



THE COVID-19 PANDEMIC ~ SOME INCIDENTAL LABOUR ISSUES

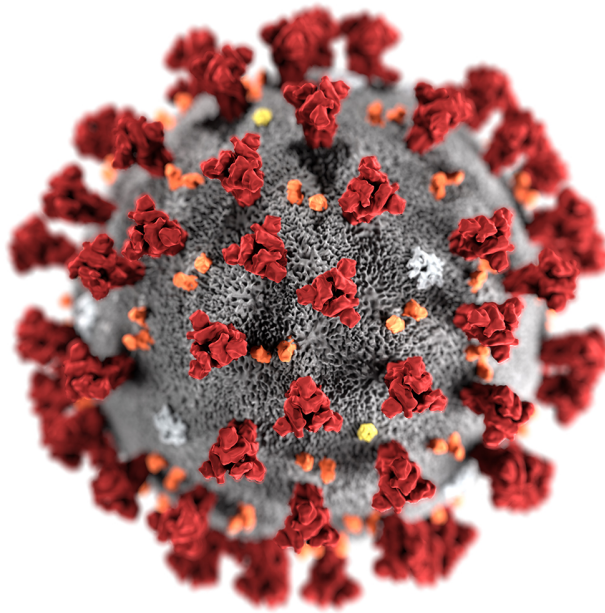


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Introduction

The World Health Organization (WHO) on 11 March 2020 declared COVID-19 a global pandemic owing to the fact that it has universally become a threatening illness affecting over 110 countries in the world and continuously spreading at a geometric rate.

In January 2020, the agency had termed it a 'public health emergency of international concern'. Accordingly, Dr. Tedros Adhanom Ghebreyesus, the Director-General of WHO, stated that '... it is not just a public health crisis; it is a crisis that will touch every sector'. The Director General's statement illuminates the fact that the pandemic is not only a threat to the physical health of individuals or the Health sector, but a Socio-Economic drawback that will have ramifying effects on the Economic, Social, Financial, and Commercial sectors in various countries across the globe. Consequently, it follows that the effects of the pandemic will invariably be felt in the global labour market and will invariably affect the stability and progression of the aforementioned sectors in every country affected by the virus.

The severity of the negative impact of COVID-19 on national and international organisations cannot be overemphasized given that it currently affects and will continue to affect all aspects of daily life, including travel, trade, tourism, education, food supplies, and financial markets to mention a few. To ameliorate the devastating impact of the COVID-19 pandemic on businesses, workers, customers, and the public, it is very crucial for all employers to set up a business contingency plan for this trying period. Already, global supply chains have been disrupted by the pandemic, which has led to reduced manufacturing and in most cases, outright closure of factories and some service industries. Thus, the risk of workers in jobs linked to the global economy being forced to work part-time for lesser or no income, or being faced with outright termination of employment on grounds of redundancy or frustration of contract is imminent.

COVID-19 Pandemic In Nigeria – The Lockdown Directive Of The Government And Impact On Labour

This Article is pivoted around the influence of the Coronavirus and its unforeseen, yet negative effects on employment, commercial and labour relations while simultaneously highlighting possible solutions to probing issues /questions likely to arise as a result of the crisis.

Consequent upon the continuous spread of the virus in the country and in an attempt to stem the tide, the President of the Federal Republic of Nigeria, President Muhammadu Buhari on 28 March 2020 ordered the lockdown of all businesses in some of Nigeria’s major cities (Lagos, Abuja and Ogun States). Ancillary to this lock down was the restriction of movement for an initial period of 14 days, with the possibility of an extension if the infection was not contained within the initial period of the lockdown. This order however, exempted certain providers of essential services including hospitals, healthcare facilities, military, key financial providers such as Central Bank of Nigeria, skeletal services for commercial banks, Gas and energy stations, etc.

Where The Employer Under This Exemption Decides To Keep Its Staff At The Workplace; Does The Responsibility Of The Safety Of Employees Shift To The Government?

This question is answered in the negative. This is because, according to the provisions of the Labour Act and Factories Act LFN 2004, an Employer has the primary duty of care to provide a safe working environment and the onus of ensuring safety in the workplace of all its employees continues to rest on the Employer. Therefore, employers under these fields must ensure strict adherence to regulations on health and workplace safety as well as preventive measures such as disinfecting the office environment, ensuring social distancing and exceptional hygiene routine during these times.

The aforementioned position is not totally different from what would be legally recommended to communities and States where the government has not instituted a complete lockdown. If employers must request that their employees continue to report to work or where it is necessary for the employees to still be at work amidst the Covid-19 Pandemic, the duties of Employers should include but not limited to:

- Keeping everyone updated on actions being taken to reduce risk of exposure in the workplace;
- Protecting workers in the workplace in line with WHO recommendations and guidance;
- Verifying every employee's contact numbers and emergency contact details;
- In line with the Labour Act, employers would have to provide work for every worker who is fit and able to work¹ so as to avoid unfair dismissal or redundancy of staff;
- Sensitizing staff on the symptoms to look out for and the procedure for reporting a suspected case in the workplace;
- Providing hand sanitizers, gloves, facemasks and tissues for staff, and encourage staff to use them².

The COVID-19 Pandemic: Preserving The Employer And Employee Relationship

Whether complying with the government directive of a lockdown or merely shutting down the office space to prevent contagion, many Nigerian businesses and organizations have devised an approach that affords staff the opportunity to work remotely. This 'work-from-home' approach is tangibly a win-win situation for both employers and employees in the duration of the lockdown or the persistence of the pandemic. This approach ensures employee's continuous output and productivity via the use of various communication media (mostly virtual and online), and stalls to a large extent the layoff/termination of the employment of the employees or disruption of services to existing and potential clients/customers.

Nevertheless, employers during this challenging period must also be equipped with a business contingency/continuity plan to push productivity. Such business contingency plan should include ease of Internet access plans for employees, interactions with staff, collective bargaining with employees (trade unions) to arrive at alternative work strategies and concessions. Such interactions and considerations (for collective bargaining) in this context could include:

¹ Section 17 Labour Act 2004

² <https://www.gov.uk/government/publications/guidance-to-employers-and-businesses-about-covid-19/guidance-for-employers-and-businesses-on-coronavirus-covid-19> accessed on April 5,2020

- Securing adequate safety equipment in the office;
- Working remotely;
- Reducing working hours;
- Establishing administrative bonus systems for first responders who are forced to work from the office space;
- Granting administrative paid leave/sick leave without medical verification due to illness, or for COVID-19 or flu-like symptoms;
- Altered shift and vacation schedules;
- Telecom/virtual task working schedules;
- Salary/wage regulation or adjustment;
- Review of HR processes and documentation;
- Declaration of redundancy and frustration of the contract of employment;
- Implementation of employee health insurance policies.

The above, if considered will, to a large extent, create a balance in the relationship between employers and the employees amidst the incidental issues that may arise during and after this global pandemic.

Whether An Employer Can Terminate The Contract Of Employment Relying On The Doctrine Of Frustration Or The Clause Of Force Majeure Where It Exists In The Contract

It is pertinent to understand what the doctrine of frustration entails to be able to assert whether it is applicable to a contract of employment. The Supreme Court in the decided case of *AG Cross River State V. AG Federation & Anor*³, defined the doctrine of frustration as the premature determination of an agreement between parties, lawfully entered into and which is in the course of operation at the time of its premature determination, owing to the occurrence of an intervening event or change of circumstances so fundamental as to be regarded by law as both striking at the root of the agreement and entirely beyond what was contemplated by the parties when they entered into the agreement.

It is not in doubt that a contract can be discharged by the doctrine of frustration. This position was reiterated by the Supreme Court when it held that a valid contract between parties may be discharged in one of four ways known to law, namely: a) by performance b) by express agreement c) **by the**

³ (2012) LPELR-SC.250/2009

doctrine of frustration; or d) by breach⁴. Frustration occurs where the court recognises that without the default of either of the parties, the contractual obligation is incapable of performance.

For the doctrine of frustration to apply to a contract, there must have occurred an event, which significantly changes the nature of contractual rights of the parties that it would be unjust to expect the parties to perform those rights. The next question that comes to mind is whether the outbreak of the Corona Virus Pandemic is capable of frustrating a contract of employment. To answer this question, it is important to look into the decision of the court in the decided case of *AG Cross River State V. AG Federation & Anor*⁵, where the court held that the doctrine of frustration of contract applies in all categories of contract. It is therefore safe to conclude that if the pandemic persists, the doctrine of frustration can operate to enable an employer terminate a contract of employment provided the conditions mentioned above are satisfied.

In another case, the Court of Appeal⁶ outlined examples of situations that can frustrate a contract. The Court held that the doctrine of frustration has been restricted to (a) situations where the supervening event destroys a fundamental assumption; and (b) **where force majeure clauses are drafted into the contract**.

In many jurisdictions such as England and Nigeria (being common law countries), Force Majeure is a creation of the contract; this means that the parties must have included it in their contract. Where the parties do not make provision for it in their contract, they cannot rely on it. In some other jurisdictions, the Force Majeure is a general legal concept and the courts can declare that a particular event such as the COVID-19 is a Force Majeure. *Force Majeure* translates literally to '*superior strength*', and it refers to unforeseen or unavoidable circumstances, which are out of the control of one or both of the parties and make it objectively impossible for one or both of the parties to perform their obligations under the contract. It is referred to as an '*Act of God*'.

Where a Force Majeure clause is included in a contract, it excuses the parties from performing their obligations under the contract as a result of the unforeseen circumstance.

⁴ *Adedeji v. Obajimi (2018) LPELR-SC.154/2009*

⁵ (Supra)

⁶ *PHCN & Anor v. Atlas Projects Ltd (2017) LPELR-CA/YL/42/2016*

From the definitions above, the outbreak of COVID-19 can indeed be seen as a Force Majeure, which frustrates the performance of the contract. Where a party to a contract wishes to rely on the principle of Force Majeure, in order to terminate a contract, such a party must establish to the satisfaction of the Court the following:

- a. That the principle of Force Majeure is an express term in the contract;
- b. That his inability to perform the contract is as a result of the force Majeure (a circumstance beyond his control);
- c. That if not for the circumstance(s), he is willing and capable to discharge his obligations.

The effect of the application of this principle of Force Majeure is that the party relying on it is relieved of the liability of his inability to perform his obligations in a contract. Nevertheless, where the contract does not contain a Force Majeure clause, the party may rely on the common law doctrine of frustration.

Conclusion

In conclusion, it is recommended for firms, companies, businesses and organizations during this pandemic to draw up an administrative framework highlighting a risk assessment plan and a business contingency plan which will suggest alternative means to foster productivity of employees and successfully manoeuvre national and international restrictions meted out as a result of the COVID-19 pandemic. It is also important that business owners, employees and consumers are aware of their rights under the contracts which they have entered into so they are well prepared when confronted by the inability to perform their obligations under the contract as a result of the COVID-19 pandemic.

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