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**IS AN EMPLOYEE ENTITLED TO PENSION CONTRIBUTION AS TERMINAL BENEFITS WHERE THERE WAS NON-REMITTANCE OF SAME DURING THE COURSE OF EMPLOYMENT?**

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Aboubakar Faure was employed by Desries Securities Limited (company/employer) under agreed terms, including contributory pension of 5% of his monthly salary to be remitted by the company to Aboubakar Faure's Retirement Savings Account (RSA). Abou (as he was fondly called) worked for the company for four (4) years, after which his employment was terminated by the company after giving him three (3) months' notice. Upon leaving the employment of the company, Abou discovered that all deductions made from his salaries were never remitted to an RSA.



When Abou confronted his employer, and demanded that all deductions made with respect to his pensions be paid to him, his employer informed him that the pension contributions could not be paid to him directly, but into his RSA. Abou was perplexed, as he did not have an RSA, was no longer an employee of the company, nor was he resident in Nigeria at the time, as he had returned to his home country in France. He therefore wondered if his former employer could validly hold on to his pension contributions without let.

The above hypothetical scenario played out in the case of *Jorge Allende Iriarite Traquini v. ASC Nigeria Ltd.*, Suit No: NICN/LA/580/2017, judgment of National Industrial Court of Nigeria (NICN) delivered by Hon. Justice N.C.S. Ogbuanya on March 10, 2021. The NICN considered amongst other critical issues of law, a novel situation of post-employment pension funds remittance.

**Facts**

Jorge Allende Iriarite Traquini (Jorge), a British national, was employed as a General Manager for ASC Nigeria Ltd. (ASC) through its parent company based in Anguilla, the British West Indies, vide an Executive Employment Agreement dated February 10, 2014, to commence on March 17, 2014, for an indefinite contractual period of time. Jorge further executed a Contract Agreement for Unspecified Period of Time dated March 15, 2014, which specified the terms and conditions of the employment with ASC, effective March 17, 2014.

During the pendency of Jorge's employment, he failed to open an RSA as stipulated under the Pension Reform Act, 2014 (PRA 2014). ASC as well did not open a nominal RSA for Jorge to hold all deductions

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made from his salaries. However, ASC continued to deduct 5% of Jorge's annual salary as pension contribution for three years, amounting to \$20,875.00 (Twenty Thousand, Eight Hundred and Seventy-Five United States Dollars). Jorge's employment was later terminated vide a letter dated July 7, 2017, to take effect on October 17, 2017. Jorge therefore sued, and as part of his claims submitted to the Court, sought for the payment of his unremitted pension contributions directly to him.

After hearing the parties, the Court examined the compliance requirement with regards to the opening of an RSA under the PRA 2014, where parties are no longer in an employment relationship, particularly as it affects a foreign employee who is no longer within Nigeria.

## Findings

The Court had no qualms reaching a finding that Jorge was entitled to the unremitted pension contribution. What seemed the rather meaty issue was whether the unremitted pension contribution could be paid directly to Jorge.



The Court found that both parties failed in their respective legal obligations under the PRA 2014 in the opening of RSA. The employee should have opened an RSA within six (6) months of employment, failing which the employer should have opened a nominal RSA for him. The Court observed that there is no provision in the PRA 2014, on how to deal with post-employment issue of deduction without remittance of pension fund where both the employer and employee did not comply with the provision mandating the opening of a RSA by either employee or employer when the employee failed to open.

Given the obvious lacuna in the PRA 2014, the Court relied on an English case *Halcyon Skies (High Court)*<sup>1</sup> where a company went into liquidation and was unable to remit the pension of an employee, the court directed that the funds be paid directly to the employee; holding that both the employer's and employee's contribution to pension schemes can be regarded as part of the employee's wages. Based on this decision, the court was persuaded to hold in the instant case that Jorge's \$20,875.00 (Twenty Thousand, Eight Hundred and Seventy-Five United States Dollars) unremitted pension could be treated as constituting his terminal benefits for which he is entitled to be paid directly in the circumstance.

The court further declared the pension contribution policy of the defendant as irregular and failing to meet statutory stipulations when it held that the 5% pension contribution of annual salary is not in line with the minimum contribution threshold under the PRA 2014. However, given that the employer is a private employer, the Court found that the claimant failed to show that ASC employed three or more persons, and as such, could not be bound by the strict provisions of the PRA 2014.

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<sup>1</sup> (1977)1QB 14, 20-26

## Our comments

The position of the law on pension contribution is as contained in the PRA 2014. By section 11 of the Act, an employee is obligated to open an RSA with any Pension Fund Administrator (PFA) of his choosing, and notify his employer of this fact. The employer is then required to remit the employee's contribution deducted at source and the employer's contribution to the Pension Fund Custodian provided by the employee within seven (7) days of the payment of the employee's salary. The pension contribution eventually finds its way into the employee's RSA. Where an employee fails to open an RSA within six (6) months of his/her employment, the employer is required to request a PFA to open a nominal RSA for that employee. Where an employer fails to deduct or remit pension contributions, that employer will be liable to penalty not less than 2% of the total contribution remaining unpaid. The penalty is recoverable as a debt owed to the employee's RSA.

What then happens where an employer fails to remit deducted pension contributions of its employee after the employee has been terminated, and both employer and employee failed to abide by the provisions of the PRA 2014 as regards PFA and RSA? Would that employee be entitled to the pension contribution directly? Jorge's case answers in the affirmative. The Court's reasoning was based on the fact that an employer will not be allowed to keep money which belongs to an employee who is no longer in the service of the employer. The Court therefore treated the pension contributions as constituting Jorge's terminal benefit for which he is entitled to be paid directly, as such deduction from earned sum constitutes terminal benefit which would eventually be paid over to Jorge as amount due as entitlement from his employment.

It is however pertinent to state that the finding of the Court in this case was based on the circumstances of the case. Jorge had not shown that ASC was an employer within the contemplation of the PRA 2014, having not established that ASC had three or more employees. It was on this score that the 5% agreed in the employment contract was upheld, as against the statutory minimum of 10% contribution for the employer and 8% contribution for the employee in section 4 of the PRA 2014. ASC's exposure would have been worse.



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