A **WORKSHOP PAPER PRESENTATION**

ON

OUTSOURCING PRACTICE AND RIGHTS AT WORK

PRESENTED BY

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AT

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I must thank the organizers for seeing me fit to present this discussion paper at this year's Workshop on "Achieving Decent Work in Third Party Employment: The Role of Stakeholders."

1.0 Introduction

It is traditional to treat individual employment relations from the common law standpoint of freedom of contract and non-interference. Today, there is a paradigm shift from this traditional approach.

In drafting employment contracts, it is now important to reflect ILO's concept of ''decent work''. This is a concept that 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.

It is from this standpoint we shall examine the concept of outsourcing and rights at work.

1.1 The Concept of Outsourcing:

Outsourcing means the practice of having certain job functions done outside a company instead of having an in-house department or employees handle them.

It is simply a business practice in which a company hires another company or an individual to perform tasks or provide services that had hitherto been done or provided by the company's own employees. Outsourcing has become a major trend in human resources over the past decade.

1.2 Regulatory Framework for Outsourcing in Nigeria:

In Nigeria, outsourcing finds statutory expression in Sections 23, 24, 25 and 71 of the Labour Act.

The Oil and Gas Guidelines amongst others, provide that the jobs on the organogram of companies in the sector must be occupied by permanent employees of the companies and restricts outsourcing to non-core business of the companies except for proven short-term projects.

There also exists **code of conduct for PEA's 2012** which was developed jointly by the **HUCAPAN**, an **association of private employment agencies** in Nigeria, **NECA, Federal Ministry of Labour and Employment and ILO.** The code sets out principles that guide practitioners in private employment industry.

Practitioners are therefore expected to respect, observe and run their business in such a way that enhances consistency, fairness, transparency, accountabilities and diversity in recruitment practices.

Furthermore, the **National Industrial Court (NIC)** which has exclusive jurisdiction to hear and determine labour and employment related disputes has recently begun to develop some principles of law applicable to outsourcing and other ''disguised employment relationships''

In addition, there is also the **''Guidelines for the Regulation of Agent Banking and Agent Banking Relationships''** in Nigeria issued by the **CBN** in 2013. **CBN** assess the adequacy and controls of outsourcing activities through regular audits.

1.3 Some of the benefits and short-comings of outsourcing are mentioned succinctly below:

- Cost –cutting measure
- Access to global talent pool
- Ability to tap into a new knowledge base without training employees
- You can focus on core areas
- Access to better technology
- Flexibility in staffing
- Reduce labour/project costs

Short-comings includes:

- Lost of control over business process

If outsourced personnel are working remotely, monitoring them could take time and effort.

- Concerns on confidentiality and intellectual property
- Quality and turnaround time issue
- Job loss
- Disparity in the pay of permanent and outsourced worker doing same job may lead to disloyalty, non-chalant attitude.

2.0 Rights at Work

The orthodoxy has always been to view employment/labour law from the prism of employee rights and hence duties of the employer. The intention of the writer here is to look at employers' rights too.

The rights and duties of the parties at work are primarily found in the contract of employment itself where written, or established by evidence where oral.

However, regardless of the express terms, implied terms to a large extent, determine the obligations of the parties.

'Right' connotes a corresponding duty or obligation. Duties owed by one party are rights to the other party in a contract of employment.

2.1 Employer's Rights at Work: These include:

(i) It is the duty of the employee to obey all reasonable and lawful orders of his employer

- A servant repudiates the contract of service if he wilfully disobeys the lawful and reasonable orders of his master.

Reasonable and lawful order depends on:

- terms and conditions of the employment.
- the nature of work ordered to be done.
- the time and place at which the work is to be done.

Unreasonable and unlawful order, examples:

- An order which exposes the health or life of the employee to danger.
- An order which will involve an employee in doing an unlawful act.
- An order which is against public policy.

(i) Duty to render faithful service (duty of fidelity)

- Employee is to serve in good faith and honesty. In the case of ***Robb v Green,*** an employee secretly copied from his employer's order book a list of names and addresses of the customers which he intended to use for his benefits after he had left the employer's service. The court held that the employee put himself in a position where his personal interest was in conflict with that of his employer
- Accepting bribes, making secret profits or commission are acts that constitute breach of duty of faithful service.

- **Does engaging in spare-time work by the employee constitute a breach of the duty of faithful service?**

(iii) Duty of Care and Skills

- The employee is impliedly under an obligation to exhibit required skill for the particular job he accepted to undertake.

(iv)Other Rights of the Employer at Work include:

- Right to manage affairs and reorganize the organisation e.g. technology upgrading, installation of labour saving machinery, physical/geographical restructuring, expansion and diversification, mergers and acquisitions, right to change the conditions of services etc.
- In ***Mbachu v AIRBDA,*** It was held that an employer can at his discretion prune the schedule of duties of an employee and the employee cannot preclude the employer from doing so.

(v) Right to post or transfer an employee e.g. from one branch to another.

- In ***shell pet dev. co v. Nwaka,*** the court held that a third party cannot foist on an employer a person who should occupy a particular position.

(vi) Right to promote an employee to a higher grade.

- In ***Abenga v Benue Judicial Service Commission,*** the court held that promotion of an employee is neither automatic nor as of right.

However, the court in ***Abdulrahman Yetunde Mariam v University of Ilorin Teaching Hospital Management Board*** & Or held that a vindictive denial of promotion amount to unfair labour practice.

(vii) Right to discipline: management prerogative

In ***SPDC v Omu***, It was held that it is a disruption of an ordinary employer's business to fetter him with an injunction not to discipline his servant or suspend him with or without pay.

- Where discipline or suspension is vindictive however, it would amount to unfair labour practice.

Employee's Rights at Work

The Rights and obligations of the parties are reciprocal in nature. While the employee owes the employer the duties of obedience, fidelity and care and skill etc, the employer owes the employee some reciprocal duties. These are examined below:

(i) Duty to pay remuneration:

It is the right of the employee to receive salary or wages as determined by the letter of appointment.

In ***Browning & ors V Crumlin Valley***, it was held that once the duty to pay wages and salary exists, the employer must continue to pay same to worker who is ready and willing to work whether or not work is provided for the employee.

Duty to provide work?

Section 17 of the Labour Act provides that every employer shall provide work suitable to the worker's capacity every day(except rest days and public holidays) save where there is temporary emergency beyond the employer's control e,g. flooding, shortage of water, electricity power, breakdown, severe damage to machinery, closure for repairs etc.

Exceptions:

- Where opportunity for actual work is of the essence of the contract of employment
- Contract of apprenticeship; need to be trained or be instructed in the trade or skill or employment in which he is apprenticed.
- Contract of employment of artistes where the amount of work done increase the publicity and exposure required for further advancement.

(ii) Duty to provide Testimonial or Reference

(iii) Duty to provide indemnity:

An employee is entitled to an indemnity from the employer in respect of expenses reasonably incurred whilst executing his duties.

(iv) Employer duty of care: employee right to refuse unsafe work.

This is the most important duty owed by an employer to his employees.

It is the duty of the employer to take reasonable care for the safety of its employees.

(v) Right to Appointment Letter and Employee Handbook:

In ***Mobil Producing (Nig.) Unltd & Or v Udo***, It was held that employers are mandated by **Section 7 of the Labour Act** to give to their employees written statements of particulars of the terms and conditions of their employment.

Other employee Rights include:

(vi)Right to be free from discrimination and harassment of all types.
(vii)Right to fair wages for work performed.
(viii)Right to reasonable accommodation for disabilities.
(ix)Freedom of Association and the right to Collective Bargaining.

(vi) Elimination of forced or compulsory labour.

(vii) Mandatory Contributory pension Scheme in which monthly contributions of the employer and employee are remitted to a PFA chosen by the employee.

(viii) Right to dignity of human person.

The Constitution of the Federal Republic of Nigeria (Third Alteration) Act, 2010: Era of legal Activism

- The Third Alteration has embraced progressive international labour standards, thereby carrying a new order as far as employer/employee relationship is concerned.
- **Section 7(6)** of its enabling legislation, grants **NIC** wide powers to apply international best practices in determining the scope and nuances of labour relations.
- **Section 254C(1)** of the Act Confers on **NIC** exclusive jurisdiction to the exclusion of any other court over labour/employment matters. The peculiarity of this revolution saw the **NIC** having the exclusive jurisdiction to adjudicate on labour/Employment law matters in a progressive manner without any hindrance having been so empowered by the Constitution.

- **Section 254(c)(2)** empowers the **NIC** to apply any international Labour Convention ratified by Nigeria but not yet domesticated as required by **Section 12 of the 1999 Constitution.** This is revolutionary in nature.

Application of International Labour Standards:

- **In Ejieke Maduka V Microsoft Nigeria Limited & Ors, NIC** held that sexual harassment amounts to a breach of an employee's fundamental right to dignity of human person.
- The **NIC** has decided that contrary to common law principles in termination and dismissal, an employer must provide reasons for the termination or dismissal of an employee. In **PENGASSAN V Schlumberger Anadrill Nigeria Limited,** the court said that it is no longer fashionable in industrial relations law and practice to terminate an employment relationship without adducing any valid reason for such termination.

  The **NIC** has also taken the revolution a stage further by making termination or dismissal for trade union activities a ground for reinstatement. This supports freedom of association.

- An aggrieved employee can now make claim where sexually harassed for breach of fundamental rights. What constitutes sexual harassment includes quid, pro quo, physical, verbal/non – verbal.
- Vindictive suspension, termination/dismissal or promotion will be struck down by the **NIC.** In the case of **Folarin Oreka Maiya V the Incorporated Trustees of Clinton health Access Initiative, NIC** awarded one year's gross full pay as damages.
- **NIC** has held that compulsory retirement can only emanate from the employee. When an employer compels or induces an employee to "retire voluntarily", it may either amount to compulsory retirement or constructive dismissal. In **Ebere Ukoji V Standard Alliance Life Assurance Co Ltd, NIC** construes constructive dismissal to include where the employee is coerced, lured or otherwise influenced to hand in his resignation.
- As held in **kelvin Nwaigwe V Fidelity Bank Plc,** there is now an implied duty in the contract of employment for employee to provide work reference to any departing employee which must be true, accurate, fair and not misleading. Anything short of this could result in the employer being liable either in contract or in tort.

- It is heartwarming that as held in **SKYE Bank Plc V Ananem** that the Court of Appeal now has the jurisdiction to hear all appeals from the **NIC**. This is a radical departure from the earlier position of the law wherein the Court of Appeal was restricted to questions on fundamental rights from the **NIC.**

Conclusion

It is important that employers, employees and other stakeholders involved in employment relations understand the changing trends and set up parameters and creative legal solutions that protect the interest of all parties involved.

Labour/Employment Law regime of Nigeria, much that was desired has come to play. It then behoves us, employers and employees and clients to be abreast of these extant developments and to seek to uphold and protect them. Employee contracts, employee handbooks, outsourcing agreements, workplace ethics and standards should therefore reflect current position of Labour/Employment Law and international best practices.