A Newsletter on Labour Law and Emerging Trends - June 2024 edition

PROTECTING THE RIGHTS OF EMPLOYEES IN RETRENCHMENT EXERCISES

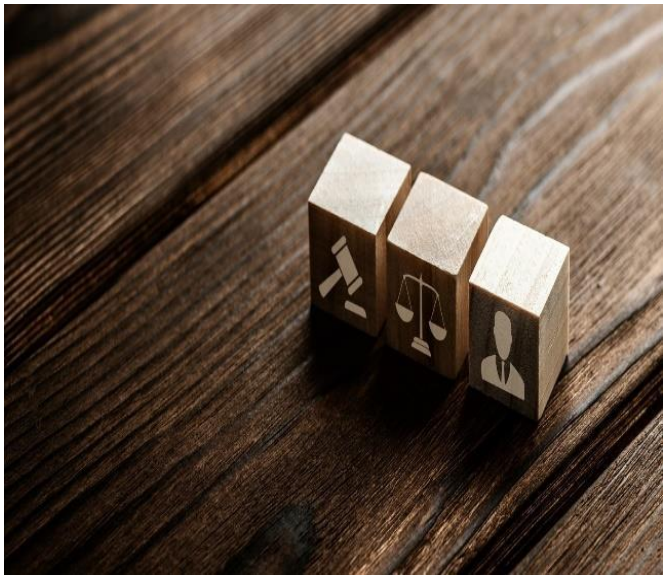
Perchstone & Graeys
SOLICITORS, ADVOCATES & ARBITRATORS

INTRODUCTION

Mrs Agnes Nwokocha was a valued staff at Global Bank Plc, one of the popular Banks along University Road, Enugu. Mrs Agnes was a Chartered Accountant and a member of the Chartered Institute of Bankers of Nigeria. She showed exemplary attitude by being the first employee to develop and take personal responsibility over the bank's corporate social responsibility and employee development. With the bank's approval, she conducted trainings and sensitization programs for the residents around the bank; this including medical outreach and free check-ups. She also ensured that new employees got periodic trainings within and outside the bank. Because of her efforts, residents around the bank and employees alike held her in high esteem, and in December 2002, she was a made the team lead of the Risk Management and Compliance department of the bank.

In 2006, Mrs Agnes was entering her 10th year as a pioneer employee of the bank when tragedy hit and the bank had to cease operations. Mrs Agnes and her colleagues were given no notice of the sudden cessation of the bank and the reason for this occurrence. They were indeed surprised because to the best of their knowledge, the bank was doing well and had even declared profits the previous year. The only information they got was vide email notifications on the faithful morning of February, 2006. Through the correspondence, they understood that the bank had been in non-compliance with industry regulations, and that despite the declaration of profits, were unable to continue operations. Mrs Agnes was commended for the exemplary attitude over the years and advised to seek employment elsewhere. Convinced that this was one big joke the board had orchestrated, she proceeded to the office as usual, only to see a crowd of angry customers and her colleagues clamouring in tears at the gates of the bank. Aggrieved at the situation, the manner of discovery of their unemployed status and the lack of compensation, Mrs Agnes and her colleagues sought advice from a close friend, a lawyer on best way to their potential remedies from the bank.

FACTS AND FINDINGS



This situation is similar to the recent revocation of Heritage Bank Plc's banking license. The announcement made by the Central Bank of Nigeria, vide a circular dated June 3, 2024, was one which put an estimated 2000 employees of the tier-2 bank out of jobs. The revocation raised serious concerns about the futures of depositors and shareholders, plunging them into uncertainty. In response, the CBN appointed the Nigeria Deposit Insurance Corporation (NDIC) as the liquidator to manage the fallout and protect the interests of those affected. The NDIC, as the liquidator, is now responsible for managing the bank's assets, settling obligations, and ensuring depositors are compensated within insurance limits. However, the abrupt loss of job of these affected employees led to protests at the head office against the job cuts happening all across its branches. A member of the bank's domestic union informed *TechCabal*[1] that the bank simply terminated its contract with an outsourcing firm which managed about 600 contract staff some of which had worked with the bank for well over a decade.

COMMENTARY

Nigeria's approach to the legalities of employment termination and retrenchment is fundamentally based on English common law, albeit with specific modifications to cater to local circumstances. The primary statutes governing these aspects are the Labour Act of 1971[2], and the Trade Disputes Acts of 1976[3]. Unlike some jurisdictions, Nigeria does not have a broad statutory framework that explicitly addresses unjust dismissal or the general principles of retrenchment. Instead, these matters are primarily governed by common law principles,

[1] https://techcabal.com/2024/06/10/2000-heritage-bank-employees-out-of-jobs/#:~:text=The%20cuts%20affected%20mostly%20drivers,employees%20are%20out%20of%20jobs.
[2] CAP L1 Laws of Federation of Nigeria 2004
[3] CAP T8 Laws of Federation of Nigeria 2004

which are significantly influenced by the Labour Acts. The Labour Act, particularly Sections 11(5) and 20, preserve the common law rights of employers. These sections authorize employers to dismiss workers for serious misconduct and to lay off or retrench employees on the grounds of redundancy.

Redundancy refers to the quality or state of being redundant or superfluous. It is the dismissal of a person from a job especially by layoff and is quite distinct from termination, resignation or dismissal. According to the Labour Act, redundancy is the involuntary and permanent loss of employment caused by excess manpower . The Labour Act does not make reference to any particular event that could give rise to a redundancy. However, redundancy could arise due to a number of factors, including but not limited to economic, technological, structural or similar reasons such as business restructuring, closing of business, headcount reduction etc.

Redundancy maintains certain attributes uniquely different from the other methods of determining an employment. Some of these include payment of redundancy allowance or compensation and negotiations. Therefore, where a company seeks to determine the employment relationship with its employees through a redundancy, the Act has laid down regulatory guidelines and procedures to be adhered to. Section 20 of the Labour Act provides that where the employees affected by the redundancy are unionized, the employer is required to promptly inform the union or the workers' representatives, stating the reasons for the redundancy exercise and its magnitude. Furthermore, in determining the employees to be affected by the redundancy exercise, the Act stipulates that the employer should adopt the principles of last-in-first-out (LIFO), subject to all factors of relative merit, including skill, ability and reliability. That is, those with the shortest length of service in the company are considered first, subject to other standard procedures to determine value and utility. Companies intending to carry out redundancy exercise, are therefore required to conduct performance appraisals in addition to the LIFO principle to determine employees to be declared redundant.

Termination by any means other than dismissal for gross misconduct, has attendant compensation for the affected employees. To prevent any cases of withheld payment or general failure to pay compensation, the Minister may make regulations providing, generally or in particular cases, for the compulsory payment of redundancy allowances where such a worker is declared redundant. Section 20(1)(c) of the Act requires the employer to use its best endeavours to negotiate redundancy payment or benefit with all discharged worker who are not protected by regulations made by the Minister of Labour. However, there is currently no regulation from the Minister of Labour regarding redundancy, therefore, companies are bound to negotiate redundancy payment with the affected employees and representatives of trade unions.

A combined reading of Section 7(6) of the National Industrial Court Act, 2006, and Section 254C(f) and (h) of the 1999 constitution enjoins the National Industrial Court, in resolution of labour disputes to apply international best standards and practices. To that end, it is safe to consider the positions on redundancy from the aspect of international best standards and


practices. Consequently, the courts in recent times, have adopted and pronounced on provisions of the International Labour Organisation (ILO) Convention on Termination of Employment (No. 158), 1982 ("the Convention"), and other labour law conventions. In its article 13 and 14, the Convention requires an employer, when it contemplates termination for reasons of an economic, technological, structural or similar nature, to consult with the workers' representatives and notify competent authorities in writing, as early as possible, stating the number and categories of workers likely to be affected, the reason for termination, and when such termination is to be carried out. In addition to this, and in due accordance with national law and practice, the employer is required to give the representatives concerned, ample opportunity for consultation on measures to avert or minimise the termination and mitigate the adverse effects of any termination on the workers concerned such as finding alternative employment. Although the Labour Act caters for employees who fall within the statutory definition of "workers"[4], the National Industrial Court, in ***Blessing Charles-Etim v. Martin Craighead and Ors*** extended the need for employers to negotiate redundancy payment with other employees exercising administrative, executive, technical or professional functions, especially in cases where their contract of employment makes no provision for redundancy[5]. In fact, the Convention, provides that in such circumstance, recourse should be made to national laws to guide the process of redundancy[6].

The National Industrial Court, was opportune to determine the issue of redundancy in ***Richardson Ebong Adu & 19 Ors v Tinapa Business Resort Limited NICN/CA/47/2019.*** The judgement delivered on January 22, 2024 by Honourable Justice Sanusi Kado, underscores the NICN's attitude towards redundancy. In this case, the employees were notified 6 days prior that their employment was to be determined on the basis of redundancy with the assurance that all their monies were to be paid to them. Since receiving the notice and after their disengagement from the defendant company, the employees did not receive any payment from the company and aggrieved, approached the court for remedies. In determining the case, the court was not averse to the claims of the employees however, the undoing of the employees was in not specifically pleading the monetary compensations claimed before the court. It was on the basis of their failure to provide a framework for properly computing the arrears of salaries and compensation owed them by the company that the court dismissed their claim. It is clear that the employees were not aggrieved by the length of notice given them by the company but the non-payment of compensation after determination of their employment. This underscores the fact that in termination of employment by redundancy, especially where evident that the company is really unable to keep the employees, or in the case of Heritage bank, unable to continue operations, the primary concern of employees is their compensation and benefits.

[4] Section 91 of the Labour Act, 1971

[5] (Unreported) Suit No. NICN/YEN/246/2016, judgement of which was delivered on May 31, 2021, per Honourable Justice F. I Kola-Olalere FCiarb

[6] Article 14 ILO Termination of Employment Convention (No.158), 1982

In essence, the Labour Act 1971, as a national law, and the ILO Convention on Termination of Employment (No. 158), 1982, as evidence of international best standards and practices are the applicable legal framework on redundancy. The similitude in both regulations is that the company is required to inform, notify and consult with the employees or their representatives and negotiate redundancy payment to be made to affected employees. This ensures that while employers can manage their workforce according to business needs, employees are also afforded a measure of protection and compensation

On a final note, it is evident that the sudden determination of the employment of a large number of employees of Heritage Bank is not a novel thing within the Nigerian Employment Landscape. On the contrary, it is an occurrence that has garnered considerable global attention, prompting numerous countries to devise and enforce a plethora of policies, rules, and regulations aimed at curbing the frequency and impact of retrenchment. Commercial banks although not under direct government control, are subject to industry regulations and are expected to uphold a certain standard of governance and regulatory compliance. Therefore, banks should expect, and indeed provide for contingency measures for sanctions such as licence revocation for non-compliance with industry practices. Most importantly, provision for the welfare of employees where this occurs should be made, and due process according to the Labour Act should be followed to prevent or mitigate potential swamp of cases from aggrieved employees. The peculiarity of the Heritage Bank situation might not give rise to the LIFO principle; however, the bank, and indeed all employers faced with the need to disengage employees on the basis of redundancy, are expected to make adequate provisions for retrenched employees.

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