
A Newsletter on Labour Law and Emerging Trends



Perchstone & Graeys
SOLICITORS, ADVOCATES & ARBITRATORS

AN EMPLOYER'S RIGHT TO RECRUIT

We all remember the basic tenets of the law of contract: offer, acceptance, consideration and the intention to create legal relations. Then the proviso called “*an invitation to treat*”. Bearing in mind that a relationship between an employer and employee is governed by an employment contract (supported by other documents), the question is, to what extent do these tenets apply, bearing in mind the ‘*unique*’ nature of an employer/employee relationship?

An example is the longstanding position of law that an employer has the right to or not to recruit an applicant. Thus, considering the usual route embarked upon in a recruitment process, when can it be said that a legal contract has been created? Upon accepting the position? Or upon resumption of duties? The recently decided case of **Akande v. Lilygate Nigeria Limited** – *Suit No. NICN/LA/209/2016* – draws the fine line in this regard.

FACTS

Pursuant to a job vacancy advertisement by Lilygate Nigeria Limited (Lilygate), Mr. Akande applied for a position with the company. At the time he submitted his application, Mr. Akande was in the employment of Golden Tulip Hotels. He successfully participated in the rigorous interview process and was issued a letter of offer of employment dated October 29, 2015; which he accepted on October 30, 2015. With this newly secured employment, Mr. Akande resigned from the Golden Tulip and in line with the new contract, resumed with Lilygate on November 23, 2015. On resumption, he was informed that Lilygate had changed its mind regarding his employment; he was subsequently issued a rejection letter dated November 26, 2015, withdrawing same.

Aggrieved, Mr. Akande instituted an action claiming, amongst other things, the sum of N5, 000,000 (five million Naira) as compensation for loss of jobs and earnings, and unfair labour practice. Lilygate argued in its final address that the offer letter was simply an invitation to treat, which was not binding on it; the letter was simply subject to certain terms and conditions (reference checks, medical examination), to which Mr Akande agreed to as opposed to an offer. Lilygate also argued that the communication between its Human Resources Manager and Mr. Akande had no binding effect on it. Additionally, the said rejection letter issued to Mr. Akande only advised him of the outcome of his interview, which was that he, Mr. Akande, was not recruited. Mr. Akande did not call any witnesses.

FINDING/DECISION

In delivering its judgment, the National Industrial Court (NIC) found that:

- I. Lilygate, through its Human Resources Manager, had indeed informed Mr. Akande via email, of his desire to employ him as a cost controller, with an offer letter attached for execution.

2. The said email was acknowledged by Mr. Akande, following which he forwarded the executed offer letter to the same Human Resources Manager. In the NIC's view, the moment the offer letter was issued by Lilygate and accepted by Mr. Akande, a valid and binding contract of employment came into force, and the fact that it contained conditions to be fulfilled subsequently did not make it any less valid.

The NIC rejected Lilygate's argument that the acts and correspondence of its Human Resources Manager cannot impose a duty and/or liability on it, viewing same as wild and preposterous, as it was unsubstantiated. The NIC held that the contract in issue generated an expectation interest on Mr. Akande's part, which he relied on and acted upon when he resigned from his prior employment to take up the employment offered. If not for the offer of employment, which was accepted, Mr. Akande would not have resigned from his previous employment. Therefore, *in relying on Lilygate's promise of employment, Mr. Akande acted detrimentally and is entitled to compensation.*

Having found that Mr. Akande had proved his case, the NIC ordered Lilygate to pay him N5, 000,000 (five million Naira) as compensation for loss of job and earnings and unfair labour practice, the cost of the suit (N300, 000; three hundred thousand Naira), and interest on the aforesaid sums (10% per annum until fully paid).

COMMENTS

The case under review defines the line between an employer's right to recruit, the principles of an employment contract and the concept of unfair labour practice. This illuminating decision stresses against abuse of the common law right to hire and fire to the detriment of the job-seeker and/or employee. It can be said to be a product of the current disposition of the NIC in upholding international best practices with regards to employment law, following from the new requirement for employers to give cogent reasons for the termination of an employment contract, particularly to enable the courts discern if such dismissal was genuine or in this case, unfair.

The tenets of law of contract

In the present case, the NIC worked to apply the tenets of law of contract and human rights to the unique contract guiding employment relationships. It explains that labour rights inure at three levels: *Pre-employment rights* (arise prior to the commencement of an employment, such as rights inuring to job applicants), *Employment rights* (arising during the pendency of an employment), and *Post-employment rights* (inuring at the end of the employment, such as pension rights), all of which are enforceable. In this case therefore, the pre-employment rights of Mr. Akande arose the moment he accepted the offer letter. This led the NIC to hold that the rejection letter was an afterthought which, having followed an already valid contract of employment, in effect, breached that employment contract.



On whether the offer letter was an invitation to treat, the NIC rejected Lilygate's argument and held that the letter of October 29, 2015, was indeed an offer of employment; conceptually, an invitation to treat, like its name implies, is an invitation to make an offer and not an offer as in this case. Accordingly, if Lilygate wanted Mr. Akande to make the offer, it would have in clear terms stated so as against making an actual offer by the offer of employment. The NIC ensured to emphasize that it is not for employers to make offers of employment and simply resile from same at their whims and caprices. Employers are required by law to, at all times, act in good faith, reasonably and

fairly towards people and matters under their charge in all circumstances; the law does not permit employers to act arbitrarily as could be deduced from the conduct of the defendant in this case.

The actions of the Human Resource Manager

Another significant part of the NIC's decision was that a company can be bound by the acts of its Human Resources Manager. The Companies and Allied Matters Act (CAMA) is instructive on this point; by Section 66, the acts of any officer or agent of a company *shall be deemed to be acts of the company if the company represents the officer as having authority to act in that matter, in which case, the company shall be liable to any person who has entered into a contract or acted in reliance on such representation, unless such person had actual knowledge or ought to have known that such officer had no authority to act in that capacity.* Thus, Mr. Akande had argued, and rightly so, that the Human Resource Manager is an officer of a company who is charged by the Board of Directors with the duty of employment and personnel management.

Accordingly, the acts of the Human Resources Manager in employment and recruitment are deemed to be actions of the company by virtue of section 66. In the considered case, Lilygate failed to prove otherwise.

CONCLUSION

In all, employers are advised to exercise caution in the exercise of its powers towards applicants and employees, bearing in mind the three tranches of rights. The current employment law disposition in Nigeria strongly condemns any act of intimidation, unfair treatment or unfair labour practice. Therefore, employers are advised to seek the prior guidance of a legal counsel to avoid exposure to avoidable litigation or liability.



Lagos: 1, Perchstone & Graeys Close, off Remi Olowude, Lekki Epe Expressway, Lagos; Tel: +234- 1-3429131, 7611051

Abuja: D3, Jima Plaza, 1627 Ahmadu Bello Way, Area 11, Garki Abuja; Tel: +234 92919191, 07045984792

Benin City: 40, Adesogbe Road, Benin City, Edo State; Tel: +234 7068518650, 07045984776

Email: editor@perchstoneandgraeys.com; counsel@perchstoneandgraeys.com

Website: www.perchstoneandgraeys.com

Photo Credit: <https://www.michiganemploymentlawadvisor.com/investigating-and-monitoring-employee-conduct/the-food-and-drug-administration/> ; <https://omh.tips/tag/termination-of-employment/>

Copyright: All rights reserved. No part of the publication may be reproduced, stored in a retrieval system or transmitted in any form or by any means without the prior permission in writing of Perchstone & Graeys or as expressly permitted by law.

Disclaimer: We invite you to note that the content of this newsletter is solely for general information purposes only and should in no way be construed or relied on as legal opinion. We urge you to contact us should you require specific legal advice on any of the topics treated in this publication.