



VARYING AN EMPLOYMENT CONTRACT
- MY RIGHT OR OUR RIGHT?

Under the common law, employment contacts were largely characterized as master-servant relationships. As a master, wielding an ostensible power over the servant, an employer had the right to engage and terminate at any time (for reason or no reason at all); unilaterally stipulate, remove or change the terms of employment at its sole discretion even to the detriment of the employee. Till date, the unequal bargaining powers between an employer and the employee continues to play out, with employees repeatedly cajoled into accepting unfavourable conditions of service, mainly owing to the employee's need for a job; a "*take it or leave situation*" one might say. However, this stance is gradually changing. The recent decision of the National Industrial Court (NIC/Court) in *Mrs. Ekeoma Ajah V. Fidelity Bank Plc.*¹ demonstrates how the NIC, applying the principles of equity and best practices has displaced the erstwhile powers of an employer to unilaterally alter the terms of an employment contract.

FACTS

Mrs. Ekeoma Ajah (the "*claimant*") was employed by FSB International Bank on January 21, 2002. Subsequently, she was absorbed by Fidelity Bank (the "*defendant*") after its merger with FSB International Bank. According to the claimant, she served the defendant diligently and rose to the position of an Assistant Manager (Notch 1) in the Risk Management Department of the defendant company. At the time, the defendant maintained a Retirement Policy (Personnel Policies and Procedure Guide) which would have entitled the claimant to a retirement benefit available for employees who attained an unbroken long service of 15 years and who were below 55 years of age. After 14 years and 9 months in the services of the defendant, she served a Notice of Retirement dated December 2, 2016 on the defendant indicating her intention to voluntarily retire in line with her condition of service. The Notice of Retirement was received and acknowledged by the defendant on December 23, 2016. On the same December 23, 2016, the defendant circulated an e-mail cancelling its Retirement Policy with effect from December 15, 2016.



At the end of her notice period in February 2017, the claimant completed all exit protocols following which she was cleared for exit. However, despite her several demands, the defendant failed to pay the claimant's terminal benefits neither was she furnished with any information in that respect. About 10 months after the claimant's retirement, the defendant paid a certain amount to the claimant which the claimant challenged as being

¹ (Suit NICN/LA/588/2017)

substantially less than her actual entitlement. The claimant also rejected the back-dated cancellation of the Retirement Policy at the point of her retirement as well as the defendant's attempt to recharacterize her retirement as a resignation. Aggrieved, the claimant instituted an action against the defendant seeking amongst other reliefs:

- a. A declaration that the defendant's failure to pay the claimant's retirement benefits and entitlements constitutes a breach of the claimant's contract of employment.
- b. An order directing the defendant to pay to the claimant the sum of ₦29,785,492.14, being the aggregated sum of the entitlements due to the claimant.
- c. An order directing the defendant to issue to the claimant the 15 years long service certificate due to the claimant in accordance with the contract of service of the defendant.

FINDING/DECISION

After a consideration of the facts and arguments submitted by the parties, the National Industrial Court (NIC) held as follows:

1. **Right of an employer to unilaterally change the terms of an employment contract:** An employer has a right to amend, cancel or modify any part of the contract of service, and it is not in all circumstance it has a duty to re-negotiate with an employee. However, any variation which has the effect of taking away any accumulated benefit of an employee should be with the employee's consent. This is because the Court has an equitable jurisdiction to preserve earned benefits of employees, particularly those of pecuniary nature, and the Court will tilt towards resolving such matters in favour of the beneficiary rather than in favour of the party attempting to take away or expropriate the benefit.



2. **Retroactive actions against an employee:** Any retroactive action taken to deny an employee of an earned benefit will fail against the employee, as the Court does not protect retroactive actions capable of denying accrued benefits. In such cases, the Court will hold both parties to their original bargain to save earned benefits. On that note, the Court held in this case that the claimant's Notice of Retirement remains valid, and that the defendant ought not to have made its policy to operate retroactively as if the claimant had not served her Notice of Retirement before the new policy came into effect.
3. **Calculation of years of service:** The Court found that the claimant had worked meritoriously for an unbroken record of 14 years and some fractions of months just before the defendant introduced a new policy attempting to eliminating her benefits. To this end, the Court held that the principle of arithmetical approximation would avail the claimant, therefore deeming her to have worked for the defendant for 15 years. To the Court, this was imperative as the claimant still served her complete 15 years even after issuing the notice of retirement before the coming into effect of the new policy. Additionally, the Court found that the defendant by its conduct admitted this approximation when it paid the claimant a terminal benefit which was only applicable to the category of employees who had served for 15 years. Consequently, having recognized the claimant as falling in the category of those who attained 15 years of long service, the defendant was estopped by its conduct

from denying or reprobating that the claimant did not meet the condition precedent to be entitled to payment of her retirement benefits. Accordingly, the Court ordered the defendant to pay to the Claimant the sum of ₦ 27,805,847.40 to the claimant, being her retirement benefits.

In all, the Court granted most of the reliefs sought by the claimant, and awarded the sum of ₦2,000,000 (two million Naira) as general damages for defendant's breach of the claimant's employment contract and associated inconveniences suffered by the claimant.

COMMENTS

The National Industrial Court recognizes that in most employment relationships, employers have superior bargaining powers and can thus unduly influence employees into signing contracts or accepting unfavourable changes to the terms of their employment contract. Accordingly, the Court may, depending on the fact pattern of each case, intervene in the interest of the weaker party where a strict reliance on the terms of a contract would be unfair to the employee who made little or no input to the terms of the contract. Evidently, by virtue of sections



13 and 15 of the National Industrial Act 2006, the Court is empowered to administer both law and equity concurrently; and where there is conflict between the rules of equity and common law on the same matter, to follow equity. This perhaps informed the decision of the Court to apply the equitable doctrine: "*equity looks on that as done which ought to be done*" to deem the claimant as having worked for 15 years. Indeed, equity will treat a contract to do a thing as if the thing were already done, albeit only in favour of persons entitled to enforce the contract.

In all, this case does not operate to diminish the right of an employer to issue or amend its internal policies. Certainly, an employer retains the right unilaterally amend operational or administrative terms of an employment contract or internal policy. However, the Court now insists on what has been described as 'participatory democracy' in the exercise of any unilateral power/right to alter a fundamental condition in the contract of employment. Thus, where a proposed alteration of an employment contract affects a fundamental term of the contract or operates to prejudice or reduce the economic and/or earned benefit of the employee, good industrial practice demands that the employee should be taken into consideration.



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