Unfair Termination of Employment Contract in Nigeria and South Africa: Comparative Analysis

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Abstract- ***This paper comparatively examined unfair termination of employment contract in Nigeria and South Africa within the context of the current legal regime of the two countries. In Nigeria, the common law position was examined vis-à-vis the Third Alteration Act in line with the jurisdiction of the National Industrial Court. With regard to South Africa, the Constitutional framework alongside the codified position in the Labour Relations Act alongside other related legislations were closely examined. It was recommended that the Nigerian legislature should adopt the South African experience and codified this inherent right of workers into the Constitution as well as the Labour Act. It was also recommended that the dichotomy between statutory regulated employment contract and other forms of employment contract should be abolished to afford all employment contracts the same statute. The authors adopt the doctrinal and comparative research method in achieving the aim of this paper wherein both primary and secondary materials were consulted.***

I. INTRODUCTION

Unfair termination of employment contract is a situation whereby an employer prematurely relieves an employee from employment contract due to unjustifiable reason (s) or on grounds expressly prohibited by labour legislation of a giving country. Instances that could amount to unfair termination are numerous and vary from one country to another. This may include; termination on the basis of trade union activities, pregnancy, discrimination, strike, perceived disobedience etc. The concept of unfair termination is alien to Nigerian Labour law jurisprudence. The Nigerian Constitution[1] as well as the Principal law legislation in the Country, the Labour Act (LA)[2] are silent about this right. Therefore, its application has become a subject of academic controversies over the years and to this end, the fate of employees in the country is largely left at the mercy of employers who are invested with unfettered power under common law to determine the employee's contract with or without reason[3] and the motive for the termination is irrelevant[4] as long as the employer acted within the confines of terms of engagement or disengagement agreed by parties.

In South Africa, there is constitutionally guaranteed right to fair labour practices[5], and this right is re-enforced in the Labour Relation Act (LRA).[6] Therefore, all employees in the Republic irrespective of their nature of employment are statutorily protected from being unfairly dismissed or subjected to unfair labour practice[7] without valid reason(s). Other employment legislations in the Republic i.e.; Basic Condition for Employment Act (BCEA)[8] and Employment Equity Act (EEA)[9] further strengthened this position.

The enactment of the Third Alteration Act[10] in Nigeria has however empowered the NICN to apply ratified labour and employment conventions as well as best international practices in the country notwithstanding section 12(1) of the Constitution. This has in effect redefined labour jurisprudence in the Country and the NICN has recently taken the bull by the horns in some of its recent decisions by given effect to this provision. It is on this premise that this paper is based, primarily

to comparatively study the jurisprudence of unfair termination in Nigeria and South Africa with the view to understand how effective the legal frameworks in these countries have fared and how best Nigeria can learn from the South African experience.

II. LEGAL FRAMEWORK FOR UNFAIR TERMINATION IN NIGERIA AND SOUTH AFRICA

- Nigeria Legal Framework

Basically, there are many legal frameworks for labour relation and employment matter in Nigeria. Our emphasis however shall be focus on the Constitution of the Federal Republic of Nigeria (CFRN), the Labour Act (LA), the National Industrial Court Act(NICA)[11] and the National Industrial Court Rules, (NICR).[12] It is noted that while the Constitution and the LA are silent about the concept of unfair termination or dismissal, the NICA on the other hand, allowed for the application of best international practices in labour and employment matters in the determination of fair labour practices and subjected the application of these conventions to question of facts that must be pleaded and proof before the Court.[13]

It is further noted that, previously, section 7(6) of the NICA was rendered inapplicable by virtue of section 12(1) of the Constitution which prohibited the application of International Convention and treaties without been re-enacted by the National Assembly. The Apex Court in the case of *The Registrar Trustees of National Association of Community Health Practitioners of Nigeria v. Minister of Labour and Productivity*[14] validated this position and since then, employers have been having a field day as they have been invested with enormous power to determine employment contracts with our without reason, and the only prevailing limitations is with regard to employment contracts that are regulated by statute where the employer is duty bound to determine the employment contract in line with the terms of employment as contained in the employment contract. Therefore, employees continued to suffered the brunt and the need to amend the constitution to give effect to section 7(6) of NICA in line with best global practice became apparent and in response to this dire need, in 2010 this far cry was loudly heard sequel to which snowballed to the enactment of the Third Alteration Act. The Act expanded the scope of the jurisdiction of the NICN by incorporating 254C (1) (f) and (h) and (2) to the CFRN[15] which aside from giving effect to section 7(6) of the NICA, allowed for the application of global best practices and conventions without complying with the requirement enshrined in section 12(1) of the Constitution. In effect, this empowered the NICN to depart from the status quo as regard termination of employment without reason and import best international practices in the determination of labour and employment matters. Adejugbe in this regard contended that, by virtue of section 254C (1)(f) of the Third Alteration Act, of the CFRN, the NICN has been vested with broad powers which is interpreted to empower the court to apply best international practices on labour and industrial related matters even though such international best practices does not form part of the laws of the land.[16] Anushien and Chukwumah were also in consonance with this position and noted that, by virtue of the Third Alteration Act, employers will no longer have a field day in determining employment contracts without reason as this practice is no longer fashionable and contrary to international best practices.[17] Okonkwo while agreeing with this position, further contended that by the provision of the Treaties (Making Procedure, etc) Act,[18] the decision of the Apex Court in *Registered Trustee of National Associaition of Community Heath Practitioners of Nigeria* which operate for a long time as a barred to the application of undomesticated international conventions in Nigeria was delivered in error having regard to provision of the Act. The author predicated this contention on the fact that, the Treaty Act allowed for the application of ratified convention of ILO without the rigors of domestication.

We are in absolute agreement with the position of the authors discussed above and It is our understanding in line with the above contention that prior to the enactment of the Third Alteration Act, it was impossible for International Treaties or Convention to receive force of law in the country without complying with section 12(1) of the Constitution as the Constitution expressly prohibited the application of international conventions that are not re-enacted by the National Assembly. However, this bottleneck has been invalidated by virtue of section 254C (f) and (h) of the

Constitution. Therefore, the authority of *Registered Trustee of National Health Practitioners* earlier cited may not in actual sense represent the true position of the law in Nigeria having regard to section 254C of the Third Alteration Act. Worthy of note is the fact that NICN has recently through industrious pronouncements demonstrated it penchant to apply best international practices as obtainable in other notable jurisdiction in redefining labour relation in the Country. A movement we considered a welcome development in an effort to redefining the labour law jurisprudence in the country.

We are therefore firm in our conviction that going by the tenure of the Third Alteration Act, it is safe to say that the NICN can apply the provisions of the ILO Convention on Termination of Employment in the determination of the fairness or unfairness of termination of employment in Nigeria under global practice as the said convention has not been ratify by the National Assembly, therefore, the court can leverage on the window of best international practices to allow for the application of the provisions of the convention. A careful perusal of the said convention will revealed that Article 4 of the Convention precluded employer from terminating employment contract without reason.[19] The Convention also listed checklist of grounds that termination of employment cannot be justifiable and this includes, termination on the basis of strike, religion, discrimination and temporary absence from work due to illness, etc.[20] The Convention also enjoin employers to accord employees the right to fair hearing before being dismiss[21] and further accord employees right to appeal decision by employers that is based on unfair dismissal or termination to the appropriate body.[22] The Convention also placed the burden of proving the fairness of termination on the Employer.[23] Irrespective of this, the Convention recognized that an employer can legitimately dismiss an employee for reason of incapacity or operational requirements or conduct and that where the dismissal is unfair, the employee should be entitle to compensation.[24]

It is noted that, there is serious move by the Nigerian government to amend the labour law in line with the best international practices as the Federal Executive Council approved the the amendments of obsolete labour Act to meet the standard of the ILO. Commending this effort, the Nigeria Employers Consultative Association (NECA) Oyerinde commended the Federal Government for the effort and in his remark noted that while new ILO Conventions were created and ratified by nations of world, our labour laws remained obsolete"[25] Christ Ngige confirmed this position who noted that the current Nigeria labour laws are obsolete and not in tandem with international standards.[26] He further noted that the ILO has pointed out to the country the need to bring the nations law to be current with international labour standards and conventions as well as principles at work. It is therefore not a gain saying having regard to the admission by the Minister of Labour and NECA that the current labour legislations in Nigeria are obsolete and the reason for employee's ordeal in the hands of unscrupulous employers, therefore the need for urgent reform cannot be over emphasis as seen in the action of the Federal Executive Council.

We are therefore firm that if this draft bill that will be up for public hearing will be passed as expected in line with best global practice, it will bring succor to the plight of employees in the country and redefined labour jurisprudence in the country in line with comity of nations.

- South Africa Legal Framework

The Constitution of the Republic of South Africa and the LRA are the principal legislations that govern employment relation in the Republic. The Constitution guaranteed the right to fair labour practices[27] and enjoined courts in the Republic in the interpretation of the laws of the Republic to interpret same in line with the Republic public obligation to international law. In effect, it suffice that, international conventions of ILO ratified by the Republic are applicable without the rigors of domestication as previously obtainable in Nigeria. The LRA is guided by Section 23 of the Constitution and entrenches the right of workers and employers to form organisations for collective bargaining. Similarly, it encompasses the same principles as the BCEA as it also deals with strikes and lockouts, workplace forums and other ways of resolving disputes.[28] It provides a framework for the resolution of labour disputes through the Commission for Conciliation, Mediation and Arbitration (CCMA), the Labour Court and the Labour Appeal Court and guatanteed the right to fair labour practices.[29]

Aside from these two legislations, there is also the Employment Equity Act. The EEA provides for employment equity regulation, affirmative action measures and prohibition against unfair discrimination. The law aims to redress injustices of the past by implementing affirmative action measures. According to the legislation, it is unfair discrimination to promote affirmative action consistent with the Act or to prefer or exclude any person on the basis of an inherent job requirement.[30] There is also the Basic Employment Condition Act (BCEA). The BCEA is applicable to both employers and employees. It regulates labour practices and sets out the rights and duties of employees and employers. The Act is intended to ensure social justice by outlining the basic standards of employment with reference to working hours, leave, payment, dismissal and dispute resolution. These factors can be used by employees to manipulate circumstances if employers do not comply with legislation. These laws also provide the legal framework for fair and equitable treatment of employees in the place of work.

It is therefore clear from the foregoing that, there is in place functional legal framework for labour and employment matters in the Republic that is consistent with the ILO Convention on Termination as the LRA clearly barred employers from terminating employment without valid reasons. The LRA also classified certain dismissal on grounds of strike, pregnancy etc as automatically unfair dismissal that will entitled the employee to full compensation as well as reinstatement whereas other forms of dismissal on basis of incapacity, operational requirement that do not follow the procedural and substantive requirements as unfair dismissal that may have the same consequences. No doubt, employers in the Republic enjoy adequate protection in contrast to what is obtainable in Nigeria.

III. UNFAIR TERMINATION OF EMPLOYMENT CONTRACT IN NIGERIA

We have noted that the Constitution of Nigeria and the Labour Act are silent about the workers right to fair labour practices prior to the Third Alteration Act. The enactment of the Third Alteration Act however made it possible for the application of international convention and treaties on labour and employment matters notwithstanding section 12(1) of the Constitution. Similarly in furtherance to this the NICN Rules[31] enabled the court to apply the rules of common law and equity concurrently and that where the rules of common law are in variance with rules of equity, the later will prevail. Kanyip in this regard noted the role of the NICN to include preventing unfair labour practices[32] and that in achieving this tenet; the court must apply the principles of justice, equity and good conscience.[33]

It therefore suffice that, NICN can safely apply best international practices in labour law as obtainable in other jurisdiction in the determination of fairness of termination or dismissal. Court in keeping to this mandate took the bull by the horns in the case of *Bello Ibrahim v Ecobank Plc*[34] and deviated from applying the common law principles of 'he who hires, can fire, for good reason, bad reason or no reason at all" to find that all employers must adduce valid and substantial reason before determining employment contract. The Court in the aforementioned case heavily relied on Section 254C(1)(a)(f)(h) & (2) of the Third Alteration Act and section 7(1)(a) and (6) of the National Industrial Court Act (NICA)[35] to find that the dismissal of the Claimant by the Respondent was wrongful as the Respondent did not comply with C158-Termination of Employment Convention. Furthermore, the court maintained the same posture in the case of *Aloysius v Diamond Bank Plc*[36] where the court relied on the provision of section 254C(1)(f) and (h) of the Constitution to apply the Conventions provisions as being the "International labour standard and international best practice"

The case of *Duru v. Skye Bank Plc*[37] is also instructive in this regard, as the NICN boldly held that an employer is bound to give reasons for terminating an employee's contract and that termination of employment without adducing cogent reason will amount to unfair termination. So also in the case of *Petroleum and Natural Gas Senior Staff Association of Nigeria v Schlumberger Anadril Nigeria Ltd*[38] the NICN held that the common law principle that clothes the employer with unfettered right to terminate employment contract without reason is unfair labour practice. In the same vein, in the case of *Godwin Okosi Omoudu v Prof. Aize Obayan & Anor*[39], per Adejumo

stated that *it can never be just where an employer of labour, without just and established cause, impugned the integrity of an employee and base on this impugnation, goes ahead to temporarily terminate his employment contract.*[40]

In another interesting development that tent to give the position of the NICN sound backing, the Court of Appeal in the case of *Sahara Energy Resources Limited v Mrs. Olawunmi Oyebola*[41] validated this position where the court held that"..*The importance of this novel provision, in my deferential view, is that the National Industrial Court, in considering measure of quantum of damages is to do so in accordance with "good or international best practices in labour or industrial relations:, which shall be a question of fact."*[42] It is important to note that in this case, the court not that the Constitution empowers the NICN to apply best international practices and conventions in the determination of labour and employment matters.

It must however be noted that, the jurisdiction of the court to apply the said conventions and international best practice will be dependent on the pleadings of parties that intents to rely on same. The Court validated this position in the case of *Raphael Obasogie v. Addax Petroleum*[43] – one of the NICN held that for a court to apply international best practices or conventions there must be evidence that such conventions have been ratified and domesticated in Nigeria. Otherwise, the said convention will not be tolerated by the Court. it is our further argument that, where the convention is not ratify, the Constitution also provide a window under international best practices, as there is no requirement or condition set for its invocation or application as did by the Court in decisions considered above. This however is left for the dexterity of the claimant to persuade the court in this regard.

It is noted that the ground breaking decisions by the NICN with respect to the employers limitation on termination or dismissal is beginning to have far reaching consequences in the employment space in Nigeria. For instance as a result of this bold decisions, on the 1st day of April 2021, the Nigeria Employers' Consultative Association ("NECA") issued a memo to its members titled, 'Status of the Law on Termination of Employment' which stated in part that, "the practice where an employer could terminate contracts of employment with or without reason, provided the termination is with notice or payment in lieu of notice, is no longer the position.[44]" No reason was provided, but NECA's position is not without judicial backing, as recent jurisprudence from the National Industrial Court of Nigeria ("NICN") suggests that an employer may no longer terminate an employee's employment without reason.

It is further noted that the Federal Executive Council in recognition of this fact approved the Labour Amendment Act. The approval followed two memoranda presented to the council by the Minister of Labour and Employment, Dr. Chris Ngige, who noted that the labour laws of the country, as presently being operated, are obsolete laws.[45] Ngige explained that the International Labour Organization (ILO) had pointed that out that Nigeria needed to bring its laws to be concurrent with international labour standards and conventions and principles at work. The bill is a product of collective effort from the Federal, ILO and labour organizations and it is a welcome development to the labour and Nigerian employment space and none that will have a far reaching positive impact in the sector.

It is thus clear as rightly canvassed above that, it is no longer fashionable for an employer to determine employment contract in Nigeria without reason or without disclosing the motive for same. The common law position of the right to "hire and fire" is no longer the position as rightly noted by the Apex Court in labour relation matters which empowers the NICN with the power to depart from common law principles that stifled the growth and development of labour jurisprudence in Nigeria. This decision has clothed judges of the NICN with the requisite competence to invoke and apply liberal approach in the determination of labour relation disputes in the Country. This is seen as a welcome development which at the long run will reshape and reset the labour jurisprudence in Nigeria in line with global practices.

- Consequences of Unfair Dismissal in Nigeria

The NICN in keeping with this development has also in cases of adjudged unfair labour practices awarded deserving cost. For instance in the case of *Captain Benedict Olusoji Akanni v The Nigerian Army &Ors*[46]

the court awarded 75 million naira to the Claimant for loss of expectation and psychological trauma as a result of the arbitrary and illegal actions of the first defendant. Similarly, in the case of *Ugochukwu Edmund Okwo v Zenith Bank Plc*[47] the court awarded the claimant the sum of 33m 194, 245 70 naira compensation. The court took account of the accrued arrears of salaries of the Claimant from the date of suspension to the date the Claimant retired.

It is thus glaring that though the Court acted within the confines of the powers vested in it by virtue of section 254C(1)(f) and (h) of the Constitution as well as section 7(6) of the NICA as affirmed by Court of Appeal in reasoning in line with Article 4 of the ILOCTE and imported practice as obtainable in other notable jurisdictions that have long departed from the common law principles, it is however against the established decisions of the Apex Court in this regard and rules of judicial precedent in the Country.[48] This will obviously present another challenge to the application of this doctrine and we hope the Apex Court will validate this position to finally resettle this issue and afford all employees in the country adequate protection from the arbitrary and brazen act of unscrupulous employers

IV. UNFAIR TERMINATION OF EMPLOYMENT CONTRACT IN SOUTH AFRICA

In terms of the CFRS and the LRA, employees in the Republic are statutorily protected from being unfairly dismissed or subjected to unfair labour practices.[49] This protection is anchored on the constitutionally enabled right to fair labour practice.[50] The gamut of unfair dismissal in the Republic is understood from two perspectives with regard to the LRA;

1. Automatically unfair dismissal; and
2. Other unfair dismissal

V. DISMISSAL ON AUTOMATIC GROUND

An automatically unfair dismissal is a dismissal that is so inherently unfair that it expressly prohibited by the LRA and pertains to the infringement of Constitutionally guaranteed right of the worker to fair labour practices as enshrined in section 23 of the CRSA. This form of dismissal is covered by section 187 of the LRA and is distinguished from an 'ordinary' dismissal i.e. a dismissal for reasons relating to the employee's conduct, capacity or the employer's operational requirements. Section 187 of the LRA listed checklist of grounds that will constitutes automatically unfair dismissal and this includes;

a. Taking action or indicating an intention to take action against an employee for exercising or wanting to exercise any right or for participating in any legal activity;
b. Being pregnant or for planning to become pregnant or any other reason related to her pregnancy;
c. Belonging to or participating in the activities of a trade union;
d. Participating in or supporting a protected strike or for wanting to do so;
e. Refusing or indicating an intention to refuse, to do the work of another employee taking part in a protected strike, or who is legally locked out, unless the work is necessary to prevent an actual danger to life, personal safety or health;
f. Refusing to accept an employer's demand related to a matter of mutual interest e.g. refusing to accept a reduced wage demand from an employer during a strike and being dismissed for such refusal;
g. Any reason based on direct or indirect discrimination on any arbitrary ground, including (but not limited to) race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, faith, political opinion, culture, language, marital status or family responsibility;
h. In contravention of the Protected Disclosures Act, 2000 because the employee made a protected disclosure as defined in that Act.

Automatically unfair dismissal are normally adjudicated by the LC and in so doing, the law places the burden of establishing that the dismissal is automatically unfair on the Claimant to bring the subject matter of the dismissal within the ambit of section 187(1) of the LRA, otherwise, the claim will fail. The LC in the case of *SA Chemical Workers Union and Others v Afrox Ltd*[51] on how to determine burden of prove in automatically unfair termination held that:

The first step is to determine factual causation: was participation or support, or intended participation or support, of the protected strike a sine qua non (or prerequisite) for the dismissal? Put another way, would the dismissal have occurred if there was no participation of support of the strike? If the answer is yes, then the dismissal was not automatically unfair. If the answer is no, that does not immediately render the dismissal automatically unfair; the next issue is one of legal causation, namely whether such participation or conduct was the 'main' or 'dominate', or 'proximate', or 'most likely' cause of the dismissal.

The Court has also in the case of *Kroukam v SA Airlink (Pty) LtD*[52] maintained that, the burden of prove will oscillate to the Respondent or the employer to show that the dismissal was fair once the employee successfully establish that the dismissal was automatically unfair. This is also the position as further confirmed in the case of *State Information Technology Agency (Pty) Ltd v Sekgobela*[53] where it was held that the burden of prove in automatically unfair termination lies squarely with the applicant and not otherwise.

VI. GROUNDS FOR DISMISSAL ON AUTOMATICALLY UNFAIR BASIS

- Dismissal on the Basis of Protected Strike

Section 23(c) of the CRSA guarantees the right to strike and picketing.[54] This protection was given effect by sections 64(1) of the LRA which provides adequate protection for the employee on basis of protected strike.[55] Protected strike is defined in section 67(1) of the Act as; "a strike that complies with the provisions of this LRA"[56] It then suggests that, it is not all strikes that are protected by the LRA. For instance, where employees on their own frolic, engage in strike outside the confines of the LRA, the action will not be afforded the protection envisage under the LRA. This is the import of section 65 of the Act which provides legal limitation for right to strike. Therefore, for a strike to amount to automatically unfair dismissal in other to be accorded protection in line with the section 187(a) of the LRA, the claimant or applicant must bring the action of the employer within the ambit of section 23(1)(c) of the CRSA, and section 64 as well as section 67(1) of the LRA. The Court affirmed this position in the case of *National Union of Public Service and Allied Workers and Others v National Lotterries Board*.[57] The Applicant in the said case was dismissed for participation in lawful strike and dissatisfied with the decision of the employer approached the Labour Court on that basis. The court after a careful appraisal of the facts constituting the case held that" dismissal on the basis that the employee participated in a lawful strike will amount to automatically unfair dismissal[58]. This position was further reaffirmed by the court in the case of *Numsa and Others v Dorbyl Ltd and Another*.[59] The court in the aforementioned case frown at practices of dismissing employees exercising their lawful right to strike and found that if the reason for the dismissal of employees during strike is the participation in a protected strike, and not the employers operational requirements, then the dismissals will amount to automatically unfair dismissal in terms of section 187(1)(a) of the LRA. See also the case of *SATAWA Obo Rune v Bosasa Security (Pty) Ltd.*[60] where the court fortified this position and held that" If employees participation in the strike was the main, or dominant, or proximate or mostly caused of their dismissal, it will be automatically unfair.[61]

- Dismissal on the Basis of Impelling the Employee to accept a Condition that is Unacceptable

It is also automatically unfair dismissal where the reason for the dismissal is on the premise that the employer impels the employee to accept a demand in any matter of mutual interest against his wish or interest.[62] This right is anchored on sections 13 and 15 of the CRSA which prohibits slavery, servitude and forced labour as well as guaranteed the right to freedom of religion, belief and opinion.[63] The court in its wisdom affirmed the protection of this right in the case of irrevocable. Similarly, in the case of *CWIU &others v Algorax (Pty) Ltd*[64] the Labour Court held that where a dismissal compels or impel the employee to agree to the employers demand to change terms and conditions of employment which he or she is uncomfortable with, will amount to automatically unfair dismissal.

- Dismissal on Ground of Pregnancy

The LRA prohibits employers from dismissing employees on the basis that the employee is pregnant, intended pregnancy, or any reason related to her pregnancy.[65] It is noted that section 23 of the CRSA

guarantees Right to fair labour practices, which entails; everyone within the employment net is treated fairly without discrimination. The court validated this position in the case of *Mashava v Cuzen and Woods Attorneys*[66] where the Labour Court held that dismissal on ground of pregnancy of the employee amount to automatically unfair dismissal. Similarly, in the case of *Wardlaw v Supreme Mouldings (Pty) Ltd*[67] the Labour Court held that where an employee alleges that her employment has been terminated on account of pregnancy, the employer bears the onus of proving that a fair reason exists for dismissal unrelated to the employees pregnancy.

- Dismissal on the basis of Discrimination

It is also automatically unfair dismissal to dismiss an employee on the basis of discrimination of any kind. It is noted that where dismissal is predicated on this ground, it will offend the provisions of the LRA and EEQ as well as section 9 of the CRSA which prohibits discrimination of any kind thus:

" Everyone is equal before the law and has the right to equal protection and benefit of the law" equality includes, the full and equal enjoyment of all rights and freedoms, to promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken; the State may not unfairly discriminate directly or indirectly against any one on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth; No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of section (3). National legislation must be enacted to prevent or prohibit unfair discrimination and Discrimination on one or more grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.[68]

This provision was given effect by section 187(f) of the LRA where the said provision qualifies dismissal on any of those grounds listed in section 9(2) of the Constitution as automatically unfair dismissal. It is further noted that section 2(a) of the Employment and Equity Act[69] also in the same spirit prohibit unfair discrimination in workplace wherein, in stating the purpose of the Act, it provides that; "The purpose of the Act is to achieve equity in work place by promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination.[70] Furthermore, section 5 of the EEA mandate all employers to take steps that will promote equal opportunity in the work place that will eliminate unfair discrimination in the workplace environment which pertains to employment policy or practice.[71] Furthermore, section 6(1) of the EEA instructively provides that "No person may unfairly discriminate, directly or indirectly, against an employee in any employment policy or practice on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, color, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language and birth.[72] Interestingly, section 11 of the EEA placed the burden of proof in unfair discrimination on the employer to show that the employee's termination of employment contract is unconnected to the grounds alleged.[73]

The courts in the Republic have also helped in the protection of this right. For instance in the case of *Allpass v Mooikloof Estates (Pty) Ltd t/a Mooikloof Equestrain Centre*[74] *and the case of Hoffmann v South African Airways*[75] the court held that dismissal predicated on the HIV status of an employee constitute discrimination prohibited by s 187(1) of the LRA and thus amounts to automatically unfair dismissal. Also, in the case of *POPCRU and Others v Department of Correctional Services and Another*[76] the court held that if an employer differentiates for no good reason between male and female employees with regard to enforcing dress code, this may constitute unfair discrimination. Similarly, in the case of *BMW (South Africa) (Pty) Ltd v National Union of Metalworkers of South Africa and Another*[77] the Court held that where an employee is dismissed based on a retirement age imposed on him without his consent, this will constitute automatically unfair dismissal. In the same vein, *In Atkins v Datacentrix (Pty) Ltd*[78] the employee was dismissed for his failure to disclose during his interview his intention to undergo a gender reassignment process.[79] The Court held that the principle or dominant reason for his dismissal was that the employer was not happy about the gender reassignment process and dismissed him for that.[80]

The Court found that the employee's claim was one of an automatically unfair dismissal in terms of section 187 of the LRA and unfair discrimination in terms of the EEA.

- Dismissal on Basis of Protected Disclosure

It is also automatically unfair dismissal to dismiss an employee on the basis of disclosing a protected secrete. This protection was considered necessary in the case of Tshishonga v Minister of Justice and Constitutional Development and Another[81] where the court reasoned that whistle blowing in organization is healthy to the development of the society and any person that takes risks in this regard for the promotion of just system should be protected by the court. This position was reiterated in the case of *Symth V Anglorand Securities Ltd.*[82] where the court noted that the action of watching wrong doers perpetrate wrong against the society and good men watching without taking any action to address will often have negative consequences for the actor and the society. As a result, such actors need to be afforded the necessary legislative protection. This protection encourages observers of maleficence to come forward knowing that the law is on their side. Especially in the employment environment, where employees in discharging their day-to-day duties may become observers of this wrongdoing and are the only ones who would have such knowledge and ability to report wrongdoing, such employees must be properly immunized from retribution by their employers, if they decide to come forward about it. This is where the Protected Disclosures Act (PDA) afford them the immunity. The court in the case of *National Institute for the Humanities and Social Sciences v Lephoto and Another*[83] reiterated this protection when the Court held thus:

'The PDA is an important piece of legislation and is part of the overall framework which ensures that the exercise of both public and private power should be conducted in a transparent and accountable way. It seeks to create a climate in which employees, whether in the private and the public sector, are able to disclose information regarding unlawful and irregular conduct by employers or other employees in the employ of the employer in a manner which will not result in any occupational detriment to a person who commendably considers that the organization, in which he or she works, should operate legally and in a meticulously regular fashion. …'[84]

It must however be noted that, it is not all disclosure that are protected. In the case of Palace Group Investments (Pty) Ltd and Another v Mackie.[85] The court gave guidance in this regard thus:

'… not all disclosures are protected in the sense of protecting the employee making the disclosure from being subjected to an occupational detriment by the employer implicated in the disclosure. A protected disclosure is defined as a disclosure made to the persons/bodies mentioned in Ss 5, 6, 7, 8 and 9 and made in accordance with the provisions of each of such sections. In terms of s 6, for a disclosure to fall within the ambit of a protected disclosure it must have been made in good faith. It is clear that before other provisions of the PDA can come into play, the disclosure allegedly made must answer to the definition of that term as set out in the definition section …

It is therefore automatically unfair where the employer dismissed the employees who disclose relevant information in this regard as seen in the case of David Smith where the Court set aside the dismissal of the Applicant on this basis and found same as automatically unfair dismissal.

VII. REMEDIES FOR AUTOMATICALLY UNFAIR DISMISSAL

In terms of section 193(3) of the LRA provides to the effect that, where the LC finds that the dismissal is automatically unfair, the Court can order for re-instatement or compensation or even make any other order that is just in the circumstance.[86] Furthermore, the compensation awarded to an employee whose dismissal is automatically unfair must be just and equitable in all the circumstances, but not more than the equivalent of 24 months' remuneration calculated at the employee's rate of remuneration on the date of dismissal.[87]

- Other Unfair Dismissal

Aside from automatically unfair dismissal whose grounds are anchored on the constitutionally guaranteed right as provided in section 23 of the

Constitution, Section 188 of the LRA also contains other grounds that dismissal of employee can constitute unfair dismissal aside from being automatic dismissal."[88] This portion of the LRA placed the burden on the employer to prove that the dismissal outside the grounds provided for in section 187(1)(a-h) is fair particularly connected to employees conduct or capacity; based on the employers operation requirements and that the dismissal was effected in accordance with fair procedure. In achieving this, recourse must be heard to Schedule 2(4) of CGP which provides in this regard that "In cases where the dismissal is not automatically unfair, the employer must show that the reason for dismissal is a reason related to the employee's conduct or capacity, or is based on the operational requirements of the business. If the employer fails to do that, or fails to prove that the dismissal was effected in accordance with a fair procedure, the dismissal is unfair.[89]

Alleged cases of unfair dismissal under this category are normally referred to the Conciliation Committee in writing within 30 days[90] of the alleged dismissal and the burden is usually on the employer to show that the dismissal was substantively and procedurally fair, otherwise, the employee will be entitled to either compensation of 12 months' salary or reinstatement.

Substantive Fairness
The employer must have a proper and fair reason for dismissing the worker.

A 'fair' reason can be one of these:

- misconduct (the worker has done something seriously wrong and can be blamed for the misconduct.)
- incapacity (the worker does not do the job properly, or the worker is unable to do the job due to illness or disability)
- retrenchment or redundancy (the employer is cutting down on staff or restructuring the work and work of a particular kind has changed)

Even if the worker is at fault, the employer must still pay the right wages, leave pay and notice pay.

2. Procedural fairness (was there a fair procedure before the worker was dismissed?)

The worker must always have a fair hearing before being dismissed. In other words, the worker must always get a chance to give his or her side of the story before the employer decides on dismissal. Other aspects of a fair procedure are explained below under the different reasons for dismissal. The worker is allowed to refer the proposed dismissal to the CCMA for conciliation.

It must therefore be noted that, in spite of the above, in terms of the LRA, there are three recognized fair grounds of dismissal –

1. Misconduct;
2. Operational Requirements (redundancy/retrenchment); or
3. Incapacity (this is inclusive of ill health, poor work performance and incompatibility).

This shows that an employer is allowed to terminate employment contract of employee where he can proof that the termination is connected with incapacity, operational requirement of the work and in accordance with fair procedure.[91] The question then is , how can these requirements be determine and whether the law has set parameters for their determination in the termination of the employment contract? Each reason for dismissal has a distinct procedure which must be followed in terms of the LRA. On a high level –

1. Misconduct – an investigation should be conducted by the employer and a disciplinary enquiry should be held to determine, on the balance of probabilities, whether the employee committed the alleged misconduct;
2. Operational Requirements (*redundancy/retrenchment*) – a consultation process should be embarked upon, in which the employer and affected employees should engage in a meaningful and consensus seeking manner. The LRA sets out specific issues which, at a minimum, the parties must consult on. No decisions about the proposed redundancies may be made or implemented before the consultation process has been exhausted; or
3. Incapacity – depending on the form of incapacity being pursued, this process could involve, *inter alia*, counseling, providing the employee with reasonable assistance and/or time to improve and/or seeking alternatives to accommodate the employee

CONCLUSION

The concept of unfair termination of employment contract is not recognize under the Nigerian Labour Act. Employers are accorded the unfettered powers to determine employment contracts with or without reason and the motive for the termination is irrelevant as long as the termination is done in accordance with the terms expressly agreed by parties and except for employment contracts regulated by statute. This however is not the position in South Africa where the Constitution recognized the right to fair labour practices and the employment relations legislations particularly the LRA, BCEA and EEA recognize the right of employees not to be unfairly dismissed without valid and cogent reasons which is in tandem with Article 4 of the ILO Convention on Termination of Employment. The NICN in Nigeria through the Third Alteration Act has been vested with the jurisdiction to apply best international practices and jurisdiction over unfair labour practices. The problem has been the barrier set by section 12(1) of the Nigerian Constitution which made the domestication of ILO Convention a precondition for its application in Nigeria. It is our understanding in this regard that though there has been a sustained controversy in this regard, section 254c of the Third Alteration Act has cured this headache which informed the rationale of NICN applying it in the determination of some cases recently. In South Africa, the Constitution and Labour Act provide platform for the application of ILO Conventions without the rigors of domestication once same are ratified.

It is further noted as observed in the discussion that the Code of Good Practice in South Africa set guidelines for employers to follow in the determination of employment contract in any of the grounds identified by the Act. Though the Code is not binding, it however provides employers with a guide for fair determination of employment contracts. This guide is however absent under the Nigerian labour law jurisprudence as employers are allow unrestrained discretion to determine employment contract of master-servant at will without regard to reason or motive. It is thus clear that, South Africa has adopted the progressive approach in labour matters while Nigeria continues to struggle in this aspect. Though, it is hopeful that the Third Alteration Act that introduced a new vista in the Nigerian labour law jurisprudence by clothing the NICN with powers to apply best international practices with respect to labour relation matters will push the court into reshaping labour jurisprudence in the country.

RECOMMENDATIONS

The following recommendations are proffered.

1. It is recommended that, the Nigerian Constitution as well as the Labour Act be amended to incorporate the right to fair labour practices.
2. It is our further recommendation that Basic Condition of Employment Act and the Employment Equity Act be replicated in Nigeria to amplify some rights that are enshrined in the Constitution and Labour Act with respect to equality and discrimination from the employment environment.
3. It is further recommended that Code of Good Practice should also be enacted in Nigeria to set parameters and guide termination of employment contract in the country.

It is also our recommendation that Article 4, 7, and 8 of the ILO Convention on Termination of Employment be incorporated in the Nigerian Labour Act to provide that valid reasons must be advance before termination of employment can be activated that in so doing, the employee must be accorded the right to fair hearing as well as approach the court in terms of dispute.

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