any preference base on race would be discriminatory. In *Espinoza v Farah Manufacturing*[515]**,** the U.S. Supreme Court said the term 'national origin' refers to the country where a person is born or... the country from which his or her ancestors came[516]. It has been observed that even if an applicant scales through national origin test, the tribal test (i.e., his/her tribe) may deny him/her job chances. For instance, Botswana Court had frowned at discrimination on the basis of tribe[517], which has the resultant effect of unjust or preferential treatment. Discrimination on the basis of race has some of these characteristics such as skin colour, hair texture or certain facial features. In United States, this has been held to violate Title VII.[518]

Although race and colour overlap, they are not synonymous. Colour discrimination can occur between persons of different races or ethnicities, or between persons of the same race or ethnicity. Colour has been understood to mean pigmentation, complexion or skin shade or tone. Thus, 'colour discrimination' occurs when a person is discriminated against based on the lightness, darkness, or other colour characteristics of the person. In U.K, the Race Relations Act 1976 modeled closely on the Sex Discrimination Act 1975, has also been a powerful influence in the fight to eliminate discrimination on racial grounds.

6.3.4. AGE DISCRIMINATION

[513] In *Thomas v National Coal Board (1987) 1 R.L.R 451, E.A.T.* additional responsibility was used alternatively under both heads.

[514] Encyclopedia Britannica; Updated 20, April 1981

[515] 94 S. ct 344

[516] See S. 25 of the Nigerian Constitution 1999, on Citizenship by birth.

[517] Kamanakao & others v AG & others (2002) AHRLR 35 (BWHC 2001),

[518] Title VII is a United States of America Civil Rights Act, 1964

Age discrimination is discrimination based on age. According to a writer[519], examples of discrimination include "forcing retirement age; assigning older workers to duties that limit their ability to compete for high jobs in the organization; requiring older works to pass physical examination as a condition of continued employment; indicating an age preference in advertisements for job applicants such as "young and dynamic person wanted"; choosing to promote a younger worker rather than an older worker because the older worker may be retiring in several years, and cutting health care benefits for workers over age sixty-five because they are eligible for Medicare[520]. SDA S38; Race Relations Act, S29 makes it unlawful to publish discriminatory advertisement.

6.3.5. RELIGION DISCRIMINATION

Another ground for discrimination is religion. In *United States v Seeger*[521]**,** The Court defines the term broadly, it says "all that is required is a sincere and meaningful belief occupying in the life of its possessor a place parallel to that filled by God of those religions generally recognized. According to Professor Mowoe, religion is another aspect of fundamental right which has generated a lot of discourse in the Court. In filling application forms and/or interview documents, the applicant would have filled his/her religion, denomination/organization. "Most employers who have fundamentalists" approach to issues may not invite such applicant for interview let alone giving him/her the job.

6.4. PRE-EMPLOYMENT DISCRIMINATION AND RIGHT TO WORK.

It is unlawful for a person in relation to employment by him if, at an establishment, the woman is discriminated against; it is unlawful to discriminate against individuals in all aspects of the recruitment procedure including advertising, short-listing criteria, interviewing and selection. See SDA, 56(1).

Right to work is a legal concept that people have a human right to work and may not be prevented from doing so. This right is enshrined in the Universal Declaration of Human Rights and recognized in International Human Right Law through its inclusion in the International Covenant on Economic, Social and Cultural Right, where its right to work emphasizes Economic, Social and Cultural Development

6.5. CASE LAW REVIEW ON EMPLOYMENT DISCRIMINATION

In Nigeria, there is a dearth of Judicial authorities on employment discrimination. However, in other jurisdictions, plethora of judicial authorities abounds on discrimination in the work-place.

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[519] Rogers E. Meiners, A L Ringleb, Frances R. Edwards (2006), The legal environment of Business (9th edition) Thompson West, p. 447

[520] Reeves v Sanderson Plumbing Products Inc. (supra) demonstrated age discrimination, where Reeves testified that Chestnut (Reeves Manager) had told him that he "was so old he must come over on the mayflower"

[521] 380 US 163

The dearth of judicial authorities in Nigeria could be linked to lack of awareness of the working class, cost of instituting and maintaining an action in Court of law; the technicalities or the legalese involved in most Court actions; inadequate knowledge of labour relations law or lack of many labour law experts who have flair for labour related matters that border on human rights; and finally, the 'I leave you to God' or 'God will judge' attitude of most Nigerians, and many other factors.

In South Africa, the case of ***Hoffman v. South African Airways***[522] has become a *locus classicus* on employment discrimination. An applicant who tested positive to H.I.V was denied employment by the South Africa Airways on the ground of his health status. This was challenged as being in breach of his constitutional right to equality. The constitution specifically prohibits discrimination on the basis of sexual preference. The Court held that, the denial of employment amounted to unfair discrimination. Discrimination generally could be direct or indirect, Sex Discrimination Act (1975); The Race Relation Act 1976 (RRA) (AS AMENDED, 2003): for example, *Sex Discrimination Act, S. 1(1)* provides:

> *"A person discriminated against a woman in any circumstances relevant to the purposes of any provision of this Act if: on the grounds of her sex, he treats her less favourably than he treats or would treat a man".*

In *James v. Eastleigh Borough Council*[523]**,** the House of Lords laid down the 'but for test' for determining whether there had been direct discrimination,

> *"Would the complainant have received the same treatment from the defendant but for his or her sex"*

In that case, Eastleigh Borough Council had set different age limits for men and women for concessionary rates of the Borough swimming pool and local amenities. Their motive for doing so was to provide subsidies to perceived needs and it was administratively convenient to relate this to the State pensionable age. The House of Lords concluded that the reason for the treatment was the sex of the Applicant and consequently she had a legitimate claim.

However, in deciding whether or not there had been indirect discrimination, a number of questions have to be considered such as: is there a condition or requirement? Is the condition or requirement absolute? Is it applied universally? Has the applicant established his/her sex, religion grouping, racial/ethnic grouping, etc.? Has the applicant established that the condition was applied to his/her detriment? Can the applicant or person of the same sex comply? Is there a disproportionate impact? Can the requirement be otherwise justified irrespective of sex, race, or marital status? Inability to answer these questions satisfactorily (affirmatively or negatively as each question requires) will establish indirect discrimination. Discrimination also extends to victimization.

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[522] supra
[523] (1990) CR 554

Judicial authorities have also established that claims of sexual harassment can be brought against the harasser and against the employer. In *Strath Clyde Regional Council v. Porcelli*[524]**,** it has been held that the objective of the harasser was not relevant to the issue of whether or not there had been sex discrimination. Sexual harassment has been extended to include hostile work environment[525]

In *Harris v. Forklift Systems Inc.*[526]**,** Harris was working as a rental manager for the respondent incorporation for two years. Her boss Hardy often insulted her in front of other workers and made her the target of sexual slurs and suggestions. He said, "We need a man as the rental manager and you are a woman, what do you know?" He told her she was a dumb-ass woman and that they should go to the holiday inn to negotiate her raise". Hardy would ask Harris and other employees to get coins from his front pants pocket, throw things on the ground and ask women to pick them up and make sexual comments about their clothing. Harris complained to Hardy about his comments, Hardy said he was only kidding. So after, while Harris was arranging a deal with a customer, Hardy asked, 'what did you do? promised the guy sex Saturday night?' Harris quit and sued, claiming that Hardy's conduct created a hostile environment for her. The Districts and Appeal Courts ruled against her, she appealed to the Supreme Court. The US Supreme Court, per *O'Connor,* held that when workplace is permeated with discriminating intimidation, ridicule and insult, that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create abusive working environment, Title VII is violated. The judgment of the Court of Appeal was reversed and the case was remand for further proceeding consistent with the opinion of the Court.

In *Oncale v. Sundower offshore services*[527]**,** a male worker sued his **employee** because he suffered verbal and physical abuse of a sexual nature by other male workers. The U.S Supreme Court held that Title VII prohibits same-sex harassment.

The case of *Nagle v. Fielden*[528] is instructive regarding discrimination based on sex. Although, the ratio of the case borders on 'restraint of trade', it also takes into account situations where sex discrimination could be said to be an interference with the right to work of an individual-concerned. Mrs. Nagle had trained race horses since 1938, but was never able to obtain a license from the jockey club to do so, without a license, she could not race her horses on the flat in that country consequently in order to follow her chosen profession, she was forced to get a license in the name of her head stable lad. There was no 'question as to Mrs. Nagle's competence as a trainer'. It was admitted that the sole ground of refusal of the license was the fact that the applicant was a woman. Mrs. Nagle sued the respondents as representatives of the standards of the club, and as individual members of it. She sought a declaration that the refusal to grant a license was contrary

[524] (1986) 1 RLR 134
[525] Bamiwola K.H. (ibid) www.ilo.org.

[526] 510, US 17, 114 S. ct 367 (1993)
[527] *118, S. ct (1998)*
[528] (1996) 2 Q.B 633

to public policy, and injunctions to restrain the respondents from pursuing their policy of refusing licenses to women. She also prayed the court for an order compelling the Club to grant her a license. The master struck out her statement of claim on the ground that it disclosed no cause of action, a decision which was upheld on appeal by Johnson Stephenson. It was against the striking out only that Mrs. Nagle appealed, and in fact, the issued was settled before the case came to trial, with the plaintiff being granted a license to train in her own right.

The judicial activism of Lord Denning had made him to doubt the validity and lawfulness of the decision of the Court in *R v. The Benchers of Lincolid*[529] **,** where the court held that a professional body such as Inn of Court had an absolute discretion as to the admission of members and recourse could not be had to the Courts of law even where that body had acted capriciously in the exercise of its discretion.

It is regrettable that, in the name of associations, many a trader has been discriminated against even in the informal sectors of the Nigerian economy. Association of vegetable Sellers, Association of Pure Water Sellers and many funny associations are now operating what looks like a "closed shop" arrangement, where non-members are usually prevented from participating in a free market economy. The side effect of this is inflation and many other consequences. The stance and position of these so-called associations are contrary to the Nigerian Constitution, 1999 as altered.

It has previously been established that employment discrimination could also manifest under age ground. In *Reeves v. Sanderson Plumbing Products Inc.*[530] Reeves fifty-seven and Oswalt, in his thirties were supervisors in a department known as Hine Rooms which was managed by Caldwell forty-five. Reeves was handling record of attendance of employees. Caldwell reported to Chestnut, director of manufacturing, that production was down because employees' attendance was not good, but record did not indicate an attendance problem. Chestnut ordered an audit, which found problems with attendance records. On his recommendation, Caldwell and Reeves were fired. Reeves sued for age discrimination. The jury found for Reeves. The appeals Court reversed the decision, holding that Reeves had not presented sufficient evidence to show that he was fired because of his age. Reeves petitioner appealed. At the Supreme Court, Reeves testified that Chestnut had told him that he was "was so old he must he have come over on the mayflower" and, on one occasion, when petitioner was having difficulty starting a machine, that he "was too damn old to do his job". The Supreme Court held that there was sufficient evidence for the jury to find that respondent had intentionally discriminated, for these reasons; the judgment of Court of Appeal was reversed.

[529]Inn (1925) 4 B & C 855 @ PP 859 and 860
[530] Supra

6.5.1. CASE REVIEW ON GENDER DISCRIMINATION

It has been earlier established that gender discrimination appears to be the most frequent of all the discriminating grounds. In the US, before Title VII was passed, several newspaper advertisements had revealed several forms of gender discrimination.

Specimen of gender-based advertisements

<table>
<tr><td>FEMALE EMPLOYMENT

Female help wanted 23</td><td>Opening soon... WAITRESS
.....No EXPERIENCE NECESSARY will train neat, trim and alert applicants to be coffee house and cocktail waitress, apply at once.</td></tr>
<tr><td>ATTRACTIVE NEAT APPEARING RELIABLE YOUNG LADIES
For permanent employment as food waitress. Interesting work in beautiful surroundings. Good salary plus tips; UNIFROM FINISHED vacation with pay: age 21-35 years for interview appointment phone.....</td><td>A REFRESHING CHANGE
From your household chores. Use those old talents of yours and become a part-time secretary. You can earn that extra-money you have been needing by working when you want XXX has temporary position upon in allocations in town and you can choose what and whose you rent top hourly rates N. Fee</td></tr>
<tr><td>LADY to run used furniture store on.....

GIRL FRIDAY
If you are a qualified secretary, dependable and would like a solid connection with a growing corporation, write me your qualifications in confidence .....</td><td></td></tr>
</table>

Title VII made it illegal to advertise based on gender. In ***Milligan-Jensen v. Michigan Technological University 767 F. Supp. 1403 (WD Mich; N.Div 1991),*** the employer initially welcomed Milligan-Jensen's applications telling her that the department would be receptive to her application because "their woman" had just quit and "they need to hire a female". Two months later, after Miligan Jensen updated her application, the employer wrote- "we are interested in

interviewing female applications for the position of PSO. Milligan-Jensen came to work as a PSO. The employer assigned her a badge number that every female before her had previously had. Initially, she was assigned another badge number, but her supervisor, Louis Fredianelli, changed to the "female" number because he said, wherever he called for her, he got the other person assigned that number because he was used to using the number for the female officer. Fredianelli who made the decision to terminate the employee, criticized her uniform and dress even though he admitted that she was helpless to change the mandatory cloths which was designed for men to wear. Further, Fredianelli treated the employee differently from a male co-worker when each of them committed the same infraction of the rules of not wearing a hat. When another officer announced his retirement and Milligan-Jensen asked Fredianneli for his shift, Fredianelli, who became angry, asked her what was wrong with the job that she had. He declared, "you 've got the lady's job. Don't you like it? The Court found that she was being treated differently because of her gender. The Court found the employer liable.

In ***Dothard v. Rawlinson 433 US 321 (1977),*** challenged the statutory height and weight requirement and a regulation establishing gender criteria for assigning prison to "contact" positions (those requiring physical proximity to inmates) as violate of Title VII of the Civil Rights Acts of 1964. The Supreme Court found gender discrimination.

In ***Phillips v. Martins Marietta Corp 400 US 542 (1971),*** a female applicant was denied employment because of the employer's policy against hiring women pre-school age children. There was no policy against hiring men with such children. The Supreme Court held the employer policy violated Title VII.

In ***Lynch v. Freeman,*** a female carpenter apprentice sued her employer for gender discrimination alleging the failure to furnish adequate sanitary toilet facilities at her work site. The Court found the unsanitary facilities violated Title VII. "The portable toilets were dirty, often had no toilet paper or paper that was soiled, and were not equipped with running water or sanitary napkins. In addition, those designated for women had no locks or bolts on the doors and one of them had a hole punched in the side". It was reported that in order to avoid using the toilets, Lynch began holding her urine until she left work. The facts of the case also showed that within three days after starting her up in the job, she experienced pain and was advised that the practice she had adopted, as well as using contaminated toiled paper, frequently caused bladder infections. Lynch introduced credible medical expert testimony to demonstrate that women are more vulnerable to urinary tract infections than are men. Although Lynch got her day in Court on gender basis; the question is, to what extent will this type of action succeed in Nigeria? Will the cause of action in Lunch's case make sense to any judge in Nigeria? In order to maintain a balance, one must not make gender related discriminatory ground, a ground for frivolous suits and complaints.

The United States Court rejected such frivolous claim in *Harper v. Block Buster Entertainment Corporation (supra) where* the employee sued the employer under Title VII and Florida Court Rights Act, alleging that employer's grooming Policy, which prohibited men, but no women from

wearing long hair, discriminated against them on the basis of gender. The Court held that the grooming policy did not violate Title VII or Florida law.

6.5.2. CASE REVIEW ON WAGE DISCRIMINATION

The Equal Pay Act provides that no employer shall discriminate between employees on the basis of sex by paying wages to employees... at a rate less than the rate of which he pays wages to employees of the opposite sex... for equal work on jobs the performance of which requires equal skill, effort and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to:

(i) a seniority system
(ii) a merit system
(iii) a system which measures earnings by quantity or quality of productions; or
(iv) a differential based on any other factor other than sex.

The case of ***Pollis v. The New School for Social Research 132 F.3d 115, 2nd CIR. (1997)*** has shown how Court will frown at any attempt to encourage wage discrimination by employers.

In *American Federation of State, County and Municipal Employees, AFL-C10 (AFSCME) v. State of Washington 770 F.2d 1401 (9th Cir. 1985),* the state of Washington conducted studies of prevailing market rates for job and wages in order to determine the wages of various state jobs. Under market rates, female-dominated jobs were paid lower than male-dominated jobs. The state then compared jobs for comparable worth after finding that female-dominated job salaries were generally about 20 percent less than wages in male-dominated jobs, legislated that it would begin basing its wages on comparable worth rather than the market rate-use, a 10-year period. State employees wanted the scheme to go into effect immediately and a class of employees in job categories at least 70 per cent female brought a Title VII suit against the state alleging it was a violation of Title VII for the State to know of the differences and not remedy the situation immediately. The lower Court held for the employees and the State appealed. The Court of Appeal held that the state's decision to base compensation on the competitive market, rather than on a theory of comparable work, did not establish its liability under the disparate impact analysis of Title VII and the states' participation in a market system did not allow an inference of discriminatory motive in order to establish its liability under a disparate treatment theory, since the state did not create the market disparity and was not shown to have been motivated by illegal gender-based considerations in setting its salaries. Therefore, the employees did not prove liability under VII and the lower Courts decisions was reversed.

Finally, it has to be re-emphasized that discrimination has many manifestations, however, the most important manifestations to this work as earlier mentioned include hiring, firing and *fetal protection policies.* Fetal protection policies have unique gender employment problems, fetal protection policies are policies adopted by an employer that limit or prohibit employees from performing certain jobs or working on certain areas of the workplace because of the potential harm

presented to pregnant employees, their fetuses or the reproductive system or capacity of employees. According to a writer "The problem with these policies is that, many times even though there is a danger presented to male employees, the policies only exclude females (and do so very broadly), and the jobs from which the females are excluded pay more or have more promotion potential. In *UAW v. Johnson Controls*[531]***;*** some employees challenged the employer's policy barring all women except those who infertility was medically discounted from jobs involving actual or potential lead, exposure exceeding occupational Safety and Health Administration (OSHA) standards. The Court found the policy to be illegal gender discrimination.

Discrimination could take other forms such as victimization, intimidation, hostile work environment, indecent work environment etc.

6.6. LIABILITY FOR DISCRIMINATION

Liability for discrimination or intimidation may take the form of either civil or criminal;

6.6.1. Civil liability

The tort of intimidation may take the form of compelling a person by threats of unlawful action to do some act which causes him loss; or of intimidating other persons, by threats of unlawful action, with the intention and effect of causing loss to a third party. In the United Kingdom, prior to 1964, it was assumed that the tort was confined to threats of physical violence, but in that year the House of Lords held that threats to break a contract were encompassed by the tort. In **Rookes v Barnard**[532]**, House of Lords**, BOAC and the Draughtsman's Union (AESD) operated an informal closed shop arrangement. The plaintiff was a draughtsman employed by BOAC, and in 1955, he resigned from the union. Officials of the union threatened BOAC that unless they dismissed the plaintiff, union members would go on strike. Rookes was given notice and his contract of employment was lawfully terminated. He sued the union officials alleging, *inter alia* intimidation.

6.6.2. Criminal liability

Under the Criminal Code of Nigeria, intimidation is a crime especially when it comes from the Trade Union; the case of **Rookes v Bernard (1964)** being the *locus classicus* case, formed part of the rationale for Section 366 of the Criminal Code Cap C38, LFN, 2004; which is in *pari materia* with section 241 of the Trade Union and Labour Relations (Consolidation) Act, 1992 of the United Kingdom. The Nigerian Criminal Code provides;

> *"Subject to the provisions of the Trade Union Act, any person who with intent to prevent or hinder any other person from doing any act which he is lawfully entitled to do, or with intent to compel him to do any act which he is lawfully entitled to abstain from doing, or to abstain from doing any act which he is lawfully entitled to do-*
>
> *a) threatens such other person with injury to his person, reputation, or property, or to the person, reputation, or property of any one in whom he is interested; or*

[531] Inc 499 U.S 187 (1991)
[532] (1964) AC 1129

b) persistently follows such other person about from place to place; or

c) hides any tools, clothes, or other property owned or used by such other person, deprives him of or hinders him, in the use thereof; or

d) watches or besets the house or other place where such other person resides or works, or carries on business, or happens to be, or the approach to such house or place; or

e) follows such other person with two or more other persons in a disorderly manner in or through any street or road; or

f) induces or attempts to induce that person to believe that he, or any person in whom he is interested, will become any object of displeasure to the Government of Nigeria or to any person employed in the public service of Nigeria;

….. is guilty of an offence and is liable on conviction to imprisonment for one year."

It is this author's opinion that the Nigerian criminal jurisprudence contemplates sanctions for discrimination or intimidation. Apart from criminal liability, the Fundamental Rights Enforcements Procedures Rules, 2009 made pursuant to Chapter four (IV) of the Nigerian Constitution, 1999 as altered, provides for reliefs or remedies for discrimination. The problems with many of the victims of discrimination is that, they are, in most cases, reluctant to seek remedies in courts. The leg-dragging approach may not be unconnected with cost of litigation, delay in justice delivery and technicalities that do come up in most court cases. This Commissioned Author canvasses for law reform to allow National Industrial Courts to have jurisdiction of purely fundamental rights enforcement cases. The FREP Rules, 2009 did not list the National Industrial Court as one of the courts that have jurisdictions on the enforcement of fundamental rights.

PRACTICE QUESTIONS

1. Identify and discuss the types of discrimination
2. Discuss the remedies available for discrimination
3. Study the case of ***Pollis v. The New School for Social Research*** and answer the following questions
    a. What are the facts of the case?
    b. What are the legal principles espoused in the case?
    c. Are there statutory provisions in Nigeria supporting the case?
4. Right at work includes the following **EXCEPT** right
    a. to equal remuneration for equal job specification
    b. to join trade union
    c. to vote and be voted for
    d. from employment discrimination

CHAPTER SEVEN
SEXUAL HARRASMENT IN THE WORKPLACE

7.0. Learning Objectives

At the end of this Chapter, readers/candidates should be able to appreciate and explain the under-listed concepts and apply them to industrial relations generally.

(i) Meaning of Sexual Harassment
(ii) Categories of Sexual Harassment
(iii) Legal Framework on Sexual Harassment
(iv) Effect of Sexual Harassment
(v) Curbing Sexual Harassment

7.1. INTRODUCTION

Generally, there have been divergent definitions of sexual harassment. However, it appears there is a general meeting point, which is the perception of sexual harassment. Thus, an unwelcome sexual advance, unwelcome request for sexual favours or other unwelcome conduct of a sexual nature, which makes a person feel offended, humiliated and/or intimidates, where a reasonable person would anticipate reaction in the circumstances. Sexual harassment is different from harassment generally; examples of harassment in the workplace include derogatory jokes[533], racial slurs, personal insults and expression of disgust or intolerance toward a particular race.

7.2. CATEGORIES OF SEXUAL HARASSMENT

There are series of behaviours that qualify as sexual harassment; they are classified into three categories such as physical, verbal and non-verbal

- **Physical-** this includes physical violence, touching, unnecessary close proximity.
- **Verbal**- this includes comments and questions about appearance, lifestyle, sexual orientation and offensive phone calls.
- **Non-verbal**- whistling, sexually suggestive gestures, display of sexual materials.

7.3. LEGAL FRAMEWORK FOR SEXUAL HARASSMENT

There are legislative approaches to fighting the menace of sexual harassment in the workplace. For example, the criminal laws of India and Tanzania address sexual harassment. In Chile and Thailand, their labour codes address sexual harassment. In South Africa and Japan, the Equality and Sexual discrimination laws address sexual harassment. In Canada, Fiji, New Zealand, their National Human Right legislation address the issue of sexual harassment. In Netherlands, laws on safe working conditions address sexual harassment.

[533] See Harris v. Forklift Systems Inc. (1993) 510, US 17, 114 S. ct 367

In Nigeria, the *grundnorm* which is the constitution of the Federal Republic of Nigeria, 1999 as altered, addresses the issue of sexual harassment. Section 34 provides:

> *"Every individual is entitled to respect for the dignity of his person and accordingly*
>
> *a. no person shall be subject to torture or to inhuman or degrading treatment"*

It is submitted that sexual harassment is a degrading treatment and thus protection is offered by the constitution. In sexual harassment cases, the fundamental rights of victims are usually threatened.[534]

Several other enactments also address the issue of sexual harassment. For example, Section 360 of the Criminal Code provides

> *"Any person who unlawfully and indecently assaults a woman or a girl is guilty of a misdemeanor and is liable to imprisonment for two years"*

Section 262 of the Criminal law of Lagos State 2011 makes elaborate provision for Sexual Harassment;

262. (1) Any person who sexually harasses another is guilty of a felony and is liable to imprisonment for three (3) years

(2) Sexual harassment is unwelcome sexual advances, request for sexual favours, and other visual, verbal or physical conduct of a sexual nature which when submitted to or rejected-

a) *implicitly or explicitly affects a person's employment or educational opportunity or unreasonably interferes with the person's work or educational performance;*
b) *implicitly or explicitly suggest that submission to or rejection of the conduct will be a factor in academic or employment decisions; or*
c) *Creates an intimidating, hostile or offensive learning or working environment.*

The Criminal laws of Lagos State is a classical code with penal sanctions for sexual harassment. The problem with our society is nobody is ready to set the machinery of the law in motion. In most cases, sexual harassment cases could lead to rape.

7.4. EFFECTS OF SEXUAL HARASSMENT

Victims of sexual harassment always suffer a lot, which include psychological, behavioural, and mental sufferings. Psychological sufferings include humiliation, reduced motivation, and loss of

[534] See section 42 of CFRN 1999 as altered.

self-esteem. Behavioural sufferings include isolation and deterioration of relationships. Stress related and physical and mental illness include drug and alcohol abuse. Some victims go as far as quitting the employment even when there is no replacement. Some have been reported to commit suicide; marriages have been shattered as spouses in most cases assume the existence of sexual relationship already and that, the report of the case by the spouse is just a cover-up.

7.5. CURBING SEXUAL HARASSMENT IN THE WORKPLACE

Report sexual harassment cases immediately and that;

a) Do not forget to always have concrete evidences to support your case.
b) Companies and organizations should have zero tolerance for sexual harassment. Company policies should be prevention-oriented.
c) Educate employees and management on what sexual harassment is, or entails.
d) Highlight the legal consequences and make them part of what constitutes misconduct.
e) HR and Senior Managers are to monitor and ensure a sexual harassment free workplace. Management should be careful of not using the cats as guards of fried chickens. Employees too should be good by-standers; sexual harassment should be formally reported.
f) Take stiff and decisive actions as sexual harassment issues arise. You can study other preventive measures.

PRACTICE QUESTIONS

1. Identify and discuss the categories of sexual harassment
2. Enumerate the ways to curb sexual harassment
3. Identify and discuss the legal framework for sexual harassment
4. Judging from the available statutory provisions in Nigeria, can we say we have adequate legal framework for sexual harassment in Nigeria?

CHAPTER EIGHT
DATA PROTECTION (CONFIDENTIALITY OF TRADE SECRETS & PERSONAL INFORMATION)

8.0. Learning Objectives

At the end of this Chapter, readers/candidates should be able to appreciate and explain the under-listed concepts and apply them to industrial relations generally.

(i) Scope of Data Protection
(ii) Confidentiality Agreement
(iii) Overview of Data Protection Act, 2023

8.1. INTRODUCTION

Whether under the common law contractual relationships or under the statutes, trade secrets are always placed with high premiums; this may not be unconnected with the fact that under perfect market economy, competitors abound. In the U.S, the Sherman Act otherwise known as Antitrust Act (named after Sherman Antitrust) of 1890 modified the common law principles of restraint of trade. However, in 1914, the Clayton Act was enacted to add to the Sherman Act, the essence of Clayton Act was to prevent monopoly.

8.2. SCOPE OF DATA PROTECTION

By way of foundation, what is restraint of trade? Generally, under the common law, a contract of employment is usually couched in such a way that a clause will be inserted in the contract that restricts a person's right to carry on his/her trade or profession. It is an attempt to eliminate or stifle competition to effect a monopoly, or to obstruct the course of trade and commerce, in other to prevent the forces of demand and supply to determine price[535].
If a brewer has worked in a brewery company for a decade and now decides to leave to start his own business, the non-compete clause in his employment contract may prevent him from working for anyone in the industry, including himself for a certain length of time or in a geographical area.

In Nigeria, the Federal Competition and Consumer Protection Act (FCCPA) 2018 is the primary legislation for the regulation of competition of consumers generally. The objective is to prohibit restrictive or unfair business practices that prevent or restrict competition. See part VIII (section 59-69) of the Act. There is also the Federal Competition and Consumer Protection Commission, which released the Restrictive Agreement and Trade Practice Regulation 2022.

Generally, contracts in restraint of trade are void, but where it can be established that such restrictions are justifiable in the circumstances as being reasonable from the points of view of the parties and the public, they are valid and binding. We are concerned here with restraint imposed on employees by employers. Lord Wilberforce in **Eso Petroleum Co. Ltd v Herper's Garage Ltd (1968) AC 269** opined and stated the law that, restraint agreements which are valid without

[535] See more on theories of demand and supply in economics

proof of reasonableness namely, "certain contracts of employment with restrictions appropriate to their character against undertaking work during their currency". The main test is that, the restraint must be seen to be reasonable in the interest of the parties; if the terms are unfair and unreasonable it will be void. See the case of **Leontarilis v Nigerian Textile Mills Ltd (1967) NCLR 114**, where it was held that a restraint on a senior employee of a textile mill based in Lagos prohibiting him for a period of two years after leaving the employment of the mill from taking any interest either directly or indirectly, or from entering into any business similar to or competing anywhere in Nigeria with the employer's business, was valid.

In **Nordenfelt v Maximim Nordenfelt Gun & Ammunitions Co. Ltd (1894) Ac 535**, it had already been established that a covenant in general restraint of trade could be valid; provided it was reasonable in the interest of the parties and the public.

It must be pointed out that, confidentiality of trade secret cannot be isolated from restraint of trade principles and test for determining whether confidentiality of trade dispute has been breached. Generally, a restraint of trade will be unlawful unless the former employer can show that;

a. It has a legitimate business interest to protect (usually trade secrets and confidential information, trade connections or the skill of the workforce)
b. The restraint is reasonable in the public interest and as between the parties (considering factors such as the geographical scope and duration of the restraint)
c. The covenants must be properly incorporated into an employment contract; this must be in consideration of additional settlement (arbitration) clause.

Employers can also protect their confidential information by including a provision in the employment entitling them to place the employee on 'garden leave' for a specified period of time until the termination of their employment. During that time, the employee is prevented from attending work and cannot access the employer's information or work for anyone else.

It is trite that if an employee breaches a restrictive covenant, the employer could obtain an injunction to prevent the employee from working for another new employer and even claim damages for loss suffered or profit made as a result of the violation of the restrictive covenant.

8.3. CONFIDENTIALITY AGREEMENT

The rule of law in contract is anchored on "*pacta sunt servanda*" meaning agreement freely entered into must be honoured. For efficient data-protection, there is need for confidentiality agreement also known as non-disclosure agreement. It will specify that confidential information must not be shared and that the information must be protected. The essence of confidentiality agreement is to protect trade secrets and other vital information. It must be noted that failure or breach of the agreement will attract legal consequences. See fiduciary relationship and the concept of *uberimae fidei*. A law suit may be filed against an employee who breaches the agreement with consequential

damages as claims. Drafting confidentiality agreement is the sole job of an experienced labour lawyer or an efficient legal department of an organization with core knowledge of labour law

8.4. OVERVIEW OF NIGERIA DATA PROTECTION ACT, 2023

Part VII of the Act broadly covers data security. Sections 39 and 40 of the Act particularly deal with the security, integrity and confidentiality of personal data and the breaches of such personal data thereof.

PRACTICE QUESTIONS

1. Discuss the scope of restraint of trade
2. Identify and discuss the importance of a confidentiality agreement
3. Study the cases of **Eso Petroleum co. Ltd V Herpers' Garage Ltd** and **Nordenfelt V Nordenfelt** Gun & Ammunitions co. Ltd. Identify and discuss the grounds upon which a restraint agreement is said to be void in law.

   These cases are online. You can download and study critically

CHAPTER NINE
LEGAL FRAMEWORK FOR RECRUITMENT FUNCTION AND ONBOARDING

9.0. Learning Objectives

At the end of this Chapter, readers/candidates should be able to appreciate and explain the under-listed concepts and apply them to industrial relations generally.

(i) Procedural Requirements for Recruiting in Nigeria
(ii) Legal Framework for recruitment
(iii) Recruitment Functions of HR
(iv) Meaning of Onboarding
(v) Importance of Onboarding
(vi) Phases of Onboarding
(vii) Difference between Onboarding and Training

9.1. INTRODUCTION

The recruitment function of Human Resource is multifaceted; in that it involves technical evaluation and expertise in analyzing the requirements of an available job, attracting suitable candidates to the position, careful screening and selecting applicants who will later be integrated into the organization. Our concern here is the legal framework for recruitment. Should a candidate be discriminated against on any of the identified legal grounds? We have examined this under discrimination.

Some scholars have submitted that HR main functions are not more than six; that is, recruitment, workplace safety, employee relations, compensation planning, labour law compliance and training. Some have identified other functions to include job analysis, job designs etc.

The fundamental principles guiding recruitment function are the legal frameworks already examined in the general legislative framework of labour law. Thus, HR must have good knowledge of labour law especially the principles guiding hiring and firing.

9.2. LEGAL FRAMEWORK FOR RECRUITMENT IN NIGERIA

The Labour Act is so elaborate to the extent that Chapter II of the Act widely covers recruitment function in Nigeria.

Section 33 of the Labour Act highlights the procedural requirement for recruiting in Nigeria and provides:

> *"33(1) No citizen recruited for employment in Nigeria shall be employed until he has-*
>
> *(a) been medically examined under section 8 of this Act and passed fit to perform the work for which he has been recruited.*

(b) been brought before an authorized labour officer and certified as properly and duly recruited in accordance with this part of this Act."

The process of recruiting for employment is to be done in line with provisions of the Labour Act, which provides in Section 23 that:

"23(1) Subject to this section and section 48 of this Act, no person or association shall recruit any citizen for employment as a worker in Nigeria or elsewhere except in the pursuance of an employer's permit or recruiter's license."

The need for such Recruiter's license or employer's permit may be waived by the Minister and in accordance with subsection 2 of same section 23 which provides:

"23(2) Where a worker-
(a) is employed by an undertaking for which it is proposed that he should recruit other workers;
(b) is formally commissioned in writing by his employer to recruit other workers for the undertaking;
(c) does not receive any remuneration or advantage from the recruiting; and
(d) does not make advances of wages to the workers he recruits,

the Minister may waive the need for permit or license under subsection (1) of this section and issue to the worker certificate to recruit citizens for service as workers in Nigeria, subject to such conditions (which shall be endorsed on the certificate) as the Minister thinks fit."

Recruiting however, cannot be carried out for every line of employment. According to section 26(1) of the Labour Act;

"No recruiting operations shall be conducted in any area in which recruiting is prohibited by the Minister by order or in a labour health area"

Recruiters are also mandated to keep records of their recruiting processes and produce such for inspection when demanded. Section 27 of the Labour Act Provides:

"27(1) Every recruiter shall keep in the prescribed form records from which the regularity of every recruiting operation and his own conduct can be verified and shall produce the records for inspection on demand by an authorized Labour officer"

9.3. MEANING OF ONBOARDING

Onboarding is the action or process of integrating a new employee into an organization or familiarizing a new customer or client with one's product or service.
After initial onboarding is complete, the organization continues to offer new hires (employees) relevant training and development opportunities

Orientation Process

- Learning the operational rudiments of the organization
- Get to know the culture, vision, mission, and values of the organization

9.4. PHASES OF ONBOARDING

The Phases of Onboarding include;

a) Phase 1: Pre-onboarding; this is immediately the offer letter is accepted. Resuming on day one, you have got to learn a lot about the organization
b) Phase 2: Onboarding and welcoming new employees
c) Phase 3: Training
d) Phase 4: Transition to new role

9.5. IMPORTANCE OF ONBOARDING

Why is Onboarding important to HR?
Human Resources facilitates or superintends the completion of official and required documents which include legal documents- Employees' Handbook which is the formal contractual documents that defines the bilateral relationship that exists between the employer and the employee. The Employees' Handbook equally contains, the express terms of contract, the grounds for discipline and dismissal, and other policy issues of the employer; some Employees' Handbook are specific on procedures for discipline or dismissal; however, some Handbooks asset that employees will be dismissed only for 'good cause'. See our discussion on modification introduced by the ILO Convention C159 0f 1982, and the ILO Recommendation 119 of 1963.
Human Resource Managers need Employees Orientation programs and other things incidental to onboarding process.

The 6 Cs of onboarding must be emphasized in passive, to consider the legal basics of onboarding; they are

i. Compliance

ii. Clarification
iii. Confidence
iv. Connection
v. Culture
vi. Check back

These six (6) Cs must be integrated into any type of onboarding, whether it is;

a. Knowledge Onboarding;
b. Performance Onboarding;
c. Social Onboarding; or
d. Talent Onboarding

It is important to note also that onboarding is different from training as onboarding is a short-term series of steps to process and acclimate new employees, while training is an ongoing process to develop workplace skills and proficiencies.

PRACTICE QUESTIONS

1. Identify and discuss the legal framework for recruitment in Nigeria
2. Enumerate the stages of onboarding
3. Identify and discuss the dichotomy between recruitment and training
4. These are some of the 6Cs of onboarding save ……
    a. Compliance
    b. Clarification
    c. Confidence
    d. All the options are correct

CHAPTER TEN
HEALTH AND SAFETY AT WORK

10.0. Learning Objectives

At the end of this Chapter, readers/candidates should be able to appreciate and explain the under-listed concepts and apply them to industrial relations generally.

(i) The concept of safety at work
(ii) Common law duties of the employer
(iii) The Factories Act, 1987
(iv) Employees' Compensation Act, 2010
(v) Negligence and its defences
(vi) Vicarious liability

10.1. INTRODUCTION

The concept of 'safety at work' and 'protection of health of employees' is an indirect way of enforcing the fundamental right to life and dignity of human person[536]. Occupational health and safety have become an aspect of industrial law that has witnessed reforms and statutory innovations in Nigeria[537]. At common law, an employer owes his/her employee a duty of care; breaching this duty would amount to negligence with consequential damages recoverable.[538] The provision of a safe work environment, machines and system of work, are mandatory obligations of employers generally; It is trite law that, where he appoints, agents, managers or supervisors to see to the smooth operation of its establishment, any injury or death occasioned to any employee will have a corresponding liability on the employer based on the doctrine of vicarious liability.

The House of Lords[539] in *Wilsons and Clyde Coal Co. v. English*[540]per Lord Wright, took time to enumerate the common law duties of an employer which are: an employer at common law has a personal duty to provide a competent staff of workers, this is the duty to employ competent staff; provide a safe place of work; provide a safe system of work and effective supervision and provide adequate work tools, plant, equipment and materials. The employer is duty bound to maintain the machines, equipment, plant and tools. These duties have been codified in the Factories Act, 1987. The case of *Koiki V. NEPA*[541] demonstrated this duty. The plaintiff, a mechanical engineer was an employee of the defendant (NEPA). He was on duty at Ijora power station, Lagos when the

[536]See sections 33 and 34 of the Constitution of the Federal Republic of Nigeria, 1999 as altered
[537]For institute, the Factories Act, 1956 which was repealed by the Factories Act, 1987 offers protection to workers engaged in industrial productions, use of machines and flywheels; and workers exposed to industrial hazards like chemicals and other life-threatening substances. Occupational diseases or injury may occur as a result of being exposed to these dangerous machines or work-environments; In Wilson and Clyde Coal Co V. English (1938) AC 57 at 84 HL, the plaintiff respondent an employee of the defendant appellant coalmine was injured when the hanlage system was negligently put into motion by a fellow employee. In a claim for damages by the respondent, the House of Lords held, that the appellant coalmine was liable for negligence.
[538] See the *locus classicus* case of Donoghue V Stevenson (1932) AC 562 HL
[539]Now the Supreme Court of England
[540] supra
[541](1972) 11 CCH CJ, 127; see also Pullen v. Prison Commrs (1957) 2 All ER 470

scaffolding on which he was standing upon collapsed. He fell to the ground and sustained injuries. The Court found the defendant liable for negligence. The scaffold collapsed as a result of careless installation by fellow employees of the defendant from another department. Thus, there was a breach of the duty of care. The Court awarded for negligence of the employer through the actions of another employee who installed the scaffold.

10.2. COMMON LAW DUTY OF THE EMPLOYER

The doctrine of common employment has been abolished in Nigeria. Common employment was an impediment to compensation for employees who suffered injuries in the course of their employment[542]. Thus, an employee who suffers injury at work may either obtain damages at common law or claim compensation under appropriate statutory framework[543].

According to Agomo[544], employer's liability deals with the responsibility of an employer to compensate his employees for personal injuries sustained in the course of their employment. The liability may also arise through the negligent conduct of the employer's workman in his course of employment, which leads to injury to another workman. Here, liability is said to be vicarious not personal.

10.2.1 . DUTY OF CARE

An employer is under a common law duty of care to take reasonable care to ensure that workers are not exposed to risk of injury at his work. Thus, where an employee sustains an injury during the course of his employment as a result of the negligence of his employer to provide for safety at the work place, the employer shall be liable to pay damages to the injured employee[545]. The statement of Lord Abinger in *Priestly v. Fowler*[546] that, the master "is no doubt to provide for the safety of his servant in the course of employment to the best of his judgment, information and belief". This statement was recognition of the fact that an employer owed some duty to his employee for the employee's safety.

In *Hutchinston v. York, Newcastle and Berwick Railway Co*.[547], it was held that "the master should have taken due care not to expose his servant to unreasonable risk". The case of *Hutchinston v. York*[548]was decided on the basis of the doctrine of common employment. The facts were that an employee was traveling on duty in his employer's train when the train collides with another train which also belonged to the employer. The employee suffered injury and later died. In an action

[542] See section 12 of the Labour Act.
[543]Factories Act and Employees' Compensation Act, 2010.
[544]Agomo C.K "Nigerian Employment and Labouur Relations Law and Practice" (2011) Concept Publications , Lagos pp185
[545] See Priestly v. Fowler (1837) 3 M & W1; Boson v. Sanford (1690) 19 ER 382
[546] Supra
[547](1850)5 EXCH. 343
[548] (supra)

instituted by his administrator, it was held that the employer was liable because the collision was caused by the negligence of a fellow employee. This has become a bad law.

Prof. Agomo observed[549], the standard of care for determining whether or not an employer has discharged this duty of care is that of a reasonable person, not that of a super-human, unless the employer holds himself or herself out as possessing a special or knowledge in relation to the risk; in which case, he or she will be judged according to the higher standard[550].

A worker with a peculiar characteristic, for example, one eye will require a different, usually higher standard from a worker who has no such peculiarity.

An employer who is found wanting of taking reasonable steps for the safety of an employee will be rendered liable in damage to an employee who suffered injury as a result of his (employer) failure to take such reasonable care. Since the abolition of the 'doctrine of common employment', it is now possible to make an employer vicariously liable for the negligence of his employee which has caused injury to any employee. We shall discuss this under "Negligence as a tortuous liability" in labour law.

On the duty of the employer to provide competent fellow employees, and, instructing them in accordance with the circumstances for example, where a competent staff is in need of practical experience[551].

Some writers have observed[552] the question has often arisen whether an employer's duty to provide equipment, tools, protective application or clothing etc. extends to a further duty to urge or supervise an employee or employees in the use or to use what has been provided. Diverse opinions have been expressed. In *Qualcast Ltd v. Havynes*[553], the House of Lords said it is a question on the evidence in each case whether there is a duty to advise every experienced or inexperienced workman as to the use of equipment provided[554]. It appears it is neither here nor there. There are situations in which employer will not only provide but will also advise as to the use.

[549]Agomo C.K. op cit
[550]See Griffiths v. Arch. Engineering Co. (Newport) Ltd &Anor (1968) 3 All E.R; The standard of care is measured by reference to the state of knowledge at the material time. See Tremain v. Pike (1963) All E.R. 1303.
[551] See Hudson v. Ridge Manufacturing Co. Ltd (1957) 2 All ER 229; on duty to provide safe machinery/equipment or plant and a safe system of work. See Morton v. William Dixon Ltd (1909) SC 807, 1809.
[552]Agomo C.K; op. cit
[553](1959)AC 743
[554] See Nolan v. Rental Manufacturing Co. Ltd (1959)2 All ER 449.

In *Mensa Sosu v. Technoexports Troy*[555], the plaintiff was engaged in drilling a hole in a metal. In the process of doing this, he sustained injury. In an action instituted, the court held that the employer should not only have provided goggles but should have ensured that they were used[556].

10.2.2. STATUTORY DUTIES

The Factories Act in 1987[557] and the Employees Compensation Act 2010[558] are statutory legal regimes for health and safety at work. Just like the philosophy behind the common law duty care, the statutes, are enacted to ensure the safety of workers, prevention of accidents, industrial diseases and provision of compensation for injured (General Provisions), Part III.

10.3. THE FACTORIES ACT, 1987

The Decree is divided into parts. Part I deals with Registration of Factories, Part II covers Health (General Provisions), Part III (the key part) deals with Safety (General Provisions), Part IV is concerned with the general provisions relating to welfare. Part V deals with special provisions and regulating relating to Health Safety and Welfare. Part VI provides for notification and investigation of Accidents and Industrial Diseases. Part VII. IX, X and XI deal with Special applications, Administration Provisions, Offences Penalties and Legal Proceedings, and General matters respectively.

Section 87(1)[559] define a factory as "any premises in which or within which, or within the close or cartilage or precincts of which, one person is, or more persons are, employed in any process for or incidental to any of…" Section 87 of the Act also classified a factory into three broad categories. See paragraph (i) to (ix) of section 87. The Act was enacted with the following aims, which include provision of reasonable care for the safety of employees in the course of employment, and imposition of penalties for any breach of its provisions. It is noteworthy to point it out that unlike 1956 Factories Act[560], the 1987 Act made provisions for a wider spectrum of workers and other professionals.

Section 1-6 of the Act provide for the Registration of Factories[561]. Failure to register the factory's premises with the Director of Factories is an offence with a fine not exceeding N2, 000 or imprisonment for 12 months or both.

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[555] (1977)11/CCHCH 2647,
[556] See also Odhigbo v. Saipen SPA (1979) NCLR 328, where an employee who was a welder lost his left eye as a result of a bit of metal that went into his eyes. He was supplied with goggles, but never wore them.
[557]Factories Act, LFN 2004
[558]Employees' Compensation Act, 2010
[559]Factories Act, LFN 2004
[560] The Factories Act, 1987 now LFN, 2004 repealed the factories Act, 1956
[561]Factories Act, LFN 2004

Part II of the Act[562] i.e., section 7-13 deal with Health generally and free from overcrowding, well ventilated, sufficiently lit, with adequate drainage of floors, and suitable sanitary convenience in a clean state. Section 9 provides for mandatory provision of ventilation. Section 13 of the Act empowers sanitary inspectors to carry out inspection of the factory for proper compliance with the Act. Thus, by virtue of section 65, the inspector can enter; inspect by day or night even with police officers. They can request for the production of register of the factory.

Part III of the Act provides for safety from being injured by prime movers, transmission machinery, powered machinery and other machinery. Sections 14-18 provide for fencing of flywheel and prime movers[563]. Also, dangerous fumes, typologies, inflammable dust, gas, vapour and substance are to be safeguarded from injuring employee(s). The employee has a corresponding duty not to willfully interfere with or misuse any means, applicable, conveniences or other person employed in the factory premises[564]. This is to exclude an employer from liability[565]. Section 40-44 of the Act deal with welfare (general provisions and regulations). This includes supply of drinking water which must be accessible to all employees; provision of a suitable place for keeping clothing not worn during working hours, readily available first aid boxes or cupboard[566].

In *Groves v. Wimboorne*[567], English Court of Appeal held that an employer is under a statutory duty not only to fence dangerous machinery but also to maintain the fence in an efficient state. In this case, a boy employed to work on the machinery where fence had been removed suffered injury. The employer intended that the boy had no good cause of action in that the penalty of a fine provided for by the statute was intended to be the only sanction for breach of its provisions. The court rejected this argument. The doctrine of common employment is not a defence to an action here.

In *Solomons v. Gertzen Ltd*[568], Somervell LJ has said the courts clearly lean in favour of conferring on workmen, a right to claim damages for breaches of statutory duty imposed on their employers or the occupiers of factories in which they work[569].

According to Uvieghara, "it is well settled law that, an injured factory employee can in his action for damages allege both breach of statutory duty and of the common law duty of care and that he may succeed in one although failing in another but where he succeeds in both he can only obtain one set of damages[570]. Before an employee can institute an action on breach of health provision,

[562] Factories Act, LFN 2004
[563]See sections 14-18 of the Factories Act, LFN 2004
[564]See section 31-33
[565] See Odhigbo v. Saiden SPA (supra) where a welder refused to use his goggles
[566]See section 40-44 of the Factories Act, LFN 2004.
[567](1898)2 QB
[568](1954)1 All ER 625, 631
[569] See Haigh v. Charles W. Ireland Ltd.
[570] See Western Nigeria Trading Co. Ltd v. Ajo (1965)2 All NLR 100.

its merit must be considered. In *Carole v. North British Locomotive Co. Ltd*[571], the workman complained that his employer had breached section 1(1) (b) of the Factories Act 1937, in that the employer had not cleaned the floor of his workroom for months as a result of which it was covered with several centimeters of founding sand and dust and that his footwear and socks had become impregnated with the sand and dust resulting in his contracting dermatitis. The court rejected the contention that an action could not lie and awarded damages because the employer had failed to clean the floor for months thereby breaching a statutory health provision.

Action can arise as a result of breaching welfare provisions. Uvieghara[572] has submitted that- "breach of welfare provision may or may not give rise to a right to civil action depending on whether it does or does not give protection regarding safety over and above purely welfare consideration[573].

10.4. EMPLOYEES COMPENSATION ACT 2010

The Employees' Compensation Act, 2010[574], repealed the Workmen Compensation Act. Employees' Compensation Act (ECA), 2010 is an improvement on the old Workmen Compensation Act (WCA) which has been criticized for its inadequacy of benefits, the non-enforceability of its insurance provisions and incomprehensiveness of the Act.

10.4.1. The Objectives of the Act[575] are:

(a) To provide an open and fair system of guaranteed and adequate compensation for all employees or their dependants from any death, injury, disease, or disability arising out of or in the course of employment;
(b) To provide rehabilitation to employees with work-related disabilities as provided in the Act;
(c) To establish and maintain a solvent compensation fund managed in the interest of employees and employers;
(d) To provide a fair and adequate assessment for employers;
(e) To provide an appeal procedure that is simple, fair and accessible with minimum delays;
(f) To expand the scope of injury to workers such as the inclusion of compensation of mental stress; and
(g) To combine efforts and resources of relevant stakeholders for the prevention of workplace disabilities, including the enforcement of occupational safety and health standards.

[571] (1957) SCT (CH CT) 2
[572] E.E Uvieghara op.cit
[573] See Reid v. Westfield Paper Co. Ltd.
[574]Employees' Compensation Act (ECA) 2010
[575]See section 1 of the Employees' Compensation Act, 2010. Section 2(1) (1) provides that the Act shall apply to all employers and employees in the public and private sectors in the Federal Republic of Nigeria.

Section 2(1) of the Act[576] is applicable to all employers and employees in both the private and public sectors in Nigeria with the exception of members of the Armed Forces. Thus, ECA 2010 has comprehensive provisions that address the plight of an injured employee and by extension to his estate in the event of death, injury, illness or any disability arising out of and in the course of his/her employment. *The Act provides further that in every case of an injury to an employee within the scope of the Act, the employee or in case of death, the dependant shall within 14 days of the occurrence or receipt of the information of the occurrence, inform the employer by given information of the disease or injury to a manager, supervisor, first aid attendant, agent in charge of the work, where the injury occurred or other appropriate representative of the employer, and the information shall include; the name of the employee, the time and place of the occurrence; and in ordinary language, the nature and cause of the disease or injury if known*[577].

The Act has nine (ix) parts: part I[578]deals with preliminary provisions which are, the objectives of scope and application of the Act and exceptions to its application. Section 4-6 contains the laid down procedures for making claims. It is a notification of the injury, and if death occurs or there is occupational disease, such must be reported. Thus, the injured employee must present a formal application under the Act. The Act shall not apply to any member of the Armed Forces of the Federal Republic of Nigeria other than a person employed in a civilian capacity[579].

Part II has ten (10) sections (i.e. section 7-16) which cover injury, mental stress, occupational disease, hearing impairment, injury occurring outside the normal workplace. Section 13 of the Act makes compensation non-waiveable, and section 14 prohibits employees from making contributions towards compensation[580].

Part IV of the Act deals with 'scale of compensation (i.e., section 17-30). Part V deals with power and function of the Board. Part VI (i.e., section 33-55) deal with employer's assessment and contribution[581].

10.4.2. Persons that can claim under the Act

Section 73 of the Act defines an employee to mean a person employed by an employer under oral or written contract of employment whether on a continuous, part-time, temporary apprenticeship or causal basis and includes a domestic servant who is not a member of the family of the employer,

[576]Factories Act, LFN 2004
[577] See section 4(1) of the ECA, 2010
[578]See section 1-3 which contain objectives of the Act, scope and applications and exemptions
[579]See section 3 of ECA, 2010
[580]Section 4-6 contain procedure for making claims under the Act: These are Employees' notification of the injury; Employers obligation to report death, injury or disease of an employee; the Employee will then make application for compensation.
[581]There is compensation for death, injury or disease; section 12 provides for limitation of action. Compensation is mandatory as it cannot be waived; Employees are prohibited from making contribution to the compensation. Compensation cannot be attached or assigned. See sections 7-16

including any person employed in the Federal, State and Local Governments, and any of the government agencies and in the formal and informal sectors of the economy[582].

The Act goes further by defining 'dependant' to include those members of the family, including adoptive and foster family, of the deceased or disabled employee who were wholly dependant upon his earnings at the time of his death, or would, but for the disability due to the occupational accident or diseases, have been so dependant. Thus, the combined effect of sections 73 and 1 of this Act will accommodate dependants of the employee to claim under the Act[583].

10.4.3. Liability and Compensation for Industrial Injuries

The first schedule to Employees' Compensation Act, 2010, contains the list of occupational diseases as provided for under section 9 of the Act. Second schedule to the Act contains injury and percentage of disability[584].

The Act defines injury to include bodily injury or disease resulting from an accident or exposure to critical agents and conditions in a workplace[585]. According to the Act, accident means an occurrence arising out of or in the course of work which results in fatal or non-fatal occupational injury that may lead to compensation under this Act. Thus, first and second schedules to the Act appear to be in conformity with International Labour Organization (ILO) standards[586].

As regards enforcement of the Act, it is trite that by virtue of the Third Alteration Act to the 1999 Constitution of the Federal Republic of Nigeria, the court held that has jurisdiction is National Industrial Court to the exclusion of all other courts. Upon formal application by the injured employee, compensation, which means any amount payable or service provided under this Act in aspect of a disabled employee and it includes rehabilitation, shall be paid in accordance with the second schedule to the Act[587].

10.5. ILO CONVENTIONS ON OCCUPATIONAL HEALTH AND SAFETY

Some of the conventions have been ratified by Nigeria and some are yet to be ratified. Those ratified are:

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[582]The Act comprehensively provides for scale of compensation for fatal cases; compensation relating to warlike action; permanent total disability, permanent partial disability disfigurement; temporary total disability and total partial disability.

[583]See section 73(1) ECA, 2010

[584]See section 9 of the ECA, 2010 and the 2nd schedule to the Act.

[585]See section 72(1) of the ECA, 2010

[586]See ILO Convention – an occupational Health and Statutory, No.155 of 1981; Protection against Accidents (Dockers) Convention (Revised) No.32 of 1932 and Prevention of Accidents (Seafarers) Convention No.134 of 1970. These conventions have been ratified by Nigeria, as such, they are applicable to occupational safety and industrial accidents.

[587]See the first and second schedule to the Act

(1) Occupational Safety and Health Convention No. 155 of 1981[588]
(2) Protection against Accidents (Dockers) Convention (Revised) NO. 32 of 1932[589]
(3) Prevention of Accidents (Seafarers) Convention No.134 of 1970[590]

The details of these conventions are in chapter fifteen.

10.6. NEGLIGENCE AND ITS DEFENCES

Negligence is a breach of a duty to take care which results to damage to another person. According to Ese Malemi[591], it is not every negligence or careless act which gives rise to a successful claim in tort. Negligence will only arise when there is a duty of care. In *Blyth v. Birmingham Water Work Co.*[592], Anderson B, defined negligence – as the omission to do something which a reasonable man guided by those consideration, which ordinarily the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do[593]

It is trite law that three basic elements must be proved in order to establish negligence. They are:

(i) That the defendant (employer) owed a duty of care to the plaintiff
(ii) That the defendant (employer) breached this duty and
(iii) That the plaintiff suffered damage as a result of the breach.

This principle of law is established in *Donoghue v. Stevenson*[594]. In *Priestly v. Fowler*[595] Alderson B said that "this principle is that, a servant, when he engages to serve a master, undertakes as between him and his master, to run all the ordinary risks of the service and this includes the risk of negligence on the part of a fellow servant, whenever he is acting in discharge of this duty as servant of him who is the common master of both.

Successful action based on negligence must be established in 'causation'. "For an employee to succeed in an action for damages for injury suffered, he must not only prove negligence[596] i.e., breach of duty by the employer, but must also show that such negligence caused or materially contributed to his injury[597].

10.7. DEFENCES TO THE TORT OF NEGLIENCE

The common law defences available to an action based on negligence are:

(i) Common employment

[588]This Convention has been summarized in chapter Ten of this book
[589]Ibid.
[590]Ibid.
[591]Ese Malemi 'Law of Tort' (2008) First Edition, Princeton Publishing Co. see pp 218-224
[592](1956)11 EX. 781 at 784
[593]See also Odinaka v. Moghalu (1992)4 NWLR (Pt 233)1 at 15 SC.
[594](1932) AC 562 H.L.
[595](Supra)
[596] See E.E Uviegharaop.cit
[597]See Bunnigton Castings Co. v. Wakdlaw (1956) AC 613

(ii) *Volenti non-fit injuria*/consent
(iii) Contributory negligence
(iv) Novus actus interveniens

10.7.1. Common Employment

Common employment is no longer relevant in labour law jurisprudence. It is mentioned here just for an academic reason since the defence has been abolished in the former Western region in 1958, and former Eastern region in 1962. It was abolished in the Federal Territory Lagos in 1961. It was available in the states of Northern Nigeria until 1988 when it was abolished for the whole country. See its meaning in the previous chapters.

10.7.2. *Volenti non-fit injuria*/consent

Just like the doctrine of common employment, this also rose on the basis that when an employee enters into a contract of employment, he thereby impliedly agrees to take the rights of the employment upon himself. In *Baddeley v. Earl Glanville*[598], the court held that the defence has no application to cases where injury arises from a breach of statutory duty on the part of the employee[599].

A plea of consent (i.e., entering into contract of employment implies consent to risks associated with the work) does not often succeed in employer and employee relationships, except the employer can show that the employee knew the risks, and voluntarily agreed that the risk should be on him. The burden of proof is not easy to discharge. Thus, when an employee is injured, a defendant employer may not be able to avoid paying compensation by claiming that the worker knew the risk and went ahead to do the work. In *Bowater v. Borough of Rowley Regis*[600], the court held that for the defence to succeed, an employer must show that the employee undertook that the risk of the employment should be on him and that this is not shown merely by proof that the employee continued in his work with full knowledge of the risk involved. The defence will not apply where the worker had acted for the benefit of the employer[601]. But it is available where the workman deliberately disobeys safety regulations which impose a direct duty on him[602].

10.7.3. Contributory Negligence

This is said to be the negligence of the employee which combined with the negligence of the employer to cause harm to the employee. The essence of contributory negligence is to the effect that the amount of compensation that will be given to the employee will be reduced according to the proportion of negligence for the injury. In *Caswell v. North*[603], contributory negligence was

[598](1887) QBD 423.
[599]See Eheeler v. New Martin Board Mills Ltd (1933) KB 669
[600](1944)1 KB AC 325
[601] See Neil v. Harland & Wolff Ltd. (1949)82 U.L.R. 515.
[602] See I.C.I v. Shatwell (1965) A.C. 627
[603] (1856)5 E & B 849

held to apply to a breach of statutory duty to fence machinery which leads to the injury of the plaintiff. The plea of contributory negligence alleges that the plaintiff was not injured thereby, but the plaintiff's own willful act, in setting the machinery in motion[604]. In *Evans v. Bakare*[605], the Supreme Court defined contributory negligence thus: "that the party charged is primarily liable but that the party charging him has contributed by his own negligence to what had eventually happened". The law allows the court to apportion liability as between the parties. The standard is that of a reasonable employee and not that of the employer[606].

10.7.4. *Novus actus interveniens*

This is a defence that states that, after the defendant's employer's conduct, a new act, independent or external and not generated by the defendant intervened to cause injury to the plaintiff (employee) and thereby relieved the employer of liability. According to Ese Malemi[607], a *novus actus intervenines* is an act or conduct that comes between the initial act and result and alters and disconnects the initial act from the injury that occurred and becomes the immediate, direct, or real cause of the harm that occurred; thereby relieving the initial wrongdoer or defendant from liability. The phrase means "a new act intervenes'.

Novus actus intervenens could arise as a result of the intervening act of a third party and the intervening act of the plaintiff (i.e., employee in this case)[608].

10.7.5. Vicarious Liability

This tortuous doctrine is of the view that an employer may be held liable to his employee who has suffered injury caused by the negligence of another of his employee in the course of his duties. According to Dennis Odiagie[609], vicarious liability simply means holding somebody else for the misdeed of another person and the person held is someone who has control over the actual tortfeasor.

In *Nduka v. Exenwaku*[610], Fabiyi JCA defined vicarious liability as "as indirect legal responsibility, for example, the liability of an employer for the act of an employee, or a principle for the torts and contracts of an agent".

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[604] See Butterfeild v. Forrester (1809) 11 East 60
[605] (1974)1 NMLR 78
[606] See Caswell v. Powell Duffiyn Associated Collieries Ltd (1940) A.C. 152.
[607]EseMalemi op. cit
[608] See Ekwo v. EneChukwu (1970) NNLR 62; Mchew v. Holland (1969)3 All ER 1621 HL.
[609]Dennis Odiagie 'Modern Law of Torts in Nigeria (2003) Joint Heirs Publications Nigeria Ltd
[610] (2001)6 NWLR (Pt 709) 474

It is trite law that, the employer will only be liable if the act was committed "in the course of employment". In *ACB v. Agugo*[611], it was held that an act is deemed to be committed in the course of employment if:

(i) It was a wrongful act authorized by the master.

(ii) The servant carried out an authorized instruction from the master in a wrongful ad unauthorized manner[612].

Vicarious liability does not extend to independent contractors carrying out work for the employer. In *Quarkman v. Burnett*[613], it was held that the one who employs another is not liable for his collateral negligence unless the relation of master and servant existed between them. In *Salsbury v. Woodland*[614]:

> *"It is trite law that an employer who employs an independent contractor is not vicariously responsible for the negligence of that contractor…".*

However, the success of an action based on vicarious liability will be on first of all, establishing that master/servant relationship exists and that the liability of servant has been established so as to connect the master who is presumed to be of substance[615].

The essence of vicarious liability is to protect innocent third parties or fellow employee who might have been injured as a result of a negligence act of another employee. Thus, it is an answer to the hardness created by the doctrine of common employment[616].

Claims for injury, death or occupational diseases can be brought under the Employees Compensation Act, 2010, and the Factories Act, 1987. This is referred to as statutory claims. However, same claims can be brought under the tort of Negligence. Claimant can only claim either under the statute or the common law and not both. It is sometimes safe to claim under the common law because of the limitation period clause in some statutes.

[611] (1995)6 NWLR (pt 599)
[612]See Julius Berger (Nig) Ltd v. Ede (2003)8 NWLR (Pt 823)626
[613](1940)6 M & M 499; 151 ER 509
[614] (1970)1 QB 324, Widgery L.J stated
[615]See IfeanyiChukwu (Osondu) Co Ltd. V. Sole) Boneh (Nig) Ltd (1993)3 NWLR (Pt 280) 246, 251-252.
[616]See *Duncan v. Findlater*(1839)6 CL & F 894 for the justification of the doctrine of common employment.

PRACTICE QUESTIONS

i. Study **Wilsons and Clyde Coal co. V English; Groves V Wimboorne, and** identify the statutory duties of an employer as codified in the Factories Act, 1989.
ii. Enumerate the objectives of the Employees' Compensation Act 2010
iii. Identify and discuss the common law duties of an employer
iv. Enumerate the ILO Conventions on Occupational health and safety
v. Discuss the tort of negligence and identify/discuss its possible defences.

Note to readers using this text for CIPM Professional examination. Kindly download some of these cases and study them critically. It will be presumed that the candidate has read the cases; as candidates will be tested on the principles of law contained or espoused in the cases that are in the text and the practice questions to be precise.

CHAPTER ELEVEN
COLLECTIVE LABOUR RELATIONS

11.0. Learning Objectives

At the end of this Chapter, readers/candidates should be able to appreciate and explain the under-listed concepts and apply them to industrial relations generally.

(i) Meaning of Trade Union
(ii) Registration/legal status of Trade Unions
(iii) Membership of Trade Unions
(iv) Voluntarism
(v) Legal framework for Trade Union
(vi) Collective Bargaining
(vii) Casualization and trade unionism in Nigeria

11.1. INTRODUCTION AND HISTORICAL OVERVIEW OF TRADE UNIONISM IN NIGERIA

Trade union movements in Nigeria started as a result of agitations for the social well-being of workers who were mere servants under the British Colonial masters. Although, it will be erroneous to say that no trade union had existed in Nigeria before the advent of colonization and the introduction of the formal employment relations.

Labour relations had existed in informal forms in Nigeria before colonization. Roper[617] has summarily captioned the then situation thus:

> *"Generally, the family farm is worked by the farmer and his wife or his wives and family. Communal duties and rights are woven into the agricultural system; an ancient system of obligatory communal labour still survives in many parts for subsidiary farming activities such as bush clearing, making forest paths or village roads. Chiefs still retain some customary powers under native law to regulate aspects of life and labour".*

Judging from Roper's submission, some forms of informal unions were noticed; these include family union and communal union. Outside these unions, artisans like Blacksmiths, coppersmiths and market women had their informal associations where things that concerned their trades were usually discussed. The Association exercised oversight functions on errant members of their trade were sometimes sanctioned them for unethical trade behaviour such as poor services or non-delivery of items already paid for.

[617]Roper; Labour problems in West Africa, 1958 Penguin, London pg 2

During colonization, artisans employed in the public works department had their associations. Colonial masters did oppose their activities; that accounted for the three days strike embarked upon by the artisans between August 9 and 12 of 1897. Thus, modern day unionism started in Nigeria in 1912 with the formation of the Nigerian Civil Service Union. It must be pointed out that, government created the union and not the workers themselves.

Trade unions exist to regulate the terms and conditions of employment of workers. Once this function is absent, then, the association will not be considered as a trade union. This function was succinctly declared by Oguntade JCA (as he then was) in *Udoh & 2 ors v. Orthopedic Hospitals Management Board & Another*[618].

> *"Primarily, the reason for the existence of a trade union is to regulate the terms and conditions of employment of workers. This is another way of saying that trade unions are to ensure that the terms and conditions given to workers by employers are suitable."*

Thus, trade union is primarily for the regulation of the terms and condition of employment of workers; it is not for political actualization of the workers' self-centered objectives, as trade unions have been found in most cases, to have become more political in their agitations in Nigeria. Sometimes, they tilt towards the opposition parties to fight the government in power. This is unhealthy for economic development, social justice and socio-economic well-being of the workers.

11.2. STATUTORY DEFINITION OF A TRADE UNION

Section 1(1) of the Trade Union Act[619], defines 'a Trade Union' as "any combination of workers or employers, whether temporary or permanent, the purpose of which is to regulate the terms and conditions of employment of workers whether the combination in question would or would not, apart from this fact, be an unlawful combination by reason of any of its purpose, do or do not include the provision of benefits for its members".

Section 1(2)[620]of the Trade Union Act goes further to state that the fact that a combination of workers or employers has purposes or powers other than the purpose of regulating the terms and conditions of employment of workers shall not prevent it from being registered under the Act. These sections alone cannot give a wholesome picture of what a trade union is.

Section 29(1) of the Act[621] provides that a trade union can be described as an organization that either "consists wholly or mainly of workers or employers of one or more descriptions and whose principal purpose is the regulation of relations between workers and employers or employers association or consists of constituent or affiliated organizations or representatives of such

[618](1993) 7 NWLR (Pt 254) 488
[619] LFN, 2004
[620]LFN, 2004
[621]Trade Union Act, LFN, 2004

constituent or affiliated organizations and whose established purpose is the regulation of relation between workers and employers or workers and employers' associations.

It is clear from the above provisions, that, for an association to qualify as a trade union, the combination must be of workers or employers and it must have proper purpose of regulating the terms and conditions of employment of workers. Both workers and employers can form trade unions of separate capacities i.e. employees' trade union or workers' trade unions. However, both cannot combine to form a trade union.

The Act defines a worker as any employee, that is to say, any member of the public service of the federation or of a state or any individual (other than a member of any such public service) who has entered into or works under a contract with an employer whether the contract is for manual labour, clerical work or otherwise, expressed or implied, oral or in writing and whether it is contract personally to execute any work or labour or a contract of apprenticeship[622]. According to Professor Uvieghara[623], any employee at common law is therefore a worker for the purpose of trade union, though there are exceptions[624].

11.3. LEGAL STATUS OF A TRADE UNION UPON REGISTRATION

The law requires that a trade union must be registered before it can be allowed to perform any act in furtherance of its purposes. The principal purpose is to regulate the terms and conditions of employment of workers. In *Re Union of Ifelodun timber Dealers and Allied Workers*[625], A combination applied for registration as a trade union but was refused registration by the registrar. On appeal, De Lestang C.J. said there is nothing in the present case to show that the association has any rules yet. Its objects are however, set out in its constitution and it is necessary to examine these objects as a whole in order to decide whether it is a trade union or not. He concluded by saying "I can see nothing in these objects which, to use the words of the definition, regulates the relation between workmen and masters or between workmen and workmen or between masters and masters".

An application for the registration of a trade union must be made to the Registrar of trade union in the prescribed form and signed by at least fifty members of the union in the case of union of employees and by at least only two members in the case of a union of employers[626]. Section 3(2) of the Act[627] provides that no trade union will be registered except with the approval of the Minister of Labour and Productivity; and that no trade union shall be registered to represent workers or employers in a place where there already exists a trade union. In *Osawe v. Registrar of Trade*

[622]See section 54 of the Trade Union Act, LFN 2004
[623]E.E Uvieghara 'Labour Law in Nigeria' (2001) Malthouse Press Ltd, first Edition
[624] See E. E. Uvieghara ibid for the exceptions
[625](1964) 2 All NLR 63
[626]See section 3(1) of the Trade Union Act
[627]Trade Union Act, LFN, 2004

Union[628], it was held by the Supreme Court that where the Registrar is satisfied that a registered trade union will adequately cater for the interest of applicants who desire to register a new trade union, the Registrar needs not proceed with the application for registration. Kazeem JSC said, this new provision makes it mandatory for the Registrar of Trade Unions, on receiving an application to register any trade union, to ensure that there is no other registered trade union in existence which caters for the same interest as the one applying for registration.

Upon Registration, a trade union is conferred with the status of an incorporated body. According to Uvieghara[629], it acquires all the attributes of an incorporated body. It can sue and be sued in its registered name, it can hold property in its name, and it continues in perpetuity no matter the changes in its membership.

In *Bonsor v. Musicians Union*[630] Lord Keith said, a registered trade union "differs from an unincorporated association in that it is unnecessary to consider who were the members at any particular time, for instance it is immaterial who were the members at the time that any cause of action arose, or what members have joined the union since the cause of action arose. The registered trade union may be said to assume a collective responsibility for all members past, present and future, in respect of any cause of action. On the other hand, the judgment creditor can look only to the funds of such a trade union to satisfy his debt and to the extent to which these may be augmented from time to time by contributions of members, whether new or old, they will still be available for the unsatisfied judgment creditor".

The essence of this long quotation from Lord Keith is that members of trade union are liable to pay subscriptions and levies under the union rules, but they are not liable for the debts of their union.

Professor Agomo[631] has observed and submitted that, 'it is believed that not the ILO's insistence on freedom of association is not to be taken as an endorsement for mushroom associations, or weak and powerless unions, that will not be able to protect the interests of their members through constructive engagement with employers in collective bargaining and, when necessary, industrial action'. The ILO recognizes that its labour standards in the form of conventions and recommendations are products of consensus and are expressly made subject to local conditions and circumstances. Such conditions and circumstances may limit right to freedom of association.

[628](1985) 1 NWLR 755
[629]E.E. Uvieghara op. cit
[630](1956) AC 104
[631]Agomo C. K. 'Nigerian Employment and Labour Relation Law and Practice (2011) Concept Publication Press Lagos

11.3.1. Cancellation of Registration

The Act[632] provides for six grounds under which the Registrar of Trade Union must cancel the registration of trade union. These six grounds must be proved to the satisfaction of the Registrar:

(a) that the registration of the trade union was obtained by fraud or as a result of a mistake; or
(b) that any of the purpose of the union is unlawful; or
(c) that, after receipt of a warning in writing from the Registrar, the union has deliberately contravened or continued to contravene any provision of the Act or the regulations; or
(d) that the principal purpose for which the union is in practice being carried on is a purpose other than that of regulating the terms and conditions of employment of workers; or
(e) that the union though still in existence, has ceased to function; or
(f) that the union has ceased to exist.

The Registrar must send a notice in the prescribed form to the trade union at its registered office whenever the Registrar proposes to cancel the registration of any trade union.

11.4. MEMBERSHIP OF TRADE UNION.

Freedom of Association is a constitutional right guaranteed by the Constitution of the Federal Republic of Nigeria. Other international instruments such as the African Charter on Human and Peoples' Rights; Universal Declaration of Human Rights, 1948; ILO Conventions guarantee peoples' right to associate with others, join or form political parties, trade union etc.

Section 12(a) of the Trade Union Act[633] provides that "a person who is otherwise eligible for membership of a particular trade union shall not be refused admission to membership of that union, by reason only that he is of a particular community, tribe, place of origin, religion or political opinion. Thus, applicant to a particular trade union cannot be denied admission[634]. Thus, the only qualification is that the age of such applicant must be between 16 and 21 and above. Section 20 of the Act[635] provides that a person under the age of sixteen shall not be capable of being a member of a trade union and a person under the age of 21 shall not be capable of being an official of a trade union[636].

Fundamental right to freedom of association is not absolute; this is demonstrated in the Trade Union Act, which excludes certain categories of workers from forming or belonging to a trade union of their choice. Section 11 of the Act[637] lists the excluded workers as members of the Nigeria

[632]Section 7 of the Trade Union Act, LFN, 2004
[633]TUA, LFN 2004
[634] This provision is anti-trade union discrimination
[635]Ibid
[636] See Labinjoh V. Abake (1924) 5 NLLR 33 on capacity to contract generally for infants.
[637]Ibid.

Army, Navy or Air Force, the Nigerian Police Force, the Customs and Excise Department, the Immigration Department, the Prison Services and the Customs Preventive Service, the Nigerian Security Printing and Minting Company Ltd, the Central Bank of Nigeria, the Nigeria Telecommunication Ltd, and every Federal or State Government establishment, the employees of which are authorized to bear arms. The Minister of Labour and Productivity is empowered to specify by order, any other such establishment from time to time.

Professors Uvieghara & Joe Abugu[638] are of the opinion that any employee who is a projection of management is prohibited from union membership where, and only where, membership will lead to a conflict of his loyalties to either the union or his employer. For the purpose of determining projection of management, a person whose status, authority, powers, duties and accountability, as reflected in the conditions of service, are such as normally inherent in a person exercising executive authority may be recognized as a projection of management[639]. Professor J.E.O. Abugu[640] has submitted that the rationale for excluding members of the Armed Forces and arms bearers from joining or forming trade unions is based on the fact that with guns in their hands, they could cause greater harm and danger to their employers.

CASES ON TRADE UNION AND ASSOCIATION

Freedom of Association for trade union is guaranteed by the provision of section 12(4) of the Act[641]. It provides that:

> "*Notwithstanding anything to the contrary in this Act; membership of a trade union by employees shall be voluntary and no employee shall be forced to join any trade union or be victimized for refusing to join or remain a membe*r[642]"

11.5. VOLUNTARISM

The concept of voluntarism cannot be examined without recourse to the history of trade unionism in Nigeria. Trade union started in Nigeria in 1912 with the formation of the Nigerian Civil Service Union. Between 1912 and 1937, only three unions functioned in the movement; they were Nigerian Civil Service Union formerly known as Southern Nigeria Civil Service Union; the Railway Workers' Union and the Nigerian Union of Teachers. 1938 heralded the growth of Trade Unionism as a result of the Trade Union Ordinance, 1938 which later metamorphosed into the

[638]E.E. Uvieghara and J.E.O. Abugu 'Trade Union Law in Commercial Law in Nigeria' (2007) Edited by E.O. Akanki, University of Lagos Press, Lagos, Nigeria
[639]See section 3() & (4) of the Act.
[640]J.E.O. Abugu notes on Trade Union Law in Nigeria, 2010 Faculty of Law, University of Lagos.
[641]TUA, LFN 2004
[642]Section 12 of the Trade Union Act is in agreement with section 40 of the Nigeria Constitution, 1999 as altered, ILO Convention 87 and 98 of 1948 and 1949 respectively. See also section 2 of the Trade Union (Amendment) Act 2005 which some writers have commended. See also DafeOtobo (2005).

Trade Union Act, 1973. The ordinance guaranteed freedom of association and trade union's right[643].
It is no gainsaying that, the right to freedom of association is fundamental and constitutional; same has been guaranteed by international treaties and ILO conventions[644].

The concept of voluntarism is the pivot upon which collective bargaining operates as a tool of industrial negotiation. Voluntarism has its ideological foundation in a libertarian socio-political system based on the absence of coercion by any arbitrary state or collective body. It is a philosophy which holds that all forms of human associations should be voluntary[645]. Voluntarism perfectly exists in pure capitalism or free market economies. The only function the state performs is to act as mediator between labour and employers. Voluntarism is based on good faith, which allows trade unions and employers to negotiate and regulate their conditions of work without interference from the state or its agents.

The central principle of Voluntarism is free collective bargaining between trade unions and employer or body of employers.

Voluntarism in Nigeria is regulated by the Constitution of the Federal Republic of Nigeria, 1999 as altered; the Trade Union Act, 1976[646], Trade Union Amendment Act[647], 2005, the National Industrial Court Act[648], 2006; The Trade Dispute Act[649] which provides for steps to be taken in settlement of industrial disputes and other procedural rules like the ADR Instrument[650], 2015 and at the international level, the ILO Conventions[651] 87 and 98 of 1948 and 1949 respectively.

Chapter IV of the Nigerian Constitution[652] does not provide for the right to collective bargaining expressly, however, the right to freedom of association[653] covers un-interfered collective bargaining. According to Prof. Uvieghara, the concept of voluntary collective bargaining has long been accepted by all sides to the employment[654]

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[643]See Hoplains A.G. "The Lagos strike of 1897. An Exploration in Nigeria Labour History; past and present, 35, December, 1966 pp133-135. In 1897 artisan workman in public works departments embarked on a three day strike from 9th of August to 12th August, 1987 which was in protest against arbitrary working hours invoked by the colonial matters.
[644]See Article 10 of the African Charter on Human and Peoples' Rights, 1981; Conventions 87 and 98 of the International Labour Organization, 1948 and 1949 respectively.
[645]Voluntarism was coined by Auberon Herbert in the 19th century and gained renewed use in the late 20th century. See www.wikipedia.org.
[646]LFN, 2004
[647]Trade Union Amendment Act, 2005, now LFN, 2010
[648]NICN Act, 2006
[649]TDA, 1976, now LFN, 2004
[650]NICN ADR instrument, 2015 now incorporated into the NICN Rules, 2016.
[651]ILO Convention 87 of 1948 and ILO Convention 98 of 1949.
[652]CFRN, 1999 as altered.
[653]Section 40 of the CFRN 1999 as altered.
[654]See E.E. Uvieghara 'Nigerian Labour Law (2001) Malthus Press Ltd, Lagos and Oxford

Voluntary collective bargaining has been recognized in government policy since 1948, through the Whitely Councils and the Joint Industrial Councils. This recognition accounted for why the government issued its official policy on collective bargaining. The government observed and declared:

> *"We have followed in Nigeria the voluntary principles which are so important an element in industrial relations in the United Kingdom...compulsory methods might occasionally produce a better economic or political result, but labour-management must, I think, find greater possibilities of mutual harmony where results have been voluntarily arrived at by free discussion between the two parties. We in Nigeria, at any rate, are pinning our faith on voluntary methods*[655].

The importance of voluntary collective bargaining cannot be over-emphasized. A writer has submitted:

> "*By bargaining collectively with management, organized labour seeks to give effect to its legitimate expectations that wages, and other conditions of work should be such as to guarantee a stable and adequate form of existence and as to be compatible with the physical integrity and moral dignity of the industrial and that jobs should be reasonably secure*[656]*"*

It has been noted that 'properly conducted collective bargaining is the most effective means of giving workers the right to representation in decisions affecting their working lives, a right which is or should be the prerogative of every worker in a democratic society[657]. Voluntary collective bargaining is gaining more popularity in industrial relations as it aids and develop workplace democracy; redistribution of power and resources from employers to employees. It lessens the employers bargaining power over individual employees. Voluntary collective bargaining also aids the promotion of efficiency by limiting industrial conflicts in the workplace. Industrial conflict is inimical to efficiency of labour and productivity. Voluntary collective bargaining aids settlement of industrial disputes without the stress and the need to embark on industrial actions.

11.6. LEGAL FRAMEWORK OF TRADE UNION

Trade Union Act is the principal Act that regulates the activities of trade unions in Nigeria[658]. The Act has five parts: Part I (i.e., sections 1 – 29) deals with registration of combinations as trade

[655]For details, see International Labour Office Ministerial Conference Record of Proceedings, 38th session, Geneva, 1955 pg 33
[656]Davies P. Frcedland, Kahn Frund'sLabour and the Law, (1983) Sweet and Maxwell, London pg 69.
[657]See Donovan Commission 'Royal Commission on Trade Unions and Employers' Association, 3623 of 1968.
[658]The Trade Union Act cap T14, LFN, 2004 and the Trade Union (Amendment) Act, 2005.

union, cancellation of registration, dissolution of trade union membership, exclusion of persons convicted of certain offences and disqualification from holding office in a trade union. Section 15 & 16 specifically provides that trade union dues are not to be applied for political purposes and certain proceedings. Section 17 of the Principal Act has been amended by section 4 of the 2005 Amendment Act[659].

Section 24 of Trade Union Act[660] protects unionists and their unions from liability in torts which may arise as a result of industrial actions. Of importance is section 23, which prevents courts from entertaining any legal proceedings instituted for direct enforcement of any agreement mentioned in subsection 2 of this section or on recovering damages of any breach of any agreement maintained[661].

11.6.1. Union Rules Book

The Act, under Part I, provides in Section 4 for the union rules. Every trade union shall have registered rules, which shall contain provisions with respect to the various matters mentioned in the first schedule of the Act. It is trite that where the Registrar registers a union, he must, at the same time, register its rules, and members upon request, shall be sent a copy of the rules on payment of a sum not exceeding fifty kobo[662]. It is submitted that the provision ought not to have mentioned a particular amount, or even so, such amount may be reviewed from time to time by the Minister of Labour and Productivity.

The rule book or constitution of a trade union is regarded by the courts as a contract document containing the terms of agreement between the members and union and defining the rights and obligations of parties. The status of the rule book was settled in the case of *Bonsor v. Musicians Union*[663]. In *Nigeria Civil Service Union & Anor v. O.G. Essen & Anor*[664], the Court of Appeal held that the constitution of a union is a contract document between the members of the union, and that the members have subsumed several rights into the letters of the constitution[665].

11.6.2. Other Provisions of the Act

Part II of the Act[666] deals with Federation of Trade Unions. Section 30 provides for formation of Federation of Trade Unions and admission of further trade unions to membership of registered federation. Part III provides for Central Labour Organization, while Part IV provides for accounts and returns of registered bodies. The Registrar has power under the Act to call for accounts at any time and investigate unsatisfactory accounts. He can go further to institute proceedings on behalf

[659]Trade Union (Amendment) Act, 2005
[660]Trade Union (TUA) LFN, 2004
[661]See section 23(2) (a) – (e) of the Trade Union Act, LFN,2004
[662]See section 22(1) of the Act.
[663]supra
[664] (1985) 3 NWLR (pt 12) 306
[665]See Alex Elufioye & Ors v. Ibrahim Haliru & Ors
[666]Trade Union Act, LFN, 2004

of registered body in certain circumstances. Part V of the Act has miscellaneous and general provisions on peaceful picketing, act not actionable in tort, if in contemplation or furtherance of trade dispute. This Act (Trade Union Act 1973) was amended in 2005[667].

11.7. COLLECTIVE BARGAINING AND COLLECTIVE AGREEMENTS

Industrial conflicts are bound to occur. Thus, mechanisms must be put in place to address or avoid frequent conflicts. Some of the processes through which industrial conflicts are resolved include collective bargaining, etc. The end product of collective bargaining is collective agreement.

11.7.1. Collective Bargaining

Collective bargaining involves negotiations and deliberations on the improvement of the working conditions of employees generally. International Labour Organization (ILO) Collective Bargaining Convention No. 154 adopted in 1981 defines collective bargaining in its article 2[668]:

> *"The term collective bargaining extends to all negotiations between employers. A group of employers or one hand, and one or more workers' organizations on the other, for (a) determining the working conditions or terms of employment and or (b) regulating relations between employer or their organizations and a workers' organization or workers' organizations."*

Improved conditions of employment, favourable terms and conditions of employment are the major targets of collective bargaining. According to Lord Donovan in *Colli-more V. Attorney Geneva of Trinidad and Tobago*[669]:

> *"It is true that trade unions may have other purposes, powers and functions, but the main purpose for their existence is workers' welfare based primarily on terms and conditions of employment*[670]"

It is paramount to workers that there must be an equilibrium in the bargaining power of both the employees and the employers, notwithstanding what may be the contents of the individual contract of employment. The balance is achieved through the mechanisms and principles enshrined in collective bargaining[671].

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[667]See Trade Union (Amendment) Act, 2005.

[668]See International Labour Organization (ILO) Convention and Recommendations, 1977-1995, Geneva International Labour Office, 1996, pg 93. See also History of Trade Unionism by B. Webb, (1926) Longman, London

[669](1970) AC. 538, 547

[670]See also Udoh V Orthopedic Hospitals Management Board (1990) 4 NWLR (Pt 142) 53

[671]Sir John Wood put it thus, 'their fundamental existence, their very purpose expressed in the phrase "Unity is power" depends on the right to act collectively. See collective will and the Law, 17 Industrial Journal, 1988, pg 6 on www.com. Standford.edu/faculty/workp/soup 97008, pdf last accessed 18th June, 2006; See also M. Oslon 'The logic of collective Action, Harvard; Harvard Press, 1905 pg 20

Akintunde Emiola[672]has submitted that 'bargaining is the process of negotiating an agreement on the basis of 'give and take'. Collective bargaining has been described as a means whereby terms and conditions of employment are settled by negotiation, producing an agreement between employers and workers' organization[673]. Collective bargaining is collective dialogue, or Collective negotiation between the employers' representatives and the workers' representatives with a view to reaching a collective agreement on the issues under negotiation.

Negotiation itself is a dispute resolution mechanism under Alternative Dispute Resolution. Negotiation entails the parties discussing and agreeing to terms or reaching mutually acceptable resolution without the aid or intervention of a third (3rd) party. This method involves discussions, concessions, compromises, communications, persuasion and bargaining. Thus, bargaining could also mean negotiation.
The Trade Dispute Act[674]provides for a mechanism through which leaders of a trade union or representatives of workers can sit down with the management round a negotiation table and iron out their differences in an atmosphere of mutual trust, freedom of contract and understanding. Thus, collective bargaining entails voluntariness of parties; this principle recognizes the rights of the parties to negotiate the terms and conditions of their employment.

The Trade Union Act 1973[675] which was modified by the Trade Unions (Amendment Act 1978 and, later the Trade Union Amendment Act 2005 provides in its section 24(1)[676]:

> *"For the purposes of collective bargaining all registered unions in the employment of an employer shall constitute an electoral college to elect members who will represent them in negotiations with the employer."*

Thus, statutory, collective bargaining has been recognized as a veritable tool for the management of industrial relations and industrial disputes.

In *Union Bank of Nigeria v. Edet*[677] and *ACB v. Nsibike*,[678] the courts held that collective agreement made between one or more trade unions on the one side, and one or more employers' association on the other side, are not generally intended to create legal relations, except in the case of certain public boards or corporation. Thus, they are at best, a gentleman's agreement- an extra-legal document totally devoid of sanction. However, it has been held in a plethora of judicial

[672]Akintunde Emiola 'Nigerian Labour Law (2008), Emiola publishers Ltd.
[673]See section 91(1) Labour Act.
[674]TUA, LFN, 2004
[675]NowTrade Union Act, Cap T14, LFN, 2004
[676]Trade Union (Amendment) Act, 2005.
[677](1993) 4 NWLR 288; See also ACB v. Nsibike (1995) 8 NWLR (PT 416) 725
[678](1995) 8 NWLR (Pt 416) 725

authorities that collective agreements regulate industrial and labour relations[679]. In *Daodu v UBA*,[680] it was held that if a collective agreement is incorporated or embodied in the terms and conditions of a contract of service whether expressly or by implication, they would be bound by it[681].

11.7.2. Processes of making Collective Agreements

The National Industrial Court Act[682] (NICA) 2006 in section 54, defines "collective agreement" as "any agreement in writing regarding working conditions and terms of employment concluded between an organization of employers or an organization representing employers, of the one part; and an organization of employees or an organization representing employees, of the other part'.

As mentioned earlier, the goal of collective bargaining is collective agreements[683]. When parties to collective bargaining meet and negotiate, a compromise is reached; this compromise which entails "give and take" for amicable resolution, is what is termed collective agreement. The law provides that such an agreement must have copies and three of these copies must be deposited with the Minister of Labour and Productivity within 14 days of reaching the agreement. The Minister of Labour and Productivity has the power to make an order directing that the terms of the agreements or any part of it be binding on the employers and employees to whom the agreement relate.[684]

Under the common law, a collective agreement is not regarded as contractually binding on the parties thereto. In *Ford Motors Co. Ltd v. Amalgamation Union of Engineering and Founding Wor*kers[685], it was held that collective agreement does not intend to create legal relations except in certain public boards or corporations. The legal implication of this is that, collective agreements are biding in honour only and their enforcement must depend on industrial and political pressure.

The law on collective agreement has changed from what it used to be at common law. At common law, collective agreements are unenforceable. They are at best considered as gentleman's agreements. However, in *AfriBank (Nig) Plc v. Kunle Osisanya*[686], the court held that collective agreements would be enforceable where they have been adopted as forming part of the terms of employment. Thus, once collective agreements are incorporated into an individual's contract of employment, they become binding and enforceable.

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[679]See Cooperative & Commercial Bank (Nig) Ltd &Anor v. Keneth C Okonkwo (2005) 3 NWLR (Pt 7) 109
[680](2004) 29 WRN 53
[681]See also *Abalogu v. Shell* (1999) 8 NWLR (pt 613) 12

[682]NICN Act, 2006
[683]See Convention 98 of International Labour Organization on right to organize and collective bargaining
[684]See section 2 Trade Union Act LFN 2004.
[685](1969) 1 All E.R 494
[686](2000) 1 NWLR (pr 642) 598

CASE STUDY

6. A C B V NBISIKE (1995) 8 NWLR (PT 416) 725 C.A

TOPIC – STATUS OF COLLECTIVE AGREEMENT.

FACTS

The respondent as plaintiff sued the appellant bank, in the Orlu High Court claiming a total of N500,000 as general and special damages for wrongful dismissal from employment. The respondent was employed as a clerk by the appellant bank in May 15, 1978 and he worked at the Orlu branch of the bank in different capacities as a clerk including calculation of interest payable with various customers' accounts with the appellant bank. The respondent relied on the condition of service in the manual titled "recognition and procedural agreement and main collective agreement between the Nigeria Employments' Associations of banks, insurance and financial institutions employees'' The manual was admitted in evidence as Exhibit 'C'.

Sometime in 1983, the respondent received an oral warning from the area inspector of the appellant who inspected the books of the bank and discovered that a group of staff members of the bank including the respondent, ganged up and awarded themselves between 1982 and 1983, excess interest in their various accounts with the bank. On another inspection of the bark of the appellant's bank in 1985 by the bank inspector, similar discoveries were made and a report sent to the appellant's head office in Lagos. Before then, the respondent had on 12/11/84 applied to the chief personnel officer of the bank's head office through the branch manager of the appellant bank at Orlu for a study leave. The respondent did not receive any reply to his application for study leave before he left for the university. He alleged that the Branch Manager at Orlu permitted him to proceed to the University assuring him that his application for study leave would be in the affirmative. However, no such reply was received. By a letter dated 23/10/85, admitted as Exhibit A, the respondent was summarily dismissed from employment by the appellant bank for gross misconduct with loss of benefits. It was the respondent's case that he was not told the cause of his dismissal, nor was he given any opportunity to clear himself. Hence, he instituted this action.

The appellant denied liability for the claim, contending that the dismissal of the respondent was in order and not wrongful. It placed reliance on the 1983 inspectors report, the report of 1985 and the fact the respondent's application for study leave was not approved, and that the appellant was not bound to give the respondent a hearing before dismissal because his case was one of misconduct amounting to fraud.

The trial court dismissed the respondent's case for wrongful dismissal but converted the dismissal to termination or retirement and proceeded to award the respondent various sums of gratuity for 7 years, staff provident fund, pension and leave allowances.

Being dissatisfied, the appellant appealed to the court of appeal contending inter alia, that the trial court was wrong in unilaterally converting the claim from dismissal to one of termination or retirement and that damages were improperly awarded.

HELD (Unanimously allowing the appeal)

1. **On legal status and abidingness of collective agreement**
   Collective agreements made between one or more trade unions on the one side, and one or more employers' associations on the other, are not generally intended to create legal relations except in the case of certain public boards or corporations. They are at best, a gentleman's agreement- an extra-legal document totally devoid of sanction – they are products of the pressure of trade unionists. In other words, collective agreements are binding in honour only and their enforcement must depend on industrial and political pressure.
   An employer, when he dismissed his employee, need not allege any specific act of conduct on the employee's part as the ground for the dismissal. The awards made by the learned trial judge in that regard were unjustified.

11.8. CASUALIZATION OF WORKERS IN NIGERIA

Several factors could account for the new trends in the private sector of the Nigerian economy, in which employers of labour sometimes prefer casualization of workers and engaging some staff on a temporary basis known as 'contract staff: The principle of economics that states that a decrease in demand for labour with an excessive supply of labour will reduce wages/salaries, *ceteris paribus* fixes into the casualization of workers in Nigeria. However, casualization of workers contradicts the doctrine of job security, social welfarism, social security and efficiency of labour. The Nigerian Labour Act specifies the period in which employees can work without a letter of appointment, and it will amount to casualization if at the end of this period,d no letter of appointment is given to the employee[687].

The Nigeria Labour Act, and the Employees Compensation Act, 2010 contemplate this situation when the two enactments define worker/employee to include those on temporary appointment. In order to quality for compensation under the Employees' Compensation Act, 2010, it is enough for the worker to be a casual worker[688].

The Nigerian Labour Act frowns at casualization of workers. It provides in Section 7(1)[689]:

[687] See section 7 of the Labour Act, LFN, 2004

[688]Employees' Compensation Act, 2010 repealed the Employees Compensation Act, 2010, see section 72 (1) of the ECA, 2010. The 2010 Act define thus: 'employee' means a person employed by an employer under oral or written contract of employment whether on a continuous, part-time, temporary, apprenticeship or casual basis and includes a domestic servant who is not a member of the family of the employer including any person employed in the Federal, State and Local Governments, and any of the government agencies and in the formal and informal sectors of the economy.

[689]See section7 of the Labour Act, LFN, 2004

"Not later than three months after the beginning of a worker's period of employment with an employer, the employer shall give to the worker a written statement specifying.

(a) The name of the employer or group of employers where appropriate, of the undertaking by which the worker is employed.

The section further provides for the inclusion of the terms and conditions of the employment[690]. The Act excludes those who enter into a written contract of employment which covers each of the particulars mentioned under subsection 1 of the section.[691] It is worthy of note that even if the employment is for a fixed term, such must be stated in the letter of appointment[692]. Thus, casualization of workers is constructive slavery and an infringement on the right of workers.

11.8.1 . On whether or not Casual Workers can form or Join Trade Unions

Although, the Constitution[693] guarantees freedom of association; however, it appears, an employee should be able to establish that, he or she has a contract of employment with the employer; the terms and conditions in the contract, specified; who appointed him/her; how he/she was appointed; how he/she can be removed including the circumstances under which his/her appointment can be terminated[694] before this right will become exercisable. However, using expansive approach to the interpretation of the Nigerian Constitution[695], a casual worker can join other casual workers to form a trade union probably to agitate for de-casualization of their members[696]. The concept of voluntariness presupposes that, once a registered trade union decides to admit a casual worker into its association, the membership of such casual worker may not be questioned. However, if there is any collective agreement reached between the employer or body of employers and the Union, it is doubtful whether that can apply to the casual worker since there is no valid contract of employment that exists between the employer and the casual worker. It is trite that a casual worker can claim under the Employees' Compensation Act whenever injury or death occurs in the course of the employment.[697]

Section 54 of the Trade Union Act[698] defines a member of a trade union to mean:

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[690]Section 7(1) (g) of the Labour Act, LFN, 2004
[691]See section 7(6)(a).
[692]See section 7(1) (d) of the Labour Act, LFN, 2004.
[693] CFRN 1999 as altered; see also ILO C87 of 1948 and ILO C98 of 1949.it is trite that, no fundamental right is absolute. There are derogations or exceptions to the provisions, however, such exceptions must be the ones provided for by the same Constitution. No statute has power to derogate the Constitution which is the organic law from where other laws derive their potency.
[694]See Okhomina V Psychiabic Hospital Management Board (1997) 2 NWLR (Pt 485) 75
[695]CFRN, 1999 as altered
[696]See section 40 of the CFRN, 1999 as altered. See also ILO C87 of 1948 and ILO C98 of 1949
[697] See section 72 of the Employees' Compensation Act, 2010.
[698]TUA, Cap T14, LFN, 2004

> *"A person normally engaged in a trade or industry which the trade union represents and a person either elected or appointed by a trade union to represent workers' interest."*

It is submitted that what is paramount is the interest of the workers. Whether they are in formal engagements or on casual basis is immaterial. However, it appears that the hurdle to cross for such casual workers' union is to get their trade union registered by the Registrar of trade union. Immediately the trade union is registered, it does not matter whether it represents casual workers or not[699]. It is further submitted that the aims and objectives of such a union must be within the contemplation of the statutory definition of a trade union.[700]

[699]History of trade unions in the United Kingdom has shown that, the Peasant revolt of 1381; was carried out by peasants, serfs and casual workers. In fact, scholar like Carl Landan has observed that Labour Organizations too exist even in the Middle Ages but only in clandestine manneror under camouflage, and as long as they could not operate openly, they had to be kept small and could be effective only in a few places. Kehinde Bamiwola has equally observed that trade unions operated in the Bible days as coppersmiths withstood the preaching of Apostle Paul in II Timothy 4:14; See Kehinde Bamiwola et al, "Historical Milestones of Trade Unionism in the United Kingdom, (2015) seminar paper presently at the faculty of law, under the supervisory lecturer, Prof. J.E.O. Abugu, School of Post-Graduate Studies, University of Lagos.

[700] See section 1 of the Trade Union Act, Cap T14 LFN, 2004; see also Re-union of Ifelodun Timber Dealers and Allied Workers (supra)

PRACTICE QUESTIONS

a. Discuss the historical development of trade unionism in Nigeria.

b. Identify and discuss the legal framework for trade unions in Nigeria.

c. Discuss the status a trade union acquires upon registration

d. Study the case of **ACB v Benedict Nbisike** and answer the following questions

   i. Summarize the facts
   ii. Identify the legal issues
   iii. List the principles of law applicable to the case
   iv. Render legal opinion based on the principles of law.

e. Discuss the concept of voluntarism in relation to trade unionism

f. Identify and discuss the reasons why casualization is frowned at.

CHAPTER TWELVE
SETTLEMENT OF TRADE DISPUTES

12.0. Learning Objectives

At the end of this Chapter, readers/candidates should be able to appreciate and explain the under-listed concepts and apply them to industrial relations generally.

(i) The meaning of trade dispute
(ii) Trade dispute and industrial action
(iii) Strikes and lockouts
(iv) Trade union immunity
(v) Legal framework for settlement of trade dispute
(vi) The role of the Minister of Employment, Labour and Productivity in Trade Dispute Settlement

12.1. INTRODUCTION

Human and social interactions may sometimes experience friction as a result of conflict of interests, divergent opinions, inequalities[701] in socio-economic status, and other factors such as environmental, psychological, and emotional among many other factors. These frictions always, when not properly managed, leads to disputes. The world of work is no exception to disputes known as trade disputes. However, it is not all disputes that can be called trade disputes. The Trade Disputes Act defines what constitutes a trade dispute.

Employees are always interested in their social and economic well-beings, as such; they make agitations for improved working conditions, reasonable work-hours, sustainable wages and salaries and so on. Employers on the other hand are primarily concerned with the objectives cum goals of their organizations, one of which is profit maximization. There is a need to maintain a balance between these interests. The Trade Dispute Act has set out steps to be taken for efficient settlement of trade disputes.

With due respect to organized labour and employees' associations in Nigeria; the statutory steps for settlement of trade disputes appear to be academic as labour unions maliciously use strikes for matters that ought to follow the laid down procedures.

12.2. THE MEANING OF TRADE DISPUTE

Trade dispute refers to any dispute between employers and workers or between workers and workers, which is connected with employment or non-employment or term of employment or

[701] Inequality is pronounced in employee/employer's relationship when it comes to bargaining. The employers always have the upper hand. He decides the terms and conditions of the employment. Employee is at the receiving end because he is incapacitated at his entrance into the relationship.

conditions of work of a person[702]. According to Professor Emiola[703], there are three basic elements in this definition, which are, the subject matter of trade dispute; the parties to the dispute and third, the purpose of the dispute. Thus, the subject matter may involve the "employment or non-employment" or "the terms of employment" or "the conditions of work" of any persons. The phrase "terms of employment" as used, will usually cover express and implied terms in a contract concerning wages, hours of work, holidays with pay, sickness benefits, grading and promotion and mode of dismissal. Trade dispute may also include dispute over an agreement of workers to join a particular trade union or the interpretation of a collective agreement[704].

The phrase 'conditions of work' has not been judicially interpreted. However, it has been submitted that the phrase would include "safety and physical comfort" at the place of work. It includes physical condition under which a workman works[705]. It must be noted also, that, Section 1(a) of the Trade Disputes (Amendment) Act 1992 has expanded the jurisdiction of National Industrial Court (NIC) by the addition of inter-union and intra-union disputes to trade as contained in section 47(1) of the Trade Disputes Act. Thus, any dispute which falls out of the scope of the above definition of the Trade Disputes will not be considered as Trade Disputes.

12.3. LEGAL FRAMEWORK FOR TRADE DISPUTES

The current legal framework for the settlement of the trade dispute is contained in the Trade Disputes Act[706] 1976 as amended, the Trade Disputes Act Trade Disputes (Essential Services) Act 1976, and the National Industrial Court Act 2006.

The legal framework established by the Trade Disputes Act recognizes the principle of free collective bargaining and voluntary settlement of trade disputes[707].

12.4. TRADE DISPUTES AND INDUSTRIAL ACTIONS

Industrial disputes arise as a result of unresolved differences between employers and employees. Since 1941, there has always been a provision for intervention of a third party to assist the parties to reach a compromise. The government has always been the only party so empowered *ab initio*. Thus, the government could appoint a conciliator only at the instance of either the employer or employee or arbitration tribunal at the invitation of the parties to a dispute. This system of trade dispute resolution changed in 1968[708]. Thus, the parties to a trade dispute must first attempt to

[702]See section 51 of the Trade Dispute Act 1973
[703]Akintunde Emiola 'Nigerian Labour Law (2008) Emiola Publishers Ltd.
[704] See Anigboro & Ors v. Sea Trucks Ltd (1995) 6 NWLR (Pt 399) 35; Nigerian Union of Constitution Workers v. Costain (W.A) Ltd (1980/81) NICLR 20; Nigerian Petroleum Refining Co v. Petroleum and Natural Gas Service Staff Association (1982)93) NICLR 275
[705]Emiola op. cit
[706]Trade Disputes Act, LFN, 2004
[707] See Sections 1 and 3 of the Trade Disputes Act, LFN, 2004
[708] See the guided intervention of 1968

settle it by means agreed between them for the settlement of the dispute. We shall consider the procedure for settlement under statutory procedure for settlement of industrial disputes.

CASE STUDY

7. SEA TRUCK (NIG) LTD V PYNE (1995) (NWLR (PT 400) 166 CA
TOPIC – TRADE DISPUTE

FACTS

The respondent therein was at all material times an employee of the appellant. He was one of the four leaders of the workers of the appellant who had been on disagreement as to which trade union the workers should belong. The appellant wanted its workers to belong to the Nigerian Union of Seamen and water transport workers but the workers declared for the National Union of petroleum and Natural Gas Workers (NUPENG) vide copies of the declaration dated 1st November, 1985.

On January 22, 1986, the appellant summarily terminated the appointment of the respondent along with other leaders of the workers in their declaration for the NUPENG. The respondent then applied at the high court for the enforcement of his fundamental right, claiming that his purported summary dismissal is a breach of his fundamental right, claiming that his purported summary dismissal is a breach of his fundamental rights under the constitution of the federal Republic of Nigeria, 1979. He claimed reinstatement or in the alternative N30,000 compensation for the said breach. The appellant raised a preliminary objection containing that the action was wrongfully brought under the Fundamental Right (Enforcement) procedure Rules, 1979 instead of by writ of summons. This was upheld by the trial court and the application was struck out. Aggrieved, the respondent appealed to the court of appeal. The court of appeal allowed the appeal holding that regardless of whatever procedure was used in bringing the application, the merits of the application should have given into. It remitted the case back to the trial court for the matter to be heard on its merits.

However, when the case was duly set down for hearing on the merits, the appellant raised, yet another preliminary objection by motion on Notice claiming the following reliefs "abating or terminating or discharging further proceedings in the suit, having regard to the provision of the trade disputes (Amendment) Degree No.47 of 1992 or in the alternative, an order for joiner as co – respondents, to the suit the following persons:

1. The Hon. Attorney – General of the Federation and Minister of justice.
2. The Hon. Minister of Employment, Labour and Productivity, Lagos
3. The National Union of Petroleum and Natural Gas Workers (NUPENG)
4. The Nigerian Union of seamen and water transport workers"

The learned trial judge held that the case before him was strictly one of breach of contract of employment and that the trade Disputes (Amendment) Degree No. 47 of 1992 did not apply. He refused the application. Aggrieved, the appellant appealed to the court of appeal.

HELD (Unanimously dismissing the appeal)

On whether a claim of wrongful dismissal of employee is a trade dispute: - (per AKPABIO JCA)

"Be that as it may, one must say that even if the controversy as to which of two rival trade unions the workers of appellant company should join was a "trade dispute" that dispute has not yet been taken to court, and is not the subject of the least a prayer or claim for a "Declaration as to the correct trade union for workers or (Employees) of appellant to join the NUPENG and not "the Nigerian Union of Seamen and Water Transport Workers"

The instant case was simply a case of "wrongful dismissal" between a master and servant based on their contract of employment. Respondent no doubt found it necessary to abandon temporarily their "Trade Dispute" with appellant to pursue his ordinary claim from wrongful dismissal so that time might not run against him under the statute of limitations. He claimed for only reinstatement or in the alternative N30,000 as damages for wrongful dismissal. It is my respectful view that if this case is treated as a trade dispute, then it shall come to pass that all other cases of wrongful dismissal between a master and servant in this country will have to be referred to the Natural Industrial Court.

12.4.1. Strikes

Strikes, have for a long time, been a tool or weapon of industrial action. It is the withdrawal of labour by employees as a means of pressing home their demands. It is a collective action of the employees. Many writers have argued that it is an integral part of collective agreement and that both are inseparable.

Strike[709] is "the cessation of work by a body of persons employed acting in combination, or a concerted refusal or a refusal under a common understanding of any number of persons employed to continue to work for an employer in consequence of a dispute, done as a means of compelling their employer or any person or body of persons employed, or to aid other workers in compelling their employer or any persons or body of persons employed, to accept or not to accept terms of employment and physical conditions of work[710].

The actions that constitute strike are "cessation of work" and "concerted refusal" to continue to work. Strike includes the so-called work-to-rule, ban on overtime, or go-slow, Cessation of work

[709] Right to strike has been discussed in chapter three titled "the Concept of Labour Rights".
[710]See section 48, Trade Dispute Act, LFN, 2004. See detailed discussion on strike in chapter three

has been defined to include deliberately working at less than usual speed or with less than usual efficiency and refusal to continue to work at usual speed or usual efficiency.

According to Section 18(1) of the Trade Dispute Act[711], an employer must not declare or take part in a lock-out and an employee must not take part in a strike in a connection with any trade dispute where (a) the procedure specified in section 4 or 6 of the Act has not been complied with in relation to the dispute; or (b) a conciliator has been appointed under section 8 of the Act for the purpose of effecting a settlement of the dispute; or (c) the dispute has been referred for settlement to Industrial Arbitration Panel under section 9 of the Act or (d) an award by an Arbitration tribunal had become binding under section 13(3) of the Act; or (e) the dispute has been referred to the National Industrial Court under section 14(1) or 17 or of the Act; or (f) the NIC has issued an award on the reference.

It is a criminal offence for anybody to take part in a lock-out, or in a strike action in connection with any trade dispute, without first exhausting these procedures as listed above[712].

According to Agomo[713], a literal construction of section 18 shows that there is a right to strike, but it is severely limited, thus leading to the opinion that there can never be a lawful exercise of any right to strike in Nigeria as long as Section 18 remains law. Although the ILO Committee of Freedom of Association has passed adverse comment on these provisions including the criminalization of strike, they still remain the law until abrogated or expansively interpreted by the court.

12.4.2. Lockouts

A lockout is defined as the closing of a place of employment or the suspension of work or the refusal by an employer to continue to employ and number of persons employed by him in consequence of a dispute, done with a view to compelling those persons, or to aid another employer in compelling persons employed by him, to accept terms of employment and physical conditions of work[714].

It is the law that, where an employer locks out his employees, the employees are entitled to wages and any other applicable remuneration for the period of the lockout and this period must not prejudicially affect any rights of the employees, being rights dependent on the continuity of period of employment. This is contained in section 43(2) of the Trade Dispute Act[715]. Questions which arise as a result of lock-out must be referred to the Minister of Labour and Productivity upon the

[711]Trade Disputes Act, LFN, 2004
[712] See section 18(2) of the Trade Dispute Act, LFN, 2004
[713]Agomo C.K 'Nigerian Employment and Labour Relations Law and Practice (2011) Concept Publications Press
[714] See section 18(2) of the Trade Dispute Act, LFN, 2004
[715]Trade Disputes Act, LFN, 2004

application of the employees or their representatives. It must be noted that, the decision of the Minister is final.

12.5. TRADE UNION IMMUNITY

As earlier pointed out under chapter three[716] of this manual, Trade Unions are protected from tortuous liability.

Section 23 Trade Union Act provides[717]:

> ***(1) Any action against a trade union (whether of workers of employers) in respect of any tortuous act alleged to have been committed by or on behalf of trade union in contemplation of or in furtherance of a trade dispute shall not be entertained by any court in Nigeria.***
>
> **(2) *Subsection (1) above applies both to an action against a trade union in its registered name and to an action against one or more persons as representatives of a trade union.***

It is trite law that this provision protects only the union and not the officials or member of the union who committed the tort[718].

It is trite that, the defence under section 23 will only avail a trade union if such a tort is committed when the union action was in contemplation of furtherance of trade dispute. This phrase "in contemplation of furtherance of a trade dispute" has been described as the "golden formula". Thus, the dispute must qualify as 'trade dispute' before the phrase will apply; the dispute must be connected with one or more of the following subject-matters; the employment or non-employment, terms of employment or conditions of work of a person. In NWL Ltd v. Woods[719], it was held by the House of Lords that all that is required is that the dispute be connected with one or more of the permitted subject matters.[720]

12.6. THE LEGAL FRAMEWORK FOR SETTLEMENT OF TRADE DISPUTES

The Trade Dispute Act and the Trade Dispute (Essential Services) Act are the principal enactments regulating settlement of industrial disputes. The National Industrial Court Act[721] confers exclusive jurisdiction on the NIC as the court that has jurisdiction over industrial disputes. The Third

[716] Chapter three covers the concept of labour rights. Trade Union Immunity is also discussed in that chapter.
[717]Trade Disputes Act, LFN, 2004
[718]See Bussy v. Amalgamated Society of Railway Servants & Bell (1908) 24 TLR 437; Vatcher & Sons Ltd v. London Society of Compositor (1913) AC 107; Adebola v. Babayemi (Unreported) Suit No. JD/12/63
[719](1979)1 WLR 1294
[720] See further discussion in chapter three of this manual.
[721] NIC Act, 2006

Alteration Act to the Constitution of the Federal Republic of Nigeria has conferred more jurisdictions on the court. Thus, the question as to whether the court is a superior court of record or not has been settled by the constitution, as amended[722]

12.7. STATUTORY PROCEDURE FOR SETTLEMENT OF TRADE DISPUTES

Section 3 of the Trade Dispute Act[723] enjoins the parties to a trade dispute to first attempt to settle it by any existing agreed means of the settlement of disputes. Upon the failure of the attempt or if there is no such agreed means of settlement, the parties must within seven days of the failure or within seven days of the date on which the dispute arose or was first apprehended where no means of settlement exists, meet together by themselves or their representatives under the presidency of a mediator mutually agreed upon and appointed by or on behalf of the parties with a view to the amicable settlement of the dispute. If within seven days of appointing the mediator the dispute is not settled, it must then be reported to the Minister of Labour and Productivity or his Permanent Secretary by or on behalf of either of the parties within three days of the end of those seven days[724].

Section 5(2) of the Act[725] provides that a report must be in writing and must record the points on which the parties to a dispute disagree and describe the steps already taken by them to reach a settlement. Upon the dissatisfaction of the Minister of Labour and Productivity or his Permanent Secretary that all the above requirements for internal settlement have been substantially complied with, he must issue to the parties a notice in writing specifying the steps which must be taken to satisfy those requirements and may specify in the notice, or if no period is specified after the expiration of fourteen (14) days following the date the notice is issued, the dispute remains unsettled. If the Minister is satisfied that those steps specified in the notice have not been taken or that either party is, for its part, refusing to take those steps or any of them, he may proceed to exercise such of his powers under sections 8, 9, 17 or 33 of the Act[726]. Thus, any of such powers that seem appropriate shall be applied by him.

Under these sections of the Act[727] (i.e., section 8, 9, 17 or 33) the Minister is empowered to appoint a conciliator, refer the dispute to Industrial Arbitration Panel (IAP), refer certain types of disputes to the National Industrial Court or appoint a Board of Inquiry.

Section 4 of the Act[728] empowers the Minister to apprehend a trade dispute, where he does so, he may in writing inform the parties or other representatives of his apprehension and of steps he

[722]The Third Alteration Act,2010 which altered the Constitution
[723]Trade Disputes Act, LFN, 2004. See chapter three of this manual for further readings.
[724]See section 4(2) of the Act, Trade Disputes Act, LFN, 2004
[725]Trade Disputes Act, LFN, 2004
[726]Trade Disputes Act, LFN, 2004
[727]Trade Disputes Act, LFN, 2004
[728]Trade Disputes Act, LFN, 2004

proposes to take for the purpose of resolving the dispute which may include appointment of a conciliator under section 7 of the Act.

Thus, an award by IAP is binding and contravening such an award is an offence[729]. However, if there is an objection to IAP award, such dispute may be referred to NIC[730].

12.8. INDUSTRIAL ARBITRATION PANEL (IAP)

As earlier pointed out under in this chapter, Industrial Arbitration Panel and National Industrial Court are the institutions saddled with the responsibility of settling trade disputes. It is trite law that the decisions of NIC are final. Appeal will only go to the Court of Appeal on matters that bother on Fundamental Rights[731]. It is also a settled law that the only court that can exercise un-interrupted jurisdiction and power over industrial matters is NIC to the exclusion of all other courts[732].

12.9. THE ROLE OF THE MINISTER OF LABOUR AND PRODUCTIVITY IN TRADE DISPUTE SETTLEMENT

The Trade Dispute Act empowers the Minister to carry out certain functions under the Act. Thus, matters must be reported to the Minister for appointment of conciliator and referrals to IAP and NIC. The Minister is also empowered to exercise his power under appropriate circumstances as specified under sections 7, 8, 16 or 32 of the Act[733]. It is trite law that under section 4 of the Act[734], the Minister can also apprehend a trade dispute.

12.10. GLOBALIZATION AND CORPORATE GOVERNANCE

According to Prof. Agomo[735], there is a complex interface between globalization and the promotion of core labour standards. Thus, universality of core labour standards cannot be over-emphasized. Nigeria cannot operate in isolation. We must take into consideration International Labour Standards which provide the blue print, benchmark or the floor on which individual countries are to build up rules that will enable the social partners engage in workplace activities to work out the social ground rules that will enable each party to contribute positively to the governance of the work-place.

It has been stated that the four core labour principles of the ILO are:

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[729] See section 12(5) of the Act, where a dispute is referred to the NIC directly especially were the dispute is one of which employees in any essential service are a party, such referral will be appropriate, as IAP would not be appropriate.
[730]See National Union of Textile Garment & Tailoring Workers of Nigeria v. Atlantic Textile Manufacturing Co. Ltd (1980-81) NICLR 81.
[731]See section 243 and 254c OF Constitution of the Federal Republic of Nigeria, 1999 as altered.
[732] See chapter thirteen of this manual
[733]Trade Disputes Act, LFN, 2004
[734]Ibid.
[735]Agomo C.K op.cit

(a) Freedom of Association and the effective recognition of the right to collective bargaining.[736]
(b) Elimination of all forms of forced or compulsory labour.[737]
(c) Effective abolition of child labour.[738]
(d) Elimination of discrimination in respect of employment and occupation[739].

Thus, for these core labour principles to be in operation at optimal level in Nigeria, our industrial and labour environment must be conducive for social interactions which include social dialogue in workplace, so as to promote economic performance, best labour standards and social progress.[740]

[736] See ILO Conventions 87 and 98 of 1948 and 1949 respectively
[737] See ILO Convention 105 of 1957;
[738] See ILO Convention 182 of 1999
[739]See ILO Convention 111 of 1968
[740]See Seyi Shadare and Kehinde Bamiwola. The legal environment of industrial relation in Nigeria, (2015) published by the Faculty of Business Administration, University of Lagos. Vol.13 No. 1.2015 pp107-118

PRACTICE QUESTIONS

i. Study **Sea Truck (Nig) Ltd. V Pyne** and and answer the following questions
    a. Summarize the facts
    b. Identify the legal issues
    c. List the principles of law applicable to the case
    d. Render legal opinion based on the principles of law.

i. Discuss the concepts of strikes and lockouts as tools for industrial actions
ii. Identify and discuss the legal framework for the settlement of trade disputes
iii. Identify and discuss the role of the Minister of labour in the settlement of trade disputes
iv. Discuss the immunity for trade unions to tortious liability during industrial actions.

CHAPTER THIRTEEN
NATIONAL INDUSTRIAL COURT OF NIGERIA[741]

13.0. Learning Objectives

At the end of this Chapter, readers/candidates should be able to appreciate and explain the under-listed concepts and apply them to industrial relations generally.

(i) Historical Background of the NIC
(ii) The NIC and the NIC Act, 2006
(iii) Judgments of the NIC Pre and Post 2006 NIC Act
(iv) Constitution of the Federal Republic of Nigeria 1999, (Third Alteration Act 2010) and the NIC
(v) Powers of the NIC under the Third Alteration Act
(vi) Composition of the Court
(vii) Jurisdiction of the NIC under the Third Alteration Act, 2010
(viii) The NIC and Ratified International Treaties
(ix) NIC Criminal Jurisdiction
(x) Appeals on the decisions of the NIC

13.1. INTRODUCTION

The National Industrial Court of Nigeria is a specialized Court which is mainly established for labour and employment related matters.[742]The importance of labour court cannot be over-emphasized.[743] Labour matters are crucial and central to any meaningful macro-economic development.[744] Both developing and developed[745] economies cannot afford not having vibrant

[741]This chapter was adopted from the work of the Commissioned Author; Kehinde Hassan Bamiwola Esq. titled 'National Industrial Court and the changing face of Labour Law in Nigeria'.

[742] For instance, the international Institute for labour studies Genava, in one of its meetings (the fourth) held in 1986 after it had held three previous ones namely the 1973 meeting for judges of Labour Courts, industrial tribunals and similar Institutions in industrialized countries; 1976 meeting, for industrial courts in English speaking developing Countries and 1977 for Labour courts in French-speaking Africa, emphasized the importance of Labour Court systems for industrial relations as well as the interest of the ILO and the IILS (international institute of labour studies) in such systems. See Labour Courts in Europe, Proceedings of a Meeting Organised by the International Institute for Labour Studies, Geneva.

[743]Labour is a vital if not the most important factor of production; capital may not be utilized unless there is labour, land may be lying wasted and unused unless labour is functional, so also other factors of production; see Applied Economics Edited by Brain Afkinson et.al (1998) on labour market analysis, pages 130-146

[744] According to Prof. C.K Agomo, Labour Law is not about law alone, it crosses across Economics, sociology, psychology, etc; Introductory classes on law of labour relations LLM class 2015; in corroborating this assertion section 254 B (3) provides 'A person shall not be eligible to hold the office of a judge of the NIC unless the person is a legal practitioner in Nigeria and has been so qualified for a period of not less than ten years and has considerable knowledge and experience in the law and practice of Industrial relations and employment conditions in Nigeria' (emphasis ours).

[745] By developing, these are economies that are labour intensive in its production capacity like Nigeria, while developed economies referred to industrialized ones where machines are replacing human labour. The latter is capital intensive see M.L Jhingan, (2001) Advanced Economics theory, (Vrinda Publications) page 1089

cum statutorily[746] and/or constitutionally[747] established labour Courts. The Nigerian Government had attempted to provide an efficient legal framework for the settlement of trade disputes since 1941 with the promulgation of the Trade Disputes (Arbitration and inquiry) Lagos ordinance of 1941.[748] This trend continued with the Promulgation of the Trade Disputes (Emergency Provision) Decree No. 21 of 1968 and the Trade Disputes (Emergency Provision) (Amendment NO.2) Decree 53 of 1969.[749] The 1969 Degree established on a permanent basis, a tribunal to be known as the Industrial Arbitration Tribunal. The problem with the 1969 Degree has to be addressed; that paved way for Decree 7 of 1976 later known as Trade Dispute Act 1976.[750] Ever since 1976, the National Industrial Court of Nigeria has witnessed structural, statutory and Constitutional changes which are the subject matter of this seminar paper. However, it appears there are rooms for more changes and reforms as this paper shall make recommendations

13.2. HISTORICAL BACKGROUND OF THE NIC

The Trade Disputes Act of 1976 introduced new legal dynamics to the settlement of Trade Disputes in Nigeria. The National Industrial Court of Nigeria is a product of the Act.[751] The Court under the 1976 Act has limited scope and jurisdiction; it was concerned with settlement of trade disputes, interpretation of collective agreements and matters connected thereto.[752] Historically, prior 1968, industrial law and practice in Nigeria was modeled on the non-interventionist and voluntary model of the British approach.[753] According to Prof. Hon. Justice Benedict Bakwaph Kanyip,[754] "by the 1970s and particularly after the Nigerian Civil War, this approach was abandoned for an interventionist model. Thus, it is right to submit that the NIC of Nigeria is a product of the interventionist approach" the Hon. Justice Kanyip further submitted "the NIC was generally,

[746] See Degree 7 of 1976 which established the NIC; see also the NIC Act, 2006.
[747] See the Third Alteration Act, 2010 which is the core-subject matter of this paper.
[748] Under the 1941 ordinance, only ad hoc bodies in the form of arbitration tribunals could set up to handle trade disputes and the role of government was merely discretionary at the instance of the invitation of the parties. The ordinance was only applicable to Lagos until 1957 when the trade Disputes (Arbitration and Inquiry) Federal Application) ordinance of 1957 was passed.
[749] The 1969 Degree banned strikes and lock-outs under pain of imprisonment without option of fine and imposed stringent duties on the employers and employees to report strikes and lock-outs within 14 hours to the Inspector-General of Police
[750] The National Industrial Court was established by the Trade Dispute Act 1976.
[751] Section 19 of the Trade Disputes Act provides "There shall be a National Industrial Court for Nigeria (in this part of this Act referred to as "the court" which shall have such jurisdiction and powers as conferred on it by this or by other Act with respect to the settlement of trade Disputes, the interpretation of collective agreement and matters connected therewith"
[752] Although the Act gave exclusive jurisdiction to the Court on the matters listed under the 1976 Act, however, the court was not listed or mentioned as a superior court of record.
[753] The British approach is that which encourages free market economy where forces of demand and supply are allowed to determine price and other variables. It was a general belief that government has no business in doing business. However, scholars have objected to this approach since regulatory roles of government cannot be undermined see M.L Jhingan (op. cit) Brian Alkinson et-al op.cit page 237.
[754] Hon. Justice Benedict B. Kanyip (Ph.D) The National Industrial Court; Yesterday, Today and Tomorrow; available on www.google.com;

structured in a regimented and compartmentalized labour disputes resolution regime but with circumscribed ministerial discretion"[755].

The NIC under the 1976 Act was faced with two different eras; the first being that, the court was established indirectly under the 1963 constitution.[756] According to Prof. C. K Agomo, '… there was no problem relating to the status of the court because the 1963 constitution was amended to give constitutional backing to the court'.[757] The second being that, 1979 constitution did not list the court as a superior court of record;[758] that singular omission led to many controversies. However, section 6(5) (g) of the 1979 constitution only mentioned "such other courts as may be authorized by law to exercise jurisdiction on matters with respect to which the National Assembly may make law"

In bid to remedy an expensive omission in the 1979 constitution, Decree 47 of 1992 specifically made the NIC a superior Court of record.[759] The 1999 constitution threw the Court back to its non-superior court of record status as section 6(5) of the constitution did not list the court as a superior court of record. The passage of NIC Act 2006 could not remove the court from the non-superior court of record status notwithstanding section 1(3) of the Act[760]

13.3. THE NIC AND THE NIC ACT 2006

[755] The jurisdiction of the court could only be invoked upon a referred from the Minister of Labour. This is no more the case. The jurisdiction of the Court has been enlarged for instance, by sections 13-19 of the NIC Act, 2006.
[756] See Agomo C.K (2011) Nigerian Employment and Labour Relations Law & practice (Concept Publication Limited) page 320
[757] See Agomo C. K op. cit pg. 320
[758] See section 6 of the 1979 constitution of the Federal Republic of Nigeria
[759] See Maritime Workers' Union of Nigeria V NLC (2005) 4 NLLR (pt. 10) 270 at 282; see also Agomo C.K op.cit page 319; see also section 5(2) of Degree 47 of 1992
[760] Section 1(3) of NIC Act provides that the Court shall be a superior Court of record and shall have all the powers of a High Court; it is well-settled that statutory provisions are inferior or rank below constitutional provisions, the fact that, the court was not listed as a superior court of record under the 1999 constitution before the third alteration Act, 2010 brought more controversies to many of its judgments; see section 1(3) of the Act.

The NIC Act[761] came in being in 2006. It conferred on the court the status of a superior court of record.[762] However, it was noted that section 6(3) of the constitution[763] specifically referred to courts listed under section 6(5) of the same constitution[764] as the superior courts of records.[765]

The NIC Act of 2006 repealed part II of the Trade Dispute Act. The NIC Act 2006 is superior to the Trade Dispute Act.[766] The Act addresses four major classifications' these are composition of the court and appointment of judges.[767] Status of the court was statutorily upgraded to a superior court of record[768] and that the court shall have all the powers of a High Court;[769] the jurisdiction of the court was enlarged with power being given to the National Assembly to confer more jurisdictions on the court.[770] It is vital to point out that the National Assembly may also by an Act prescribe that any matter under sub-section (1)(a) of section 7 may go through conciliation or arbitration before such is heard by the court.[771]The NIC Act recognizes the need to operate within and in the spirit of international labour standards.[772] In addition, the court is empowered to make an order of mandamus, requiring a thing to be done, an order of prohibition prohibiting any proceedings, cause or matter or an order of certiorari removing any proceeding, cause or matter into the court for any purpose.[773]

[761]On the 31st day of May, 2006, the National Assembly passed the National Industrial Act, 2006. The Act was assented to by the then president, Chief Olusegun Obasanjo on the14th day of June, 2006. The Act established the NIC as a superior court of record and conferred exclusive jurisdiction on the court with respect to labour and industrial relations matters

[762] Section 1(3) of the Act has no legal power to amend section 6(5)(a)(1) of the 1999 constitution; thus, notwithstanding the provision of the Act, there were diverse commentaries and adverse judicial sentiments. See the decision in NUEE V BPE

[763] Constitution of the Federal Republic of Nigeria, 1999 before amendments'

[764] Ibid.

[765] See the conflicting ratios of the four courts of Appeal cases of Kalango V Dokubo (2003) 15 WRN 32; A.G Oyo State V NLC Oyo State Chapter [2003] 8 NWLR 1; BUREAU OF PUBLIC ENTERPRISES (BPE) V NATIONAL UNION OF ELECTRICITY EMPLOYEES (NUEE) [2003]13 NWLR (pt 837) 382; see also Agomo C.K op.cit.pg 320-321 on the constitutionality of NIC as a superior court of record. See Maritime Workers' Union of Nigeria V NLC

[766] See section 53(1) & (2) of the NIC Act 2006

[767] Section 1 of the NIC Act 2006, established the court, subsection 2 of the section provides that the court shall consists of the president and other judges not less than twelve (12) Judges; sub section 4 of section 2 makes it mandatory for legal practitioners only to be appointed as judges; unlike what was the practice under 1976 Act and the 1992 Degree which allowed non-lawyers to be judges of the Court.

[768] See section 1(3) of the Act

[769] See section 1(3)(b) of the Act

[770] See section 7(1)(9) &(b); the jurisdiction of the court covers labour including trade union and industrial relations; environment and conditions of work, health, safety and welfare of labour and matters incidental thereto; other matters include strike, lock-out, interpretation of collective agreement

[771] The matters here are matters under part 1 of the Trade Dispute Act- see Agomo C.K op.cit. pg 330

[772] See section 7(6) of the NIC Act, 2006

[773] See section 16-18 of the Act; compared these express provisions to the decision in Kalango V Dokubo (supra) where the court of Appeal held that the NIC cannot grant declaratory and injunction orders. The court was relying on the orbiter dictum of His Lordship Oputa J.S.C in Western steel Works V Iron & Steel Workers Union [1987] 1 N.W.L.R (pt. 49) 284.

It is submitted, one of the popular controversies that rocked the NIC as a court were laid to rest by the provisions of sections 16-19 of the Act which invalidated the decisions and/or orbiter dictum in *Western steel Works V Iron & steel Workers Union*[774] and *Kalango V Dokubo*.[775]

13.4. JUDGMENTS OF NIC PRE AND POST 2006 NIC ACT

As earlier pointed out,[776] Decree 47 of 1992 made NIC a superior court of Record; however, the constitutional and fundamental status problem the court was faced with had not been removed. The Court had suffered many setbacks among which were- (1) The NIC was the only court of law in the country where litigants would not on their own volition, except when activating the interpretation jurisdiction of the court, approach the court to ventilate their grievances unless referred to the court by the minister of labour[777]; the requirement of referral in other than interpretation disputes worked in a manner that precluded the court from hearing matters directly even when cases were transferred to the court[778] by the other courts.[779] Some of the cases transferred to the NIC from other courts include *Incorporated Trustees of Independent Petroleum Marketers Association V Alhaji Alli Abdulrahman Himma & 2 ors.*[780]

Prior to the passage of the NIC Act, 2006, some Court of Appeal decisions created much controversies and questions as to the constitutionality of the NIC.[781] For instance, in *Kalango V Dokubo*,[782] the Court of Appeal came to a conclusion that the dispute which was the subject matter of the case was an intra-union dispute and not a trade-dispute; thus, making it outside the jurisdiction of the NIC. With due respect, this decision was reached in error of law.[783] The decision in *kalango's* case robbed the NIC of its jurisdiction. More disturbing is the decision of the court of Appeal in *Attorney General of Oyo State V NLC*[784] in which the plaintiff sought an injunctive and declaratory relief to restrain the defendants from going on strike without first exhausting the laid down procedure under part 1 of the Trade Dispute Act; it also filed a motion ex-parte and a motion on notice asking for others against the defendants to maintain the status quo pending the

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[774] (supra)

[775] (supra). However, the facts remained then that, no constitutional backing for the supposed status as a superior Court of record

[776] See Decree 47 0f 1992

[777] See Ho. Justice Kanyipop.cit

[778] The court here is referring to the NIC

[779] 'Other courts' means High court of a state, Federal High Court or High Court of the Federal capital Territory.

[780]Unreported Suit NO. FHC/ABJ/CS/313/2004, the ruling of which was delivered on January 23, 2004

[781] The case of Ekong and Oside (2004) All FWLR 562 threw up difficult questions as to the constitutional status of the NIC, however, it was held that, it is difficult to read unconstitutionality in the statutes that created the NIC; SEE B.B Kanyip, The National Industrial Court: Jurisdiction, Powers and Challenges in Rocheba's Labour Law Manual edited by Enobong Etteh, Vol. 1 (2007) published by Rocheba Law Publishers

[782] (supra) According to Hon. Justice Kanyip, the decision in Kalango V Dokubo had the additional problem of insisting that jurisdiction is conferred on a court only by sections labeled "jurisdiction".
In dismissing sections 1A and 19 of TD A 1990 and in holding that an inter or inter-union dispute must qualify as a trade dispute if NIC is to have jurisdiction

[783] Prof. Chioma K Agomo had asked rhetorically; did the Trade Disputes (Amendment) Act introduce a new head of jurisdiction the question was answered affirmatively. See Agomo C.K op.cit page 323.

[784] (2004) 1 N.L.L.R (pt 3) 591; the case is reported in Agomo C.K op.cit page 324.

determination of the substantive suit. Oyo state High Court granted the orders. The jurisdiction of Oyo sState High Court was challenged on the ground that the TDA gave exclusive jurisdiction to the NIC over such matters. The Court of Appeal came to the conclusion that the declaratory and injunction reliefs sought were outside the jurisdiction of the NIC by virtue of section 20 of the Trade Dispute Act and held that the High Court ought not to have declined jurisdiction since the orders sought were within its jurisdiction[785]. The court relied on the authority of *National Union of Road Transport Works V Ogbodo*[786] and *Western steel works Ltd V Iron & steel Workers Union of Nigeria*.[787] It has been submitted that the court could not interpret a document without making a declaration on the nature of rights emanating from it.[788]

Prior to the NIC Act of 2006, it had been further observed that both the High Courts and NIC were generally held to have concurrent jurisdiction in the resolution of labour disputes.[789] It has been noticed that, decisions of the NIC were sometimes subjected to the Federal High Court for Judicial review; an example of this is *SGS Inspection Services (Nigeria) Ltd V Petroleum and Natural Gas Senior Staff Association of Nigeria (PEN GASSAN)*.[790]A constitutional issue arose in the case of *NUFBTE V DANGOTE & ORS*[791] where the judgment of NIC ordering the reinstatement of certain employees was sought to be judicially reviewed before the Lagos High Court. The NIC went ahead and held that its decisions cannot be subject to the supervisory powers of judicial review of the High Court.[792]Post NIC Act 2006 Judgments of the NIC have addressed and reviewed to some extent the previous decisions that challenged the superior court of record status of the court and in addition, the power to order declaratory injunctive reliefs among other things. In *AUPCTRE V*

[785] See also Ekong V Oside (2004) All FWLR 562
[786] (1998) 2 NWLR (pt 537) 189 at 191
[787] (supra)
[788] See Agomo C.K pg 325; see also Hon. Justice Kanyip "The National Industrial Court, current Dispensation in the Resolution of Labour Disputes. Paper delivered at the Refresher Course for judges and Kadis organized by the National Judicial Institute (NJI) Abuja 12-16, March, 2007; see also Hon. Justice Benedict Kanyip, The National Industrial Court, Yesterday, Today and Tomorrow op.cit. in National Union of Civil Engineering Construction, Furniture and Wood Workers V Beton Bau Nigeria Limited &Anor. [suit No.Nic/8/2002 of February 6, 2007, the NIC distinguished the court of Appeal decision in Western Steel Works Ltd V Iron & Steel Union of Nigeria and other decisions[see A.G Oyo State V NLC,(supra)KALANGO V DOKUBO (supra)]on the matter as not applicable if the question related to the interpretation jurisdiction of NIC."
[789] In FRN V Adams Oshiomole [2004] 1 NCLR 326 FCA the Court of Appeal then directed that the matter be heard by the Federal High Court. The reason adduced was that, for the fact that the Federal Government was a party to the suit; According to Prof. Hon. Justice Kanyip, since the issues were purely labour in nature, the appropriate court ought to be the NIC.
[790] (Unreported) Suit No. NIC/3/2000 (summarized at pp 428-430 of the digest of Judgments of the NIC (1978-2006)
[791](Unreported) suit No. NIC/2/2008 delivered on April 2, 2009
[792] See Hon. Justice Kanyip, The National Industrial Court yesterday, today and tomorrow. Op.cit; see also B.B Kanyip- Trade Unions and Industrial Harmony: The Role of the National Industrial Court and the Industrial Arbitration Panel" a paper presented at the 2001 Annual Conference of the Nigerian Bar Association held at the Cultural Center, Calabar from August 27-31, 2001 and published in (2003) Nigerian Bar Journal, VOL.I NO. 2 at page 218-235

FCDA[793] and *ASSIBIFI V Union Bank of Nigeria plc & ors*,[794] the NIC has held that inter and intra-union disputes are trade disputes which must go through part 1 processes of the Trade Dispute Act.[795] It is vital to point out that under the 2006 Act; the Court has both original jurisdiction and appellate jurisdiction[796]

13.5. CONSTITUTION OF THE FEDERAL REPUBLIC OF NIGERIA 1999, (THIRD ALTERATION ACT 2010) AND THE NIC

In the words of Professor Chioma K. Agomo, the Third alteration Act, 2010 has laid to rest all controversies that have surrounded the NIC since its inception.[797] The Third Alteration Act of 2010, is a 16(sixteen) section Act of the National Assembly altering 12(twelve) major sections of the 1999 Constitution of the Federal Republic of Nigeria.[798] The major concern here is not to examine and quote sections of the Third Alteration Act, 2010, but to examine the developments and modifications introduced by the Act.[799] These developments, modifications and alterations cover the status, composition, powers, and jurisdictions of the court. The NIC and the international treaties especially the position of the constitution as provided for by section 12 of the same constitution, shall be examined.

13.6. POWERS OF THE NIC UNDER THE THIRD ALTERATION ACT

Section 2 of the Third Alteration Act, 2010 altered section 6(5) of the Constitution[800] by inserting immediately after the existing paragraph (C) a new paragraph "(cc)" to include the National

[793] UNREPORTED Suit No NIC/17/2006 delivered on May 23,2007
[794] Unreported Suit No NIC/11/2007
[795] This decision has been criticized by Prof. C.K Agomo: see Agomo C.K op.cit page 335
[796] See section 7(4) of the NIC Act, 2006 and Association of Senior Staff of Banks, insurance and Financial Institutions (ASSBIFI V Union Bank on Nigeria Plc & Ors (suit No) NIC/11/2007 delivered on January 2008 unreported
[797]Agomo C.K. the NIC and Third Alteration Act 2010, a paper delivered at the One-Day Symposium on the statutes, power and jurisdiction Conferred on the National Industrial Court of Nigeria by the Constitution of the Federal Republic of Nigeria (Third Alteration) Act, 2010 organized by Gani Adetola Kazeem, SAN & CO, held at Lagos Airport Hotel on the 15th day of August, 2011; see also the Keynote Address delivered by His Lordship Hon. Justice Babatunde Adeniran Adejumo OFR; His Lordship at the symposium. His Lordship specifically mentioned the case of the National Union of Electricity Employees and 1 or V Bureau of Public Enterprises (supra) on page 1 of the paper; where the supreme Court of Nigeria had held that the NIC was an inferior Court of record and that if had no exclusive jurisdiction in those subject matters listed under section 7(1) of the National Industrial Court Act, 2006.
[798] The affected sections of the Constitution which the Act altered are sections 6, 84, 240, 243,254, 287, 289, 294, 316 and 318; the constitution is referred to as" the principal Act" in the third Alteration Act. It is important for semantic sake to address the Constitution as constitution of the Federal R4epublic of Nigeria, 1999 as altered instead of the popular "as amended." The Third Alteration Act, 2010 altered the constitution and not amended strict senso.
[799] The 'Act' here refers to the Third Alteration Act.
[800] Referred to as the "Principal Act"

Industrial Court as Superior Court of Record[801]. In the words of Hon. Justice Adejumo concerning the controversies:

> ***"All that is now history, as the Act has effectively established the Court as a superior Court of record"***[802]

13.7. COMPOSITION OF THE COURT

Under the Third Alteration Act, 2010, Section 254 of the Principal Act. A new sub-heading (cc) and section 254A-254F were inserted. Thus, the National Industrial Court shall consist of (a) President of the National Industrial Court and (b) such number of Judges of the NIC as may be prescribed by an Act of the National Assembly[803]. Worthy of note is section 254b (4) which exclude non-legal practitioners from being appointed as judges of the Court. The person must have qualified to practice as a legal practitioner in Nigeria and has been so qualified for a period of less than ten years with considerable knowledge and experience in the law and practice of industrial relations and employment conditions in Nigeria[804].

13.8. JURISDICTION OF THE NIC UNDER THE THIRD ALTERATION ACT, 2010

Section 254C deals with jurisdiction of the court. The court has exclusive jurisdiction [805] in disputes:

1. relating to or pertaining to any Labour, employment, trade unions, Industrial relations, and matters arising from work place, the conditions of service, including health, safety, welfare of labour, employee, worker and matters incidental thereto or connected therewith[806];
2. relating to, connected with or arising from Factories Act,[807]Trade Dispute Act[808], Trade Unions Act, Labour Act, Employees' Compensation Act[809] or any other Act or Law relating to Labour, Employment, industrial relations, workplace or any other enactments replacing the Acts or Laws[810];
3. relating to or connected with a grant of any order restraining any person or body from taking part in any strike, lock-outs or any industrial action, or any conduct in contemplation

[801] With this alteration, the case of National Union of Electricity Employers and 1 Or V Bureau of Pubic Enterprises (supra) seized to be the law. The Act of the National Assembly and the Constitution are hierarchically ranked above judicial pronouncements. See Section 1(3) of the Constitution of the Federal Republic of Nigeria, 1999 as altered.
[802] See Hon. Justice Adejumo's Keynote address at the symposium held on 15th day of August, 2011; op.cit.
[803] Unlike under the 1976 Act and the 2006 Act, no particular number of Judges is mentioned but subject to the Act of the National Assembly
[804] It should be noted that the 2006 NIC Act allows the court to sit without the president. It is not a must for the president to preside over every sitting of the court. See Section 1 (2) (b) of the NIC Act 2006
[805] Section 254C (1) of the Third Alteration Act, 2010
[806] See section 254C (a) CFRN,1999 as altered
[807] See Agomo C.K "Some Reflections on the Factories Decree1987
[808] See E.E Uviaghara and J.E.O Abugu "Trade Union Law:' in Commercial Law in Nigeria (2005) edited by E.O Akanki, pp738-793
[809] See Employees' Compensation Act, 2010
[810] See section 254C (1)(b) CFRN 1999 as altered

or in furtherance of a strike, lock-out or any industrial action and matters connected therewith or related thereto[811];

4. relating to or connected with any dispute over the interpretation and application of the provisions of Chapter IV of the Constitution[812] as it relates to any employment, labour, industrial relations, trade Unionism, employer's Association or any other matter which the court[813] has jurisdiction to hear and determine[814];
5. relating to or connected with any dispute arising from national minimum wage for the federation or any part thereof and matters connected therewith or arising therefrom[815];
6. relating to or connected with unfair labour practice or international best practices in labour[816], employment and industrial relations matters[817];
7. relating to or connected with any dispute arising from discrimination[818] or sexual harassment at workplace[819]collective agreement, minimum wage, payment or nonpayment of salaries, pension and other emoluments, discrimination[820], sexual harassment at the work place[821];
8. relating to, connected with or pertaining to the application or interpretation of international labour standards[822]; connected with or related to child labour, child abuse, human trafficking or any matter connected therewith or related thereto[823];
9. relating to the determination of any question as to the interpretation and application of any[824];

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[811] Section 254C(1)© CFRN 1999as altered

[812] CFRN, 1999as altered

[813] The Court here refers to the NICN

[814] Section 254C (1)(d) CFRN, 1999 as altered

[815] Section 254C(1)(e) CFRN 1999 as altered

[816] See Agomo C.K 'Corporate Governance and International Labour Standards in Rocheba's Labour Law Manual (2007) Edited by Enobong Etteh, published by Rocheba's Law Publishers, pp1-16

[817] Section 254C(1)(f) CFRN, 1999 as altered

[818] See Kehinde Bamiwola (2011) 'Human Rights and Employment Discrimination; A Comparative Examination of Equal Job opportunities, published by the ILO, see also section 42 CFRN, 1999 as altered, see Harris V Forklift Systems Inc. 510 US 17,114S. ct 367 (1993; see also Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) UN Treaty Series, NO. 660, Page 195

[819] Section 254C(1)(g) CFRN, 1999as altered

[820] See Agomo C.K 'the Legal Framework for gender', Equality in Nigeria in Paradox of Inequality in Nigeria Politics (Lai Olorode ed.) 2004 Concept Publications, Lagos; see also Kehinde Bamiwola "Human Rights and Employment Discrimination: A Comparative Examination of Equal Job Opportunities published by the ILO in 2011

[821] See Agomo C.K (2004) Inaugural Lecture Titled "the working woman in the Changing World", University of Lagos Press, see also Agomo C.K" Women's Rights in Law" Southern University Law, Edited by Obilade A.O, Southern University Law Centre and Faculty of Law, University of Lagos, (1993).

[822]section 254C(1)(h) CFRN, 1999 as altered; see also international best practice in labour or Industrial relations and what amounts to good or international best practice shall be a question of fact. See Agomo C.K.; See also the Four Core Labour Standards as outlined by the International Labour Organization; see also Agomo C.K. "ILO declaration on fundamental principle and rights at work' in Rocheba's Labour Law Manual edited by Enobong Etteh; Vol. 1, 2007, Published by Rocheba Law Publishers.

[823] Section 254C(1)(i) CFRN, 1999as altered

[824] 'any' here refers to collective agreement; award or order made by an arbitral tribunal in respect of a trade dispute or a trade union dispute; award or judgment of the court; terms of settlement of any trade dispute; trade union dispute or employment dispute as may be recorded in a memorandum of settlement; trade union constitution, the constitution of an association of employers or any association relating to employment. Labour industrial relations or workplace and dispute relating to or connected with any personal matter arising from any free trade zone in the federation or any part thereof. See section 254C(1)(j) CFRN, 1999as altered

10. relating to or connected with disputes arising from payments or nonpayment of salaries, wages, pensions[825]I, gratuities, allowances, benefits and other entitlement of any employee, worker, political or public office holder, judicial officer or any civil or public servant in any part of the federation and matters incidental thereto[826];
11. relating to appeals from the decisions of the Registrar of Trade Unions, or matters relating thereto or connected therewith, appeals from the decisions or recommendations of any administrative body or commission of enquiry, arising from or connected with employment, labour, trade unions, or industrial relations and such other jurisdiction, civil or criminal and whether to the exclusion of any other Court or not, as may be conferred upon it by an Act of the National Assembly[827];
12. relating to or connected with the registration of collective agreements[828].

It is submitted that the jurisdiction of the NIC under the third Alteration Act is wider in scope as its exclusive jurisdiction may not be well appreciated now until all other courts realize that, majority of cases that have employment flavour or connotation can longer be proper and competent before them. The Act has withdrawn all employment related matters from these courts[829]

13.9. THE NIC AND RATIFIED INTERNATIONAL TREATIES

This study material will be incomplete without appreciating the legal and jurisprudence innovations introduced by the Third Alteration Act, 2010. Prior the Act, the law has always been that, before any international treaty will have the force of law in Nigeria, such international instrument must have been ratified and domesticated[830]. Section 12(1) of the constitution[831] provides:

> *"No treating between the federation and any other country shall have the force of law except to the extent to which any such treaty has been enacted into law by the National Assembly."*

It is submitted by this group that; this provision does not apply to the National Industrial Court of Nigeria by virtue of Section 254C (2) which provides;

> "Notwithstanding anything to the contrary in this constitution, the National Industrial Court shall have the jurisdiction and power to deal with any matter connected with or pertaining to the application of any international convention, treat or protocol of which Nigeria has ratified relating to

[825] See Pension Reform Act, 2014, especially section 120 which this group has criticized under our assessment and recommendations
[826] Section 254C(1)(k) CFRN 1999 as altered.
[827] Section 254C(1)(l) CFRN 1999as altered.
[828] Section 254C(1)(m) CFRN, 1999 as altered
[829] These courts refer to state High Courts, Federal High Court and High Court of Federal Capital Territory, Abuja
[830] This is called dualism. See section 12 of the constitution of the FRN 1999 as altered.
[831] CFRN 1999 as altered.

> Labour employment, workplace, industrial relations or matters connect therewith."

This is appreciable and in total conformity with international best practices as far as labour and employment law is concerned. Nigeria cannot be an island of its own, it is submitted that, the law, as stated by the Supreme Court of Nigeria, in *R.T.N.A.C.H.P.N V M & H.W.U. N*[832] is no more the law on labour and employment relations matters. In that case, the Court[833] held that, 'in so far as the International Labour Organization (ILO) Conventions have not been enacted into law by the National Assembly, they have no force of law in Nigeria, and they cannot possibly apply'. Mukhtar JSC further held:

> **"*To say that, because the words "shall have the force of law except to the extent" was used in section 12(1) of the constitution supra, simply admits that there is disqualification or proviso to the opening part of the provision is a misapprehension. Indeed, thus situation is a locus classicus of the necessity to read the whole of section 12(1) as a whole. The use of the phrase 'the extent' does not connote that a person with interest in the provision should fish around for other enactments that contain such provisions in order to make them valid and enforceable. In essence, what the legislature meant or intended is that for a Treaty to be valid and enforceable, it must have the force of law behind it, albeit it must be supported by a law enacted National Assembly, not bits and pieces of provisions found here and here in other laws of the land, but not specifically so enacted to domesticate it, to make it a part of our law. To interpret similar provisions as being part of the International Labour Organization Conventions just because they form parts of some other enactments like the African Charter on Human and Peoples Rights etc. will not be tolerated."*[834]**

13.10. NIC CRIMINAL JURISDICTION

Section 254C (5) CFRN 1999 as altered confers criminal jurisdiction on the Court in causes and matters arising from any causes or maters of which jurisdiction is conferred on the National Industrial Court by the Section or any other Act of the National Assembly or by any other law. It is submitted by this group that, criminal causes like fraudulent appropriation of employees'

[832](2008) 2 N.W.L.R (PT1072) 575. The subject matter of the appeal was the enforceability of ILO Conventions 87 and 98, whether or not they are justifiable.

[833] The Supreme Court of Nigeria

[834] See also Abacha V Fawehinmi (2000) FWLR (PT.4) 533, where it was held that, by virtue of section 12 of the CFRN, 1999, an International Treaty entered into by the Government of Nigeria does not become binding until enacted into law by the National Assembly and that, before its enactment into law by the National Assembly, an international treaty had no such force of law as to make its provisions justifiable in our courts

salaries, theft etc. that have criminal connotation in all labour and employment matters can be tried by the court although appeal on such matters are as of right to the Court of Appeal[835]

13.11. APPEALS ON THE DECISIONS OF THE NIC

Worthy of Note is section 243(b) (2)-(4) of the Federal Republic of Nigeria which was introduced by the Third Alteration Act, 2010, which limits appeals on the decision of the court to fundamental rights matters. Section 254c (6) adds criminal causes and matters as matters that can be appealed as of right. The decision of the Court of Appeal is final on this.[836]

13.12. ASSESSMENT

The Third Alteration Act, 2010 has changed the face of labour law and its practice in Nigeria. The court being a specialized court has overcome its challenges of status, power and jurisdiction. However, there may be more challenges as calibers of practitioners who appear and prosecute cases before the court will go a long way to determine the rate and speed of legal development and jurisprudence of Industrial relations in Nigeria. The popular saying "garbage in, garbage out" fits into this; good case presentations will help the court to advance the application of the law of Labour and employment relations. The approach of the court in awarding damages for wrongful exercise of the right to terminate employment is commendable.[837]In the bid to avoid rigidity and the common law courts' practice of paying more attention to 'litigating the margin'[838], the NICN in its rules of court make provisions against technical justice[839] and avoid things that may constitute cogs in the wheel of justice. It is hoped that, the Court will not go back to rigidity and technicality prevalent in common law courts.[840]

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[835] See Section 254(c)(6) of the Constitution Third Alteration Act, 2010

[836] See Section 243(b)(4) of the constitution of the federal Republic of Nigeria, 1999, third Alteration Act, 2010; see Section 9(2) of the NIC Act, 2006 on appeals as of right on fundamental rights cases

[837] According to Prof. C.K. Agomo, the NIC has declared its willingness to chart new path from what the common law would normally allow as compensation or remedy for wrongful exercise of the right to terminate a contract of employment. See Agomo C.K. Nigerian Employment and Labour Relations Law and Practice, Op. Cit, pg. 193; see also Industrial Cartons Ltd v. National Union of Paper and Paper converter Workers. (1980-1981) NICLR at 54. Michelin (Nigeria) Ltd. V Footwear, Leather and Rubber Products Senior Staff Association (1980-1981) NICLR 153. The Court is both a Court of Law and a Court of equity; see Section 13 of the NIC Act, 2006, see also the Judicature Act 1873-1875 which fused all common law Courts and Chancery Court together under the English Legal System; that Courts shall apply both common law principles and the doctrine of equity.

[838] Litigating the margin is the practice in which counsel handling cases use technicality to outsmart each other. Sometimes, admissibility of evidence can be dragged and argued for months and the other party may appeal interlocutory rulings while the substantive matter is still pending; see Nipol Ltd V Bioku Investment & Property Co LTD (1992) 3 NWLR (Pt 232) P.727 @P.783.

[839] See Order 5 Rule 3; see also section 12(1)(b) NIC Act, 2006 which provides that, the court shall be bound by the Evidence Act but may depart from it in the interest of justice

[840] See Order 5 Rule 3 NICN Rules, 2007 which provides that, the Court may depart from these Rules where the interest of Justice so requires. See also Order 15 NICN Rules, 2007 which empowers the Court to adopt such procedure as will in its view do substantial justice to parties. On substantial Justice see the case of Nwazurike & Ors V A.G Federation (2013) 3-4 M.J.S.C (pt II) P.174 @ p 198 Para D

Although, the court has been revolutionized with the introduction of the Third Alteration Act, 2010; however, it appears the court still has many challenges. It is appreciative that a specialized court of this nature has been helpful in many areas; for instance, ordinary courts of law were regarded as too slow; these courts did not have the necessary expertise to settle disputes arising out of collective agreements; thus, the need for a separate labour court of special composition would more easily gain the confidence of workers' organizations[841]. It is the belief of this group that the National Industrial Court of Nigeria has achieved this expertise/specialized philosophy behind the creation of the court. However, there are rooms for improvements and Labour Law reviews. For instance, Section 120 of the Pension Reform Act, 2014[842], interprets Courts of competent jurisdiction to include Federal High Court, High Court of the Federal Capital Territory, High Court of a State, and the National Industrial Court as Courts that have Jurisdiction over pension matters. It is the view of this commissioned author[843] that, Section 120 of Pension Reform Act violates Section 254C (1) of CFRN 1999, as altered on the exclusivity of the Jurisdiction conferred on the NICN.

13.13. INDUSTRIAL ARBITRATION PANEL (IAP) AND TRADE DISPUTES

Industrial Arbitration Panel and the National Industrial Court are the institutions saddled with the responsibility of mediating, settling and adjudicating of trade dispute. As earlier pointed out, the decision of the National Industrial Court is final safe on matters that border on the enforcement of fundamental rights[844].

[841] See Labour Courts in Europe; Proceedings of a meeting organized by the International Institute of Labour Studies, Geneva, Op.Cit.

[842] See the Pension Reform Act 2014, LFN 2014 signed by the Clerk to the National Assembly, dated 16th Day of June, 2014

[843] The Author, Kehinde H Bamiwola has submitted elsewhere that, section 120 of the Pension Reform Act contradicts the Constitution of the Federal Republic of Nigeria which gave exclusive jurisdiction to the National Industrial Court. See the article, N.I.C and the changing face of Labour in Nigeria submitted to the faculty of Law, University of Lagos in partial fulfillment of the award of the degree of Master of Laws, 2015

[844] See section 243(b) of the Constitution of the Federal Republic of Nigeria, 1999 as altered

PRACTICE QUESTIONS

i. Discuss the historical development of the National Industrial Court

ii. Discuss the NIC in relation to the NIC Act, 2006

iii. Identify the differences in the jurisprudence of the decisions of the NIC pre and post the NIC Act 2006

iv. Discuss exhaustively the National Industrial Court and the Third Alteration Act of the 1999 Constitution of the Federal Republic of Nigeria as altered.

v. The National Industrial Court can apply the provisions of ratified international treaties to labour/industrial cases even if such treaties have not been domesticated in Nigeria. Do you agree with this position?

CHAPTER FOURTEEN
ALTERNATIVE DISPUTE RESOLUTION (ADR)

14.0. Learning Objectives

At the end of this Chapter, readers/candidates should be able to appreciate and explain the under-listed concepts and apply them to industrial relations generally.

(i) Nature, meaning and types of ADR
(ii) ADR principle
(iii) ADR in Industrial/Trade Dispute Settlement
(iv) National Industrial Court Alternative Dispute Resolution (ADR) Centre Instrument, 2015
(v) The Arbitration and Mediation Act, 2023.

14.1. INTRODUCTION AND THE NATURE OF ADR

The dynamism cum paradigm shifts in our Legal System[845] has made the understanding of alternative dispute resolution, its principle and areas of its applicability, become almost indispensable. This is undoubtedly not unconnected with the demands of the Courts in various jurisdictions encouraging amicable resolution of disputes before resorting to litigation[846] which ought to be the last resort. Thus, an understanding of the various dispute resolution mechanisms becomes expedient. It is appreciable that conflict or dispute resolution outside the Court engenders mutual co-existence. It guarantees continued friendship and harmony after settlement of dispute; aside its cheaper nature[847]. In Nigeria today, it is mandatory/compulsory for a Legal Practitioner to inform his client on the importance of ADR which is further provided for in Rule 15(3)(d) of the Rules of Professional Conduct for Legal Practitioners[848].

[845]Nigeria is classified under the common law system. Nigeria had its indigenous legal system before the advent of the British colonial masters. This indigenous legal system is what is known as the "Nigerian customary laws which are rules of polite behavior or courtesy, morals norms, value systems and traditional dispute resolution techniques. Thus, the advent of the colonial masters introduced the English legal system into the existing customary laws. That accounted for dualising of the Nigerian legal system, that is, the operation of the customary laws side by side with the English legal system or the received English laws, the common law of England and the doctrines of Equity. Islamic law is considered as part of the customary laws. However, where there is a conflict between the English laws and the customary laws, English laws will prevail. See John O. Asein Introduction to Nigerian Legal System (2005) Ababa Press Ltd.

[846]Some contract of employment documents contain an Arbitration clause in which Arbitration mechanism must be applied before litigation can suffice. See also Rule 15(d) Rules of Professional Conduct for Legal Practitioners, 2007.

[847]In settlement of trade dispute, litigation via the National Industrial Court is the last option. The Act specifies steps to take. See sections 3,4,6,8 and 9 of the Trade Dispute Act, 1976. See John O. Asein, Ibid, pg 324.

[848]In his representation of his client, a lawyer, shall not fail or neglect to inform his client of the option of alternative dispute resolution mechanism before resorting to or continuing litigation on behalf of his client.

This provision clearly[849] implies that failure to comply amounts to professional misconduct. Lawyers are by this rule expected to explore any of the available ADR mechanism before resorting to litigation[850].

The provisions of section 254C (3)[851] has no doubt confirmed the position of ADR as a means of dispute resolution. This section empowers the National Industrial Court to establish an Alternative Dispute Resolution Centre[852], within the premises of the Court on matters in which jurisdiction is conferred on the Court[853]. The purpose of this is to promote industrial harmony even when issues arise between employer and employee. Since ADR most times engender a WIN-WIN situation[854]. It is imperative that its usefulness in setting industrial disputes cannot be over-emphasized.

14.2. DEFINING ALTERNATIVE DISPUTE RESOLUTION (ADR)

According to Efevwerhan. D. I.[855], Alternative dispute resolution is any means of achieving a mutually acceptable solution to disputes; agreed to by the parties without resort to the conventional court litigation. The settlement reached by the parties can be made binding by reducing it into writing, signing by them and, filing it in Court as a consent judgment.

J.A. Agabu posits that ADR refers to all the various processes of resolving disputes between parties other than the formal court system. He further argued that arbitration, contractual adjudication and other forms of third-party determination are classified as ADR options even though in these cases there is a final decision by a third party just like a decision of a court.

Notably, it can be argued that what the third party does in ADR is not really to give a final decision rather he is to bring about an agreement by parties in dispute by identifying areas of agreement and then ensure agreement in areas that are contentious[856]. The agreement reached by the parties is what is referred to as an award.

It's instructive to note that Alternative dispute resolution may and may not be court connected. The provisions of National Industrial Court of Nigeria Alternative Dispute Resolution ADR centre

[849]Rule 15(d) of the Rules of Professional Conduct for Legal Practitioners, 2007 provides. A lawyer shall represent his client within the bounds of the law and shall not fail or neglect to inform his client of the option of alternative dispute resolution mechanism before resorting to or continuing litigation on behalf of his client.
[850]See Rule 15(d) RPC, 2007
[851]The 1999 Constitution of the Federal Republic of Nigeria as amended by the Third Alternation Act, 2010
[852]See section 254C(3) Constitution of the Federal Republic of Nigeria as altered; see National Industrial Court of Nigeria Alternative Dispute Resolution (ADR) centre, Rules, 2015 B 93-109, Government Notice No 51, vol. 102 of 10th April, 2015 and National Industrial Court of Nigeria Alternative Dispute Resolution (ADR) centre Instrument, 2015, B63-92 . 102 of 8th April, 2015
[853]See section 25C(1)Constitution of the Federal Republic of Nigeria as altered
[854]Dispute Resolution through conciliation or mediation is always a win-win matter as parties in most cases may surrender some rights to each other for amicable resolution or settlement.
[855]Efevwerhan D.I. 'Principles of Civil Procedure in Nigeria (2013) snap press ltd, Enugu pg 331
[856]Contentious areas are always technical; these are where issues are joined. They require expertise of the mediators or Arbitrators for compromise to be reached.

Rules, 2015 give credence to the court's position and connection to ADR. The power to make this rule is derived from section 254C (3)[857]

14.3. TYPES OF ALTERNATIVE DISPUTE RESOLUTION

There are four basic Alternative Dispute Resolution methods namely:

1. Mediation
2. Arbitration
3. Negotiation
4. Conciliation

14.3.1. Mediation

Mediation refers to a process whereby parties to a dispute come together in confidence, with a neutral third party, in order to explore how the dispute may be resolved amicably. The neutral body called the mediator does not decide how the dispute should be settled. He merely facilitates the arrival at an amicable settlement by keeping communications by parties open[858].

It is noteworthy that it was civilization that brought about the court system; urbanization relegated the traditional mediation into the background though customary ADR is still recognized in the Nigerian Legal System[859]. This clearly shows that mediation as a means of conflicts resolution is in no way alien to Nigerians. This position was further observed by Justice Oguntade thus: 'In the pre-colonial time and before the advent of the regular court, our people (Nigerians) certainly had a simple and inexpensive way of adjudicating over disputes between them. They referred them to elders or a body set up for that purpose. The practice has over the years become strongly embedded in the system that they survive today as custom'[860].

Mediation as a means of dispute resolution is now structured such that the courts see it as alternative means of resolving dispute. There are some provisions in various state High Court Laws[861] and the recent National Industrial Court ADR Centre Instrument, 2015.

14.3.2. Arbitration

Arbitration refers to a system of dispute resolution whereby disputing parties refer the matter to a private tribunal or persons for settlement in a judicial manner. It is a private law system available only to those who agree to use it, instead of litigation[862]. Parties to an agreement may further agree

[857]1999 Constitution Ibid
[858]See Gunmi, L.H., Alternative Dispute Resolution: The High Court of the FCT Abuja Experience in Oyeyipo, et al ed., The Judicial Integrity, Independence and Reforms, (Essays in Honour of Hon Justice M.L. Uwais) Enugu, Snaap, 2006 p 19 at 27
[859]See John O. Asein, Ibid pg. 324
[860]Okpwuru v Okpokan (1998)4 NWLR (pt 90) 554 at 586
[861]See section 24 High Court Rules of Lagos State, section 29 High Court Rules of Rivers State, section 22 High Court Rules of Bornu State cap 63 Laws of Bornu state 1994.
[862]See the NKN, ADR centre instrument, vol. 2, 2015

that any dispute arising therefrom shall be settled through arbitration by one or more arbitrators. An example of this is the trade dispute settlement by the Industrial Arbitration Panel[863].

It is important to reiterate the fact that for an agreement to qualify for arbitration, it must be in writing[864]. Where an action is the subject of an arbitration agreement, the court can enforce the arbitration agreement and direct the parties to go to arbitration[865].

An arbitral award which is the final decision in arbitration is enforceable as a judgment[866]. It can also be set aside[867]. The arbitral tribunal or members of the arbitral panel, called "arbitrators" are normally made up of people knowledgeable in the field of dispute management.

14.3.3. Negotiation

This is a problem-solving process where disputing parties; two or more voluntarily discuss their differences and attempt to bargain among themselves for an amicable settlement[868]. The disputants attempt to reach a joint decision on their common concerns[869] Efevwerhan[870] states that there are two types of negotiation namely, the positional approach also called the win-lose approach; and the integrative or problem-solving or win-win approach. He explained that in the former, the parties take opposing and often dogged positions and negotiate from their vantage position. In the latter, the parties are open and ready to compromise in order to reach an amicable settlement[871]. Since the objective of Alternative Dispute Resolution is harmony after resolution of disputes, the problem-solving approach seems to engender long-lasting relationship as trust and confidence which is the fulcrum of peace and harmony are guaranteed.[872]

It must be noted that negotiation can be applicable both in civil and criminal matters. This implies that negotiation as an ADR is not restricted to civil matters only. Plea bargaining is an example of negotiation in criminal matters[873]. No doubt some statutes provides for it in Nigeria,[874] giving the accused persons the opportunity to negotiate with the prosecution. Plea bargaining was first used in Nigeria by Economic and Financial Crimes Commission (EFCC) in the trial of the former Inspector General of Police Mr. Tafa Balogun and later in the case of late Diepreye Alamieseigha, the ex-Governor of Bayelsa State. Plea bargaining has received plethora of condemnation from some Legal Practitioners and Scholars. The fact that the accused person surrenders a portion of

[863]See section 4-9 Trade Dispute Act, LFN, 2010
[864]See section 1 Arbitration and Conciliation Act cap 19, 1990 Laws of Nigeria
[865]See section 4 and 5 Ibid
[866]See section 31 and 51 Ibid
[867]Section 14 Trade Dispute Act, LFN, 2010
[868]See NICN, ADR instrument vol. 2 2015 op.cit.
[869]Halpern, A Negotiating Skills (London, Blackstone Press Ltd) 1992 pg 3.
[870]Efevwerhan, D.I. op. cit.
[871]See Efevwerhan, D.I. "Principles of Civil Procedure in Nigeria (2013) 2nd edition snaap press Nig. Ltd pg 333
[872] See Efevwerhan, D.I. op. cit.
[873]See Economic and Financial Crime Commission Act, 2004
[874]See section 13(2), Economic and Financial Crimes Commission Act, 2004

the money which he has embezzled and for which he is being tried has made some scholars[875] to describe it as "celebrity justice". The Administration of Criminal Justice Act 2015 also make express provision for it[876].

14.3.4. Conciliation

According to Obi Okoye, conciliation involves a situation where a third party known as a conciliator is obliged to use his best endeavours to bring the parties in a dispute to a voluntary settlement of their dispute[877]. The conciliator will listen to all parties. The parties will present their care. Having listened to them, he will prepare a draft term of settlement and submit same to parties for their consideration.

The arbitration and conciliation Act provide for right to settle disputes by conciliation[878]. The Act confers right to settle dispute by conciliation. It empowers the conciliator to explore opportunities for the settlement of disputes before him[879].

It is instructive to note that conciliation and mediation are used interchangeably in Nigeria even for the purpose of arbitration and Conciliation Act. As a general rule conciliation is essentially governed by the decision of the parties. It is also governed by the enabling statutes as operative in Nigeria. Types of disputes for conciliation includes, commercial disputes, this covers areas corporate disputes, franchise, agency, intellectual property, industrial and labour disputes. Family disputes as well as community and neighbourhood disputes qualify for conciliation. International disputes are equally inclusive. No doubt conciliation as an alternative dispute resolution mechanism is developing in Nigeria.

14.4. ADR PRINCIPLES

The principles of the ADR appear to be the same in all the types of the ADR mechanisms. This is a result of the fact that ADR generally, is an alternative to litigation, geared towards amicable resolution of disputes. Courts exist and are maintained by the state to provide dispute settlement services for parties[880]. It is the statutory responsibility, of the state[881] to ensure that Courts are established and staffed with qualified judges appointed to hear and determine cases brought before them. ADR is predicated primarily on the agreement of the parties to explore ADR. It follows that they have a right to go by litigation where they disagree[882].

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[875]See KehindeAdegbile 'plea Bargaining in Nigeria': Any legal foundation – online article accessed on the 10th day of January 2017, www.lawyerschronicle.comm.'The Magazine for the African lawyer.
[876]See part 28, section 270 (1) to 18, Administration of Criminal Justice Acts 2015.
[877]See A. Obi Okoye "Law in Practice in Nigeria second edition snap press Nig Ltd 2015 pg 440
[878]Section 35-55 of the Act
[879]Section 37 of the Act
[880] See section 6 of the Constitution of the Federal Republic of Nigeria, 1999 as altered
[881]See section 6 of the CFRN, 1999 as altered
[882]Section 14 Trade Dispute Act, LFN 2010

ADR is procedurally informal; Parties to Arbitration for example must have agreed to terms that the procedure will be informal and would be devoid of complexities of Court procedures in matters of litigation. The objective is to ensure the simplicity of process.

Impartial, knowledgeable and neutral persons are to serve as arbitrators, conciliators and mediator[883] since there are varied interests and field in human endeavour from which dispute may arise; it is of utmost importance that only experts knowledgeable in the subject matter and points of disputes should arbitrate or mediate. The essence of this is to ensure that a proper decision is arrived at while the third party does not have any interest in the dispute[884].

ADR can only take place if both parties agree to it. Where one of the parties elects to opt for litigation, he is at liberty to so do except there is an agreement with an arbitral clause. In such a case, the ADR or arbitration option will have to be explored. It is only where the disagreeing party is not satisfied with the award that he can challenge it and such award will no longer qualify for consent judgment[885]. Unlike mediation, a party cannot unilaterally withdraw from arbitration voluntarily.

The consensus between parties to a dispute is crucial to initiating ADR; this is because it is entirely voluntary and non-coercive as parties are free to decide whether to agree in the initiation process and the termination thereof. Sometimes ADR may be ordered by the Court. It may be statutorily recommended as in some cases, the court ordered ADR may leave both parties with no option than to resolve their dispute through ADR. For instance, the courts are duty bound to adjourn proceedings to allow for possible settlement of the dispute by the parties in marriage except the matter is of such a nature that it will not be appropriate to do so[886]. Failure to attend by any party may be to his or her or detriment as a fine may be imposed.

It is pertinent to note that where a statute prescribes a legal line of action for the determination of an action, albeit, administrative, chieftaincy or a taxation matter, the aggrieved party must exhaust all remedies in the law before going to court[887]. Although ADR is voluntary, failure to attend by any party makes the objective defeated.

14.4.1. Non-bindingness of Terms of Settlement

Settlement of disputes through ADR depends on the participation and agreement of parties involved, parties can only be persuaded to resolve their differences amicably through ADR. Where parties decide not to settle, then the matter will be resolved through litigation. However, where

[883]Section 14 Trade Dispute Act, LFN 2010, Ibid
[884]This is to avoid conflict of interest.
[885]Section 29 of ACA 1990.
[886] See section 111 Matrimonial Causes Act.
[887]See Owoseni v Faloye (2005) 14 NWLR (pt 946) 719 and Aribisala v Ogunyemi (2005) 6 NWLR (pt 921) 212

parties settle, the terms of settlement will be adopted as consent judgment of the National Industrial Court[888].

14.4.2. Confidentiality

According to Hobbs, 'confidentiality is a critical element of successful mediation. In order for the mediator, the attorneys and the clients to understand the central issues, the motivations, the pressure points and the risks of litigation, the participants must be assured the discussions cannot and will not be disclosed to others so they can talk openly…. If discussions with the mediator are not confidential and privileged, the mediation process the mediator's role and the potential for resolution are significantly diminished'[889].

In many jurisdictions, confidentiality rules are considered so important that they are both statutory and regulated by codes of conducts and ethical standards. The confidentiality of it's the ADR proceedings make it distinct. The parties are at liberty to determine who and who attend the sittings. As a matter of principle ADR proceedings are not open to the public. This is a major significant difference between court and ADR proceedings.

14.4.3. Neutrality

The hallmark of the ADR process is the neutrality of the third party; the capacity of parties to trust and repose confidence in the third party is crucial to the success of the ADR proceedings. The third party must not have any interest in any of the parties, else the objective intervention would be compromised[890]. No person shall serve as a mediator in any dispute in which that person has any financial or personal interest in the result of the mediator except with the written consent of the parties.

14.4.4 . The Parties' Settlement

ADR is generally parties centered. It confers a level of authority on the parties. In fact, the disputants are in control of the settlement as it is only attainable when parties agree to resolve their differences through the ADR process. It is on this note that fulfillment of terms of agreement becomes indispensible. Although with recent developments in the administration of Justice through ADR process, the courts may impose sanctions on parties that reject or refuse to attend the mediation process.

However, for a party to evade mediation, he has to show that mediation would have no reasonable prospect of success[891]

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[888]See Njoku v Ikechukwu (1992) 2 ECSLR 1991. See NICN ADR Centre Instrument of Rules, 2015.
[889]Hobbs, "Mediation; Confidentiality of Enforceability; Deal or no deal?" (2006) On line article available at www.mediate.com. See also Johnson "Confidentiality in Mediation (2002) 30 flast. UL Rev 489.
[890]See Rules 6(a) of the Abuja Multi-door Court House
[891]See Hasley v Milton Keynes General NHS Trust (2004) ECWA Civ. 576; (2004) 1 WLR 3002

14.5. ADR IN INDUSTRIAL/TRADE DISPUTE SETTLEMENT

Conflict is an inevitable part of everyday working life and it has been so noted by Pioneer, that "people get struck in conflict at work or a number of reasons. Conflict defines us, validates our behavior and strengthens our bonds with allies. It is very difficult to move on from conflict without compromising this identity and losing face. Yet remaining in conflicts make us lose perspective and the opportunity of self-development. It is also toxic to the person involved and those surrounding the conflict"[892].

Factors that account for industrial cum workplace dispute include conflict of interests or differential bargaining power and differences of the parties; in fact, they are catalyst for escalation of industrial disputes. It has been rightly observed by a commentator that "Those who populate the workplace today are better educated, more sophisticated, more diverse and more demanding. Getting to grips with workplace conflict inside organizations today is an increasingly important matter at both organizational and individual level[893].

The complexities of the workplace today call for a management and dispute settlement framework or model that will guarantee optimum performance. The capacity to resolve or settle industrial disputes effectively contributes to the quality of the working environment[894] and has a significant impact on the organizational performance in terms of reducing days lost, enhancing productivity and improving management/employee relations.

Since it has been noted that, ADR offers a model of conflict resolution that is less formal, cheaper and further guarantees harmonious working relationship, its importance in trade dispute settlement cannot be over-emphasized. ADR offers options where disputes are speedily and fairly resolved to the mutual satisfaction of all parties involved. It is for this reason that both public and private organizations consider incorporation of ADR into their dispute resolution procedures. It is making litigation the last resort having exhausted all ADR options. It is instructive to note that ADR offers a means of bringing industrial or work place justice to more people at lower cost and also helps to clear the backlog of cases at statutory dispute resolution institution, thus enhancing government and organizations performance in meeting its objective.

Explosion in disputes between employers and employees are said to have been occasioned by sharp increase in joblessness. The Labour Relations Commissions of the United Kingdom in its 2009 annual report state that, there are 14, 596 referrals to the Labour Relations Commission 2009 a 33% increase compared to increase compared to 2008"[895]

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[892]Pioneer 'Overcoming resistance to workplace mediation' (2009). Online article available at: www.adrgroup.co.uk.
[893]Doherty & Teague "The Essential Guide to Alternative Dispute Resolution" (IBEC, 2008) See also Berger "Employment Mediation in the Twenty First Century: Challenges in a Changing Environment" (2003) 5 U Pa Lab & Emp L 487
[894]See Seyi Shadare and Kehinde Bamiwola, The Legal Environment of Industrial Relations in Nigeria op. cit.
[895]Annual Report 2009 (Labour Relations Commission), 2010 of the United Kingdom.

The above statistics gives credence to the possibility of resolving a significant number of disputes through the use of ADR mechanisms. The benefits accruable from adoption of ADR in conflict resolution cannot be overemphasized. It engenders greater transparency within the workplace, procedural flexibility, efficiency and confidentiality which provides privacy for the parties and protection for the organization's reputation.

ADR can also offer greater sensitivity to the needs of particular workplace and their employees especially in a highly sensitive and personal dispute such as sexual harassment claims and gender-related issues. The terms of agreement under ADR may contain a wide range of novel outcomes which would not normally form part of a court decision or agreement and which may provide solutions that better suit each party's needs and divergent workplace peculiarities.

English Courts have also recognized the role of mediation in the resolution of workplace conflicts as demonstrated in the Appeal case of *Validi v Fourstead House School Trust Ltd*[896]. The Court stressed the appropriateness of mediation for resolving workplace disputes[897].

14.6. NATIONAL INDUSTRIAL COURT ALTERNATIVE DISPUTE RESOLUTION (ADR) CENTRE INSTRUMENT 2015

The Federal Government of Nigeria Official Gazette No.37, vol. 102, Lagos, dated 8th April, 2015 published the ADR Instrument that will be used by the National Industrial Court of Nigeria in settling industrial disputes[898]. The Instrument has ten articles. Article 1 provide for the applications of the Instrument which shall be primarily to ADR centre established pursuant to section 254C (3) of the 1999 Constitution of the Federal Republic of Nigeria as altered.

Article 2 established the ADR centre in the Premises of the National Industrial Court[899]. The Instrument established six ADR centres in the North-Central Zone, Abuja ADR centre in Abuja Judicial Division's North-East Zone in Gombe ADR centre in Gombe Judicial Division's North-West Zone, Kano ADR situate in Kano Judicial Division; South-East Zone, Enugu ADR situate in Enugu Judicial Division; South-South Zone, Warri ADR situate in Warri

[896](2005) ECWA Civ. 06

[897]See also McMillan Williams v Range (2004) ECWA Civ. 294

[898]The Federal Government of Nigeria also published the Centre Rules of procedure known as National Instrument Court of Nigeria ADR centre Rules, 2015. The preamble to the Rules provide, "In exercise of the powers conferred on me by section 254C (3), 254F (1) of the 1999 Constitution of the Federal Republic of Nigeria (as amended by the Third Alteration Act, 2010) and section 36 of the National Industrial Court, 2006, and Article 2 paragraph (5) of the AID centre Instrument 2015, and other powers enabling me in that on behalf; I… hereby make the following rules to govern the practice and procedure of the National Industrial Court ADR centre of the NICN. Order 1, Rule 2 of the Centre Rules provides. These rules shall apply to all proceeding referred to the ADR centre for settlement of disputes including all part-heard causes and matters in respect of steps and procedures to be further taken in such causes and matters for the attainment of a just, efficient and speedy dispensation of justice.

[899]The ADR centre within the NICN premises shall be referred to as "the centre. See Article 1 of the Instrument.

Judicial Division; South West Zone, Ibadan ADR situate in Ibadan Judicial Division[900]. The President of the court is empowered to relocate any of the centres to any of the states comprising the zone, in the interest of peace, security or any unforeseen contingency which may make the operation of the centre impossible or unsafe[901]. The centre shall be responsible for the resolution of conciliation mechanisms of the alternative dispute resolution under the supervision and control of the president of the Court[902].

Article 3 of the Instrument[903] provides for the personnel of the centre, conditions of service and organogram. Article 4 provides for the mandate and functions of the centre which shall amongst other things be the application of mediation or conciliation technique in the settlement of disputes between or amongst parties[904]. It must be pointed out that the Introduction of the ADR Instrument is to enhance and facilitate quick, efficient and equitable resolution of certain employment, labour and industrial relations disputes within the jurisdiction of the Court; to minimize, reduce, mitigate and eliminate stress, cost and delays in justice delivery by providing a standard Alternative Dispute Resolution framework for fair, efficient, fast and amicable settlement of disputes; to assist disputants in the resolution of their disputes without acrimony or bitterness[905].

Matters in which the instrument shall apply to shall be matters listed in paragraph (5) (a)-(d) of Article 4 and shall be matters in referral to the centre by the President of the Court or a Judge of the Court or by parties mutually opting to use mediation or conciliation processes for the resolution of their matter, upon the commencement of an action and joining of issues[906]. Any of the parties to a dispute may apply to the President of the Court for the resolution of the action already filed through the process of mediation or conciliation[907].

[900]See Article 2 (3) of the Instrument
[901]See Article 2 (3) (b)
[902]See Article 2 (4) (a) & (b). The providing has pure, to assign and designate or direct the assignment and designation of a Director and other staffers of the centre; receive regular updates on the overall activities of the centre, and take any action or give direction which he or she may consider appropriate or necessary for the overall effectiveness and growth of the centre to enhance fast and effective justice delivery.
[903]The Instrument here means, National Industrial Court of Nigeria, ADR Centre Instrument, 2015
[904]See Article 4 of the Instrument
[905]See Article 4 (1)-(3) of the Instrument
[906]See Article 4 (4) (a). the legal implication of this provision is that, matters for ADR centre may be referred to the Court either by the president of the Court, or a judge of the Court or parties after filing an action in the National Industrial Court of Nigeria, may upon mutual agreement decide to take the matter to the ADR centre for mediation or conciliation.
[907]See Article 4 (4) (b) of the instrument

14.6.1. Matters that Qualify for Mediation or Conciliation

The instrument provides that the centre shall have power to mediate or re-conciliate in the following subject matters in which the Court has jurisdiction as provided for in section 254C (1) (a)[908], section 254C (1) c[909], section 254C (1) (g)[910] and section 254C (1) k[911].

The instrument forbids the bringing of extraneous matter or issue not contained in the originating process filed before the Court during any of the mediation or conciliation session(s) after the issues joined in the Court have been referred to the centre[912]. The instrument[913] further provides that 'the centre shall not have power to entertain any interlocutory application[914] or grant any order or interpret any matter before it.

The ADR officers are prevented from imposing their personal opinions on the parties during mediation or conciliation[915]. Thus, the centre does not have power like the Court[916]. The National Industrial Court has power to *suo-motu* refer a pending matter or part-heard matter filed before it before the commencement of the instrument to the ADR centre for mediation or conciliation[917].

ADR instrument, 2015 has another salient advantage; this is the liberty given to any person(s) wishing to mediate or conciliation his or her dispute of the centre; to apply to the president of the Court without necessary filing a suit at the Court. This, the president of the Court can do within the provisions of the instrument and the Rules made thereto[918]. Agreements reached by the parties

[908]Section 254C (1) (a) of the CFRN, 1999 as altered are matters relating to or connected with any labour, employment, trade unions, industrial relations and matters arising from workplace, the conditions of service, including health, safety, welfare of labour, employee, worker and matter incidental thereto or connected therewith.

[909]There are matters relating to or connected with disputes arising from any strike, lock-out or any industrial action or any conduct in contemplation or in furtherance of a strike, lock-out, or any industrial action and matters connected therewith or related thereto: see also section 48 of the Trade Dispute Act, 1976 which defines strike; Tramp shipping Corporation v Greenwich Marine Inc. (1975) All E.R 898 at 890 on the deformation of strike.

[910]There are matters relating to or connected with dispute arising from payment or non-payment of salaries, wages, pensions, gratuities, allowances, benefits and any other entitlement of any employee, worker, political or public office holder, judicial officer or any civil or public servant in any part of the Federation and matters incidental thereto

[911]There are matters in which the Court has exclusive jurisdiction over under section 7 (1) (a) & (b) of the National Industrial Court Act, 2006 namely, labour, including trade unions and industrial relations; and environment and conditions of work, health, safety and welfare of labour, and matters incidental thereto

[912]See article 4 (6) of the instrument.

[913]ADR centre instrument, 2015

[914]Interlocutory application is a motion either ex-parte or notice in which an order of court is sought to do or abstain from doing any act during the pendency of the suit. The order given are appealable. Thus, the philosophical justification for preventing interlocutory application may not be unconnected with the prevention of technical delays and frivolities. It is only the Court that can entertain interlocutory applications see Article 4 sub-articles 8 (a)

[915]See Article 4 (10) of the instrument

[916]Article 4 (11) of the instrument

[917]Article 4 (15) of the instrument.

[918]See Article 4 (17) (a) of the instrument.

after mediation or conciliation may be registered as terms of settlement between the parties; this will be binding on the parties[919] such terms of settlement can be enforced as by the Court[920].

Parties have right to settle or not to settle their dispute at the ADR centre.[921] Upon the conclusion of the mediation or conciliation session(s), a report of any matter referred to the centre by the President of the Court or a Judge of the Court shall be made to the President of the Court or a Judge of the Court that made the referral[922]. Where a matter is not resolved through the ADR process, the matter shall be remitted back to the President of the Court or a Judge of the Court who made the referral within 5 working days for adjudication in accordance with the Rules of the Court[923].

It is finally submitted, with the introduction of Alternative Dispute Resolution to employment/labour dispute management cum adjudication, it is hoped that, unnecessary delay will be removed; cost of litigation will be minimized; technicalities associated with advocacy such as 'litigating the margin'[924] will be eradicated. Employment matters are matters of life and death. Such matters need speedy dispensation of justice in the interest of justice for the parties in a dispute.

14.7 **ARBITRATION AND MEDIATION ACT, (AMA) 2023[925]**

During the pendency of writing this study Pack, the thirty-five years old Arbitration and Conciliation Act (ACA), 1988 was repealed with the AMA, 2023. the essence of the amendment which repealed the old law is to unify all Arbitration and Mediation mechanisms in conformity with Arbitration and Mediation Convention and Protocols at the international level. Thus, Nigeria cannot be an island of its own when it comes to arbitration and mediation. Thus, in employment ADR procedures, the new Act, AMA 2023 is the applicable law.

[919]Article 4 (17) (b).
[920]Article 4 (17) (c); the Court here is the National Industrial Court of Nigeria.
[921]See Article 4 (22) of the instrument.
[922]See Article 4 (23) of the instrument.
[923]See Article 4 (22) of the instrument.
[924] Litigating the margin is the use of technicalities in advocacy. This includes capitalizing on forms rather than the substance. A counsel of one party can argue admissibility of a document for months, appeal the ruling on his argument if not in his favour, thereby occasioning delay in the dispensation of justice. Sometimes, typographical errors or mistakes can be made a major point of argument. Thus, the NIC Act and Rules abhor technicalities.
[925] Download the Arbitration and Mediation Act, 2023 and peruse critically.

PRACTICE QUESTIONS

i. Expatiate on the concept of Alternative Dispute Resolution

ii. Identify and discuss the types of alternative methods to dispute resolution.

iii. Alternative Dispute Resolution principles are solution-based. Expatiate

iv. Discuss the advantages of ADR over litigation.

v. Identify and discuss the salient provisions of the ADR Centre Instrument of the National Industrial Court, 2015

vi. …… is the law that repealed the ACA, 1988

a. CAMA 2020

b. ACA 2020

c. AMA 2023

d. CAMA 2023

CHAPTER FIFTEEN
INTERNATIONAL LABOUR ORGANISATION CONVENTIONS AND INTERNATIONAL INSTRUMENTS[926]

15.0. Learning Objectives

At the end of this Chapter, readers/candidates should be able to appreciate and explain the under-listed concepts and apply them to industrial relations generally.

(i) Application of international treaties in Nigeria
(ii) Conventions ratified by Nigeria
(iii) Convention 29 of 1930
(iv) Convention 87 of 1948
(v) Convention 98 of 1949
(vi) Convention 100 of 1951
(vii) Convention 105 of 1957
(viii) Convention 111 of 1958
(ix) Convention 138 of 1973
(x) Convention 155 of 1981
(xi) Convention 32 of 1932
(xii) Convention 174 of 1993
(xiii) Convention 182 of 1999
(xiv) Other international instruments

15.1. Introduction

The Nigerian Constitution being the *grundnorm,* recognizes the importance of international treaties. No country can operate in isolation. Nations are bound to have interactions as a result of international trade, joining forces together for peaceful co-existent and international relations. The Nigerian Constitution appreciates the need for Nigeria to join international organizations[927] like the United Nations, African Union, Economic Community of West Africa (ECOWAS) World Health Organization; International Labour Organization (ILO) amongst other international bodies. These bodies do gather to make international laws known as conventions or treaties: sometimes, they give directives such as protocols and declarations.

Nigeria is a member of many international organizations. These include the United Nations (UN), International Labour Organization (ILO) which was founded in 1919 as an agency of the United

[926] This chapter is an extract from the work of the commissioned Author, Kehinde Bamiwola. The work is titled "Labour Rights and Law in Nigeria.: A Practical Approach (Text under publication).

[927]See section 12 of the Constitution of the Federal Republic of Nigeria which provides that 'No treaty between the Federation and any other country shall have the force of law except to the extent to which any such treaty has been enacted into law by the National Assembly.

Nations[928], the African Union[929]. This chapter shall examine some of the international instruments vis-à-vis their relevance to employment relations.

The International Labour Organization (ILO) is the body responsible for the regulating and setting of international standards for employment/labour relations world-wide. The body (ILO) works at achieving social equality, fairness in labour practice and justice through the instrumentality of setting standards, implementing the standards and supervising its enforcement among member-states. Thus, it can be argued that achieving international labour standard is one of the ILO primary goals. The International Labour Organization (ILO) has been actively involved in seeking to achieve improved working conditions by regulating hours of work[930], preventing unemployment, protecting welfare of workers against hazards, diseases, sickness, discrimination; unfair labour practices and injuries etc. that may arise in the course of employment[931].

According to Prof. Agomo,[932] 'The International Labour Organization has been described as a unique organization world-wide founded in a tripartite structure involving government, employers and workers. Conventions are recommendations are products of deliberation at international conferences of the ILO or other International bodies. These conventions and recommendations are what constitute international labour standards. Thus, an international labour standard or best practice will promote decent work environment, freedom of association[933], respect for human dignity[934], absence of discrimination, equality of employment opportunities for men and women[935] among other things.

[928]Nigeria joined the United Nations on October 7, 1960 thus joining the International Labour Organization.
[929]Formerly known as Organization of African Union: Instrument such as the African Charter on Human and Peoples' right are vital international instrument that regulate employment relations. The African charter has been enacted as part of Nigeria municipal law in accordance with section 12 (1) of the Nigerian Constitution, 1999 as altered.
[930]See Convention 100 of 1951 on Equal remuneration
[931]See Agomo C.K. op.cit
[932]Ibid
[933]See Convention 87 & 98 on freedom of Association and Protection of the Right to Organize of 1948 and Right to organize and collective bargaining 1949 respectively.
[934]See Convention 105 of 1957 on Abolition of Forced Labour Convention and Convention 12, Elimination of the Worst Forms of Child Labour Convention of 1999; see also convention 29, Force labour convention of 1930
[935]See Kehinde H. Bamiwola "Human Rights and Employment Discrimination: A comparative examination of Equal Job Opportunities (2010) published by the International Labour Organization: www.ilo.org.

15.2. APPLICATION OF INTERNATIONAL TREATIES IN NIGERIA

It is the law in Nigeria that, before any international treaty will have the force of law; such treaty must have been ratified and domesticated[936]. This process is otherwise known as dualism[937]. The legal effect of this is that treaties once ratified, cannot be enforced directly as a local law until such treaty is enacted into law as an Act of the National Assembly[938]. However, the Third Alteration Act, 2010, which altered the 1999 Constitution,[939] has changed the law on the application of international treaties already ratified by Nigeria as far as employment matters are concerned.[940] . However, it is trite that the National Industrial Court has been given the power or jurisdiction to deal with any matter connected with or pertaining to the application of any international convention, treaty or protocol which Nigeria has ratified or not[941].

It must be noted that the applicability of the ILO standards in Nigeria and every other member State is a matter of obligations of all member states[942]. The ILO Constitution makes it clear in its provisions that, the member states should undertake that, they will within the period of one year at most from close of session of conference, bring the convention before the authority or authorities within whose competence the matter lies for domestication or enactment into municipal law[943]. It is submitted, member states including Nigeria have not been living up to expectations as far as these directives are concerned.

15.3. CONVENTIONS RATIFIED BY NIGERIA

Nigeria being a member of the International Labour Organization (ILO), has ratified thirty-eight (38) conventions out of all ILO conventions. It has been noted that, out of these conventions, only seventeen (17) are up to date. Others are archaic, and have outlived their purposes, and waiting to be revised.[944] Professor Abugu[945] has rightly observed that, out of the International Labour Organization Conventions, eight (8) are fundamental. The implication of being fundamental is

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[936] See section 12(1) of the Constitution of the Federal Republic of Nigeria, 1999 as altered. See also Akin Oyebode, 'Treaty Making and Treaty Implementation in Nigeria: An Appraisal. Ph.d dissertation submitted to the faculty of Graduate Studies, Osgood Hall Law School, Toronto, Ontario, Canada, January 1988,pg 284 cited by J.E.O Abugu, 'A Treatise on the Application of ILO Conventions in Nigeria (2009) University of Lagos Press. Pg 25.

[937]Dualism approach has two steps; the first being that the treaty must have been ratified; the second is that the National Assembly must enact the ratified treaty into law thus, making it the Act of the National Assembly. This has been done to African Charter on Human and Peoples' Rights.

[938]See J.E.O. Abugu 'A treatise on the Application of ILO Convention in Nigeria (2009) University of Lagos Press. See Abacha v Fawehimi (2000) FWLR (pt 4) 533.

[939]Constitution of the Federal Republic of Nigeria, 1999 as altered, see section 254C (2)

[940]See chapter Eight under the National Industrial Court of Nigeria

[941]Section 6 of the 3rd Alteration Act, 2010 of the Constitution of the Federal Republic of Nigeria, altering S. 254C (2) of the Constitution of the Federal Republic of Nigeria, 1999

[942] See Article 19 of the ILO Constitution.

[943]See Article 19 (5), (6) and (7) of the ILO Constitution. See also Art 26 of the Vienna convention on the law of Treatises which states that every treaty in force is binding upon the parties and it must be performed by them in good faith, UN Treaty Series Vol. 1155, p.331.

[944]J.E.O. Abuguop.cit, pg 55

[945]J.E.O. Abugu Ibid

that, all member-states of the ILO are under obligation to respect the principles contained in the instrument[946]. The fundamental conventions are:

(i) C.29 Forced labour convention 1930
(ii) C.87 Freedom of Association and Protection of the Right to Organise1948.
(iii) C.98 Right to organize and collective bargaining 1949.
(iv) C.100 Equal Remuneration Convention 1951.
(v) C.105 Abolition of Forced Labour Convention 1957.
(vi) C111 Discrimination (employment and occupation) Convention 1958.
(vii) C.138 Minimum Age Convention 1973
(viii) C.182 Elimination of the Worst Forms of Child Labour Conventions 1999.

The Eight principal cum fundamental conventions which Nigeria has ratified, shall be and examined vis-à-vis their principles and objectives and the extent to which Nigeria has been applying them[947].

15.3.1. CONVENTION 29 (C29) FORCED LABOUR CONVENTION, 1930

This convention was adopted on June 28 1930, during the 14th session of the ILO Conference in Geneva, and it came into Force on May 1, 1932. The subject matter of the convention is forced or compulsory Labour. Article 3(1) of the convention defines forced or compulsory labour as:

"All work or service which is extracted from any person under the menace of a penalty and for which the said person has not offered himself voluntarily."

The convention excludes certain types of labour such as: work of a purely military character exacted in virtue of compulsory military service; any work or service which forms parts of the normal civic obligation of the citizens of a fully self-governing country; any work or service extracted from any person as a consequence of a convention in a Court of law, provided that the said work or service is carried out under the supervision and control of a public authority and that the said person is not hired to or placed at the disposal of private individuals, companies or associations. The exceptions to this provision are:

"any work or service extracted in cases of emergency, that is to say, in the event of war or of a calamity or threatened calamity, such as fire, flood, famine, earthquake, violent epidemic or epizootic diseases, invasion by animal, insect or vegetable pests, and in general any circumstance that would endanger the existence or the well-being of the whole or part of the population;

[946]See ILO Declaration of Fundamental Principles and Right at work, 1958
[947] See J.E.O. Abugu Ibid. pp 56-61 for the table containing the ratified conventions and their dates of ratification.

minor communal services of a kind which, being performed by the members of the community in the direct interest of the said community, can therefore be considered as normal civic obligations incumbent upon the members of the community, provided that the members of the community or their direct representatives shall have the right to be consulted in regard to the need for such services".

Nigeria has codified these conventions into its constitution. Thus, the 1963, 1979 and 1999 Constitutions contained provision for fundamental right to dignity of human person[948]. In fact, the third aspect of Section 34 of the Nigeria Constitution[949] provides that:

"No person shall be required to perform forced or compulsory labour"[950].

The exception to Article 2 of the convention has also been codified in the Constitution[951].

15.3.2 . CONVENTION 87 (C87) FREEDOM OF ASSOCIATION AND PROTECTION OF THE RIGHT TO ORGANIZE, 1948

This convention was adopted on of July 9, 1948 at the 31st session of the ILO Conference in San Francisco; the subject matter of the convention is Freedom of Association and Protection of Right to Organize. It came into force on the July 4, 1950. Nigeria ratified the convention on the October 17, 1960.

The convention provides that 'workers and employers without distinction whatsoever have the right to establish and, subject to the rule of the organization concerned, to join organizations of their own choosing without previous authorization[952]; workers and employers shall have the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organize their administration and activities, and to formulate their programs[953].

It must be pointed out that this convention has been codified into the Nigerian Constitution[954]. Article 9 of this Convention specifically subjected the application of the Convention to the Armed forces and the Police to the provisions of the national law.[955] The convention contemplates the hindrance that may occur as a result of national laws as it relates to Armed forces and the police[956]. Thus, its ratification does not affect any existing law, award, custom or agreement in virtue of which members of the Armed forces and the police may enjoy any right guaranteed by the

[948]See section 34 CFRN 1999, as altered.
[949]Ibid
[950]See section 34(1) CFRN, 1999 as altered
[951] See section 34(2) CFRN, 1999 as altered
[952]See Article 2 of the convention
[953]Article 3(1) of the convention
[954]See Article 40 of the CFRN as altered.
[955]Note that section 11 of the Trade Union Act excludes the Armed forces, the police and others from joining or forming trade unions although, the provision that excludes these categories of workers contradict the Constitution on the right to freedom of association.
[956] See chapter three "The Concept of Labour Rights"

convention.[957] Although, there is another convention on the right to organize, this convention urges member states to take all necessary and appropriate measures to ensure that workers and employers may exercise freely the right to organize.[958]

15.3.3. CONVENTION 98 (C98) RIGHT TO ORGANIZE AND COLLECTIVE BARGAINING, 1949

This convention was adopted on the July 1, 1949 at the 32nd session of the ILO conference in Geneva. The subject matter of the convention is Freedom of Association, Collective Bargaining and Industrial Relation. It came into force on the July 18, 1951.

The convention provides for adequate protection against all acts of union discrimination in work places. Every worker shall enjoy the right to freedom of association and collective bargaining[959]. No workers shall be subjected to any condition in the enjoyment of his or her right to join a union or be forced to relinquish trade union membership[960]. Every worker is equally protected from being dismissed for being a member of a trade union or because of the worker's participation in union activity, outside working hours or, with the consent of the employer, within working hours[961]. The convention further provides for collective bargaining. Article 4 of the convention[962] provides:

"measures appropriate to national condition shall be taken, where necessary to, encourage and promote the full development and utilization of machinery for voluntary negotiation between employers or employers' organization and workers' organizations with a view to the regulation of the terms and conditions of employment by means of collective agreements"

The extent to which the convention shall apply is at the instance of member states and national laws[963]. Nations that have ratified the convention are at liberty to denounce it.[964]It is pertinent to state that, to some extent, Nigeria has complied with the Convention with the passage of the Trade Union Amendment Act, 2005 and more importantly, Section 40 of the Constitution of the Federal Republic of Nigeria, 1999 as altered, which guarantees freedom of association.

[957]See Article 9(2) of the convention
[958]See Article 11 of the convention and the Nigeria Trade Union Act, 1976 and the Trade Union Amendment Act, 2005 on the right to organize
[959]Article 1 of the convention
[960]See Article 1(2) (a) of the convention
[961]See Article 1(2) (b)
[962]C98 of 1949
[963]See Article 5 of the convention
[964]Article 11 of the convention

15.3.4. CONVENTION 100 (C100) EQUAL REMUNERATION 1951

This convention was adopted on June 29, 1951, at the 34th session of the ILO conference in Geneva; the subject matter of the convention is equal value. It came into force on May 23, 1953. Nigeria ratified the convention on May 8, 1974.

The Convention defines "remuneration" to include the ordinary basic or minimum wage or salary and any additional emoluments whatsoever payable directly or indirectly, whether in cash or kind, by the employer to the worker and arising out of the worker's employment[965]. The term: 'equal remuneration for men and women for work of equal value' refers to rates of remuneration established without discrimination based on sex'[966].

The Convention enjoins each member state to use means appropriate to the methods in operation for determining rates or remuneration, promote and in so far as is consistent with such methods, ensure the application to all workers of the principle of equal remuneration for men and women workers for work of equal value[967]. This principle may be applied by means of national laws or regulations, legally established or recognized machine for wage determination; collective agreements between employers and workers of a combination of these various means[968]. Each member state shall co-operate as appropriate with the employers' and workers' organizations concerned for the purpose of giving effort to the provision of the convention[969].

It may be argued to some extent that Nigeria has not complied with the convention. This author is of the opinion that, until the National Assembly passes an Act like the U. K's Equal Pay Act. United States of America's title VII of the Civil Rights Act, 1964, it appears, the application of the convention may be more honoured in theoretical framework than its practical application. Unemployment as a menacing factor to employee's bargaining power may account for different pay to employees of work/job of equal value.

15.3.5. CONVENTION 105 (C105) ABOLITION OF FORCED LABOUR CONVENTION, 1957

This convention was adopted on the 25th day of June, 1957 of the 40th session of the International Labour Organization Conference in Geneva. The subject matter is forced labour. It came into force on the 17th day of January, 1957. Nigeria ratified it on the 17th day of October, 1960.

C29 of 1930 has defined what constitutes 'forced labour'. However, C105 enjoins all state to suppress and not to make use of any form of forced or compulsory labour; as a means of political

[965]See Article 1(a) of the convention
[966]See Pollis V the New School for Social Research 132F. 3d 115 (2nd CIR 1997)
[967]See Article 2(1) of the convention
[968]See Article 2(2) of the convention
[969]See Article 4 of the convention

coercion or education or as a punishment for holding or expressing political views or views ideologically opposed to the established political, social or economic system; as a method of mobilizing and using labour for purposes of economic development, as a means of labour discipline as a punishment for having participated in strikes; as a means of racial social, national or religious discrimination[970].

The Convention enjoins each member state that ratified the convention to see to the abolition of forced or compulsory labour[971].

15.3.6. CONVENTION 111(C111) DISCRIMINATION (EMPLOYMENT AND OCCUPATION) 1958

This convention was adopted on the 25th day of June, 1958 at the 42nd session of the International Labour Organization Conference in Geneva. The subject matter is Equality of Opportunity and Treatment. It came into force on the 15th day of June, 1960. Nigeria ratified it on the 2nd day of October, 2002.

Before the Convention was ratified by Nigeria, the right against discrimination has been part of the Nigerian fundamental right protected by the constitution from the Republican Constitution of 1963; it was also provided for under the 1979 constitution and the Current Constitution of the Federal Republic of Nigeria, 1999 as altered[972].

The Convention defines the term discrimination to include: any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation; such other distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation as may be determined by the member concerned after consultation with representative employers' and workers' organizations, where such exists and with other appropriate bodies. Any distinction, exclusion or preference in respect of a particular job based on the inherent requirements thereof shall not be discrimination: For the purpose of this Convention, the term **employment** and **occupation** include access to vocational training, access to employment and to particular occupations, and the terms and conditions of employment[973].

Of importance is Article 2 of the convention, which prescribes the scope of the term discrimination not to include any distinction, exclusion or preference in respect of a particular job based on the inherent requirements. Thus, any job applicant who is refused employment based on his/her

[970]See Article 1 (a)-(e) of the C105. See also 34 of the CFRN, 1999 as altered.
[971]See Article 4 of the convention; see also section 34(2) CFRN, 1999 as altered.
[972]See section 42 CFRN, 1999 as altered
[973] See Article 1(a) & (b) of the C111, 1958

ineligibility as it relates to skill, qualification or aptitude test, cannot complain of discriminatory selection[974].

15.3.7. CONVENTION (C138) MINIMUM AGE CONVENTION, 1973

This convention was adopted on the 26th day of June, 1973 at the International Labour Organization Conference in Geneva; the subject matter is Elimination of child labour and protection of Children and Young persons. It came into force on the 19th day of June, 1976. Nigeria ratified the convention on the 2nd day of October, 2002.

The convention enjoins member states to undertake to pursue a national policy designed to ensure the effective abolition of child labour and to raise progressively the minimum age for admission to employment or work to a level consistent with the fullest physical and mental development of young persons[975]. Each member is to make a declaration as to a minimum age for admission to employment or work within its territory and on means of transport registered in its territory[976]. However, the convention puts the least minimum age at fifteen (15) years, which is presumed to be the age of completion of compulsory schooling[977].

The convention considers an unfriendly economic situation that may warrant a nation reducing age to fourteen (14)[978]. The reason for reducing the age to 14 must be given in a report on the application of the convention which must be submitted to the ILO pursuant to Article 22 of the Constitution of the International Labour Organization (ILO)[979].

15.3.8. CONVENTION 155 (C155) OCCUPATIONAL SAFETY AND HEALTH CONVENTION, 1981

This convention was adopted on the 22ndof June, 1981 at the International Labour Organization Conference in Geneva; the subject matter is Occupational Safety and Health. It came into force on the 11th day of August, 1983. Nigeria ratified the Convention on the 3rdday of May, 1994.

The convention applies to all branches of economic activity[980]. However, some branches of the economic activities may be excluded. However, that may be after consultation at the earliest possible stage with the representative organization of employers and workers concerned that the whole or part of that particular branch of economic activity such as maritime shipping or fishing,

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[974]See Article 1(2) of the C111, 1958. For detailed reading on discrimination, see this Author's work Kehinde H. Bamiwola "Human Right and Employment Discrimination": A Comparative Examination of Equal Job Opportunities (2010) published by the International Labour Organization www.ilo.org.
[975]Article 1 of the convention
[976]Article 2(1) of the Convention. This means that, a minimum age in Nation A may be different from that of Nation B. It is a function of what is declared as the minimum age.
[977]See Article 2(3) of the convention
[978]See Article 2(4) of the C138, 1973
[979]See Article 2(5) (a) & (b) of the C138, 1973.
[980] Article 1(1) of the C155 1981

in respect of which special problems of substantial nature may arise, can be excluded from the economic activity in which the Convention shall apply[981]. It is also provided that, such exclusion must be reported to the ILO pursuant to Article 22 of the ILO Constitution[982].

The Convention defines branches of economic activity to cover all branches in which workers are employed, including the public service; workers cover all employed persons including public employees; work place covers all places where workers need to be or to go by reason of their work and which are under the direct or indirect control of the employer, the term health in relation to work, indicates not merely the absence of disease or infirmity; it also includes the physical and mental elements affecting health which are directly related to safety and hygiene at work,[983] so far as reasonably practicable, the causes of hazards inherent in the working environment[984].

The policy shall take account of the under-listed main spheres of action in so far so they affect occupational safety and health and the working environment:

a. Design, testing, choice, substitution, installation, arrangement, use and maintenance of the material elements of work (workplaces, working environment, tools, machinery and equipment, chemical, physical and biological substances and agents, work processes);
b. Relationships between the material elements of work and the persons who carry out or supervise the work, and adaptation of machinery, equipment, working time, organization of work and work processes to the physical and mental capacities of the workers;
c. Training, including necessary further training, qualifications and motivations of persons involved, in one capacity or another, in the achievement of adequate levels of safety and health;
d. Communication and co-operation at the levels up to and including the national level;
e. The protection of workers and their representatives from disciplinary measures as a result of actions properly taken by them in conformity with the policy referred to in Article 4 of this Convention.

15.3.9 . Convention 32 (C32) Protections against Accidents (Dockers) Convention (Revised)

This convention was adopted on the 27th day of April, 1932 at the 16th session of the International Labour Organization Conference in Geneva. The subject matter is Dockworkers. It came into force on the 30th day of October; 1934. Nigeria ratified the Convention on the 16th day of June,

[981]See Article 1(2) of the convention
[982]Article 1 (3) of the convention
[983] Article 3 (a, b, c & e)
[984]See Article 4(2) of the convention

1961. However, the convention is now outdated. It was revised by convention 152. Thus, convention 32 is no longer open to ratification.

The aims of the convention include provision of safety for workers, proper maintenance of all docks, wharfs, quay, or similar premises which workers use for going to and from their workplaces. It is mandatory to light the shores and any dangerous breaks, corners and edges shall be adequately fenced to a height of not less than 2 feet 6 inches (75cm).

Article 3 provides for safe means of access to a quay, and such means of access shall be where practicable, the ship's accommodation ladder, a gangway or a similar construction[985].

Article 9 provides for appropriate measures to be prescribed to ensure that no hoisting machine gear, whether fixed or loose, used in connection therewith, is employed in the processes on shore or on boardship unless it is in safe working condition[986].

Article 12 of the convention provides that National laws or regulations shall prescribe precautions as may be deemed necessary to ensure proper protection of the workers, having regard to the circumstances of each case, when they have to deal with or work in proximity to goods which are in themselves, dangerous to life or health by reason either of their inherent nature of their condition of the time or work where such goods have been stowed[987].

Thus, with the alteration[988] to the Constitution of the Federal Republic of Nigeria (1999), the NIC has jurisdiction to entertain matters that bother on international conventions whether or not that law has been domesticated. Ratification of such international treaty is the only condition required[989].

15.3.10. Convention 174 (C174) Prevention of Major Industrial Accident Convention 1993

This convention was adopted on the 26th day of June, 1993 at the 80th session of the International Labour Organization Conference in Geneva. The subject matter is occupational safety. It came into force on the 3rdday of January, 1997.

The purpose of this convention is to provide for ways in which appropriate measures will be taken to prevent major accidents and also minimize the risk of major accidents and its effects. According to this convention, the responsibility of identifying major hazard installations is now that of the

[985]See Article 3 of the C32 of 1932
[986]See Article 9 of the C32 of 1932
[987]See Article 12 of the C32 of 1932
[988] See Third Alteration Act, 2010
[989] See section 254C (2) of the CFRN, 1999 as altered

employer. Whenever a major accident occurs, the employer is duty bound to inform such competent authority of the accident.

Again, Article 9 provides that employer shall establish and maintain a documented system of major hazard control. Article 10 provides that employers shall prepare a safety report based on the requirements of Article 9[990]. The report shall be prepared in case of existing major hazard installations, within a period after notification prescribed by national laws and regulation[991].

It is doubtful whether Nigeria has ratified this convention. Specifically, the Labour Standards Bill and Executive Legislative Bill, first presented to the National Assembly under Obasanjo's presidency, are yet to be passed into law. Thus, the selective approach of Nigeria to the adoption of international conventions that bother on international best practices shows lack of political will to develop and reform our labour laws and practices.

15.3.11. Convention 182 (C182) Elimination of the Worst Forms Of Child Labour, 1999

This convention was adopted on the 17th day of June, 1999 at the 87th session of the International Labour Organization Conference in Geneva. The subject matter of the convention is elimination of child labour and protection of children and young persons. It came into force on the 19th day of November, 2000. Nigeria ratified the Convention on the 2nd day of October, 2002. It is one of the fundamental conventions of the ILO.

A child is considered to include all persons under the age of 18 years. It further states the worst forms of child labour to include:

(a) All forms of slavery or practices similar to slavery such as the sale and trafficking of children, debt bondage and serfdom and forced or compulsory labour, including forced or compulsory recruitment of children for use in armed conflict[992].
(b) The use, procuring or offering of a child for prostitution, for the production of pornography for pornographic performance[993].
(c) The use, procuring or offering of a child for illicit activities in particular for the production and trafficking of drugs as defined in relevant international treaties[994].
(d) Work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children[995].

[990] See Article 9 of the C174, 1993
[991]See Article 10 of the C174, 1993
[992]Article 3(a) of the C182, 1999
[993]Article 3(b) of the C182, 1999
[994]Article 3(c) of the C182, 1999
[995]Article 3(d) of the C182, 1999

It is mandatory for each state that ratifies the conventions to take immediate and effective measures to secure the prohibition and elimination of the worst form of child labour as a matter of urgency[996]. The types of work described under Article 3(d) of the convention shall be determined by the national laws or regulations or by competent authority of each state that ratifies the convention after consultation with the organizations of employers and workers concerned, taking into consideration relevant International standards[997]. Education is seen as a powerful tool in eliminating child labour; thus, each state that ratifies the convention must ensure that children have access to free basic education, and, wherever possible and appropriate, vocational training for all children removed from the worst forms of child labour[998].

15.4. OTHER INTERNATIONAL INSTRUMENTS

15.4.1. Universal Declaration of Fundamental Human Rights (UDHR), 1948

The United Nations General Assembly adopted this instrument on the 10th day of December, 1948 and proclaimed it as Universal Declaration of Human Rights. The instrument recognizes the inherent dignity and of the equal and inalienable rights of all members of the human family, as the foundation of freedom, justice and peace in the world[999]. Nigeria ratified the instrument immediately after independence.

There are salient provisions of the instrument which protect labour rights generally. Article 4 of the instrument prohibits slavery and servitude. Article 22 provides for right to social security. Article 23(1) provides for right to work and free choice of employment; Article 23(2) guarantees every worker's right to equal pay for equal work; worthy of note is the provision for just and favourable remuneration ensuring an existence worthy of human dignity[1000]. Employers' and workers' rights to form and join trade unions are guaranteed by the instrument[1001].

It must be further clarified that, the right to rest and leisure, limitation of working hours and periodic holidays with pay is provided for in the instrument[1002]. Among other things that are covered by the provisions of the instrument are right to non-discrimination[1003]; right to an effective remedy by the competent national tribunals for acts violating the fundamental rights of every person[1004]

[996]Article 1 of the convention
[997]See Article 4 of the convention
[998]See Article 7(a)-(e) of the C182, 1999
[999]See the preamble to the UDHR, 1948
[1000]See Article 23(3) of the instrument
[1001]See Article23(4)
[1002]Article 24 to the UDHR, 1948
[1003]Article 21 to the UDHR, 1948
[1004]Article 8 of the instrument

15.4.2. International Covenant on Civil and Political Rights (ICCPR)

This instrument also contains provisions that are related to labour and social protection. It provides against slavery, servitude and forced labour[1005]; right to form and join trade unions[1006]; General principles of equality is provided for in the instrument. Thus, men and women are equal as far as labour benefits are concerned[1007]. The general principle of equality under Article 26 of the instrument covers cases of discrimination in the work place or discriminatory recruitment. Every person in a ratified nation has right to effective remedy when the rights are infringed[1008].

15.4.3. International Covenant on Economic, Social and Cultural Rights (ICESCR)

This instrument provides for right to work and freedom of employment[1009]. It further guarantees right to just and favourable conditions of work including pay for work of equal value; wages allowing a decent living; safe and healthy working conditions; rest, leisure, limitation of working hours, periodic holidays with pay[1010].

Other rights that are provided for in the International Covenant on Economic, Social and Cultural Rights include freedom of association and right to strike[1011]; right to social security and social insurance[1012]; protection of family and maternity benefits[1013]; and right to health[1014].

15.4.4 . African Charter on Human and Peoples' Rights (ACHPR)

The African Charter on Human and Peoples Right (ACHPR) came into being after the General Assembly of the Organization of African Unity (now African Union) met in 1979 and adopted a resolution for a committee to be set-up to draft an instrument on human rights with principles that resemble the already adopted human rights instruments in Europe and America. The charter was later adopted in 1981 and came into force on 21st day of October 1986. Nigeria ratified the charter on the 22nd day of July, 1983.

The Charter is primarily adopted for the promotion and protection of human rights in all the countries in the then Organization of African Unity. Almost all African countries here ratified the instrument except few which include South Sudan, Morocco etc.

The Charter protects labour rights. Article 15 of the African charter provides that every individual shall have the right to work under equitable and satisfactory conditions and shall receive equal pay

[1005]See Article 8(3) of the instrument
[1006]Article 22
[1007]See Article 26. However, some special labour benefits may not be enjoyed by both men and women for differential factors. These include maternity leave, exclusion of women from underground works etc.
[1008]See Article 2(3) (b) of the ICCPR
[1009]Article 6, International Convention on Economic Social and Cultural Rights (ICESCR)
[1010]See Article 7 of the ICESCR
[1011]Article 8 of the ICESCR
[1012]Article 9 of the ICESCR
[1013]Article 10 of the ICESCR
[1014]Article 12 of the ICESCR

for equal work[1015]. The instrument also provides for the right of workers to form or join trade unions of their choosing[1016].

The African Charter on Human and peoples' right mandates the member states to recognize the rights, duties and freedom enshrined in the charter. Each member state is to adopt legislative or other measures to give effect to the provisions of the Charter[1017].

It is concluded that, even if, right to work, right to strike, right to collective bargaining and many more rights are not expressly provided for by the chapter IV of the Nigerian Constitution, it is logically legal that these rights are enforceable when international instruments already ratified by Nigeria are cited, relied on and sought to be enforced by the National Industrial Court. It is the view of this commissioned Author that, the provisions of these international instruments and the rights contained therein shall be enforced successfully.[1018]

[1015]See article 15 of the ACHPR, 1981
[1016]See Article 10 of the ACHPR, 1981
[1017]See Article 1 of the ACHPR, 1981
[1018] This position is supported by section 254C (2) of the Constitution of the Federal Republic of Nigeria, 1999 as altered which is an improvement cum alteration introduced by the Third Alteration Act, 2010. Read chapter three and eight of this book, for detailed clarifications on the concept of Labour rights and the power of the National Industrial Court, respectively.

PRACTICE QUESTIONS

1. Discuss the concept of "dualism" to the application of international treaties in Nigeria
2. Forced labour is sternly frowned at internationally. Discuss, applying the relevant ILO Conventions.
3. Freedom of association is for workers and employers alike. Discuss this in line with the relevant ILO Conventions on freedom of association.
4. The protection of employees' rights is and should remain paramount to employers. International instruments back this position. Discuss.
5. Identify the ILO Conventions that address:
    i. Wage discrimination
    ii. Sexual harassment.
    iii. Child labour
    iv. Freedom of association
    v. Voluntarism
    vi. Collective bargaining.

NOTE TO LANGUAGE EDITORS

Kindly watch out for the legalese that may not follow the rule of grammar. Certain words are esoteric and have their foundations in *Latin.* For example, lawyers are comfortable with '**dependant'** and not '**dependent'**, '**defence**' and not '**defense**' etc.

There are quotations that are directly from statutes or judicial pronouncements, kindly avoid fragmenting the sentences or clauses or phrases.

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APPENDIX