A Newsletter on Labour Law and Emerging Trends - April 2022 Edition

Perchstone & Graeys
SOLICITORS, ADVOCATES & ARBITRATORS

SOBRIQUETS, WORKPLACE HARASSMENT, VICTIMIZATION, RETALIATION, UNFAIR TREATMENT, WRONGFUL TERMINATION, AND CO-EMPLOYER LIABILITY

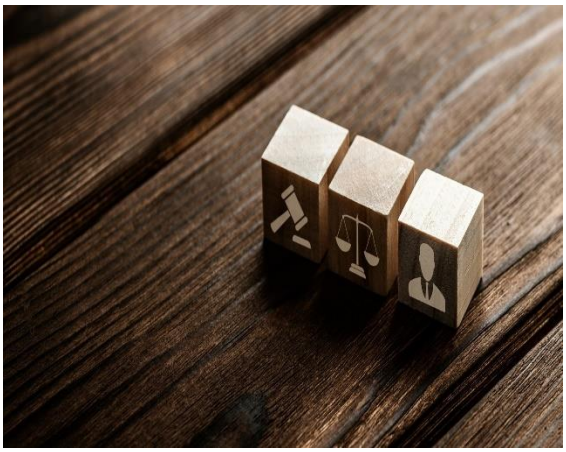
Plasmonic Inc. is a multi-national company based in the United States of America with a subsidiary, Plasmonic Services Nigeria Limited ("Plasmonic NG"), and several other subsidiaries around the world. Plasmonic NG is headed by one Ms. Adesola Coker ("Sola"), famed to be an industry leading figure in the sub-Saharan region and heads the Business Transformation Unit of Plasmonic Inc. for the region. Beyond her depth of knowledge and mastery, Sola is known to be jovial, easy-going, and fun to work with. She thought it easier to use sobriquets on employees than actual names, which many Plasmonic NG employees found quite endearing. Sometime in January 2022, Plasmonic Inc. hired John Doherty, an Irish-Canadian man, and upon agreed terms, posted him to Plasmonic NG.

On his first day at work, John Doherty was welcome by Sola and given a brief tour of Plasmonic NG's business premises and introduced to other employees. The recurring decimal during the introduction was, "…*meet John Doherty. He is joining us from Canada. You can call him "John Doe" for short*…" To this, Sola and the other employees would laugh. On completing the tour and introductions, John Doherty informed Sola of his displeasure with being called John Doe as he felt the name basically referred to an unknown person. He specifically asked to be called "John" but in response, Sola said, "…*and where's the fun in that*?" Sola and a few employees continued the 'joke' of calling John Doherty "*John Doe*" against his express wishes. Unable to bear the embarrassment, John escalated the issue to Dwight Younsen, his second line manager based in South Africa, with seniority over Sola, John's first line manager. Rather than comply with Plasmonic Inc.'s policy and putting an end to the use of the displeasing sobriquet, Dwight simply asked John to "…*fix the issue with Sola*…"

On hearing that John had escalated the issue to Dwight, the jovial, easy going, and fun-to-work-with Sola morphed into an angry, vindictive person, now bent on ensuring John's time at Plasmonic NG was a nightmare. Sola began assigning John's tasks to lower-level employees and insisting that John takes his instructions from his subordinates. Sola deliberately cut John off teams he should ordinarily lead and reduced John's engagement to the barest minimum. All efforts by John to rectify the issue, including trying to mend his relationship with Sola and further escalations to Dwight, proved abortive.

Within two months of joining Plasmonic NG, John was given thirty days' notice of termination of employment without stating the reason for the termination and asked to proceed on leave whilst being denied access to his work tools. Given the circumstances of his exit, John has now sued Plasmonic Inc., Plasmonic NG, and Sola for

workplace harassment, victimization, retaliation, wrongful termination, unfair labour practices amongst other claims.



A similar scenario was considered in the recent case of *Cheick Ouedraogo v. Uber Technologies System Nigeria Limited & 2 Ors., Suit No. NICN/LA/424/2020*, the judgment of which was delivered by the National Industrial Court of Nigeria (NICN), per Hon. Justice I.G. Nweneka, on May 13, 2022. In this case, the Court posited that an employee is not a piece of article that can be tossed at will and given the peculiar facts and circumstances of the case, held the claimant's termination as being despicable, wrongful, and a bad testimonial of a global institution, amongst other insightful pronouncements of the Court to be examined in succeeding paragraphs.

FACTS AND FINDINGS

Mr. Cheick Ouedraogo ("Cheick") a dual citizen of Burkina Faso and Canada, was employed as Senior Business Development Associate, Vehicle Solutions by Uber Technologies Inc. (Uber Inc.) and Uber Technologies System Nigeria Limited (Uber Nigeria), a subsidiary of Uber Inc. subject to Uber Inc.'s overall control. Shortly after resuming at Uber Nigeria, Cheick was repeatedly subjected to offensive, intimidating, and hostile behaviour from his first line manager, the 3rd defendant in the suit. On many occasions, his first line manager called him "Drogo", a barbarian and homeless character in the popular HBO series "Game of Thrones", in the most condescending manner much to Cheick's displeasure, and in breach of Uber Inc.'s anti-harassment policy. As a result of the toxic work environment, Cheick's ability to work effectively suffered greatly.

In compliance with Uber Inc.'s grievance procedure, Cheick escalated the issues to his second line manager, who merely advised him to send an email to his first line manager and monitor the progress of the situation, without making an effort to rein in Cheick's first line manager. Seeing that Cheick had raised a grievance, his first line manager retaliated by significantly reducing Cheick's workload and transferring his files to junior colleagues, refusing to assign any deal or instruction to him, cancelling meetings, and reducing communication with him, thereby victimizing him in breach of Uber Inc.'s employee handbook.

Eventually, Cheick's employment was terminated. On requesting the reason for the termination of his employment, Cheick's second line manager informed him that he had performed unsatisfactorily upon a performance evaluation which in any case was never conducted nor any performance report availed Cheick. Although the termination was to take effect on a subsequent date, Cheick's access to Uber Nigeria's network and official email was deactivated and he was placed on paid leave. On discovering the irregularity of its actions, Uber Nigeria reconnected Cheick and placed the initial termination on hold after Cheick wrote the Uber Inc.'s Human Resources Team based in South Africa alleging bullying, victimization, and harassment from his first line manager. A putative investigation was said to have commenced but Cheick was shut out of the process and not allowed to defend himself. The said investigation was later closed and filed and Cheick's employment was terminated again. Cheick therefore sued Uber Inc., Uber Nigeria, and his first line manager.

In deciding the case, the Court found that despite the distinct legal personalities of Uber Inc. and Uber Nigeria, they are interconnected, given the fact that Uber Inc. is the directing mind and controller of Uber Nigeria, issuing and approving the policies applicable to Uber Nigeria's employees. On this score, the Court held that Uber Inc. and Uber Nigeria were co-employers of Cheick. The Court also found that the second line manager's silence and refusal to intervene as required of him under Uber Inc.'s employee handbook amounted to condoning the unlawful harassment and unfair treatment meted out on Cheick.

Although no reason was stated for the termination of Cheick's employment and Uber Nigeria simply placed reliance on a clause in the employment contract treating the termination as being without cause, the Court went beyond the wordings of both termination letters, finding that from the meeting held prior to the second termination, it was clear that both companies had alleged unsatisfactory performance and Cheick's inability to fix his relationship with his first line manager as the reason for the termination of his employment. The Court therefore held the subsequent reneging on the reasons and placing reliance on a clause for termination without cause, when the termination was clearly for cause was dishonourable and amounted to unfair labour practice. The Court held that failure to terminate Cheick's employment in accordance with his employment contract was in breach of the said contract of employment and therefore wrongful.

The Court further held that stripping Cheick of his work tools, shutting him off the company mailing system, and placing him on paid leave five days after the termination of his employment constitutes unfair labour practice, as an employee on paid leave is entitled to all the rights and benefits of an employee. The Court also found this as clear retaliation by Cheick's first line manager and that the failure of Uber Inc. and Uber Nigeria to protect Cheick from the retaliation and unfair treatment was a ratification of the unlawful actions of Cheick's first line manager.

To the Court, it did not matter that Cheick was still on probation at the time of the termination of his employment. Cheick's employment was protected by international labour standards and the termination of same ought to have been done in compliance with the provisions of the ILO Termination of Employment Convention, 1982 (No. 158) and the ILO Termination of Employment Recommendation, 1982 (No. 166). All three defendants; Uber Inc., Uber Nigeria, and Cheick's first line manager were damnified in damages and legal costs.

OUR COMMENTS

Workplace harassment arises where a person (employee or employer) through acts or inactions makes an employee feel threatened, humiliated, demeaned, or makes the workplace a hostile environment for such employee. It takes different forms; physical, verbal, sexual, or emotional and could be prompted by offensive jokes, use of sobriquets, physical assaults, threats, intimidation, ridicule or mockery, insults, etc. Workplace victimization on the other hand, is an act of retaliation in the workplace by one employee or group who targets another employee aimed at causing harm to the victim for actions taken in pursuance of employee rights.

Employers have a legal duty to prevent workplace toxicity, harassment, discrimination and create a safe working environment for all employees. Failure in this regard, and inactions and silence may occasion vicarious liability for the unlawful acts of the employee(s) on the employer. In ***Ejike Maduka v. Microsoft & Ors***,[1] it was held that the inactions and silence of both Microsoft entities tolerated and ratified the conduct of the country manager which was against the companies' policy of prohibition and non-tolerance of sexual harassment, gender discrimination and retaliatory actions and a breach of the companies' duty of care and protection of their employees, for which both companies were held vicariously liable.

Where there is a co-employer relationship, both companies can be held liable in damages where they are so interconnected that their corporate veils are pierced to determine the extent of liability.

Employers must also be circumspect in terminating employment contracts in that they ensure that they comply strictly with contractual provisions as well as international best practices and labour standards as evinced in relevant labour conventions. By this, employers must give valid reason(s) for termination of employment connected to the capacity or conduct of the employee. Termination on grounds of unsatisfactory performance must be preceded by an opportunity for improvement, to where the employee is placed on an improvement plan and upon further unsatisfactory performance, the employee may then be terminated. On the other hand, prior to termination on grounds of misconduct, the affected employee must be given the opportunity to defend himself against all allegations.[2]

The case under reference is instructive for all employers. In view of the above decision of the Court, it is expected that employers will put in place policies to guard against victimization, harassment, discrimination, and generally create a safe working environment for employees.

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[1] Unreported Suit No: NICN/LA/492/2012, judgement of which was delivered on December 19, 2013.
[2] See Articles 4 and 7, ILO Termination of Employment Convention, 1982 (No. 158) and Article 8, ILO Termination of Employment Recommendation, 1982 (No. 166).