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UNILATERAL SALARY CUTS IN THE NPFL -PERFRMANCE CLAUSES, ENYIMBA FC AND APPLICABLE EMPLOYMENT JURSPRUDENCE

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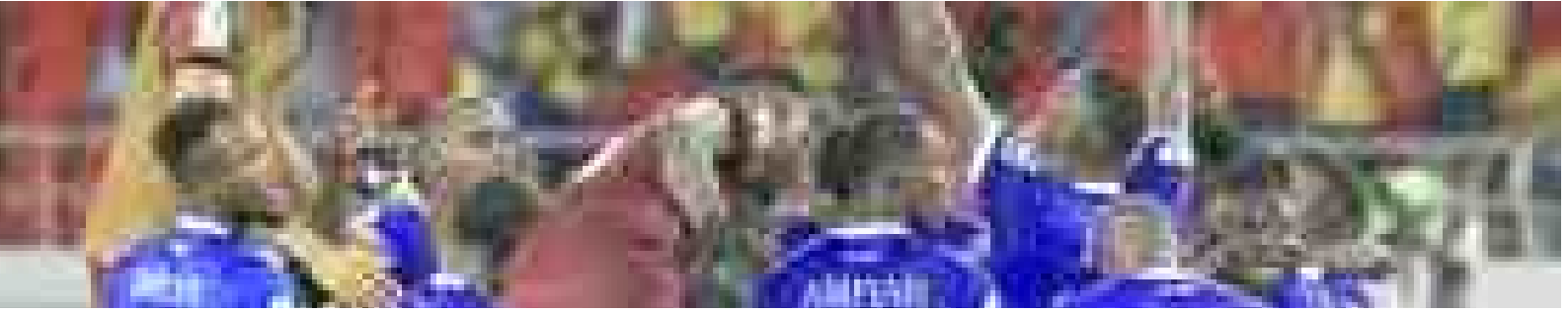

The relevant clauses in sports contracts are often a culmination of the interplay among individual employment and sponsorship contracts, league constitutions, tournament rules, and the collective bargaining agreements between owners and the players where applicable. Contract clauses have played a significant role in the growth of the sports industry and professional football in particular. Understanding and negotiating contract clauses in sports requires an understanding and appreciation of the inter-relationship between judicial decisions arising from the general principles of contract law on the one hand and the ever-evolving employment law practice on the other. Amid a string of disappointing performances in the NPFL and CAF Confederation Cup, players and staff of Enyimba International Football Club of Aba have reportedly accepted a 50% salary cut imposed by the club's management. We analyze the propriety of this action in the light of emerging employment law trends and the football jurisprudence. This analysis is firmly circumscribed within performance clauses in football.

The law generally, does not permit a Court to alter, by subtraction or addition, the terms and conditions of a contract entered into by the parties, on the pretext of exercising a judicial discretion that completely ignores the sanctity of their agreement. It is widely recognized in the United Kingdom that an employment relationship is a special kind of contractual relationship that contains express and implied terms, obligations, and duties that may not be present in other types of contract.[1] In ***Braganza v BP Shipping and Another***,[2] a case which concerned an employer's refusal to pay a death in service benefit, the United Kingdom Supreme Court acknowledged that an employment contract is "*of a different character from an ordinary commercial contract*",[3] and "*had specialties that do not normally exist in commercial contracts.*"[4]. In ***Eastham v Newcastle United Football Club Ltd***[5] the English High Court referred to the inequality of bargaining power in a professional football player's relationship with a club. It highlighted the role of the Court as being to ensure that restrictive covenants agreed in circumstances of unequal bargaining power are reasonable. The courts recognize that power disparities arise in an employment relationship and are

[1] See *Autoclenz Ltd v Belcher and Others* [2011] UKSC 41 (SC).
[2] See *Braganza v BP Shipping Ltd and Another* [2015] UKSC 17.
[3] *Braganza*, *supra* n 5, para 32.
[4] *Braganza*, *supra* n 5, para 54.
[5] [1964] Ch 413 (ChD).

relevant to the enforceability of a contract or contractual clause. Weaker bargaining power may undermine a party's ability to consent meaningfully to a contractual term.

The Nigerian labour/employment law context

The ILO Decent Work Agenda now prescribes 'social dialogue', which is essentially the same as what the National Industrial Court of Nigeria refers to as 'participatory democracy'. Both standards simply operate to restrain employers from unilaterally making material changes to an employment contract without recourse to the affected employees. Accordingly, where an employer intends to review employee benefits, the employer should negotiate the proposed changes with its employees, and have the agreed terms documented and signed by both parties. Ordinarily, for a pay cut to arise, the employer will need to carry the employee along and negotiate the issue of pay cut with them. The negotiation must be transparent and the worker must be allowed to voluntarily consent to a pay cut. Where an employer unilaterally applies a pay cut, the employee can do either of the following:

1. accept the variation in the salary payment;
2. reject the variation and sue for damages on constructive dismissal; and
3. express his rejection, and continue to work; in which case the defendant will know his position and decide to either continue on the original terms or to utilize its right of termination, in the terms provided by the contract.

The case of ***Tolulope Emmanuel Oyeyemi v Guardian Global Resources Ltd Suit No NICN/LA/372/2017*** **delivered on Thursday, May 24, 2018,** which facts occurred during the economic recession in Nigeria between 2015 to 2017, presents the guiding principles for remuneration adjustment when economic realities beckon. The court held that the behaviour of the claimant in the aftermath of the breach (salary cut) was such that the employee would be deemed to have accepted the change and the conditions under which it was made. The American Courts have described elements that can lead to acquiescence to include:

1. the plaintiff remained silent;
2. with knowledge of her rights;
3. and with knowledge or expectation that the defendant would likely rely on her silence;
4. the defendant knew of the plaintiff's silence, and
5. the defendant in fact relied to her detriment on the plaintiff's silence.

The curious case of Plateau United FC of Jos

While the author acknowledges that he is not privy to the terms of Plateau United of Jos players' contract, the reports around this development suggest that the club is invoking a clause in the employment contract which empowers it '**to sack, suspend or deduct the salaries of the players in the event of poor performance"**. If this hypothesis is correct, it is pertinent to briefly analyze the propriety of this move in the light of the prevailing labour and sports jurisprudence. In the first place, standard employment law practice does not

support the unilateral reduction of players' salaries. It is common to insert performance-related bonuses in players' and managers' employment contracts which entitle the players and managers to receive a liquidated payment as bonuses for promotion or attaining a major milestone like winning the title. Conversely, another performance-related clause could entitle the club to reduce the wages and salaries of the coaching and playing staff upon the team's failure to gain promotion and/or relegation to a lower tier of the football league.

This point is illustrated by the case of ***Manchester City Football Club Plc v Royle***[6] the case concerned the interpretation of ambiguous expressions in a liquidated damages clause. This provided for different termination payments to be made to the manager depending on whether the club was in the Premier League or the EFL Championship at the date upon which his employment was terminated. The manager had been dismissed following the conclusion of the 2000/01 season after the club had completed its fixtures and been relegated but before the full season had ended. When the club's relegation from the Premier League was confirmed, the manager was paid compensation on the basis that he was a First Division manager. He contended that he was still a Premier League manager and was therefore entitled to a higher sum in liquidated damages. The manager succeeded in the High Court but the Court of Appeal overturned the ruling, holding that, for the purposes of determining the appropriate rate of liquidated damages, the club was a First Division club with the consequence that the lower rate was payable.

A performance-related clause that entitles the club to reduce the salaries of the coaching and playing staff after just a few games in the season is not only an anomaly but unduly punitive and may well be considered so by the court once a robust challenge is put up by the affected coaching and playing staff. Secondly, a performance-related clause that seeks to reduce the staff's salaries is not one of the standard clauses required in form 7 in the appendices to the NPFL framework Rules even though the parties are always at liberty to agree to insert one. The players may therefore contend that a performance-related clause that entitles the club to unilaterally reduce the staff's salaries as a result of the team's dismal form in the league before the conclusion of the league season is a violation of the minimum wage provisions of the NPFL Rules (where the reduction is below the approved minimum wage of **N150, 000. 00**). Ultimately, the strongest challenge to this practice is by invoking the 'The ILO Decent Work Agenda' and the NICN's[7] 'participatory democracy' on the grounds that it would be unjust to make material changes to the terms of their employment contract without recourse to the employee.

As a postscript, poorly drafted performance-related clauses like the one just analyzed are not only bad for the clubs but the league as well. It makes a mockery of our claims to commercializing the football league and ultimately, stifles investment in the league. The LMC, therefore, needs to rein in the clubs and ensure that such over-reaching clauses do not

[6] (2005) ECWA Civ 195
[7] The National Industrial Court of Nigeria

find their way in professional football contracts. The playing and coaching staff need to engage the services of lawyers to review every employment contract given to them to sign. The clubs on their part should engage the services of in-house counsel who would review and make appropriate recommendations on draft employment contracts prepared by the clubs to ensure the contract conforms with international best practices and prevailing labour jurisprudence.

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