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MODULE 1

Unit 1	History and Sources of Nigeria Labour Law
Unit 2	The Contract of Employment
Unit 3	Who is an Employee?
Unit 4	Employer And Employee - Duties And Obligations

UNIT 1 HISTORY AND SOURCES OF NIGERIAN LABOUR LAW

CONTENTS

1.0	Introduction
2.0	Objectives
3.0	Main Content
3.1	History and Sources of Labour Law in Nigeria
3.2	Purpose of Labour Law
3.3	The scope of Labour Law
4.0	Conclusion
5.0	Summary
6.0	Tutor Marked Assignment
7.0	Reference/Further Readings

1.0 INTRODUCTION

This unit is to introduce the students to the history and sources of Nigeria Labour Law. The basic context of Labour Law will be examined to know its nature.

One of the effects of the Europeans coming into this part of the world was the introduction of wage-earning employment. In the course of time it was discovered that it was absolutely necessary to safeguard the interest of both the employer and the employee, hence the introduction of the various means of regulating employer-employee relationship. Initially, it was thought that the employees were being made objects of servitude but in the long run it became apparent that this sort of relationship requires the incorporation of rules to avoid either party being cheated outrightly. Labour law which was fashioned to ameliorate the prevalent crisis engulfing the industry in England at a time was adopted in Nigeria as a direct consequence of colonialism by the United Kingdom.

However, as time went on, other very germane laws which regulated employment relationship and the relationship of trade unions and their members on the one hand, and the relationship with the employers such

as the Trade Unions Act and the Trade Disputes Act, on the other, emanated. Some of these pieces of legislation will be fully examined in this course.

Succinctly put, Labour law which is the law of the relationship between the employer and the employee in Nigeria was developed from several sources which will be adequately dealt with in this unit.

2.0 OBJECTIVES

By the end of this unit you should be able to:

- identify the various sources of Nigeria Labour Law;
- discern the history of Labour Law in Nigeria;
- understand the whole essence of Labour Law in Nigeria;
- determine factors of a Master/Servant relationship; and
- identify various statutes on Labour Law in Nigeria.

3.0 MAIN CONTENT

3.1 History and Sources of Labour Law in Nigeria

The History and sources of Nigerian Labour Law may be divided into legal and extra-legal sources. Extra-legal sources, in contradistinction to the legal sources are those created by the voluntary conduct of the parties.

The legal sources of Nigeria Labour Law are:

- (a) The Nigerian constitution
- (b) Nigeria's statutes
- (c) The received English law, comprising
 - (i) the common law,
 - (ii) the doctrines of equity; and
 - (iii) statutes of general applications in force in England on January 1, 1990.
- (d) Nigerian case law i.e. decisions of Nigerian courts relevant to labour law.

The extra-legal sources, on the other hand, include;

- (a) Collective agreements
- (b) Workplace notices and documents e.g. rule books and handbooks
- (c) Custom and practices

SELF ASSESSMENT EXERCISE 1

- i. What are the major sources of Nigeria Labour Law?
- ii. What are the differences if any, between the legal and extra-legal sources of Nigeria Labour Law?

HISTORY OF LABOUR LAW IN NIGERIA

Labour law in Nigeria is generally defined as that branch of the country's law which regulates industrial relations. In essence, labour laws are meant to guarantee peace and harmony in the industry so as to increase productivity and profits.

Our labour laws are largely a reflection of our colonial heritage. By virtue of this, many principles of British labour law featured prominently in our labour statutes.

The main characteristics of the incursion of the colonial masters were the introduction of labour laws and policies which seemed largely designed to facilitate the commercial and economic objectives and interests of the colonial masters. Thus, in spite of the fact that Britain proudly claimed to observe the Bill of Rights and the rule of law, labour leaders were targets of repression and oppression for no other justifiable reason than that they had the effrontery to demand for their rights.

In 1861, Lagos was ceded to the British Crown and in 1862 it was made a colony or settlement as it was sometimes called. By virtue of the Supreme Court Ordinance 1876, English common law, doctrines of equity and statutes of general application were received into Nigerian legal system and by extension, Nigerian Law.

Notwithstanding that the offence of criminal conspiracy as it affected trade unions had been abolished in England by the Conspiracy and Protection of Property Act as far back as 1875, Nigerian workers did not enjoy such protection until 1939 when the Trade Union Ordinance was enacted.

Apart from statutes and laws regulating employment, common law has played and continues to play an important if not dominant role in regulating the relationship of master and servant or, as it is known in modern times, employer and employee.

The courts have by themselves have also developed rules which have become permanent features of the contract of employment. By these rules, certain obligations and rights are implied into contracts of employment in order to give such contract the required and necessary business efficacy.

According to the eminent Professor of Law, Professor Uvieghara, Nigeria Judges provide the vehicle by which the received English common law is brought into Nigerian law with binding effects. The learned author cited the Supreme Court judgement in *Ezeani V Njidi* (1965) *N.M.L.R.*95 as an example of the distinctive character which the Nigeria judicial decisions are taken on in the light of the prevailing unfavourable local circumstances.

Labour law in Nigeria has come to stay and had grown considerably well after its first introduction following the cession of Lagos to the British crown in 1861 and has enjoyed a high level of judicial activism up to date. It is now part and parcel of our laws with up to date legislations which take care of as they emerge.

SELF ASSESSMENT EXERCISE 2

- i. Trace the history of Labour law in Nigeria from 1861 to date.
- ii. Highlight the various sources of Nigeria labour law.

3.2 Purpose of Labour Law

One of the major purposes of labour law is to regulate the relationship between an employer and an employee. By this, the common law and statute have established that an employer is under an obligation to ensure the safety and security of his employee.

Therefore, it is now recognized that an employer owes a duty to each employee to take such action as the nature of the work and circumstance of the employee demand so that the employee is reasonably safe at his place of work.

An often quoted statement of this important duty of the employer is that of Lord Wright in *Wilson and Clyde Coal Co. Ltd V English* (1938) *AC* 57 at 80 where he said that;

...the whole course of authority consistently recognizes a duty which rests on the employer and which is personal to the employer to take reasonable care for the safety of his workman, whether the employer is an individual, a firm or a company,

and whether or not the employer takes any share in the conduct of the operations.

Therefore, the primary purpose of labour law is that it imposes direct liability on the employer and is separate from the Master's vicarious liability for negligence of his servants. This is a duty imposed on the master and recognized by the common law. It is popularly referred to as the 'Duty of Care' but is subject to certain limitations as it is open to defenses of *volenti non fit injuria* and contributory negligence. This duty is now statutorily under the Factories Act and other statutes designed for the safety of workers.

SELF ASSESSMENT EXERCISE 3

What are the significance, relevance and purpose of labour law to an employee?

3.3 The Scope of Labour Law

To understand the major scope of Labour law, one has to look at the likely and probable legal consequences which may follow it in a situation where there is a breach of any of the obligations imputed on either the employer or the employee. A typical example of the scenario being examined is wrongful dismissal of an employee by the employer without recourse to the regulations and guidelines of the company. This under the law is a typical example of wrongful dismissal. This will automatically give rise to a civil proceeding at the instance of the wrongfully dismissed employee.

On the other hand where an employee who is under an obligation to give adequate and substantial notice to his employers before quitting such job abandons his employers without recourse to the conditions of his employment, he will be the defendant at the suit of the company/employers for damages caused as a result of his unprofessional attitude to work without recourse to the regulations and conditions of his employment.

SELF ASSESSMENT EXERCISE 4

How can you determine who is wrong when a clause in the regulation governing the employment of an employee is breached?

4.0 CONCLUSION

This unit has afforded you the opportunity to know the history and sources of Nigeria Labour Law. It has also exposed to you the purpose

and scope at the subject. It therefore implies that the relationship of an employer vis-à-vis an employee could arise due to the nature of the transaction between them.

5.0 SUMMARY

This unit has revealed the fact that;

Nigeria Labour Law developed from English common law.
The sources of Nigeria Labour Law also emanated from two major sources viz Legal and Extra-legal sources

LEGAL SOURCES

- (i) The Nigerian constitution
- (ii) Nigerian legislations
- (iii) The received English law comprising of the common law, the doctrines of equity and statutes of general application in force in England on January 1, 1990.
- (iv) Nigeria case law i.e. decisions of Nigeria courts relevant to labour law.

EXTRA-LEGAL SOURCES

- (i) Collective agreements
- (ii) Workplace Notices and documents e.g. rule books and handbooks
- (iii) Custom and practice

6.0 TUTOR MARKED ASSIGNMENT

Discuss on the historical antecedent of the Nigerian Labour Law.

7.0 REFERENCES/FURTHER READINGS

OGUNNIYI O. (2004) *Nigeria Labour and Employment Law in perspective*, 2nd Ed, Folio Publishers Limited; Ikeja, Lagos.

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UNIT 2 THE CONTRACT OF EMPLOYMENT

CONTENTS

- 1.0 Introduction
- 2.0 Objectives
- 3.0 Main Content
 - 3.1 What is a contract of employment?
 - 3.2 Nature of contract of employment
 - 3.3 The applicable statutes to contract of employment
 - 3.4 The Terms of the Contract
- 4.0 Conclusion
- 5.0 Summary
- 6.0 Tutor Marked Assignment
- 7.0 References/Further Readings

1.0 INTRODUCTION

The Contract of Employment is the central element in the structure of labour law. At common law, the assumption is that the terms of the contract are freely established by parties who are equal. Contract of Employment, otherwise called, contract of service, like all other contracts, is governed by the general law of contract.

Therefore, all the essential features which characterize ordinary contracts must be present in a contract of employment before it can be a valid contract of service.

The major object of a contract of employment is to put in a written form the regulatory guidelines for the relationship between the employer and the employee. This unit is also meant to emphasize for the student the importance of a contract of employment in any master/servant relationship

2.0 OBJECTIVES

By the end of this unit you should be able to:

- define what a contract of employment is;
- highlight the importance of a written contract of employment in a master/servant relationship;
- understand the importance of the necessity for a contract of employment in any master/servant relationship; and
- identify the basic consequences/liabilities of the failure of either party to the contract of employment.

3.0 MAIN CONTENT

3.1 What is a Contract of Employment?

As in every form of contract, the contract of employment is the central element in the structure of labour law. One could succinctly say that a contract of employment is that written document that governs the relationship between an employer and an employee. This will generally presuppose that there is someone who is in dire need of labour and another who is in dire need of wages.

3.2 Nature and Basic Elements of Contract of Employment

As stated in the introductory part of this unit, a contract of employment, like all other contracts, is governed by the general law of contract. Therefore, all the essential features which characterize ordinary contracts must be present in a contract of employment before it can be said to be a valid contract of service.

A contract of employment may be under seal, oral, in writing or inferred from the conduct of the parties thereto. The essential elements required for the validity of contracts are;

- (a) offer;
- (b) acceptance;
- (c) consideration;
- (d) intention to create legal relations;
- (e) capacity to contract;
- (f) certainty; and
- (g) legality.

3.2.1 Offer

The offer is an expression of willingness to contract made with the intention (actual or apparent) that it shall become binding on the person making it as soon as it is accepted by the person to whom it is addressed. It may also be express or by conduct.

In *AGOMO V GUINNESS (NIG) LTD (1995)2 N.W.L.R (PT380) P.672 at 675*, the Supreme Court defined an “offer” as

A proposition put by one party (the offeror) to another in dire need of a means of survival in terms of a gainful employment. When these two meet, and there is a consensus as to the terms and conditions of service to be rendered by the employee for a fee, salary or wages mutually agreed by both parties, then it is

said that a master/servant relationship exists between them. Therefore, the said employee becomes subservient to the dictates of the employer who is otherwise regarded as the master.

In labour law however, there is a clear distinction between servants who are subject to the whims and caprices of their masters who chose, directs, monitors and controls the servant in respect of the jobs to be performed by the servant. The master dictates what to do and what not to do. In such a situation, the contract of employment is said to be a contract to service.

On the other hand, where the employer chooses, directs, monitors and controls the type of job to be performed for the master, such contract of employer is categorized as a contract of service. The employees in this category include professionals such as lawyers, doctors, architects, nurses, engineers and so on. This distinction shall be dealt with at the appropriate unit in this course.

3.2.2 Acceptance

While an offer is an expression of willingness to contract, an acceptance on the other hand is a final and unqualified expression of assent to the terms of an offer. In *Lawal V U.B.N. Plc (1995) 2NWLR (pt. 378) 407 at 409* the Supreme Court defined acceptance as an unqualified assent to the terms of an offer. The Court further stated that for acceptance of an offer to constitute an agreement the acceptance must be made while the offer still subsisted, and was known to the offeree, and must be communicated to the offeror, or the requisite act required by the offeror must have been done.

One could safely conclude that expression of interest to an offer clearly indicates an interest to accept the terms and condition of such an offer.

CONSIDERATION

Usually consideration takes the form of promises exchanged by the contractual parties, or the duty undertaken by one party on account of the promises of the other. In the famous English case of *CURRIE V MISA (1875) L.R.10 Exch. 153 at 162*, *LUSH J.* made a classical definition of the term consideration as follows;

A valuable consideration in the eye of the law may consist either in some right, interest, profit or benefit accruing to one party, or some forbearance, detriment, loss or responsibility, given, suffered or undertaken by the other. Thus consideration does not only consist of profit by one

party but also exists where the other party abandons some legal right in the present, or limits his legal freedom of action in the future as an inducement for the promises of the first.

In a contract of employment, the consideration for work is wages and the consideration for wages is work.

INTENTION TO CREATE LEGAL RELATIONS

The question is “did the parties intend that legal consequences should flow from their agreement?” If the answer is negative, there is no contract, while a converse answer will yield a contract.

In answering this question, the law presumes that social or domestic agreements are not contracts.

There is, however, a strong presumption that commercial agreements are legally binding because the parties usually intend that their agreements should be enforceable. However, these presumptions are rebuttable.

Therefore, once the above elements are present, a contract exists, provided, however, that it is not rendered wholly or partly ineffective on account of some defects when it was formed. These elements include;

- (1) Illegality
- (2) Lack of capacity to contract
- (3) Misrepresentation
- (4) Mistake
- (5) Duress, and undue influence

Where any of these elements exists, the whole essence of the contract will be negated and the contract declared null and void *ab initio*.

3.2.5 Capacity to Contract

This head forms part of the basic elements that may vitiate a contract of employment to create legal relation. It is worthy to mention that it is also a basic requirement for a valid contract. The general rule was stated by SIR GEORGE JESSEL in *PRINTING AND NUMERICAL REGISTERING CO. V. SAMPSON (1875) L.R. 19 E q. 462 at 465* as follows;

Men of full age and competence understanding shall have the utmost liberty of contracting and their contracts, when

entered into freely and voluntarily shall be sacred and shall be enforced by courts of justice.

The simple interpretation of the foregoing is that apart from men and women of full age, infants, insane and drunken persons generally lack contractual competence.

3.2.6 Certainty

For a contract of service to be valid it must be certain in its terms. The parties must be certain or must be capable of being reasonably identified, the subject matter must be certain and all essential terms must equally be certain.

3.2.7 Legality

The proposed contract must be legal in its object and manner of performance. As an example, a contract which involves the commission of crime e.g. smuggling or the employment of people for the purpose of sexual immorality will be null and void. So also is a contract intended to defraud tax authorities, say by understating the salary so as to pay less tax.

SELF ASSESSMENT EXERCISE 2

- i. What are the basic elements for a valid contract of employment?
- ii. What are the distinctive features, if any, between certainty of contract and legality of contract?

3.3 The applicable statutes to contract of employment

The Labour Act Cap 198, Laws of the Federation of Nigeria, 1990 is the only Nigeria statute which makes provisions on minimum terms which certain employment contracts must have. The parties to the contracts of employment covered by the Act can agree on terms better than those of the Act.

However, it is not a disputable fact that where a contract of employment is covered by the Act, in the absence of contrary terms agreed by the parties, the terms provided by the Act will form part of their contract. These terms will include the following.

- (i) Period of Notice – section 11(1) Labour Act
- (ii) Provision of transport – section 14(1) Labour Act
- (iii) Duty to provide work – section 17 Labour Act
- (iv) Annual holiday with pay – section 18(1) Labour Act.

In the same vein by virtue of section 2(3) of the Trade Disputes Act, Cap 423 and 18(3) of the Wages Board and Industrial Councils Act, Cap 466, terms of collective agreements, to which those sections relate, become part of the contracts of employment of employees concerned, once the Minister of Labour makes an order to that effect.

SELF ASSESSMENT EXERCISE 3

- i. Examine the basis of regulatory statutes in respect of Labour Law in Nigeria.
- ii. What is the effect of the Trade Dispute and Wages Board and Industrial Councils Acts on contract of employment in Nigeria?

3.4 The terms of a Contract of Employment

By virtue of section 91 of the Labour Act, Cap 198, Laws of the Federation of Nigeria, a contract of employment means any agreement, whether oral, written, express or implied, whereby one person agrees to employ another as a worker and that other person agrees to serve the employer as a worker.

By the foregoing, it is clear that contractual terms consist of express and implied terms.

Express terms comprise those orally agreed or reduced to writing. Section 7 of the Labour Act makes it mandatory for an employer, not later than three months after the commencement of a worker's employment, to take the particulars of the employer, place and date of commencement of the engagement, the nature of the employment, duration of the contract, method of termination of contract, wages and the period of payment, hours of work, holidays, holiday pay and sick pay.

Implied terms are those which the contractual parties have not expressed or made but which may yet form a part of their contract. Mi Awolowo ?????University Sources of implied terms include;

- (a) Common law
- (b) Collective agreements
- (c) Workplace notices and documents
- (d) Customs and practices
- (e) Terms imposed or assumed by the courts
- (f) Statutes

See: *Olatunde V Obafemi Awolowo University (1998) 4 S.C.*

Asrta Industries Nigeria Ltd V N.B.C.I. (1998) 3 S.C. 98.

SELF ASSESSMENT EXERCISE 4

- i. What are the effects of terms of contract in a contract of employment?
- ii. Distinguish between express and implied terms in a contract of employment.
- iii. Highlight the various terms implied by a contract of employment.

4.0 CONCLUSION

This unit has revealed the basic concepts in a Contract of Employment in terms of the nature and basic elements, the applicable statutes and the various terms of the contract.

The concept of contract of employment as discussed above took into cognizance the peculiar nature of the Nigerian situation under the various legislations in respect thereto.

5.0 SUMMARY

This unit has revealed the following facts;

Definition of contract of employment both under the common law and under the Nigeria statutes regulating thereto.

The nature of a contract of employment and the basic requirements needed for a valid employment contract.

A discussion of the relevant statutes

The distinctive features between the terms of contract.

Where a contract of employment exists, it is necessary to put in place all the necessary machineries that will make it workable and compensatory to the adverse party in time of breach.

6.0 TUTOR MARKED ASSIGNMENTS

1. Examine the basic features of a contract of employment.
2. What is the effect of the enabling statutes in a contract of employment situation?

7.0 REFERENCES/FURTHER READINGS.

OGUNNIYI O. (2004) *Nigeria Labour and Employment Law perspective*, 2nd Ed, Folio Publishers Limited; Ikeja, Lagos.

NWAZUOKE A.N. (2001) *Introduction To Nigeria Labour Law*, 1st Ed,
Department of Public Law, & Jurisprudence, Faculty of Law,
Olabisi Onabanjo University, Ago-Iwoye

Labour Act, CAP 198, Laws of the Federation of Nigeria, 1990.

Factories Act, CAP. 126 Laws of the Federation of Nigeria, 1990.

UNIT 3 WHO IS AN EMPLOYEE?

-CONTENTS

- 1.0 Introduction
- 2.0 Objectives
- 3.0 Main Content
 - 3.1 Who is an employee?
 - 3.2 Contract of service and contract for service contrasted
 - 3.3 The Control test
 - 3.4 The Integration or Organization Test
 - 3.5 Employee, Worker and Workman
- 4.0 Conclusion
- 5.0 Summary
- 6.0 Tutor Marked Assignment
- 7.0 References/Further Reading

1.0 INTRODUCTION

According to the definition provided by the Labour Act, a ‘worker’ means any person who has entered into or works under a contract with an employer, whether the contract is for manual labour or clerical work or is expressed, implied or oral, written, and whether it is a contract personally to execute any work or labour.

The foregoing also includes all other sorts of contract which shall be examined at the appropriate portion in this course. However, the issue at hand is to reveal to the student who a worker or an-employee is in relation to a contract of employment under the Nigerian Labour Law as established over the years.

An employee may either be engaged in the private or public sector of the economy which forms the nucleus of the Nigerian economy. The most paramount fact here is that the employee is gainfully employed and could conveniently cater for his family’s immediate and remote needs.

2.0 OBJECTIVES

By the end of this unit you should be able to:

- determine who an employee is in relation to a contract of employment;
- understand the determinant factors in the determination of the status of an employee under a contract of employment;
- reveal and examine the basic distinctive features between the various determinant tests of whom an employee is; and
- distinguish between an employee, a worker and a workman.

At the end of the exercise, students should be able to determine the status of a worker, an employee and a workman when they see one irrespective of the availability of their various contracts of employment.

3.0 MAIN CONTENT

3.1 Who is an employee?

The contract of employment deals with the relationship between an employer and an employee. This contract, which is also called a contract of services, is markedly different from a contract for services, under which an independent contractor is engaged. The contract of employment is the basis of labour law; and for the following reasons, the courts have had to distinguish between employees and independent contractors.

- (1) At common law, an employer is vicariously liable for the civil wrongs (torts) of his employees but not generally, for those of independent contractors.
- (2) Although an employer owes, at common law and under statute, a general duty of care to lawful visitors to his premises, he owes his employees, at common law, a personal duty of care, that is, a duty to take reasonable care for the safety of his employees in the course of their employment.
- (3) Income tax is deducted by employers under the PAYE (Pay As You Earn) system, from the wages or salary of employees, independent contractors or self-employed persons pay their tax under a different method.
- (4) Statutes such as the Labour Act, Cap 198, the Workmen's Compensation Act, Cap 470, afford legislative protection to certain class of employees, which do not apply to independent contractors.
- (5) The implied rights and duties of a contract of employment do not apply to contract for services.
- (6) Under the Companies and Allied Matters Act, Cap 59, Laws of the Federation of Nigeria, 1990, section 494 provides that employees have certain preferential rights over other creditors of the employer in the event of bankruptcy and winding up of companies.

An employee therefore is that person who is employed by another, the employer, who determines his wages, salary, time of work and the kind of work to be done in an organization.

See: *NIGERIAN PORTS PLC V. OSINUGA* (2001) FWLR (PT 55) 514 C.A.

SELF ASSESSMENT EXERCISE 1

Who is an employee?

3.2 Contract of service and contract for service

It has always been the opinion of several legal writers that it is essential to remember that the protection offered by the labour statutes is only for those under a contract of service, commonly referred to as “employees” and not those under a contract for service – often described as “independent contractors or self-employed persons”. This distinction is more than a question of mere semantics. In order to determine whether a person is a servant or an independent contractor, various tests have been applied.

See: *NWANA V F.C.D.A. (2004) 6-7 S.C. 136.*

THE CONTROL TEST

The usual view is that the sole determinant of whether a contract of service exists between “A” and “B” was the extent or degree of control which “B” was entitled to exercise over “A”, in the latter’s performance of his contractual obligations.

Thus in *COLLINS V HERTS COUNTY COUNCIL (1947) K.B. 598 at 615*, HILBERY J. said;

The distinction between a contract for services and a contract of service can be summarized in this way; in the one case, the master can order or require what is to be done, while in the other case he cannot only order or require what is to be done but how it shall be done.

In other words, a person is an independent contractor if the employer can only tell him what he wants him to do but not how he should do it. On the other hand, a person is an employee if the employer tells him not only what he should do but how he should do it.

The contract of service, or the test of control, had four indices, namely;

- (a) The employer’s power of selection of his employees;
- (b) The payment of wages or other remuneration;
- (c) The employer’s right to control the method of doing the work;
and
- (d) The employer’s right of suspension and dismissal.

However, it has been said that that control can no longer be the decisive factor in determining whether a person is an employee because it is now clear beyond question, especially, when dealing with a professional or a person with some particular skill and experience, e.g. lawyers, doctors, engineers etc.

THE INTEGRATION OR ORGANIZATION TEST

If control is not a decisive test, what other considerations are relevant? In 1952, Denning L.J. (as he then was) propounded what became known as the “Organization” or integration testing the case of *STEVENSON, JORDAN & HARRISON LTD V MACDONALD & EVANS (1952) 1 T.L.R. 101*. He said;

It is often easy to recognize a contract of service when you see it, but difficult to say wherein the distinction lies. A ship master, a chauffeur and a reporter on the staff of a newspaper are all employed under a contract for services. One feature which seems to run through the instances is that, under a contract of service, a man is employed as part of a business, and his work is done as an integral part of the business; whereas under a contract for services, his work, although done for the business, is not integrated into it but only assessor to it.

The integration test has been found to be of assistance in overcoming some of the difficulties posed by the control test in the area of greater specialization of labour.

However, its usefulness is that a person is most likely to be held to be an employee if he is on the staff of an employer as Denning L.J and other Lord Justices held in *CASSIDY V MINISTER OF HEALTH (1951) 2 K.B. 343*. In that case, the authorities of a hospital were held vicariously liable for the post-operative negligence of their doctors, even though they could not exercise any real control over how the doctors did their work.

However, as Professor Khan Freund has observed, the concept of organization entails the right of the employer to make rules governing the running of his enterprises. Thus, even though an employer may not regulate the manner of doing the work, a person may be an employee if he is subject to the rules governing the “where” and “when” of doing the work.

THE ‘MULTIPLE’ TEST

It is now recognized that no single test, control or integration, will suffice in all circumstances to determine who an employee is, and thus, distinguish him from an independent contractor. A movement towards what is called the “multiple” test is traceable to a passage in the judgement of Lord Wright in *MONTREAL V MONTREAL LOCOMOTIVE WORKS LTD (1947) I.D.L.R. 161* where he said;

It has been suggested that a fourfold test would in some cases be more appropriate, a complex involving (1) Control (2) Ownership of tools; (3) Chance of Profit; (4) risk of loss In many cases the question can only be settled by examining the whole elements which constitute the relationship between the parties. In this way it is in some cases possible to decide the issue by raising as the crucial question whose business is it, or, in other words, by asking whether the party is carrying on the business in the sense of carrying it on for himself or on his own behalf and not merely for a superior.

The fundamental question which the multiple tests seek to answer is the person who has been engaged to perform those services performing them as a person in business on his own account? If the answer to that question is “yes” then the contract is for services. Otherwise, the contract is Contract of Service.

Other factors which the Courts have considered as having some bearing on the nature of the relationship are;

- (i) Payment of wages and salaries
- (ii) Ownership of the equipment
- (iii) Personal obligation to work
- (iv) Hours of work
- (v) Place of work
- (vi) Exclusive service

See: *IFETA V SHELL (2006) 4 S.C. (PT. 1) 136.*

SELF ASSESSMENT EXERCISE 2

- i. What are the distinctive features of a contract of service and a contract for service?
- ii. Examine the following (1) The control test (2) The integration or organization test and (3) The Multiple test.
- iii. Highlight the differences in these tests.

3.5 Employee, worker and workman

The terms worker and workman have been used by some Nigerian statutes, rather than the generic concept of employee for purposes of granting protection to certain categories of employees. These statutory terms, therefore, have restrictive meanings.

The common law concept of employee or servant, on the other hand, encompasses these restrictive statutory definitions of workers and workman.

See the following statutes

- (i) The workman's compensation Act, Cap 470 LFN 1990
- (ii) Sec. 91 of the Labour Act
- (iii) Sec. 27(1) of the Wages Boards and Industrial Councils Act, Cap 466 LFN 1990.
- (iv) Sec. 47(1) of the Trade Disputes Act, Cap. 432 LFN 1990
- (v) Sec. 52 of the Trade Unions Act, Cap 437 LFN 1990

Note: In (ii) – (v) respectively, the worker and employee were used interchangeably within the contexts of trade dispute and trade unionism.

SELF ASSESSMENT EXERCISE 3

What is the relationship between the terms Worker, Workman and Employee?

4.0 CONCLUSION

This unit has exposed the student to the true meaning of who an employee is vis-à-vis the terms of his contract of employment.

5.0 SUMMARY

This unit has revealed the following facts;

Who is an employee?

Distinction between a contract of service and contract for service.

The concept of the various tests used over time to determine the status of an employee in a contract of employment.

The control test

The organization or Integration test

The Multiple test

Other factors used by the court to determine an employee's status.

The relationship between the terms; Employee, Worker and Workman.

6.0 TUTOR MARKED ASSIGNMENT

1. Who is an employee?
2. How do you distinguish between a contract of service and contract for service?
3. Examine the various applicable tests in the determination of the status of an employee under a contract of employment.

7.0 REFERENCES/FURTHER READINGS.

OGUNNIYI O. (2004) *Nigeria Labour and Employment Law in perspective*, 2nd Ed, folio publishers limited; Ikeja, Lagos.

NWAZUOKE A.N. (2001) *Introduction To Nigeria Labour Law*, 1st Ed, Department of Public Law, & Jurisprudence, Faculty of Law, Olabisi Onabanjo University, Ago-Iwoye.

The Workman's Compensation Act, Cap 470 LFN 1990.

Wages Boards and Industrial Councils Act, Cap 466 LFN 1990.

Trade Disputes Act, Cap. 432 LFN 1990.

Trade Unions Act, Cap 437 LFN 1990.

UNIT 4 EMPLOYER AND EMPLOYEE - DUTIES AND OBLIGATIONS

CONTENTS

- 1.0 Introduction
- 2.0 Objectives
- 3.0 Main Content
 - 3.1 The implied duties of the employee
 - 3.2 Covenant in restraint of trade.
 - 3.3 The implied duties of the employer.
- 4.0 Conclusion
- 5.0 Summary
- 6.0 Tutor Marked Assignment
- 7.0 Reference/Further Readings

1.0 INTRODUCTION

The duties of master and servant (employer and employee) arise both under the contract and out of the relationship from which that contract arises. These duties are the subject of discussion in this unit.

2.0 OBJECTIVES

At common law, there are certain reciprocal duties of the employee and his/her employer, which, in the absence of express terms to the contrary are implied into all contracts of employment. These duties alongside their attendant effects on the relationship between an employer and an employee are the focus in this unit. Similarly, the effect in the case of a breach of any of these duties by either party will be discussed.

3.0 MAIN CONTENT

3.1 The implied duties of the employee

(A) THE DUTY OF OBEDIENCE

The fundamental duty of the employee is to carry out his duties in obedience to the reasonable and lawful order of his employer. Breach of this duty by an employee, usually, attracts the penalty of summary dismissal. In *NWOBOSI V A.C.B. Ltd (1995) 6 N.W.L.R (pt 404) 658* the Plaintiff/Appellant was employed by the respondent bank. He was dismissed summarily for disregarding the respondent's express instruction on loans and advances. The Supreme Court upheld the trial and appellant courts' decisions.

The order which an employee is contractually bound to obey must be lawful and reasonable. It is neither lawful to order a high ranking employee to do some manual job which is outside his contractual job description or content, nor, reasonable to order an employee to remain in an area though within his contractual service area, where his life or health is exposed to grave danger.

See: *OTTOMAN BANK V. CHAKARIAN (1930) A.C. 277.*

Generally, an isolated act of disobedience may not automatically justify a dismissal unless the act of disobedience amounts to a repudiation of the fundamental condition of the contract or the nature of the act is of sufficient magnitude

Lastly, for a single act of disobedience to justify a summary dismissal, it must be willful as was held in *LAW V LONDON CHRONICLE LTD (1959) 2 ALL E.R. 386.*

(B) THE DUTY OF CO-OPERATION

This duty requires an employee to discharge his contractual duties in a manner that promotes the object of his employment. While this duty does not impose a positive obligation on an employee to do more for his employer than his contract requires, it does; however, demand that an employee should execute his contractual obligations so as not to willfully obstruct the business of his employer. To act conversely will amount to a breach of contract.

See: *SECRETARY OF STATE FOR EMPLOYMENT V ASLEF (1972) 2 Q.B. 455.*

(C) THE DUTY OF CARE

It has been recognized at common law that an employee owes his employer a contractual duty to exercise reasonable care in the performance of his contractual obligations. Thus, where an employee's negligence, in the course of his employment, has resulted in damage to third party and his employer has been made vicariously liable for the resultant damage, the employer, can recover the damages which he has so far paid from the employee, on account of the employer's breach of his contractual duty of care.

See: *HARMER V. CORNELIUS (1856) 5 C.B.N.S. 236.*

See also: *LISTER V. ROMFORD ICE AND STORAGE CO LTD (1957) A.C. 535.*

(D) THE DUTY OF FIDELITY

While it is indisputable that a servant owes his employer an implied duty of fidelity or of faithful service, the practical difficulty lies in giving a precise definition of this nebulous duty. Admittedly, each must depend on its facts.

However, it is unquestionable that this duty requires an employee not to use the position which he holds by virtue of his employment, or the knowledge which has come to him by virtue of that position, in such a way that his personal interests conflict with his duty to his employer.

It is also an aspect of this duty that an employee should not “*knowingly, deliberately and secretly set himself to do in his spare-time, something which would inflict great harm on his employer’s business.*” This duty is divided into the following;

- (i) Good faith or honesty – *MAJA V. STOCCO* (1968) NLR 372.
- (ii) Spare – Time - *HIVAC V. PARK ROYAL SCIENTIFIC INSTRUMENT LTD.* (1946) 1 CH. 167.
- (iii) Ex-Employees – *AMBER SIZE AND CHEMICAL CO. LTD. V. MENZEL* (1913) 2 CH. 329.
- (iv) Invention – *BRITISH SUPHON CO. LTD V. HOMEWOOD* (1956) 2 ALL E.R. 897

(E) DUTY NOT TO MISUSE THE EMPLOYER’S CONFIDENTIAL INFORMATION

An employer’s confidential information is regarded as part of his property which, like any other type of property is entitled to protection. It is for this reason that employers often insert a clause in the contract of employment against disclosure of sensitive and confidential information.

In practice, such sensitive information often includes marketing plans and business strategies, financial plans, industrial relation strategy or production formulae.

SELF ASSESSMENT EXERCISE 1

Examine the various implied duties imposed under a contract of employment on an employee.

3.2 Covenants in restraint of trade

The contract of employment may contain a term which stipulates that an employee, on the cessation of his present employment, will not set up on

his own, or be employed by other employers, in the same line of business as that of his employer.

At common law, all covenants in restraint of trade are *prima facie* unenforceable. They are enforceable only if they are reasonable with reference to the interest of the parties concerned and the public.

However, it has been held that an employer who seeks to enforce a restrictive covenant must show;

- (i) That he has some proprietary interest deserving of protection.
- (ii) That there is danger or mischief from which he seeks to protect that interest.
- (iii) That the restrictive covenants he has put in place to safeguard that interest is reasonable. That is, reasonable with respect to the time and geographical area to which it is limited.

See: *KOUMOLIS V LEVENTIS MOTORS LTD (1973) 8 N.S.C.C. 557.*

SELF ASSESSMENT EXERCISE 2

- i. Explain the term “covenant in restraint of trade.”
- ii. Mention the condition precedent for a covenant in restraint of trade to be enforceable.

3.3 The implied duties of the employer.

(A) DUTY TO PAY WAGES

It is generally accepted that the most significant consideration which an employer may give to an employee in return for work performed or services rendered to the employer is the employee’s monetary remuneration in terms of salary or wages in legal tender such as cheques, cash or postal orders.

It will amount to a repudiating breach of contract, giving rise to an action for damages or debt, for an employer to refuse or fail to pay agreed remuneration. See generally Section 1-4 of the Labour Act.

See also: *NIGERIAN AIRWAYS LTD V. GBAJUMO (1992) 5 NWLR (PF 244) 735.*

YUSUF V. VOLKSWAGEN OF NIGERIA LTD (1996) 7 NWLR (PT. 463) 746.

However, the employer’s obligation to pay remuneration may cease under the following circumstances;

- (i) Sickness – *PETRIE V. MACFISHERIES LTD* (1940) 1 K.B. 258.
- (ii) Lay-off – *BROWNING V. CRUMLIN VALEY COLLIERIES LTD* (1926) 1 K.B. 522.
- (iii) Suspension - *YUSUF V. VOLKSWAGEN OF NIGERIA LTD* (1996) 7 NWLR (PT. 463) 746.
- (iv) Industrial action – SEC. 42(1) of the Trade Disputes Act, CAP. 432 LFN 1990.

(B) DUTY TO PROVIDE WORK

The contract of employment does not normally oblige an employer to provide his employee with work to do, provided he pays him his wages or salary as and when due. This duty is established by section 17 of the Labour Act, Cap, 198, Laws of the federation of Nigeria, 1990.

(C) DUTY TO TREAT WITH RESPECT

The employer's obligation to treat his employees with respect is the correlative of the employee's obligation of co-operation, and obedience.

This implied duty requires the employer to treat his employees with such consideration as would facilitate, and not obstruct or impede the employee's performance of his contractual duties.

See: *TURNER V. SAWDON* (1901) 1 K.B. 653.

(D) DUTY TO PROVIDE ADEQUATE PLANT APPLIANCES AND PREMISES

The employer owes the employee the duty to provide adequate plant, appliances equipment and premises.

(E) DUTY TO PROVIDE A SAFE SYSTEM OF WORK

The duty in this case is to ensure that the employer carries out his operation in a safe manner. It deals with supervision and safety precautions which the employer uses in his operations.

By section 65 and 66 of the Labour Act, the employer is bound to provide and maintain safe sanitary system for the servant, provided such facilities and arrangements comply with such regulations as may be specified by the minister in respect of labour health areas.

See: *COLE V. TRAFFORD* (No 2) (1918) 2 K.B. 523.

I.I.T.A. V AMRAMI (1994) 3 NWLR (PT. 332) 296.

(F) DUTY TO PROVIDE A SAFE PLACE OF WORK

This duty is held to arise wherever the employee is doing his work within the scope of his employment. In *BRYCE V. SWAN HUNTER GROUP PLC & OTHERS (1987) L.T.L.R* employers were held liable for the death of an employee when, through their negligence and breach of statutory duty, they failed to take precautions against exposure to asbestos dust. The precautions which ought to have been taken care were decided according to the state of knowledge at the time.

See: *WESTERN NIGERIA TRADING CO. LTD V. BUSARIO AJAO (1965) NMLR. 178.*

(G) DUTY TO TAKE CARE

An employer has a common law duty to take care of the safety of his employees. The duty is that of a reasonable man; but a reasonable man does not hold himself out as having specialized skills without expecting to be treated according to the standards of his representation.

(H) DUTY TO PROVIDE A REASONABLE COMPETENT

The master is under a duty to provide a reasonable competent and responsible workforce especially where the duties of one staff are closely linked with those of another or are such as to affect other staff.

See: *HUDSON V. RIDGE MANUFACTURING CO. LTD. (1957) 2 Q.B. 348.*

SELF ASSESSMENT EXERCISE 3

Discuss the various implied duties of the employer.

4.0 CONCLUSION

A thorough understanding of the various implied duties of both the employer and the employee under a contract of employment will not be complete without stating, in passing that there are corresponding obligations imprinted on them by virtue of their respective duties. These obligations are also as important as the duties.

5.0 SUMMARY

At the end of this unit, you should have been able to identify the following;

- The various implied duties of the employee
- The covenants in restraint of trade
- The various implied duties of the employer
- The duties and obligation implied through the contracts on both the employer and the employee

6.0 TUTOR MARKED ASSIGNMENT

1. Explain the various duties implied on the employee by virtue of his contract of employment
2. Examine the basic distinctive features and exception in the covenants in restraint of trade.
3. List and explain the implied duties of the employer.

7.0 REFERENCES/FURTHER READINGS

OGUNNIYI O. (2004) Nigeria Labour and Employment Law Perspective, 2nd Ed, Folio Publishers Limited; Ikeja, Lagos.

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MODULE 2

Unit 1	Formations of Contract of Employment and its Effects
Unit 2	Freedom of contract and Restrictions thereon
Unit 3	Common Law Implied Terms

UNIT 1 FORMATION OF CONTRACT OF EMPLOYMENT AND ITS EFFECTS**CONTENTS**

1.0	Introduction
2.0	Objectives
3.0	Main Content
3.1	Formation of Contract of Employment
3.2	Nature of Contract of Employment
3.3	Content of Contract of Employment
3.4	Effects of Contract of Employment
4.0	Conclusion
5.0	Summary
6.0	Tutor Marked Assignment (TMA)
7.0	References/Further Reading

1.0 INTRODUCTION

Like every other type of contracts, Employment Contract has its peculiar ways by which such a relationship could be established. The Employment contract in this regard is governed by the general principles of law of contract.

2.0 OBJECTIVES

The learners are expected to be able to discern the differences in the mode of establishing an employment contract from all other forms of contracts because of its peculiar nature. In the context of this unit, learners are also expected to be able to know the relevant contents of a contract of employment and the effects thereof.

3.0 MAIN CONTENT

3.1 Formation Of Contract Of Employment

There are five ingredients of a valid contract. The Court of Appeal In *ORIENT BANK V BILANTE INTERNATIONAL LTD (1997) 8 NWLR 515* held that there are five ingredients that must be present in a valid contract. They are offer, acceptances, consideration, intention to create legal relationship and capacity to contract. These ingredients and many more have been treated earlier in this work. However, efforts shall be made to state the peculiar ingredients of a valid contract of employment.

The real issue here is that a contract of service is a relationship entered into between two parties - employer and employee - (or master and servant) whereby the servant agrees to serve the master and to be subject to the control of the master either for fixed terms or a term of indefinite duration in return for a benefit.

In the case of *NIGERIA AIRWAYS V GBAJUMO (1992) 5NWLR 2164 at 735*, the Court of Appeal, Lagos Division, while dismissing the appeal held that the relationship of master and servant is characterized by;

- a) A contract of service made under seal, oral or inferred from the conduct of the parties.
- b) Payment of wages and salaries.

Therefore it is safe to conclude that the basic distinctive features of an employment contract is inferable from the fact that where one party employs another, appoint him to various positions in its establishment, pays him salary and allowances, these acts constitute sufficient fact from which a contract of employment can be inferred.

Unlike other types of contract where the parties involved are at par in terms of decision making regarding the object or substance of the contract, the master rules the servant and dictates the pace in an employment contract. Therefore, the master or employer stands in a position of authority in an employment contract and his orders, if lawful, must be obeyed by the servants.

Another distinctive feature is the payment of wages and salaries by the employer to the employee, and this by implication puts the employee in a disadvantageous position in that he may find it difficult to recover his wages and salaries where the employer dies unexpectedly or the employment is frustrated by natural occurrence. Every other ingredient such as offer, acceptance, consideration, intention to create legal relation and capacity are primary while the discussed issues above are peculiar and secondary in an employment contract.

SELF ASSESSMENT EXERCISE (SAE) ONE

What are the major ingredients of an employment contract?

3.2 Nature Of Contract Of Employment

The premise for the determination of the nature of a contract of employment could be determined by establishing the particular type of employment contract entered into by the parties. It is essential to argue that the protection offered by the labour legislations (as shall be seen later) is only for those under a contract of service commonly referred to as “employees” and not those under a contract for services often described as “independent contractors or self-employed persons.”

Over the years several tests has been propounded by jurists and legal scholars for the purpose of determining the nature of contract of employment entered into by the parties. These tests has been adequately treated in Unit 3 of Module 1 of this course material, however, a list of these test shall be made for ease of reference.

- 1) The Control Test
- 2) The Integration Test
- 3) The Multiple Test

It is necessary to remember that no single fact, by itself is conclusive and all relevant circumstances must be taken together and considered. However, in addition to the two broad classifications of independent contractor and an employed person, there are other servants whose tenures are said to be protected by statute. These are public servants who work for the government or in public service and whose appointments are governed and regulated by statutes when such servants have been unlawfully dismissed; the court has always intervened to order reinstatement.

This remedy was applied by the Supreme Court in *SHITTA BEY V FEDERAL PUBLIC SERVICE COMMISSION* {1981} 1 S.C.40 and followed in *OLANIYAN & ORS V UNIVERSITY OF LAGOS* (1985) 2 NWLR 9.

It should however be clearly understood that not all who work in the public service are so protected. The remedy only applies to those who can establish that the relevant statutory instrument applies to them and they are among the categories of employees who are intended to be protected by the relevant statute.

SELF ASSESSMENT EXERCISE (SAE) 2

How do you determine the nature of an employment contract?

3.3 Contents Of Contract Of Employment

The Labour Act as laid down contains minimum conditions which must be in a standard contract of employment. It generally provides that contract be reduced to writing when it is to last for six months or more, the fixing of hours of work, and the number of days leave to which a worker is entitled etc.

The law also provides for the periodicity of payment of wages and maximum deduction that can be made from a worker's pay, redundancy and arrangements for negotiations of benefits when workers have to be laid off for redundancy.

Apart from the Labour Act, there are other legislations which have comprehensive provisions for workers' safety at work. Such laws include the

Factories Act Cap 125 LFN 1990.

Workmen's Compensation Act, Cap. 470 LFN 1990.

Petroleum Act Cap 350 LFN 1990.

Federal Environmental Protection Agency Cap 131 LFN 1990.

Converse to the provisions of these statutes, there is not yet any reported case in Nigeria on the protection of employees because it has been observed that since these statutes were not willingly enacted to genuinely guarantee workers' safety, the Nigerian state has turned around to breach them. Even private employers who violate the provisions of the relevant statutes have also been left unchallenged by factory inspectors and other law enforcement agents.

In essence, there is no particular enforcement of these statutes in relation to the contents of a standard contract of service. What we always see is the letter of offer of employment which is usually less instructive apart from the annual take-home income and allowances accruable to the employee and other minor entitlements such as leave and leave bonuses and hours of work. The factory's regulation is rarely given to the employees for fear of enforcement of breached provisions.

SELF ASSESSMENT EXERCISE 3

Explain the basic contents of a standard contract of service.

3.4 Effects Of Employment Contract

The major effect of a contract of service is that from the date of the commencement of the contract which is usually expressly stated in the letters of appointment given to the employee, the employee is bound by the terms and conditions of service consented to by him. By this he is subject to the whims and caprices of the employer provided the exercise of control by the said employer is not in violation of any existing law and if the orders and directions are not illegal.

The contents of a contract of employment which forms the basis of the rights, duties and obligations of the parties under the contract usually varies from one organization to another. But generally, there are certain elements which are common in most categories of employment. Some of there are;

1) Payment of Wages

One of the major effects of a contract of employment is that an obligation as to payment of wages is imputed on the employer and this is usually effected in the forms of remuneration.

By the provision of Section 1 (1) - (3) of the Labour Act the issues relating to the basic salary of the employee is adequately protected. This also covers Housing or Housing Allowance, Leave Allowance, End of Year Bonus, overtime and sick-pay. The statute makes it a duty for the employer to ensure that these issues are adequately taken care of and by that it implies that from the date of the commencement of the contract of employment the employer is answerable to the welfare of the employee.

2) Area of Services

It is the usual practice for the contractor letter of employment to define the area of operation of the employers work. Therefore, it will be tantamount to a breach of contract and a dismissible offence for the employee to refuse a reasonable request for a transfer to another location, having consented to work for his employers in any part of the country where it operate.

In *BOVZOVURU V OTTOMAN BANK [1930] A.C. 271 DC*, the appellant, a bank employee of 22 years standing refused to accept a transfer to a branch in Turkey on the grounds of his lack of knowledge of Turkish language and the hostile attitude of the civil authority he would have to deal with there. He also maintained that he was not contractually oblige to accept such move but the court held that the respondent were giving a reasonable and lawful order, which the appellant was bound to obey,

that is disobedience was justifiably treated by the respondents as '*faute grave*' under article 5 of the regulations, and that his dismissal was justified.

On the contrary, in *OTTOMAN BANK V CHAKARION [1930] A.C.277*, an employee of the same bank who had variously escaped execution at the hands of the Turkish forces was held entitled to leave Constantinople, which was under Turkish control, despite being ordered by his employer to remain. The effect of a contract of employment as implied by these decisions is that where the order is lawful, the employee is bound to obey while an unlawful order will not be enforced even though the employee consented to it at the time of taking up the employment.

The overall effect of contracts of employment on the parties is that they are bound by the content of the agreement provided the mode or ways by which such obligations are to be executed are not unlawful.

SELF ASSESSMENT EXERCISE 4

Examine the major effects of a valid contract of employment.

4.0 CONCLUSION

This unit has exposed learners to the concept or termination of contract of employment and has sufficiently demonstrated the fact that there are laid down rules and guidelines for termination of employment contract.

5.0 SUMMARY

Through this unit, learners has been able to know the following

- a. Formation of a contracts of employment
- b. Nature of a contract of employment
- c. Contents of a contract of employment;and
- d. Effects of contract of employment

6.0 TUTOR MARKED ASSIGNMENT

1. Enumerate and discuss the required elements for the formation of a contract of employment.
2. Nature and contents of a contract of employment is one and the same thing. Discuss.
3. Examine the major effects of a valid contract of employment.

7.0 REFERENCES/FURTHER READINGS

OGUNNIYI O. (2004) *Nigeria Labour and Employment Law in perspective*, 2nd Ed, Folio Publishers Limited; Ikeja, Lagos.

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UNIT 2 FREEDOM OF CONTRACT AND RESTRICTIONS THEREON

CONTENTS

- 1.0 Introduction
- 2.0 Objectives
- 3.0 Main Content
 - 3.1 The Concept of Freedom of Contract
 - 3.2 Factors Inhibiting Freedom of Contract Duress and Undue Influence
 - 3.3 Restrictions on Freedom of Contract
- 4.0 Conclusion
- 5.0 Summary
- 6.0 Tutor Marked Assignment
- 7.0 References /Further Readings

1.0 INTRODUCTION

The coercive nature of the contents of certain contracts, particularly contract of employment, makes it practically impossible for employees to vary the terms and conditions of such contracts bearing in mind the peculiar nature of their environment in relation to the high rate of unemployment situation in the country. Harsh conditions of service are usually accepted by the employees just because of their desire to put food on the table of their family and to take care of immediate family needs. The courses of the acceptance of these harsh and inhuman conditions shall be the focus in this unit.

2.0 OBJECTIVES

This unit is mainly designed to examine the right of the employee to freely discuss the terms and conditions in a contract of employment with a view to vary the harsh and inhuman ones among them. It is also meant to highlight and discuss the various factors responsible for the acceptance of these stringent conditions without freewill and their right to have those conditions expunged from the whole content of the contract of employment where it is observed that they are meant to exploit the employee in the name of employment.

3.0 MAIN CONTENT

3.1 The Concept Of Freedom Of Contract

The general rule of law relating to the concept of freedom of contract is to the effect that parties to any type of contract, particularly in an

employment contract situation should freely, without any fear of intimidation enters into the contract with the aim of making the most use of it.

However, where the employer dictated the terms and conditions of the contract of employment without the employee's right to vary or reject any unfavorable term or condition, it is said that such employee has not entered into the contract based on his own freewill and therefore the corpus of the concept of freedom of contract is defeated.

It is also noteworthy that Labour Law rests on individual contract of employment. The rights, duties and obligations of an employee will be regulated and determined by the contract of service entered into between him and his employer. The Nigerian Labour Law recognizes the right of a worker and the employer to freely enter into a contract of service and to agree upon terms and conditions as they deem fit without any fetters except that such terms and conditions should be within the bounds of legality. As far as the law is concerned, a worker and an employer are equal parties to a contract of employment, thus the myth of equality of bargaining powers is promoted by this legal fiction.

Considering the prerogative right of the employer to hire, determine whom to hire, determine the rate and grade of the job and with intimidating powers of dismissal and termination, determine when to fire the job holder, is the employee really of equal bargaining power with the employer?

A typical example of the lack of freedom or freewill to enter into a contract of employment was exhibited in the case of *AFRICAN SONGS LTD V SUNNY ADENIYI [UNREPORTED]* High Court of Lagos State, Dosunmu J. Suit No. LD [1300] 74 where the agreement contained many onerous and harsh terms and conditions in relation to the defendants. They included the following;

- a) The defendant was tied to the service of the plaintiff exclusively for five years.
- b) The plaintiff was given the right to dictate where and when the defendant was to make music recordings.
- c) The remuneration of the defendant for his service was grossly inadequate, compared to what the plaintiff was to get out of the contract. For example, for the sake of a 12-inch double sided L.P. which cost about ₦6.00, the defendant was to get 15kobo while the plaintiff would get the remaining ₦5.85k.
- d) The plaintiff was assigned the full copyright of all the compositions and recordings of the defendant.

- e) The plaintiff was entitled to the sole right of production, reproduction, use and performance (including broadcasting) of the defendant's works, throughout the world.
- f) The defendant was, during the currency of the agreement, prohibited from rendering any performance whatsoever, to him or any company or group of persons.
- g) The plaintiff had the exclusive right to decide which one and when to commence or discontinue or recommence the production or sale of records and the fixing or alteration of their prices.
- h) The plaintiff had the option to renew the contract at its expiration for a further two-year term or "for any longer period". The defendant had no such right.
- i) The plaintiff reserved the right to terminate the contract in the event of the defendant's illness or involvement in an accident, which rendered the defendant incapable of performing.

These terms and conditions are contrary to public policy, onerous and oppressive in their application, hence, they were held only to be capable of being enforced in an oppressive manner.

In essence, it is right to state that even though the law requires that parties should enter into contract freely, the employer and employee are not of equal bargaining power. Rather, the employee is an under-dog and it may be deceitful to peddle the myth of equality in employment contract issues.

SELF ASSESSMENT EXERCISE 1

The concept of freedom of contract is a myth, not a reality. Discuss.

3.2 Factors Inhibiting Freedom Of Contract

The most decisive factor in this regard is to know what is meant by freedom of contract. Freedom of contract literally means the right of a party to a contract, in this regard, a contract of employment. There is also the right to enter into the contract and renege from it without any reason, for fear of molestation, coercion, undue influence or duress on the part of the other party to the contract.

The following has been identified as factors negating freedom of contract.

(1) DURESS

Traditionally, duress in common law means actual violence or threat of violence to the person, or his personal freedom, i.e. threats calculated to

produce fear of loss of life or bodily harm, or fear of imprisonment. The subject of such threat must be either the plaintiff himself, or his wife, parent, child or other near relative. In particular reference to Labour Law, it covers not only threat, but pressures and it extends far beyond threat to the person or to his freedom, to all unconscionable bargains, brought about by the abuse of position, or the oppression of a weaker contracting party.

A good illustration of what the wider and modern concept of duress would accommodate occurred in the case of *NNADOZIE V DIZENGOFF* [1967] 1 A. L. R. 255, where the plaintiff, a former employee of the defendant company whose employment was wrongfully terminated, successfully brought an action to recover, £ 2,000 which he had paid to the defendant as security of his initial employment, and £1, 082 .10s. as damages for wrongful dismissal. The plaintiff alleged that when he arrived at the premises of the defendants to collect the inducement debt, the defendant's manager made the following statement:

“Mr Nnadozie, you are wasting your time doing all this. You succeeded in the East [Eastern Nigeria] because you were able to buy our lawyer and all the judges. Now is the time for me to play my turn in Lagos. I am going to appeal in both cases and I am going to show you that there is no justice in Nigerian courts. All the judges in the Supreme Court are my personal friends. I am going to show you what money is capable of doing in Lagos. The appeals will be discussed at a round table conference between the judges of the Supreme Court and myself. Unless you agree to accept your deposit of £2,000 (i.e. whilst giving up the damages of £1,082 10s) you will lose both the deposit and the general damages. In addition you will be made to pay costs.”

The court did not believe this allegation and stating that only a lunatic could say such things, Adedipe J. dismissed the suit. But it is interesting that it was regarded by the court as a case of duress, though in the final resort, not proven.

(2) UNDUE INFLUENCE

Mainly as a result of the narrow scope of the traditional doctrine of duress, equity developed its own doctrine of undue influence which is far more comprehensive than duress at common law. It covers cases of coercion, domination, pressure and generally bargains obtained in an unfair manner. It applies where influence is acquired and abused, and confidence is reposed and betrayed.

Apart from the more comprehensive nature of undue influence, the most noticeable distinction between it and duress at common law is that in the latter, the pressure of coercion tends to be direct, while in the undue influence, pressure tends to be indirect and more subtle.

The boldest and most comprehensive attempt to bring all the disparate threads of the doctrine of undue influence and related doctrines under one coherent umbrella, which he gave the name “*inequality of Bargaining Power*,” was made by Denning M. R. in *LLOYD’S BANK LTD V BUNDY [1975] Q.B 326*.

With reference to Labour Law, the only case in which the issues of restraint of trade and inequality of bargaining power concerning artistes have arisen for consideration before a Nigerian court, is the unreported case of *AFRICAN SONGS LTD V SUNNY ADENIYI (Supra)*. In it, the court held that going by the terms of contract of employment subsisting between the plaintiff and defendant, which were very stringent and unfavourable to the latter, there was no good ground to hold that the contract was invalid.

The general rule of law in this regard with particular reference to master/servant relationship, is that where the terms of the contract of employment is onerous on the employee, harsh and oppressive to him, it should be declared as being against public policy. This in effect shows that the party with superior knowledge and much stronger bargaining power used these factors in driving an extremely unconscionable bargain against a hapless and desperate employee.

SELF ASSESSMENT EXERCISE 2

Duress and undue influence is one and the same thing. Discuss.

3.3 Restrictions On Freedom Of Contracts

A restriction on freedom of contracts usually comes by way of the employer’s attempt to protect trade secrets and confidential information about his business. By this, he will not allow the employee to dictate any term or condition of service. They often and usually impose restraint of trade clauses in the terms and conditions of service of their employees. Ordinarily, restraint of trade clauses obviate the difficulties of having to decide which information is confidential and therefore deserving of protection and which is not.

As a matter of general principle and in particular reference to Labour Law, covenants in restraint of trade are unenforceable unless they are considered in their scope, nature and content and having regard to the

intents of the parties concerned and of the public. This restraint of trade clause, if enforced against an employee will constitute a restraint upon his right to freely enter into the contract of employment.

The locus classicus on the law as to restraint of trade was the case of *NORDENFELT V MAXIM NORDENFELT CO.*[1874] A.C. 535, where it was held that all covenants in restraint of trade are, in the absence of special circumstances justifying them, void as being contrary to public policy.

In *KOVMOULIS V LEVENTIS MOTORS LTD* [1973] 1 ALL N.L.R.(pt. 2) 144, the objection to the doctrine of restraint of trade is amply illustrated in the decision of the Supreme Court. Delivering the judgement of the Supreme Court in this case, Udoma J.S.C said;

Generally, all covenants in restraint of trade are prima facie unenforceable at common law. They are enforceable only if they are reasonable with reference to the interests of the parties concerned and of the public.

The covenant in that case was however held reasonable and necessary for the protection of business interest of the respondents and therefore valid and enforceable at law.

However, where the court is of the opinion that the restraint which the employer sought to enforce against the employee is wider than expected to protect the employer's interest, it will be void subject to the possibility that the offending parts of the clause may be severed or removed from the rest so as to render enforceable the narrower part considered reasonable.

In *JOHN HOLT &CO [LIVERPOOL] LTD. V CHALMERS* [1918] 3 NLR 77, the court held that a restriction which prohibited the employee from conducting business or serving any person in similar business with a wide area after leaving the employer's service without the consent of the employer went beyond that which was necessary to protect the employer's interest and was therefore unreasonable.

As a general rule, in considering the reasonableness of a restraint, its scope and therefore, enforceability, the position in the organization of the employee subject to the restraint may be relevant and this will be taken into account. In *GILFORD MOTOR CO.LTD V HOME* [1933] ALL E. R. 109, the employee who was the company's Managing Director has a restraint imposed on him prohibiting him from dealing with any of the company's customers whether directly or indirectly.

This restraint was upheld, although it was not limited in respect of either time or geographical location.

Major, restraints in trade forms the bedrock of restriction on the freedom of contract of an employee under a contract of employment and it has, as has been shown, constituted a clog in the wheel of progress in terms of expression of willingness or otherwise of an employee to accept the terms and conditions in a contract of employment.

The following factors have been considered in deciding on the reasonableness of a restraint of trade clause in an employee's contract:

1. Range of product to be covered by the clause.
2. Length of time for which a restraint is to run.
3. Geographical area of the restraint.

SELF ASSESSMENT EXERCISE 3

What do you understand by restrictions on freedom of contract.

4.0 CONCLUSION

From the foregoing it is believed that learners were able to know what is meant by freedom of contract and the restrictions thereon. Freedom of contract specifically demands that parties to a contract, particularly contracts of employment are able to express their minds on the various terms and conditions contained therein and also to be able to reject outrightly those that are not in their own interest provided they are not under any duress or undue influence from the other party to the contract.

5.0 SUMMARY

This Unit has taught learners;

- The basic concept of freedom of contract.
- Factors inhibiting freedom of contract.
- Restrictions on freedom of contract.

6.0 TUTOR MARKED ASSIGNMENT

1. What do you understand by freedom of contract.
2. Discuss the essential and recognized factors inhibiting against freedom of contract.
3. Discuss, with the aid of decided cases, what you understand by restrictive to freedom of contract.

7.0 REFERENCES/FURTHER READINGS

OGUNNIYI O. (2004) Nigeria Labour and Employment Law in perspective, 2nd Ed, folio publishers limited; Ikeja, Lagos.

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UNIT 3 COMMON LAW IMPLIED TERMS

CONTENTS

- 1.0. Introduction
- 2.0. Objectives
- 3.0. Main content
 - 3.1. Who is a Worker?
 - 3.2. Generally Implied Terms of Employment
 - 3.3. Terms Implied by the courts
- 4.0. Conclusion
- 5.0. Summary
- 6.0. Tutor Marked Assignment
- 7.0. Reference/Further Readings

1.0 INTRODUCTION

There are always terms and condition in every contractual arrangement which the parties thereto are bound to give effect. However, there are other terms and conditions which are not normally expressly stated but are usually implied into the contract based on the nature of such contracts. This common law implied terms and conditions form the bedrock of the discussions in this unit.

2.0 OBJECTIVES

The objective which this unit is meant to achieve is the thorough examination of the various common law in Implied Terms in a contract of service agreement. This will be achieved by viewing the statutory definition of who is a Worker, an examination of the Implied Terms of employment, a discussion of the terms implied by the courts and the implied terms of mutual trust and confidence.

3.0 MAIN CONTENT

3.1 Who Is A Worker

According to the definition provided by the Labour Act a “Worker” means any person who has entered into or works under a contract with an employer, whether the contract is for mutual labour or clerical work or is expressed implied or oral or written, and whether it is a contract of service or a contract personally to execute any work or labour but does not includes;

- (a) Any person employed otherwise than for the purposes of the employer’s business, or

- (b) Persons exercising administrative, executive, technical or professional functions as public officers or otherwise, or
- (c) Members of the employer's family or
- (d) Representatives, agents and commercial travelers in so far as their work is carried on outside the permanent work place of the employer's establishment or
- (e) Any person to whom articles or materials given out to be made up, cleaned, washed, altered, ornamented, finished, repaired or adapted for sale in his own home or an other premises not under the control or management of the person who gave out the articles or the materials, or
- (f) Any person employed in a vessel or aircraft to which the laws regulating merchant shipping of civil aviation apply. "Young person" means a person under the age of eighteen years."

Apart from the foregoing, the determination of who is a worker is possible by viewing the essential features of the control, integration and multiple tests which are used to measure the differences between an employee and an independent contractor. Therefore, any person who falls into the categories of persons mentioned in paragraph (a) to (f) above will not qualify as a worker under the Act.

SELF ASSESSMENT EXERCISE 1

Who is a worker?

3.2 Implied Terms Of Employment

By the provisions of section 91 of the Labour Act and by the definition of a worker given above, it will be seen that a worker's contractual terms may usefully be divided into the following categories;

- (i) Express Terms which includes oral and written
- (ii) Implied Terms. This includes;
 - (a) Custom and practice terms
 - (b) Those implied by statute
 - (c) Those implied by the courts into all contracts
 - (d) Those implied by the courts into individual contracts
- (iii) Terms arising from collective agreements with the various industrial unions and the employee trade groups.

By the provision of section 7 of the Labour Act, employers are required to provide workers with a written statement of terms and conditions of employment not later than three months after the beginning of the workers period of employment, and it has been observed over the years and with available statistics that this may not always contain all the

essential elements of the terms and conditions of employment. This in effect means that in order to fully understand the terms and conditions applicable to a particular employment we have to look into some extra-contractual sources, written and unwritten.

To prove the existence of a term implied by custom and practice it will be necessary to show three things about that practice;

- a. Notoriety:- It must be shown that the term is well known in the trade, industry, company e.t.c.
- b. Certainty:- The formulation of the term must be certain to constitute a definite offer.
- c. Reasonableness:- The scope and operation of the term must not be unduly onerous or operate unequally between those who it applies.

Summarily, the implied terms of contracts include;

- (1) Custom and practice
- (2) Conduct of the parties
- (3) Circumstantial evidence

In particular reference to implied terms and conditions, in *DANIELS V SHELL BP PETROLEUM DEVELOPMENT (1962) ALL NLR 19*, it was held that period of notice could be determined from the evidence offered by the servant as to the period of notice offered to staff of similar status and that a custom or trade practice may be presumed to have been incorporated into the terms of employment where no provisions are agreed. The notice of one month was considered reasonable in the case of a Materials Assistant when it was proved that other staffs of equivalent status were entitled to one month.

In *B. STABILINI & CO. LTD V OBASA (1997) 9 NWLR (pt. 520) 293*, the Court of Appeal held that contracts need not necessarily be in writing as the conduct of the parties may also create contractual obligations. This is so because a contract may be express or implied from the conduct of the parties.

However, in *BUHARI V TAKUMA (1994) 2 NWLR (pt. 325) 183*, the court held that where there is no written document evidencing contractual relations between the parties, and there is no third party to prove the contractual relationship, the court will fall back to the circumstance surrounding the relationship between the parties as narrated by both of them to determine whether there was such a contract or not.

- (4) Also, in *IBAMA V SHELL PETROLEUM CO. NIGERIA LTD (1998) 3 NWLR (pt. 542) 493*, the court lucidly stated that in

certain contracts where no such express words are available then implied terms may be incorporated into the contract in so far as they do not contradict the express terms of the particular contract.

SELF ASSESSMENT EXERCISE 2

Discuss with the aid of decided cases, the various generally implied terms of a contract of employment

3.3 Terms Implied By the Courts

The basic principle for the enforcement of terms of contracts of employment implied by the courts is that the courts will imply a term into a contract, whether of employment or otherwise where the inclusion of such a term is necessary to give business efficiency to the contract. This is premised on the fact that the courts often take it upon themselves to determine what the parties must have agreed between themselves where this is not expressed or otherwise implied

(1) THE BUSINESS EFFICACY TEST

The business efficacy “test” developed from the judgment of *BOWEN L.J.* in the case of *THE MOORCOCK (1889) 14 PD 64*. In that case, the defendants who were under a contract with the plaintiffs agreed that the plaintiffs could discharge their cargo at the defendants’ jetty. The water by the jetty was tidal and, as both parties realised, if the tide ebbed whilst the cargo was being unloaded, the ship would go aground. The defendants had not guaranteed that the tide would not ebb or that it would be safe to unload the cargo at a particular time and since there was no express term of the agreement whether a term could be implied into the agreement that the river’s bottom was reasonably safe for the ship whilst it was unloading. *BOWEN L.J.* said;

“ I believe that if one were to take all the cases, it will be found that the law is raising an implication from the presumed intention of the parties, with the object of giving the transaction such efficiency as both parties must have intended that at all events it should have. Such business efficacy must have been intended at all events by both parties who are businessman ”.

(2) 'OH, OF COURSE' TEST.'

This test was formulated by Mackinnon L.J. in *SHIRLOW V SOUTHERN FOUNDRIES LTD* (1939) 2 ALL E.R. 113. The learned Lord Justice said;

“Prima facie that which in any contract is left to be implied and need not be expressed is something so obvious that it goes without saying; so that if while the parties were making their bargain an officious bystander were to suggest some express provisions for it in their agreement, they would testify suppress him with a common ‘Oh, of course’.

From the foregoing it is clearly evident that these two tests define the limits to both of when a court implies a term into a contract and the extent or scope of that implied term.

The common trend now is that many of the written form into all types of agreement, including a contract of employment agreement.

SELF ASSESSMENT EXERCISE 3

Discuss the terms usually implied by the courts into a contract of employment.

4.0 CONCLUSION

The imputation of various terms and conditions into all types of agreement, particularly a contract of employment cannot be over emphasized when one considers their overall advantage to the parties where conflict arises in terms of interpreting the contents of such terms and conditions. As noted in the analysis in respect of this issue, it is now a common trend to incorporate into the contract of employment most of the terms hitherto implied generally by the courts into the terms and conditions of service under the contract of employment.

5.0 SUMMARY

This unit has exposed the learners to the fundamental knowledge of who is a worker, the basic elements of an implied term of a contract of employment and the terms usually implied by the courts which are now always parts of the terms and conditions of service in a contract of employment.

6.0 TUTOR MARKED ASSIGNMENT

1. What is the statutory definition of a worker under the Nigeria Labour law?
2. What implication(s), if any, does an implied term have on a contract of employment?
3. Differentiate between express and implied terms of a contract of employment.
4. The business efficacy 'Oh, of course' tests are relevant to our labour law. Discuss.

7.0 REFERENCES/FURTHER READINGS

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MODULE 3

- Unit 1 Employer's Vicarious Liability
- Unit 2 Termination of Contract of Employment
- Unit 3 Remedies for Wrongful Dismissal
- Unit 4 Collective Bargaining

UNIT 1 EMPLOYER'S VICARIOUS LIABILITY

CONTENTS

- 1.0 Introduction
- 2.0 Objectives
- 3.0 Main Content
 - 3.1 The Course of Employment
 - 3.2 Employer and Independent contractor
 - 3.3 Vehicle Owners and Agent Drivers
 - 3.4 Presumption in Road Accident Cases.
 - 3.5 The Permanent and the Temporary Employer
- 4.0 Conclusion
- 5.0 Summary
- 6.0 Tutor Marked Assignment
- 7.0 Reference/Further Readings

1.0 INTRODUCTION

The corpus of this unit is to evaluate and examine the scope of the employer's vicarious liability in respect of his employee. The doctrine of vicarious liability is one that fixes liability on the employer for the tortious act of the employee committed in the course of employment and causing injury to a third party, without any necessary element of fault on the part of the employer.

2.0 OBJECTIVES

The main objective of the concept of vicarious liability in relation to labour law is the liability of A to C for the damages caused to C by the negligence or other tort of B. The employer's vicarious liability for the tort of his employees arises out of their employment relationship. In other words without this particular relationship there would be no basis for the employer's vicarious liability.

Therefore, on the basis of the foregoing this unit will focus basically on such situations that will naturally give rise to the vicarious liability of the employer towards the victims of the acts and omissions of his employee and the exceptions thereto.

3.0 MAIN CONTENT

3.1 The course of employment

The basic statement of this doctrine is that the master will be vicariously liable for the tortious act of his servants committed in the course of employment. This phrase “course of employment” is a technical legal term and the master will not be responsible unless the act complained of was committed in the course of employment.

Denny L.J. In YOUNG V. BOX & CO. LTD (1951) T.L.R. 789 AT 793 said as follows;

“To make a master liable for the conduct of his servant the first question is to see whether the servant is liable. If the answer is yes, the second question is to see whether the employer must shoulder the servant’s liability.”

See: *ODEBUNMI V. ABDULLAHI* (1997) 2 NWLR (PT. 489) 526.

However, before the employer will be held liable for the torts committed by his employee, the following conditions must be satisfied.

- (i) The Plaintiff must prove that the tortfeasor is an employee.
- (ii) Since the employee is the principal of the tortfeasor, to make his employer vicariously liable for his test, the employee must be joined as a co-defendant; otherwise, the vicarious liability of his employer will not arise.

The following considerations may however be taken into account in distinguishing an act which is, from one which is not, a test of vicarious liability.

- (a) The scope of employment – *CANADIAN PACIFIC RAILWAY CO. V LOCKHART* (1942) 2 ALL E.R. 464.
- (b) Unauthorized manner of doing something authorized
POPOOLA V. PAN AFRICAN GAS DISTRIBUTORS LTD (1972) 1 ALL N.L.R. (PT. 2) 395.
- (c) Express prohibitions
JARMAKANI TRANSPORT LTD V. MADAM ABEKE (1963) 1 ALL N.L.R. 180.
- (d) Unauthorized delegation
DAWODU V. AGBONAHU (1970) 2 ALL N.L.R. 7.
- (e) Implied authority

SELF ASSESSMENT EXERCISE 1

- i. Explain the concept of course of employment in vicarious liability of employers to victims of employees acts and omissions
- ii. Examine the various distinguishing factors responsible for the tort of vicarious liability to be fully established.

3.2 Employer and independent contractor

The law is that an employer is not liable for the negligence of his independent contractor; however, there are occasions when he will be so liable.

Firstly, the employer's personal duty of care for the safety of his workman is non-delegable. Thus, where an employer chooses to discharge the obligations thereby imposed on him through a third party such as an independent contractor, he, nonetheless, remains fully liable for the negligence of the contractor which results in an injury to his workman.

Secondly, where a statute imposes an obligation on employers e.g. the duty of an employer or occupier of a factory, under the Factories Act to have certain machines securely fenced, liability for non performance of the obligation is not avoided by delegating its performance to an independent contractor.

There are however, certain activities such as setting fire on open bush land, carrying out of construction work on the highway, which the law regards as extra hazardous, and requires from those who engage in them a special standard of care.

An employer who employs a contractor to carry out such activities on his behalf will be responsible for any negligence of such a contractor, except he stipulates in their contract not only the proper precautions to be taken, but also sees that they are in fact taken.

See: *DAVIES V. NEW MERON BOARD MILLS LTD.* (1959) A.C. 604.

SELF ASSESSMENT EXERCISE 2

Examine the responsibilities of an employer and an independent contractor in a vicarious liability situation.

3.3 Vehicle owners and agent drivers

The general principal of law in relation to vehicle owners and Agent-Drivers in a vicarious liability situation is that the mere ownership of a vehicle does not itself impose any liability on the owner for the negligence of driving of others whom he permits the use of his vehicle.

However, under certain circumstances, the law imposes vicarious liability on such an owner for the negligent use of his vehicle, irrespective of the existence of any contract of service between the owner and the driver.

Generally, to make the vehicle-owner vicariously liable for the negligent use of his vehicle, two elements must be proved.

- (a) That the use is authorized, expressly or impliedly; and
- (b) That the driving was either wholly or partly in the execution of a task or purpose on the owner's behalf.

It was held in *HIGBID V. R.C. HAMMERT (1932) 49T.L.R. 104*. That the mere fact that a man has the authority of a vehicle owner to drive his vehicle does not suffice to make the owner liable for his negligent driving, otherwise any man who allows another the use of his vehicle stands in peril while the vehicle is being used.

SELF ASSESSMENT EXERCISE 3

In what circumstances will the owner of a vehicle be held vicariously liable for the wrongs committed by a user of his vehicle?

3.4 Presumption in road accident cases

The general rule of law in relation to this point is that where the facts of the relationship between the owner of a vehicle and the driver are not fully known, proof of ownership will give rise to a presumption that the driver was acting or driving as the owner's agent or employee.

However, this presumption is rebuttable where the owner adduces evidence to disprove any connection or relation between him and the driver relevant to the tort of vicarious liability. See *ODEBUNMI V. ABDULLAHI (1997) 2 N.W.L.R. (PT. 489) 526*. *OKEOWO V. SANYAOLU (1986)2 N.W.L.R. (PT. 23) 471*.

SELF ASSESSMENT EXERCISE 4

What is the basic element in the determination of the liability of owners of vehicle in road accident cases?

3.5 The permanent employer and the temporary employer

Occasionally, there may be questions as to who of two possible employers is vicariously liable. This difficulty often occurs where one employer (normally referred to as the permanent employer) who employs “A” lends the services of ‘A’ to another employer, ‘B’ and “A” commits a tort while in the employment of ‘B’ to whom his services have been sent.

In resolving this issue, what ought to be considered is, has the borrower placed himself in such a position that he, instead of the permanent employer, should bear liability?

In *MERSEY DOCKS AND HARBOUR BOARD V. COGGINS AND GRIFFITHS LIMITED* (1947) A.C.I, LORD UTHWATT said;

“The workman may remain the employee of his general employer, but at the same time, the result of the arrangement may be that there is vested in the hirer a power of control over the workman’s activities sufficient to attach to the hirer responsibility for the workman’s acts and defaults and to exempt the general employer from that responsibility.”

The above dictum of the learned jurist formed the bedrock of what is today known and referred to as “The Mersey Docks case” which was quoted with approval in the Nigerian case of *ROTIMI V. ADEGUNLE* (1056 – 60)1 N.S.C.C.14

SELF ASSESSMENT EXERCISE 5

What is the distinguishing factor between a permanent employer and a temporary one?

4.0 CONCLUSION

The concept of vicarious liability in respect of labour law vis-à-vis contract of employment has grown over the years, to the extent that most of the previous cases have been overruled and replaced with more profound authorities. However, the basis of this concept is yet to be eroded by the events of modern times. Therefore, like other concepts of

law, this principle continues to grow through judicial activism and as a result of the overwhelming influx of exceptions.

5.0 SUMMARY

In this unit, we have learnt the following –

- The meaning of the concept of vicarious liability
- The object of and aims of the proponents of this legal concept.
- The various grounds upon which an employer will be vicariously liable for the acts and misdeeds of his employee.
- The various exceptions to this principle.

6.0 TUTOR MARKED ASSIGNMENT

1. Examine the concept of vicarious liability, in respect of labour law and particularly contract of employment
2. Examine the various heads under which a master will be held vicariously liable for the torts or default of his employee alongside the probable exceptions.

7.0 REFERENCES/FURTHER READINGS

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UNIT 2 TERMINATION OF CONTRACT OF EMPLOYMENT

CONTENTS

- 1.0 Introduction
- 2.0 Objective
- 3.0 Main Content
 - 3.1 Methods of Termination
 - 3.2 Summary Dismissal
 - 3.3 Misconduct
 - 3.4 Wrongful Dismissal
 - 3.5 Place of Motive in Termination Cases
- 4.0 Conclusion
- 5.0 Summary
- 6.0 Tutor Marked Assignment
- 7.0 Reference/Further Readings

1.0 INTRODUCTION

This unit is meant to expose the various means by which a contract of employment may be terminated. It will also encompass the solutions to unlawful termination of such contracts.

2.0 OBJECTIVES

The Nigeria Labour Law is fashioned after that of the United Kingdom and as such most of the basic principles in our Labour Law are derived from the Common Law, Doctrines of Equity and statutes of general application in force in England as at 1st January, 1900.

Therefore, the object of this unit is to examine those various means by which employers of labour both under the common law and equity have determined the contract of employment of their employees over the years.

3.0 MAIN CONTENT

Termination or dismissal is the bringing to an end of the employment relationship. Since a contract of employment is like any other commercial contract, in determining whether a cessation of employment has occurred, one has to look into the contract from which the relationship emanates.

The three possible types of contracts of employment are;

- (1) Contract determinable by notice
- (2) Contract for a fixed term
- (3) Contract which expires by performance or at the happening of a specified event.

3.1 Methods of Termination

There are several ways by which a contract of employment may be determined. These include

- (A) By the agreement of the parties, namely;
 - (i) By notice or payment in lieu of notice
 - (ii) By expiry of time
 - (iii) By subsequent agreement
 - (iv) By contractually stipulated causes
 - (v) By the expiry of a general hiring
- (B) By statutorily prescribed procedure

The general rule since the decision of the Nigerian Supreme Court in *SHITTA BAY V F.P.S.C.* (1981) N.S.C.C. VOL. 12, 19, is that when a statute, or a subsidiary instrument, provides the procedure to be followed in the determination of a contract of employment, a statutory body must comply with it otherwise, the termination will be declared null and void.

- (C) By frustration

A contract is determined by frustration when the law accepts, certain circumstances as terminating the contract, irrespective of the intention of the parties. In other words, the contract is determined by the operation of the law.

The doctrine of frustration, within the context of employment contracts, deals with situations where a supervening external event, not produced by the fault of either the employer or employee, destroys the ability of either the employer to continue to employ, or of the employee to continue to work, under the contract. The legal effect of frustration is that it releases the parties from further obligations under the frustrated contract.

On the other hand, the determination of the fact of whether or not the employer – employee relationship has come to an end by frustration due to the employer's sickness or capacity depends on the following factors;

- (i) The terms of the contract, especially its duration and provision for sick – pay.
- (ii) The nature of the employee’s work.
- (iii) The nature of the employee’s sickness or injury
- (iv) The period of past-employment.

Finally, the law is that the death of the employer, where the employer runs a one-man enterprise, like the death of the employee, will terminate the contract of employment by frustration.

SELF ASSESSMENT EXERCISE 1

- i. What do you understand by the term “Termination of contracts of employment?”
- ii. Highlight and discuss the several methods of termination of contract of employment.

3.2 Summary dismissal

Generally, summary dismissal is the right of an employer to dismiss an employee who has committed a repudiatory breach of the employment contract. In other words, the contract was terminated by the repudiator’s misconduct of the employee which the employer has accepted as annulling the employment relationship.

Therefore, an employee who has committed a sufficiently fundamental breach of his contract can be dismissed summarily by his employer – in that case, there is an immediate disengagement or separation without notice; thus, the employee loses his entitlement to notice or payment in lieu thereof.

In law, he is deemed to have committed an offence or been involved in an act which strikes at the root of the employment relationship and which amounts to a repudiation of the contract.

The following representative acts of misconduct on the part of the employee may be considered as responsible for summary dismissal.

- (i) Infidelity
- (ii) Corruption and the taking of bribe/kickback
- (iii) Fighting on duty/assault
- (iv) Drunkenness/drug addiction
- (v) Contracting debts and other pecuniary embarrassment
- (vi) Gross immorality
- (vii) Willful disobedience or insubordination
- (viii) Use of bad language at work

- (ix) Incapacity
- (x) Professional misconduct

Also relevant to a valid and total understanding of the concept of summary dismissal are the following;

- (1) Dismissal for incompetence
- (2) Retrospective dismissal

See: *JOMBO PETROLEUM V. PETROLEUM EQUALISATION FUND* (2001) FWLR (PT. 45) 651.

ISIEVWORE V. NEPA (2002) 7 S.C. (PT. 11) 125.

SELF ASSESSMENT EXERCISE 2

- i. What do you understand by the phrase ‘Summary Dismissal’
- ii. Enumerate the various acts of misconduct that may compel an employer to exercise the right of summary dismissal of an employee.

3.3 Misconduct

The law is that there is no fixed rule of law defining the degree of misconduct which will justify dismissal. A contract of employment may, sometimes contain express grounds for summary dismissal or confer on the employer a discretion to determine what amounts to misconduct.

See: *OLANREWAJU V. AFRIBANK PLC* (2001) FWLR (PT. 72) 2008. S.C. and

ANTE V. UNIVERSITY OF CALABAR (2001) FWLR (PT 41) 1909.

Where, however, there are express grounds as to what would amount to misconduct, it is the duty of the court to construe the contract so as to decide whether the act of misconduct alleged is one of those contractually stipulated.

Where on the other hand, the ground for summary dismissal is subjectively worded so as to reserve to the employer the discretion to determine what amounts to misconduct, the question is “is this contrary to public policy as ousting the jurisdiction of the court?”

In *MOELLER V. MONIER CONSTRUCTION CO (NIG) LTD* (1961) 2 ALL N.L.R.167, it was held by the Nigerian Supreme Court that it was not necessary for the employer to prove that the conduct, on the basis of

which he exercised his discretion to dismiss the employee, actually brought it to disrepute.

There are two major types of misconduct. These are:

(1) Antecedent Misconduct

This will arise where an employee had been found guilty of misconduct unknown to his employer, the discovery of that misconduct, if not condoned, would validate an otherwise wrongful dismissal.

(2) Misconduct Justifying Dismissal.

These include;

- (i) Incompetence and negligence
NEW NIGERIAN BANK LTD V. OBEVUDIRI (1986) 3 NWLR (PT. 29) 387.
- (ii) Crime – *ARINZE V. FIRST BANK PLC* (2004) 5 S.C. (PT.1) 160.
- (iii) Absence from work
BRITISH – AMERICAN INSURANCE V. OMOTAYO (1991) 2 NWLR (PT. 176) 721.
- (iv) Drunkenness
- (v) Immorality
- (vi) Abusive language

WHEN SUMMARY DISMISSAL WILL BE INEFFECTIVE FOR BREACH OF APPLICABLE PROCEDURE

The general rule is that an employer in summarily, and justifiably dismissing an employee need not follow any procedure. Exceptions to this rule were propounded in the case of *JIRGBAGH V. U.B.N PLC* (2000) F.W.L.R (PT. 26) 1790 at 1807-8 by Chukwhumah Eneh J.C.A. as follows;

- (1) Where the contract itself, though not regulated by any statute or subsidiary legislation, has made provision for the procedure to be followed when termination is for misconduct, the summary dismissal of the employee in breach of the contractual procedure would render the dismissal wrongful.
- (2) Where a statute or a subsidiary instrument provides the procedure to be followed when the dismissal of an employee is on disciplinary grounds, the requirements of the statute must be complied with when the removal of the employee is for misconduct, otherwise the dismissal would be a nullity.

- (3) Where the employment is public and pensionable, the employer cannot effectively determine the employment on grounds of misconduct without giving the employee a fair hearing, notwithstanding that there is no statute prescribing the procedure to be followed when the employment is to be determined for misconduct. See *OLATUNBOSUN V N.I.S.E.R. COUNCIL* (1988) Vol. 19 N.S.C.C.1025.

SELF ASSESSMENT EXERCISE 3

- i. Examine the major forms of misconduct likely to terminate a contract of employment.
- ii. Highlight the basic exceptions to termination of contract of employment by summary dismissal as a result of misconduct.

3.4 Wrongful Dismissal

Wrongful dismissal is a termination of contract of employment in breach of the express or implied mode, for the determination of employment contract.

Wrongful dismissal entails "...the objective element of the discontinuation of the exchange of work for wages; and the subject element of the intention to end the employment relationship." This form of dismissal occurs where the employer terminates the contract without giving notice, in breach of a provision for notice, or gives a notice which is shorter than the requisite notice.

There will also be wrongful dismissal where the employer terminates a contract for a fixed term before the expiry of its terms, for no justifiable reason.

See: *OSAKWE V. NIGERIAN PAPER MILL LTD.* (1998) 7 S.C. (PT. 11) 108.

SELF ASSESSMENT EXERCISE 4

What do you understand by the phrase "*wrongful dismissal?*"

PLACE OF MOTIVE IN TERMINATION CASES

It is trite law that where a contract of employment has been terminated properly the motive or intention which actuated the termination is irrelevant. Thus in *SOGBETUN V. STERLING PRODUCTS LTD.* (1973) N.C.L.R.323, the plaintiff's appointment was validly terminated by one month's salary in lieu of notice. The plaintiff contended that the

termination was wrongful since it was motivated by her refusal to succumb to the sexual advances of her employer. *DOSUNMU J*; in reiterating the well-settled law that motive is immaterial when termination is valid said:

“Where an employee is lawfully dismissed by being given the notice or payment in lieu of notice stipulated in the contract of employment; the employer’s motive in dismissing him is irrelevant, and the fact that the employer has a bad motive or gives an untrue reason does not make dismissal wrongful”

See: *UMENZE V. CHEVROTIN* (2001) FWLR (PT. 75) 595 C.A.

SELF ASSESSMENT EXERCISE 5

What is the effect of prove of motive in the termination of employment contract?

4.0 CONCLUSION

This unit has exposed the learner to the concept of termination of contract of employment. It has sufficiently demonstrated the fact that there are laid down rules and guidelines for termination of an employment contract.

5.0 SUMMARY

By the end of this unit you should now be able to comprehend:

- The meaning of termination of contract of employment
- A discussion on the various modes of termination of employment contract
- An elaboration on the various applicable exception thereto.
- The place of motive in employment termination procedure.

6.0 TUTOR MARKED ASSIGNMENT

1. What do you understand by the concept of termination of employment?
2. Discuss the various methods of termination of contract of employment.
3. Expatriate on the phrase ‘*summary dismissal*’.
4. Examine the various acts regarded as misconduct in employment contract termination.
5. Discuss the exceptions laid down by the Nigeria Court of Appeal in *JIRGBAGH V U.B.N. PLC* (2000) F.W.L.R. (PT.26) 1790
6. What is the place of motive in termination cases?

7.0 REFERENCES/FURTHER READINGS

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UNIT 3 REMEDIES FOR WRONGFUL DISMISSAL

CONTENTS

- 1.0 Introduction
- 2.0 Objective
- 3.0 Main Content
 - 3.1 Damages
 - 3.2 Mitigation
 - 3.3 Deduction from Damages
 - 3.4 Damages and Job Security
 - 3.5 Equitable remedies
 - 3.6 Equitable Remedies
 - 3.7 Prerogative Remedies
- 4.0 Conclusion
- 5.0 Summary
- 6.0 Tutor Marked Assignment
- 7.0 References/Further Readings

1.0 INTRODUCTION

Under the law of contract, the rule generally is that contract of employment will not be specifically enforced. Special circumstances must be shown before the courts will exercise their equitable jurisdiction to specifically enforce the contract in favour of an employee wrongfully dismissed, and its exercise will be at the discretion of the courts

2.0 OBJECTIVE

The purpose this unit is meant to serve is endured in the fact that there should be adequate compensation in form of remedies for wrongful dismissal of a valid and subsisting contract of employment. The corpus of this exercise is to broaden the scope and understanding of the learner, in a concise manner of presentation, on the various means by which an aggrieved and perceived wrongly dismissed employee may seek redress under the law and the possible exceptions thereon.

3.0 MAIN CONTENT

The concept of wrongful dismissal can be defined as the exclusion of an employee from further employment with the intention of severing the relationship of employer and employee while wrongful dismissal is usually the claim of an employee at common law where he contends that his contract has been wrongfully repudiated by the employer or where he feels that his contract has not been brought to an end in accordance with the procedures laid down by the contract.

3.1 Damages

In the law of contract the guiding principle for the assessment of damages is *restitutio in interum*. This literally means that so far as damages are not too remote the plaintiff should be put back, as far as money can do it, on the same position in which he would have been but for the breach.

Therefore, where a servant is wrongfully dismissed, he is entitled, subject to mitigation, to damages equivalent to the wages he would have earned under the contract from the date of dismissal to the end of the contract. *IFETA V. SHELL* (SUPRA)

Thus, a restrictive construction is placed on restitution in the assessment of damages for wrongful dismissal. This restrictive construction was made clear by the Supreme Court in the Nigeria case of *NIGERIA PRODUCE MARKETING BOARD V. ADEWUNMI* (1972] N.S.C.C. 662.

Further reading on this point is recommended to the students.

SELF ASSESSMENT EXERCISE 1

Explain the term 'Restitutio in Integrum'

3.2 Mitigation

The law is that the fact that a plaintiff is entitled to a particular head of damages for breach of contract does not entitle him without more, to compensation. He must show further that he has taken reasonable steps to mitigate his loss. The real meaning of mitigation in the context of employment is that the law requires the plaintiff to seek alternative employment, in the absence of which the law will reduce the plaintiff's measure of damages by the loss which he has avoided through securing alternative employment,; and by the loss which the courts think is avoidable had the plaintiff taken reasonable steps in mitigation.

The law further, however, requires that whether there has been a failure on the part of the plaintiff to mitigate is a question of fact and the onus imputed on the defendant to prove it.

SELF ASSESSMENT EXERCISE 2

Elaborate on the term mitigation of damages.

3.3 Deduction from Damages

Apart from the fact that damages for wrongful dismissal may be reduced or negated by the failure to mitigate, other considerations may further reduce the measure of damages. This was the position of the English House of Lords in *BRITISH TRANSPORT COMMISSION V. GOURLEY* [1956] A.C.185 where the court held for the first time that in every case where damages for loss of earnings fall to be assessed, the measure should be his net earnings after deduction of his estimated income tax, and not his gross earnings before the payment of tax.

However, notwithstanding the strong persuasiveness of decisions of the English House of Lords, it is submitted that Nigerian case law, with regard to the assessment of damages for wrongful dismissal, will take a different approach.

See: Section 3 (1) (b) of the Personal Income Tax Decree, 1993 No.104. This section defines chargeable income to include;

“Any salary, wages, fees, allowance or other gains from employment including gratuities, compensation, bonuses Given or granted by any person to an employee’

The proviso to paragraph (b) thereof excludes from chargeable income, at sub-paragraph (v), “any compensation for loss of employment.”

Therefore, it is apposite to say that since damages for wrongful dismissals is a compensation for the unwarranted loss of employment, it is submitted that Nigerian courts will not in any way take income tax into consideration in the assessment of damages for wrongful dismissal.

SELF ASSESSMENT EXERCISE 3

Distinguish between the English and Nigerian respective positions on the deduction from damages in cases involving remedies for wrongful dismissal.

3.4 Damages and Job Security

Given the application of ‘*restitutio in integrum*’ to the assessment of damages for wrongful dismissal and the imposed duty on the employee to mitigate his damage, it is submitted that the quantum of damages for wrongful dismissal is generally nominal.

It is neither an adequate satisfaction of the employees' expectations from his contract of employment nor an effective restriction on the employer not to arbitrarily terminate the contract. The remedy of damages is not an effective protection of the employee's right from arbitrary dismissal.

3.5 Equitable Remedies

The remedy of damages was the only relief for breach of contract under the common law and this remedy is hardly adequate as compensation to an employee's wrongful dismissal. As a result of the shortfalls of the common law remedies, the principle of specific performances was developed by equity.

The order for specific performances is such where the defendant is directed or compelled by the court to specifically perform the contract in accordance with its terms, wherever this order is made in favour of an employee wrongfully dismissed the effect is that the dismissal is invalid and the employee is reinstated or restored to his employment.

See: *GATEWAY BANK PLC V. ABOSEDE* (2001) FWLR (PT. 79) 1316. C.A.

However, the of Appeal held in that case on the issue of whether specific performance of contract of service can be ordered, Per ADEKEYE JCA, that;

"It is only in exceptional cases that a court will order specific performance of a contract of employment as that would amount to imposing an employee on an unwilling employer"

Apart from the equitable remedy of specific performance, the other equitable remedies of injunction and declaration may seem as indirect means of appointing reinstatement. Unlike a declaration, specific performance and injunction are coercive orders of the court. The effect of the grant of an order of injunction, whether in its prohibitory or mandatory character against an employer in an action for wrongful dismissal may be that the court is indirectly enforcing specifically a contract for personal services.

The law is that while a plaintiff in an action for wrongful dismissal is entitled to damages once he proves breach of his contract of employment he has no such right to the equitable remedy of specific performance since this is a discretionary remedy.

The following are the circumstances under which the court may justify the enforcement of specific performance of a contract of employment.

- 1) Statutory status. – *CENTRAL BANK OF NIGERIA V. JIDDA* (2001) FWLR (PT. 47) 1066. C.A.
- 2) Termination for misconduct. – *ARINZE V. FIRST BANK OF NIGERIA PLC (SUPRA)*
- 3) Whether the contractual provision is exhaustive on ground for termination.
- 4) The existence of mutual confidence.

SELF ASSESSMENT EXERCISE 5

- i. Contrast the equitable remedies of specific performance, injunction and declaration to the remedy of damages in relation to wrongful dismissal relating to breach of contract of employment.
- ii. Highlight the other equitable remedies developed by the courts over the years in respect of wrongful dismissal of an employee.

3.6 Equitable remedies and job security.

The essential reason behind the grant of the equitable remedy of specific performance is the general inadequacy of damages as a remedy for breach of contract.

The order of specific performance in favour of an employee allows him to 'sit in the sun' and claim arrears of wages as money deducted and all his entitlements from the date of the purported dismissal to the date of judgement or actual resumption of duty, as the case may be, without rendering service, and without the need to mitigate his loss.

While the remedy of specific performance is, under the law of contract, the best safeguard for an employee against arbitrary dismissal, the grant of the decree is subject to several limitations. Some of these are;

- 1) It is a discretionary remedy.
- 2) Most of the reported instances are cases of employment with statutory flavour or legal status.
- 3) Most other cases are ill defined, because, of the uncertainty of what will amount to specific performances. Equity, however, does not prevent the employer from subsequently and validly dismissing the employee by complying with contractual or statutory provisions on termination.

3.7 Prerogative Remedies

The common law does not favour the enforcement of contracts by remedies which deny or compel the contract to continue as for instance in issues relating to injunction and specific performance. The general principle in this respect is that specific performance will not be ordered in respect of obligation to perform personal services. This principle is predicated on the fact that equity will not make an order whose performances would require instant supervision.

The reasons for the above are as follows;

- 1) Damages are often adequate as a remedy.
- 2) A contract of employment requires mutual trust and confidence.

In the same vein, administrative or prerogative remedies, in addition to, or apart from, equitable remedies have sometimes been applied to contracts of employment, where the employing authority is a statutory body. These prerogative remedies include, mandamus, certiorari and prohibition. They are instruments of judicial review of administrative actions.

See: *KABELMETAL NIG. LTD. V. ATIVIE* (2001) FWLR (PT. 66) 662. and

OBO V. COMMISSIONER OF EDUCATION, BENDEL STATE (2001) FWLR (PT. 38) 1226. S.C.

SELF ASSESSMENT EXERCISE 7

Examine the various prerogative remedies available to an aggrieved employee wrongfully dismissed.

4.0 CONCLUSION

This unit deals with remedies available to an aggrieved employee wrongfully dismissed under a contract of employment. Learners are exposed to these remedies with their attendant exceptions where applicable.

5.0 SUMMARY

This unit can be summarized as in relation to the expositions emanating there from. By the end of this unit you should now have -

An insight into what remedies are available to an employee who believes that his contract of employment has been wrongfully determined; and

An understanding of the following concepts;

- I. Damages
- II. Mitigation
- III. Deduction from damages
- IV. Damages and Job security
- V. Equitable remedies.
- VI. Equitable Remedies & Job security
- VII. Prerogatives Remedies

6.0 TUTOR MARKED ASSIGNMENT

1. What is wrongful dismissal?
2. What is the basic concept of remedies for wrongful dismissal from employment?
3. Distinguish between damages, equitable remedies and prerogative remedies.
4. Explain the concept of deduction from damages and the exceptions thereof.

7.0 REFERENCES/FURTHER READINGS

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UNIT 4 COLLECTIVE BARGAININGS

CONTENTS

- 1.0 Introduction
- 2.0 Objectives
- 3.0 Main Content
 - 3.1 Recognition Agreement
 - 3.2 Procedural Agreement
 - 3.3 Parties to a Collective Agreement
 - 3.4 Legal Status of Collective Agreement
 - 3.5 Impact of status on the enforcement of collective Agreement.
 - 3.6 Collective Agreement and Contracts of Employment.
- 4.0 Conclusion
- 5.0 Summary
- 6.0 Tutor Marked Assignments
- 7.0 References/Further Readings

1.0 INTRODUCTION

Collective bargaining may be defined as the process of working out a *modus operandi* between two parties- employer and trade union organizations - in matters pertaining to both parties. It may also be seen as the process of making rules which will govern employment. This is the basis of this unit.

2.0 OBJECTIVE

The objective of this unit is to stress the importance of agreements in any employer/employee relationship and by extension, the trade unions to which the employee belongs. In addition, collective bargaining is not the only means of regulating labour relations which a union may use. Three principal methods of regulating labour relations have been identified by labour law scholars over the years. These are;

- Unilateral Union regulation
- Statutory Regulation
- Collective Bargaining – Agreement.

The above shall form the basis of this unit and it is aimed at sensitizing and educating the students on the need of a very strong and virile bargaining power on the of employee representatives.

3.0 MAIN CONTENT

Collective Bargaining is the process through which the antithetical interests of employers and employees are harmonized through discussions and negotiations. It has also been defined as those arrangements under which wages and other conditions of employments are settled by negotiations and agreement between an employer and association of employers and workers' organizations.

One very important aspect of this concept is that the terms of employment are usually contained in those rules which regulate such matters as wages, hours of work, holidays, holiday pay, sick pay, overtime and redundancy. However the procedural function of this concept has been subdivided into the various heads that form the main body of this unity.

3.1 Recognition agreement

The fundamental basis of collective agreement is the Recognition Agreement which deals first and foremost with the recognition by an employer or association of employers of a specific trade union or a group of trade unions, as the sole bargaining agent for the employers within the bargaining unit in relation to terms and conditions of employment.

Conversely, where recognition is not given or is withdrawn, the union will not be able, on behalf of its members, to bargain with an employee or employers association. In Nigeria, the recognition of registered trade union is a matter of statutory obligation for employers, provided that a trade union has more than one of its members in the employment of an employer.

See: *NATIONAL UNION OF GOLD, SILVER AND ALLIED TRADE V. ALBURY BROTHERS LTD* [1929] I.C.R. 84.

In that case, it was held inter alia that, recognition entailed not merely a willingness to discuss but also to negotiate, that is, negotiate with a view to striking a bargain.

However, dispute may arise in the absence of any clear stipulations in the recognition agreement of matters for negotiation and for consultation.

See: *NIGERIAN BREWERIES LTD V NIGERIAN BREWERIES MANAGEMENT ASSOCIATION* [1978-9] N.I.C.R. [H.I] 35

SELF ASSESSMENT EXERCISE 1

Explain the basis of Recognition Agreement and its shortfalls, if any.

3.2 Procedural Agreement

Unlike recognition agreement, the procedural agreement otherwise called the disputes procedure provides the procedure or stages which the collective parties to the bargaining must or ought to exhaust before embarking on an industrial action.

Disputes procedures are usually worded as follows;

“It is agreed that in the event of any difference arising which cannot be immediately disposed of then whatever practice or agreement existed prior to the difference shall continue to operate pending a settlement or until the agreed procedure has been exhausted.”

A clue from the foregoing example points to the fact that the bane of most industrial actions embarked upon by labour leaders in Nigeria through the Nigerian Labour Congress has been as a result of the negotiating parties inability to strike a bargain, thereby exhausting all available means of settling the emerging issues available before an industrial crisis.

SELF ASSESSMENT EXERCISE 2

Examine the effect of procedural agreement on both the employer’s association and trade union.

3.3 Parties to a collective agreement.

From our preceding comments it is clear that parties to a collective agreement are the trade union of employees and either an employer or an association of employers.

See; *HOLLAND V. LONDON SOCIETY OF COMPOSITORS* [1924] 40 T.L. R. 440; and *BURTON GROUP LTD V SMITH* [1977] I.R.L.R. 351.

3.4 Legal status of collective agreement.

The fundamental question to be asked under that head is ‘Are collective agreements legally enforceable contracts or are they only binding in honour’? In other words, can a trade union or either an employer or an

employers' association legally enforce a collective agreement to which it is a party?

The answer to this is that, in the absence of statutory imposition of enforceability of collective agreement, it depends on whether the court can find an express intention of the parties to be bound or can, given the climate of opinion prevalent at the time the agreement was made, imply such an intention into the agreement.

Several judicial pronouncements have been made on this issue but the *locus classicus* is *FORD MOTOR CO.LTD V. AMALGAMATED UNION OF ENGINEERING AND FOUNDRY WORKERS* [1968] 2.Q.B. 303, where it was held, inter alia, that collective agreements themselves cannot be termed as contracts in law as the parties do not intend to be legally bound. This is also the position in Nigeria.

SELF ASSESSMENT EXERCISE 4

Are collective Agreements legally enforceable?

3.5 The impact of statute on the enforcement of collective agreement

The primary law governing trade disputes in Nigeria is the Trade Unions Act, Cap 437, Law of the federation of Nigeria, 1990. You are enjoined to read and digest the provision of *section 22(1), (2) and (3) of the Trade Union Act, 1990*.

However, the general purpose of this provision of the law is that any collective agreement between two trade unions may constitute a valid contract where the parties so intend. Therefore, the basic element to be considered in climates where the question of bindingness and enforceability of agreement between two trade unions arise is that of intention of the parties.

3.6 Collective agreements and contracts of employment

The most usually asked question is; can an employee directly enforce the terms of a collective agreement, though he was not a party of it?

In *U.B.N. LTD V. EDET* [1993] 4. N.W.L.R {OF 287}288, the plaintiff contended that her dismissal was wrongful because it was in breach of a collective agreement between her employer and her trade union, it was held, inter alia, that it is not for an individual employee to found a course of action on the agreement to which he is not a party.

However, the court, in that same case, propounded the three methods of effecting such agreement provided it was incorporated into the contract of employment between the employee and the employers. Viz –

1. Express Incorporation.
2. Implied Incorporation.
3. Incorporation by statutes.

SELF ASSESSMENTS EXERCISE 6

The general rule is that collective agreement terms are not enforceable, discuss the exceptions thereon.

4.0 CONCLUSION

The basis of collective bargaining as a concept under the Nigerian Labour Law has been given an expository approach in this unit and students are better equipped, going by the various discussions here above stated, to easily discern between an enforceable collective agreement and unenforceable agreement.

5.0 SUMMARY

This unit has dealt with the following points;

1. Required elements for the recognition of an agreement
2. Procedural effects of an agreement
3. Recognized parties to a collective agreement
4. Legal Status of collective agreement
5. Impact of status on the enforcement of collective agreement
6. Distinguishing factors and exceptions in collective agreements and contracts of employment.

6.0 TUTOR MARKED ASSIGNMENT

1. What do you understand by the concept of collective Bargaining?
2. Explain the basis of Recognition Agreement and its shortfalls, if any.
3. What are the effects of procedural agreement on both the employer's association and trade unions?
4. Who are the recognized parties to a collective Agreement?
5. Are collective agreements legally enforceable?
6. State and examine the impact of that on the enforcement of collective agreement.
7. Discuss the exceptions to the enforceability of collective agreements by an employee under a contract of employment.

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MODULE 4

Unit 1	Trade Unions
Unit 2	Industrial Actions.
Unit 3	Tortious Liability And Trade Disputes.
Unit 4	Settlement Of Trade Disputes.
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UNIT 1 TRADE UNIONS

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1.0. INTRODUCTION

From time immemorial, there have been associations and unions in various fields of human endeavor. The aims of the association or union in most cases include but are not limited to the regulation of conduct and affairs of its member. In the same vein, employers of labour do form associations and unions for the purpose of protecting their various interests in the relationship with their employees who usually, like their employers do form associations and unions for the purpose of protecting their interests under their various contracts of employment. This is the basis of the establishment and formation of Trade Unions.

2.0 OBJECTIVES

The objective of this unit is exposing to the student the reasons why we have Trade Unions as a concept in labour law in Nigeria. It will further state the major particulars in relation to the law that provides for the formation of trade unions in Nigeria. Attempt will also be made at going to the rest of the formation and registration of trade unions with a view to establishing their legal status.

3.0 MAIN CONTENT

3.1 What are trade unions?

The parent law for the establishment of Trade Unions in Nigeria is the Trade Unions Act, cap.432, laws of the federation of Nigeria, 1990. Section 1 (1) of the Act defines a Trade Union as;

“Any combination of workers or employers, whether temporary or permanent, the purpose of which is to regulate the terms and condition of employment of workers, whether the combination in question would or would not, apart from this Act, be a lawful combination by reason of any of its purposes being in restraint of trade, and whether its purpose does or does not include provision of benefits for its members.”

From the foregoing definition, two criteria must exist for the purpose of determining whether an association, for purposes of registration, qualifies to be treated as a trade union. These are:

1. The association must comprise workers or employers.
2. The main or principal purpose of the association must be to regulate the terms and conditions of workers.

1. ASSOCIATION OF WORKERS.

From the above definition only an association of workers or employers is registrable as a trade union. By the provision of Section 52 of the Trade Unions Act, a worker means;

“Any employee, that is to say any member of the public service of the federation or of a state or any individual (other than a member of any such public service) who has entered into or works under a contract with an employer, whether the contract is for manual labour, clerical work or otherwise, expressed or implied, oral or in writing and

whether it is a contract personally to execute any work or labour or a contract of apprenticeship.”

2) THE PRINCIPAL PURPOSE

The general principle of law in this regard is that whatever other lawful purposes a trade union allows itself under its rules, books or constitution, its principal or overriding purpose must be the regulation of terms and conditions of employment of workers.

In line with the general law and by the provisions of section 7(1) (d) of the Trade Union Act, where the principal purpose for which a trade union is being carried on has ceased to be that of regulating the terms and conditions of the employment of worker, the registrar of trade unions is empowered to carry out an inspection on the valid registration of such a union.

The courts, in order to determine what the principal purpose of an association is, must peruse the rule book or constitution of the association in its totality, especially its objects or purposes clauses. See *RE: UNION OF IFELODUN TIMBERS DEALERS AND ALLIED WORKMEN* [1964] 2 ALL N.L.R. 63.

It is also important to point out that the regulation of terms and conditions of employment of workers may be affected by a trade union through,

- a) Collective bargaining.
- b) Industrial actions.

SELF ASSESSMENT EXERCISE 1

- i. Define a trade union in line with the relevant provision of the Trade Union Act, 1990.
- ii. Examine the two criteria for the registration of a Trade Union.

3.2 Formation, registration and legal status of trade unions.

A trade union cannot take any step for the purpose of which it has been formed unless it has been registered. Although the Trade Union Act does not expressly vest corporate personality on a trade union, the question, nonetheless, is whether a trade union is, by indication a legal entity.

One of the fundamental attributes of a legal entity is the ability to sue and be sued. The English House of Lords held in *TAFF VALE*

RAILWAY CO. V. AMALGAMATED SOCIETY OF RAILWAY SERVANTS [1901] AC.426 that:

“If the legislature has created a thing which can own property, which can employ servants, and which can inflict injury, it must be taken to have impliedly given the power to make it suitable in a court of law for injuries purposely there by its authority and procurement”.

There has not been any dissenting view or opinion in all causes involving trade unions both in England and in Nigeria since the decision in the above cited case and this is indicative of the fact that given the rights and statutory recognition of a registered trade union, a refusal to call it a “*legal entity*” may be the result of a mere dislike of a terminology.

SELF ASSESSMENT EXERCISE 2

Are trade Unions Legal Entities?

3.3 Union membership and Office

See – Sec. 37&40 of the 1999 Constitution of Nigeria

See also *OSAWA V. REGISTRAR OF TRADE UNIONS* [1985] I.N.W.L.R. [PT.4] 755.

3.4 Union rule Book

See Section 4(2) of Trade Union Act, generally.

The general rule is that a registered trade union has a statutory duty to deliver or send a copy of its rule to any person on request and on paying of the prescribed fee. However, it is an offence for any person, with the intent to mislead or defraud, to supply or lend to any member or prospective member of a registered union a false copy of its rules.

The rules of a registered trade union constitute a contract between the union and its members. The contract is exhaustive as to the purposes of the union and the rights and obligations of its members. Therefore, it will be ultra vires the union to do a thing not provided for in its rules, that is, by the terms of the contract.

SELF ASSESSMENT EXERCISE 3

What is the significance of the Union Rule Book?

3.5 Suspension and expulsion of members.

The authority of a trade union to act on behalf of its members is derived from its rule book. A trade union can exercise only those disciplinary measures over its members that are stipulated in its rules. The following are the criteria required by the courts for this purpose;

1. The rules should expressly grant to the Union the power to take the disciplinary measure in question.
2. The union must in taking disciplinary measures comply with the rules of natural justice, and with such other procedure stipulated in its rules.
3. Even where there is a power to discipline, the union can only impose the specific sanction stipulated in the rules.

SELF ASSESSMENT EXERCISE 4

Enumerate and explain the criteria required by the courts before disciplinary measures taken by a union against its members can be upheld.

3.6 Union membership and the rule in *Foss V. Harbottle*

The common law principle in *FOSS V. HARBOTTLE* [1843] 2 at 461 states that where a wrong is done to a company or where there is an irregularity in its internal management which is capable of being ratified by a simple majority of the members, the court will not interfere at the suit of a minority of the members to rectify the wrong or to regularize the irregularity.

This rule has given rise to two other rules which regulate the institution of actions in respect of wrong done to a body corporate and any other incorporated association. These rules are;

1. Actions in respect of wrongs done to a company must be brought by the company and in its name.
2. The court will not interfere in respect of actions if the wrong done or the irregularity complained of is within the powers of the majority to rectify.

The exceptions to these rules are the following;

- 1) It does not apply where the action is brought to restrain the union from an ultra vires act.

- 2) Where the action is to restrain the union from doing by a simple majority that which ought to be done by a special majority the rule will be excluded.
- 3) Where the action is to prevent a fraud on the minority.
- 4) Where the action is brought to restrain the invasion or violations of membership rights.

SELF ASSESSMENT EXERCISE 5

Discuss the rule in *FOSS V. HARBOTTLE* and its exceptions.

3.7 Union membership and the doctrine of closed shop

The term “Closed Shop” is a colloquialism for “*Union Management Agreements*”. This means collective agreement between trade unions and employers, whereby “employees come to realise that a particular job is only to be obtained or retained if they become and remain members of one of a specified number of trade unions.

In pre-entry closed shop, the prospective employee must first join a particular union before he could be employed while in post-entry closed shop, the employee must join the required union within a short time after acquiring employment. It is however important to note that in any trade or industry in which the closed shop operates, the consequences of an employee losing his union membership may be disastrous to his capacity to earn a living.

The concept of closed shop is an aspect of the English labour law, which was not incorporated into Nigeria labour law.

SELF ASSESSMENT EXERCISE 6

Discuss the concept of closed shop in relation to Labour Law and trade unionism.

3.8 Exhaustion Of Internal Remedies

Usually, the rules of the union may expressly provide that a “*member cannot sue the union until he has exhausted all internal remedies provided by the rules*”. This provision where available, requires an aggrieved member to exhaust all domestic remedies before proceeding to the court.

There are four exceptions to this rule.

1. Where the member can show cause why the court should interfere with the contractual relationship between him and his union. The court will interfere where a member has been disciplined in breach of the rules of natural justice.
2. Where non-intervention will result in the deprivation of some special membership right, e.g. the right to union office.
3. Where the decision of the union is ultra vires, in which case, there is no decision in law from which the member would be obliged to appeal against.
4. Where there is no express provision regarding exhaustion the courts can readily or at all events, grant relief without prior recourse to the domestic remedies but may require the plaintiff to resort first to those remedies.

SELF ASSESSMENT EXERCISE 7

State the general rule and discuss the exceptions to the exhaustion of internal remedies rule in trade unionism.

RE-ORGANISATION OF TRADE UNIONS

See the following enactments.

- 1) Trade Union Ordinance of 1938.
- 2) Trade Union (Amendment) Ordinance caps 200 of 1958.
- 3) Trade Union (Amendment) Act of 1978-1978.
- 4) Trade Union Act, cap. 437, LFN, 1990
- 5) Trade Unions (Amendment) Decree No. 4 of 1996.

4.0 CONCLUSION

The basis of this unit is to expose the learner to the operation of Trade Unions in Nigeria against the backdrop of Nigerian labour law. Further study of the relevant provisions of the law as stated above will in no way improve the knowledge of the student in respect of labour law matters.

5.0 SUMMARY

This unit has dealt with the following facts in the Nigerian labour law.

Exposition of the statutory definition of what Trade Unions are.
Distinguishing factors between Association of workers or employees and the principal purpose.
General and statutory requirement for the formation and registration of Trade Unions.

Legal status of Trade Unions.

Legal position of union membership and the office.

Purpose and significance of the Union Rule Book.

Legal requirements for the suspension and expulsion of members of a trade union.

Union Membership and the rule in *FOSS V HARBOTTLE*.

Union membership and the concept of the “closed shop.”

General rule and exceptions in Trade Unionism.

Relevant statutes in recantation to the re-organization of Trade Unions.

6.0 TUTOR MARKED ASSIGNMENT

What is the legal status of trade unions? Discuss.

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UNIT 2 INDUSTRIAL ACTION

CONTENTS

- 1.0 Introduction
- 2.0 Objectives
- 3.0 Main Content
 - 3.1 Strike and Contract of Employment
 - 3.2 Picketing
 - 3.3 Lock –Out
- 4.0 Conclusion
- 5.0 Summary
- 6.0 Tutor Marked Assignment
- 7.0 References / Further Readings

1.0 INTRODUCTION

The phrase “*industrial action*” is a generic form used to represent concerted efforts which employees may take in order to exert pressure on the employer so as to persuade or compel him to accede to their demands or claims.

Although a strike action is the major form of industrial action, there are, however, other forms short of strike. Employees, rather than strike, may decide to do a “work-to- rule” or “go –slow” or “*sit-in*” by being at work and doing nothing, or by, ‘*work-to – contract*’ which is by withdrawing their usual enthusiasm and co-operation or, boycott the employer’s products. All these form the basis of our discussion in this unit.

2.0 OBJECTIVE

This unit will take as its priority the concept of industrial action with a view to discussing the various means by which the employees, either by themselves or through their unions drive home their points in terms of demands from their employee.

We shall also look into the causes and effects of industrial action on the economy and the advantages or otherwise attributable to this concept.

3.0 MAIN CONTENT

3.1 Strike and the contract of employment.

In some cases, it is important to note that in embarking on industrial action short of strike, employees may be liable for breach of their contract of employment, depending however, on the express and implied terms of the contract.

Following the completion of the contract of employment between an employee and an employer, and the attendant consequences, it appears that strike may be the only instrument left in the hands of employees to compel a recalcitrant employer to comply with the terms of a collective agreement or to collectively bargain with their union or representatives. Thus, it has been observed that the “*threat or actuality of a strike by the union represents the economic and social power that often causes the company to reverse its wages to a point where they are acceptable to the union*”.

Whatever may be the actual and potential benefits of a strike from the perspective of the employee, there are statutory and common law restrictions on the right or freedom to strike. See *Section 42(1) of the Trade Disputes Act, cap 432, LFN, 1990*.

At common law, a strike may not only be in breach of the contract of employment of the strike, entitling the employer to summarily dismiss its employees. Essentially, employees cannot embark on a strike without issuing a strike notice on their employers otherwise the employer will exercise his right to summarily dismiss the employees which is a right he has under the contract of employment.

Where the strike notice is shorter than the contractual notice, the employer can either treat such a notice as anticipatory breach by the employees of their contracts of employment or wait for the threatened strike to take place. The notion of a strike notice merely suspends the contract of employment. This has its attendant problems as follows;

1. Who decides when to lift the suspension?
2. Can the employer order the striking workers to return to work?
3. Would the employee be free to take up other employments during the period of suspension?

SELF ASSESSMENT EXERCISE 1

- i. Examine the effect of strike on the contract of employment.

- ii. Discuss the effect of non-issuance of strike notice on the contract of employment.

3.2 Picketing

Picketing is defined as the physical means employed by employees either to intensify the economic pressure meted on the employer or to ensure that the concerted stoppage of work is not undermined.

The right to picket is closely knitted with such issues as the freedom of assembly and expression, the right to privacy, the rights of individuals to the highway and the duty of the state to maintain law and order. See generally chapter 4 of the 1999 constitution of the Federal Republic of Nigeria. The law regulating picketing is contained in section 42 of the Trade Union Act, 1990.

SELF ASSESSMENT EXERCISE 2

- i. What do you understand by the term ‘picketing’?
- ii. What is the effect of *section 42 of the Trade Union Act; cap 437 LFN 1990* in respect of picketing?

3.3 “Lock – Out”

A “lock – out” is the converse of a strike. It is the right of the employer to lock his employees out of his business premises in order to compel them to accept his terms and conditions of employment. This is provided by section 47 (1) of the Trade Disputes Act, cap 432, LFN 1990 as follows;

“.....the closing of a place of employment, or the suspension of work or the refusal of an employer to continue to employ any number of persons employed by him in consequence of a dispute, done with a view to compelling those persons, or to aid another employer in compelling persons employed by him, to accept terms of employment and physical conditions of work”.

As in the case of strike action by employees, the exercise of the option of “Lock – Out” by the employer is not automatic as he is required to issue “Lock – Out” notice to the affected employees without which he will be liable for deprivation of work as contained in the contract of employment.

SELF ASSESSMENT EXERCISE 3

Compare and contrast strike and “Lock – Out” in relation to the Trade Disputes Act.

4.0 CONCLUSION

The various options available to any of the aggrieved parties in a contract of employment like strike action, picketing and “lock-out” have been discussed in the most simplified way available and as could be noticed only the third option, “lock – out”, is in favour of the employer. This is indicative of the fact that the whole gamut of our labour law is in favour of the employee.

5.0 SUMMARY

This unit has exposed the intricacies of industrial actions to the student through the discussion of the following;

The legal meaning and implication of strike action as an alternative to drive home the employees demand.

The legal effect of the issuance of strike notice by the employee on the employer.

The significance of picketing.

The effect of “lock-out” option as available to the employees.

The various applicable statutes relevant to trade disputes.

6.0 TUTOR MARKED ASSIGNMENT

1. Discuss the option of strike as available to the employee in a trade or industrial dispute.
2. What is the significant effect of non issuance of strike notice by the employee on the employer on the contract of employment?
3. Compare and contrast common law and statutory positions on the issue of strike in an industrial action situation.
4. Discuss the term ‘picketing’.
5. Explain the statutory effect of lock- out.

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UNIT 3 TORTUOUS LIABILITY AND TRADE DISPUTES

CONTENTS

- 1.0 Introduction.
- 2.0 Objective.
- 3.0 Main Content
 - 3.1 Conspiracy.
 - 3.2 Inducing Breach of Contract.
 - 3.3 Defences
 - 3.4 Section 23 of Cap. 437
 - 3.5 Trade Dispute
- 4.0 Conclusion.
- 5.0 Summary.
- 6.0 Tutor Marked Assignment
- 7.0 References/Further Readings

1.0 INTRODUCTION

The purpose of this unit is to examine those areas of contracts of employment that may result in tortious liability either by the employee solely or on behalf of the employee as distinguished from various liabilities. This examination will be in relation to trade disputes as governed and protected by the relevant statutes.

2.0 OBJECTIVES

This unit deals, first with those common law torts which a trade union, its officials and members are prone to commit in the cause of an industrial action. Secondly, it examines the extent of statutory protection afforded to trade unions and unionists from those torts, in the prosecution of trade dispute.

3.0 MAIN CONTENT

3.1 Conspiracy

Torts could either be criminal or civil. In this unit the two types shall be discussed with a view to determining how they relate to trade dispute.

A. CRIMINAL CONSPIRACY

In *CROFTER HAND – WOVEN HARRIS TWEED CO. LTD V. VELTCH* (1942) A.C.435, Viscount Simmonds stated that;

“Conspiracy, when regarded as a crime, is the agreement of two or more persons to effect any unlawful purpose, whether as their ultimate aim, or only as a means to it, and the crime is complete if there is such agreement, even though nothing is done in pursuance of it”.

At common law, the agreement of two or more persons to do any unlawful act by an unlawful means is in itself a crime; in Nigeria, for such an agreement to constitute criminal conspiracy the act done, or the means adopted by the conspirators must be an offence, defined and the penalty for it prescribed, in a written law.

See *section 36 (12) of the 1999 constitution*

See also *AOKO V. FAGBEMI {1961} 1 ALL C.L.R. 400* and *section 518 A (1) of the criminal code cap 77, L.F.N.1990.*

However, it is important to state that offence, under *section 518A (1) C.C.* does not include an offence punishable only by a fine. Thus the agreement of two or more members or officials of a trade union to do an act prohibited by *sections 516-518 C.C.* “*in contemplation or in furtherance of a trade dispute*” will not amount to criminal conspiracy if the act is not an offence punishable with imprisonment.

B. CIVIL CONSPIRACY

Conspiracy as a tort has different forms, viz; conspiracy to effect an unlawful act and conspiracy to injure. The difference between the civil conspiracy to effect an unlawful act and criminal conspiracy is that, in the former, the agreement does not constitute conspiracy to be liable, the conspirators must have done some act in pursuance of their agreement and to the damage of the plaintiff.

On the other hand, criminal conspiracy is constituted by the agreement itself. There is no defence at common law to civil conspiracy to effect an unlawful act. Conspiracy to injure does not involve the use of any unlawful means, such as crime or tort, in effecting the purpose of the conspirators, otherwise, it will cease to be conspiracy to injure and might become criminal conspiracy or other form of civil conspiracy.

Therefore, the conspirators will be liable for the tort of conspiracy to injure if their real or predominant purpose is to inflict damage on another person in his trade.

3.2 Inducing Breach of Contract

There are two major forms of inducement which may result into breach of contract. These are direct and indirect inducements. In direct inducement, the defendant personally intervenes in a contractual relationship by persuading one of the contracting parties to break his contract with the other party.

In indirect inducement, the defendant does not use personal persuasion on one of the contracting parties, but either does a wrongful act e.g. commits a breach of contract himself, or procures a third party, for example, an employee of one of the contracting parties, to commit a breach of his contract of employment as a result of which one of the contracting parties is rendered incapable of performing his contractual obligations.

The highpoint of this rule is that in indirect inducement, to make the defendant liable, the plaintiff must inter alia, prove the unlawful means employed by the defendant, while in direct inducement, it is the personal intervention that is wrongful act.

ELEMENTS OF THE TORT

Three elements must be proved by the plaintiff against the defendant in order to succeed in an action for inducing breach of contract.

I. KNOWLEDGE AND INTENTION

The plaintiff must prove that the defendant knew of the existence of the contract between the plaintiff and the third party and intended to induce or procure its breach. It is not mandatory for the plaintiff to prove that the defendant knew the exact terms of the contract.

II. INTERFERENCE

The plaintiff must also prove that the action of the defendant which constitutes the undue interference which induces the other contraction party was responsible for his action which caused the breach of the contract between them. A mere call would not be sufficient inducement while the offer of a higher pay by the defendant will be inducement or interference which may procure the breach.

III. BREACH AND DAMAGE

The plaintiff must also prove that the inducement or interference caused a breach of contract and that he has suffered damage consequently.

3.3 Defences

Some of the defences available to a defendant in tortious liability in respect of trade dispute are as follows;

I. COMMON LAW

At common law justification is a defence to the tort of inducing breach of contract. The defence consists in the admission of the act complained of but with the plea that the defendant was justified in action as he did and ought reasonably to be exercised having regard to the surrounding circumstances.

Justification is a defence to the tort of conspiracy to injure, if the predominant purpose of the conspirators, (who are usually officials and members of a trade union) is not to injure the plaintiff but to forward and protect their legitimate interests. However, trade union's interests have not been accepted by the courts as a justification for the tort of inducing breach of contract.

II. STATUTORY DEFENCES

See generally *section 43(1) of the Trade Union Act, cap 437*.

Note: that for this defence to be negated it must be proved that;

- a) The tort was committed in contemplation or in furtherance of a trade dispute.
- b) The contract breached by the inducement was a contract of employment.
- c) Breach of any other form of contract will not be protected.

III. INTIMIDATION

The general position of the law in respect of this defence is that it is what the defendant has threatened to do that determines whether the tort of intimidation has been committed or not. If what the defendant has threatened to do is unlawful, he would be liable to the party who has suffered damage as a result of the person threatened complying with the threat.

However, if what the defendant has threatened to do is what he has a right to do, that is, when no unlawful means is involved, he would not have committed the tort of intimidation even though a party has suffered damage as a result of the person threatened complying with the threat.

SELF ASSESSMENT EXERCISE 1

- i. Define conspiracy in relation to trade dispute.
- ii. Differentiate between civil and criminal conspiracy with respect to trade dispute.
- iii. Examine the basic features in inducing a breach of contract.
- iv. Examine the elements of the tort and available defence to a defendant.

3.4 Section 23 of cap. 437

The Trade Unions Act, cap 437, LFN, 1990 provides a variety of protection to unionists in the exercise of the rights and protection of their members. Of particular importance is the protection granted by section 43(1) of the Trade Union Act.

In the same vein, section 23 of the Act provides the union itself absolute immunity from tortious liabilities provided, of course, the liabilities arose from torts committed in contemplation or in furtherance of a trade dispute.

Section 23(1) of the Trade Union Act reads;

“An action against a trade union {whether of workers or employers} in respect to any tortious act alleged to have been committed by or on behalf of the trade union in contemplating or in furtherance to a trade dispute shall not be entertained by any court in Nigeria.”

Section 23(2) of the Trade Union Act reads;

“Subsection (1) of this section includes both to an action in its registered name and to any action against one or more persons as representatives of a trade union.”

The following points are deducible from the foregoing provision:

- i. It is the trade union as a registered association under the Trade Unions Act, that is, protected. Agents of the union whether officials or members are not protected.
- ii. Protection is given to the union whether it is being sued in its registered name or in a representative capacity.
- iii. A trade union is not debarred from suing for torts committed against it.
- iv. There is protection only when a trade dispute is contemplated or being furthered.

SELF-ASSESSMENT EXERCISE 2

What is the legal effect of the provision of section 23(1) & (2) of the Trade Union Act, cap 437, LFFN, 1990 with respect to protection granted to unionists?

3.5 Trade dispute

This section will deal with the substance of Trade Dispute.

WHAT IS A TRADE DISPUTE?

Section 52 of the Trade Unions Act, cap 437 and section 47(1) of the Trade Disputes Act, cap 432, LFN 1990 respectively define a “trade dispute” as,

“Any dispute between employer and worker or between workers and employers, which is connected with the employment or non-employment, or the terms of employment and physical conditions of work of any person.”

From the foregoing definition, for there be a trade dispute, the following must be present.

- i. The dispute must be between proper parties i.e. between employer and workers or between workers and employers.
- ii. The subject matter of the dispute must involve any of the following;
 - a) Employment or non-employment, or
 - b) Terms of employment; or
 - c) Condition of work of any person.

“IN CONTEMPLATION” OR “IN FURTHERANCE” OF A TRADE DISPUTE.

A. “IN CONTEMPLATION”

This has been defined as *“an act done in contemplation of a trade dispute”*. However, it has been held that for a trade dispute to be *“in contemplation”* or *“Imminent”*, there must first be a demand made on employers by employees or their union and the employer must have rejected the demand even though no active dispute has yet arisen.

Therefore, a trade dispute is in contemplation once a demand is made on an employer by his employees and has been rejected, prior to the employees taking industrial action in pursuance of their demand.

B. “IN FURTHERANCE”

The law is that once a trade dispute has become active, through industrial action, an act is done in furtherance of that dispute if it was done with the purpose of helping one of the parties to a trade dispute to achieve its objectives in it.

The test to be applied in determining whether an act was done in furtherance of a trade dispute is subjective, rather than objective. By this way the real motive of the disputing parties could be easily uncovered.

SELF-ASSESSMENT EXERCISE 3

- i. What is a trade dispute in the contemplation of section 52 of the Trade Unions Act and section 47(1) of the Trade Disputes Act, 1990?
- ii. Differentiate between these terminologies.
 - a. “In contemplations” and
 - b. “In furtherance” of a trade Dispute.

4.0 CONCLUSION

In this unit we have been able to see what usually constitutes tortious liability on any of the contracting parties under a contract of employment. We have also been able to know what trade dispute is vis-à-vis the relevant defence to such disputes as provided by the enabling statutes.

It is pertinent to say that if the parties to a subsisting contract of employment could maintain their respective obligations under the contract, less trouble will have to be solved.

5.0 SUMMARY

Through this unit, efforts has been made to expand the knowledge of the student with a view to understanding the fact that no contract of employment is devoid of problems when it comes to the point of implementation of the terms. There following points have been aptly discussed in this unit;

- ☞ Basic concept of torts in relation to Trade Disputes and trade unionism.

Criminal and civil conspiracies distinguished.
 Effect of inducement that causes a breach of contract in a contract of employment.
 Elements of the tort of conspiracy.
 Available defences to the defendant.
 Protection offered the unionists and the unions by the enabling acts.
 Meaning of a trade disputes.
 Relevance of acts done “in contemplation” and “in furtherance” of a trade dispute.

6.0 TUTOR MARKED ASSIGNMENTS

1. Define conspiracy in relation to trade disputes.
2. Examine the elements of the tort of conspiracy and the available defences to a defendant.
3. Discuss the relevance of section 23(e) and 43(c) of the Trade Unions Act, cap 437 LFN 1990.
4. What is a Trade Dispute?
5. Differentiate between these terminologies “In contemplation” and “In furtherance of a Trade Disputes”.

7.0 REFERENCES /FURTHER READINGS

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UNIT 4 SETTLEMENT OF TRADE DISPUTES

CONTENTS

- 1.0 Introduction
- 2.0 Objective
- 3.0 Main Content
 - 3.1 The parties
 - 3.2 Arbitration
 - 3.3 National Industrial Court
 - 3.4 Jurisdiction of the Court
 - 3.5 Enforcement of the Award
- 4.0 Conclusion
- 5.0 Summary
- 6.0 Tutor Marked Assignment
- 7.0 References/Further Readings

1.0 INTRODUCTION

The main purpose of this unit is to examine the various modes or means by which disputes arising from industrial relations are settled. By this, it is aimed at reviewing the enabling law connected thereto.

2.0 OBJECTIVES

The relevant and most prevailing statute in relation to trade disputes is the Trade Disputes Act, cap 432, LFN, 1990. The statute has by its relevant provisions laid down the rules to be followed in case of an industrial dispute and the likely consequences in the event of non-compliance with these rules.

This unit is meant to discuss the various modes or means of settlement of industrial disputes, their advantages, disadvantages and suggestions for improvement.

3.0 MAIN CONTENT

The basic law in relation to settlement of industrial or trade dispute is the provision of section 17(1) of the Trade Disputes Act, cap 432, LFN, 1990. This section provides thus;

“An employee shall not declare or take part in a lock – out and a worker shall not take part in a strike in connection with a trade dispute where;

- a) The procedure specified in section 3 or 5 of this Act has not been complied with in relation to the dispute; or
- b) A conciliator has been appointed under section 7 of this Act for the purpose of effecting a settlement of the dispute; or
- c) The dispute has been referred for settlement to the industrial panel under section 8 of this act, or
- d) An award by an arbitration tribunal has become binding under section 12(3) of this act; or
- e) The dispute has subsequently been referred to the National Industrial Court under section 13(1) or 16 of this act; or
- f) The National Industrial court has issued an award on the reference.

Section 17(2) provides for the punishment on anyone who contravenes the provision of section 17(1) of the Act. The effect of section 17(1) of the Trade Disputes Act sets the headings to be discussed under the main body part of this unit.

3.1 The Parties

The existence of a dispute or disagreement necessarily means there are parties to the dispute or disagreement. Normally, it requires a minimum of two parties to have a dispute. In the case of industrial disputes, it could arise between employer and worker or worker and worker.

Section 52 of the Trade Union Act defines who a worker is and a similar definition is contained in Section 1 of the Workmen's Compensation Act.

Section 43(1)(c) of Trade Union Act is to the effect that a worker in respect of whom a dispute arises need not be in the employer's business.

Naturally, human interaction especially in an industrial setting must of necessity, in certain circumstances and under certain conditions, produce conflict or dispute, despite the virtual prohibition of strikes and lock-outs by Section 17(1) of the Trade Disputes Act.

The simple implication of the foregoing exposition is that for there to be an industrial conflict or trade dispute there must be an employer and an employee making up the parties to the dispute.

SELF-ASSESSMENT EXERCISE 1

What are the distinctive features of section 17(1) of the Trade Disputes Act?

3.2 Arbitration

Despite this virtual prohibition of strike and lock-outs, there have been strikes and lock outs.

There is no doubt that the intervention of a third party will be inevitable where the machinery of collective bargaining process is inadequate. The government has often intervened by providing the required machinery as exemplified by the enactment in 1941 of the Trade Disputes (Arbitration and Inquiry) Act which vests the power for the resolution of industrial disputes in the government.

However, the Act contains some limitation in that the powers of the government could be exercised only where the collective parties consent to their use. In effect, the Minister of Labour can neither appoint a conciliator nor set up an arbitration tribunal for the dispute unless the parties so request.

Once a dispute has been referred to the Arbitration Panel, the chairman constitutes an arbitration tribunal from among the members of the panel. The tribunal may consist of-

- a) A sole arbitrator; or
- b) A sole arbitrator assisted by assessors; or
- c) One or more arbitrators under the presidency of the chairman or vice-chairman.

An arbitration tribunal has twenty one days, or such longer period as may be allowed by the minister, to make an award. The award is not communicated to the parties but to the minister, who notifies the parties of the award.

The parties have seven days from the date of the notification to object to the award. In the absence of any objection, the minister is bound to confirm the award by a notice of confirmation of the award published in the Federal Gazette. With the confirmation of the award, it becomes binding on the parties concerned.

See section 8, 12 and 13 of the Trade Disputes Act in relation to Arbitration.

In order to facilitate the speedy settlement of trade disputes, and to free the panel from suspicion, the disputants should and are usually allowed direct access to the panel and thereafter to the National Industrial court. Industrial Tribunal gives its award in the open and the award is binding from the day it was made or such other date as may be specified in the order.

SELF ASSESSMENT EXERCISE 2

Explain the mode of settlement of Trade Disputes through Arbitration Tribunal.

3.3 The National Industrial Court

Section 19 of the Trade Disputes Act establishes the National Industrial Court. The court has a president and four other members. The members of the court are appointees of the President of Nigeria after consultation with the Federal Judicial Service Commission.

One of the basic requirements of a candidate for the post of the president of the court is that such person must either have been a High Court Judge or a person qualified to practice as a Solicitor and advocate in Nigeria and has been so qualified for not less than ten years.

The court deals with matters referred to it with the assistance of assessors who shall consist of two nominees of the employers concerned chosen from a panel of employers representative drawn by the minister under section 43 of the Act, and two nominees of the workers concerned, chosen from a panel of workers representatives.

SELF-ASSESSMENT EXERCISE 3

- i. What are the roles of assessors appointed to assist the president of the National Industrial Court?
- ii. The appointment of the president of the National Industrial Court is political. Discuss.

3.4 The Jurisdiction of the Court

The power and authority to adjudicate on industrial and trade disputes is conferred on the National Industrial Court by the provision of section 20 of Trade Disputes Act. This section confers exclusive jurisdiction on the court to make award for the purpose of settling trade disputes and determining questions as to the interpretation of any collective agreement, any award made by an arbitration tribunal or by the court itself under part 1 of the Act or the terms of settlement of any trade dispute as recorded in any memorandum under section 7 of the Act. By virtue of section 20 (3) of the Act, no appeal shall lie to any other court or person from any determination of the National Industrial Court.

In the same vein, in spite of the unlimited powers of state High Courts, they have no jurisdiction in industrial or trade dispute matters. This is

however inconsistent with the provisions of section 272 (1) of the 1999 constitution which confers unlimited civil and criminal jurisdiction on State High Courts and has been said to be void to the extent of that inconsistency. This issue was canvassed at the Supreme Court in *W.S.W. LTD V. IRON of STEEL WORKERS UNION OF NIGERIA* [1987] L.N.S.C.C. 133. In that case, the apex court declared section 20 of the Trade Disputes Act as void to the extent of its inconsistency with the 1999 Constitution.

SELF ASSESSMENT EXERCISE 4

Compared the jurisdiction conferred on the National Industrial Court by section 20 of the Trade Disputes Act and the provisions of Section 272(1) of the 1999 constitution of the Federal republic of Nigeria.

3.5 Enforcement of award

The National Industrial Court, under section 20(1) of the Act, has thirty working days within which to determine any dispute referred to it. The award of the court becomes binding on the employers and workers concerned either from the date of the award or from such date as may be specified in the order.

The Court, as well as the Industrial Arbitration Panel , are not only empowered to enforce their awards but also to commit for contempt any person or a representative of a trade union who does any act or commits any omission which in the opinion of the court or the panel constitutes contempt of the court or panel.

SELF ASSESSMENT EXERCISE 5

The National Industrial Court and the Industrial Arbitration panel have power as of right to enforce awards granted by them. Discuss.

4.0 CONCLUSION

The rate at which the law in relation to industrial trade disputes settlement developed in Nigeria is not comparable with what obtains in other jurisdictions. However, it is a highly commendable situation as the present position as posited above is comparable with what obtains in advanced countries of the world, save for some minor differences. However, the points enumerated and discussed under the main body of this unit constitute the bulk of the relevant points required.

5.0 SUMMARY

The learner has been shown the relevant provisions of the law in relation to settlement of industrial and trade disputes in Nigeria with particular reference to the arbitration panel, the National Industrial Court, the jurisdiction of the court, the modes of enforcing the award and primarily the parties necessary in a settlement of trade dispute matters.

6.0 TUTOR MARKED ASSIGNMENT

1. What do you understand by the term “settlement of industrial or trade dispute”?
2. Examine the effect of section 17(1) of the Trade Dispute Act; cap 432, LFN.1990.
3. Who are the necessary parties to an industrial or trade dispute?
4. What are the roles of an arbitration panel in trade dispute settlement?
5. The jurisdiction of the National Industrial Court under section 20 of the Trade Dispute Act is unfettered. Discuss?
6. The enforcement of awards is as of right. Discuss.

7.0 REFERENCES / FURTHER READINGS

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UNIT 5 PROTECTING HEALTH AND SAFETY

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- 2.0 Objectives
- 3.0 Main Content
 - 3.1 The Factories Act
 - 3.2 Nature of Fencing
 - 3.3 Elements of Civil Liability
 - 3.4 Proof of Liability
 - 3.4.1 The principle of res ipsa lonquitur
 - 3.4.2 Foresight
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 - 3.4.5 Attributes of the Employees
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 - 3.5 Defences
 - 3.5.1 Remoteness of Damages
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 - 3.5.4 Limitation of Action
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1.0 INTRODUCTION

In common law, there are certain duties which an employer owes the employees. The point however must be made that apart from this duties, growing industrialisation has brought into existence a number of statutes designed to govern, order and regulate industrial activities generally. The purpose of this unit is to examine these statutes as they relate to employer and employee relationship.

2.0 OBJECTIVES

The major objective of this unit is to review and examine the relevance of those statutes designed to govern, order and regulate industrial activities generally. Some of these statutes can be viewed first as instruments designed to promote the health, safety, welfare and security of the worker and second, as instruments for providing compensation for the employees in case of injury.

3.0 MAIN CONTENT

3.1 The Factories Act

The Factories Act, cap 126 laws of the Federation of Nigeria (LFN) 1990 was primarily designed to govern order and regulate industrial activities generally.

In essence, its main duty is to prevent occupational accidents and diseases in factories. In *PULLEN V. PRISON COMMISSIONARS* [1957] 3 ALL E.R.470, Lord Goddard, C.J. commenting on the object of the English Factories Act of 1937 said;

“The Factories Act, 1937, is an Act which is designed for the protection of persons working in factories, that is to say, it is an Act which is intended to and does put obligations on employers of labour in factories, to take various precautions for the protection of their work-people...”

Section 89(1) of the Factories Act, 1990 which is in pari material with section 175 of the English Factories Act, 1961, which replaced section 151 of the 1937 Act defines what a factory is.

You are hereby directed to see the full text of that section. it is also important to state at this point that it has earlier being said that Nigeria Labour Law principally is derived from English Labour Law and as such the Factories Act, LFN 1990 is the Nigerian version of the English Factories Act of 1961 albeit with little modification to fit into our own peculiar local circumstances.

Essentially, it is an off-shoot of the English common law, most of which is now codified. However, a thorough understanding of the provisions of section 37(1) of the Act will reveal the following points;

- 1) A factory premises must be used for trade or gain in order to qualify as a factory. The phrase “trade” or “gain” connotes an intention to make profit. Thus, the kitchen of a manual hospital had been held not to be a factory because the mincing of meat by electrical means carried on in it was not carried on by way of trade or gain.
- 2) The employer must have access to or control over the promises if the place is to be a factory.
- 3) Generally, the person or persons who work in a factory must be employed. Thus it has been held that a prison workshop was not a factory under the definition of factory in the Act since there was no relationship of master and servant or employment for wages.

Part II of the Act, which is on general health provisions, imposes on the occupiers of factories, duties designed to protect the health of those employed in such places. Sections 7-12 deal with cleanliness, overcrowding, ventilation, lighting, damage of floors and sanitary conveniences.

The principal provisions of part III of the Act are those dealing with general safety provisions with particular emphasis on the provision for fencing of machinery. Machinery under the Act is divided into three classes;

- a) Prime movers see sec. 14; these are engines, motors and other enhancements which provide mechanical energy derived from steam, water, wind, electricity, the combustion of fuel and other sources.
- b) Transmission Machinery; See section 15. This consists of every shaft, wheel, drum, pulley, and system of fast and loose pulleys, coupling, clutch, driving-belt or other devices by which the motion of a prime mover is transmitted to or received by any machine or appliances.
- c) Other dangerous parts of machinery. The combined effect of the provision of sections 14(1), 15(1) and 17(1) of the Act is that it is obligatory on the occupier of a factory to securely fence these parts of a machinery unless they are in such position or of such construction as to be safe to every person employed or working on the premises as it would be if securely fenced.

SELF ASSESSMENT EXERCISE 1

- i. Examine the major purpose of the Factories Act, 1990
- ii. Examine generally the provision of section 87(1) of the Factories Act LFN, 1990.

3.2 The Nature of Fencing

The primary purpose of section 17 of the Act is that it imposes a duty to fence every dangerous part of machinery on the owner of the factory. Prime movers and transmission machinery must be securely fenced. The duty to fence any other part of machinery arises only if that part is dangerous.

In determining whether a part of machinery is dangerous, the test to be applied is "*forcibility*". In other words, a part of a machinery is dangerous if it could reasonably cause harm. Section 19 of the Act, which specifically provides for fencing of dangerous machineries provides as follows;

“All fencing or other safeguards provided in pursuance of the foregoing provisions of the Act shall be of substantial construction, and constantly maintained and kept in position while the parts required to be fenced or safeguarded are in motion or in use, except when any such parts are necessarily exposed for examination and for any lubrication or adjustment shown by such examination to be immediately necessary, and all the conditions specified in section 18(2) of this Act are complied with.”

From the above provision of the Act, machinery means, for purpose of fencing, machinery used in the course of the factory's processes or production as distinct from machinery which is merely a product of the factory. The fencing requirement therefore, *“extends to all machinery forming part of the equipment of a factory, whether in a fixed position or capable of moving from place to place, thus they apply to a mobile crane and also vehicles used in a factory...but not visiting vehicles...”*

It is therefore submitted that the duty to fence imposed by the Act is absolute and strict in the sense that it is neither qualified by such words as *“as far as reasonably practicable”* nor does it impose on the occupier a duty to take *“all practicable measures.”* The duties to fence apply irrespective of practicability. An occupier of a factory cannot therefore excuse his failure to securely fence a machinery by suggesting that fencing would make the machinery unuseable.

In essence, strict or absolute obligation to fence does not mean that the fence must be so constructed that it cannot be climbed over, or broken down, by an employee who is determined to get out the machinery. That would be demanding the impossible from the employers.

SELF ASSESSMENT EXERCISE 2

What are the essential requirements of section 14, 15, 17 and 19 of the Factories Act, 1990?

3.3 Elements Of Civil Liability

The duty to fence imposed by the Factories Act is a duty of absolute liability, therefore, it is not open to the defendant to say that he had done all that was reasonable to prevent or avoid the danger complained about.

It should not however be imagined that because of the absolute liability imposed by the Act, every failure to fence automatically results in the employer's liability. Whether the employers liability is absolute or dependent on reasonable care or foresight, it is quite clear that there is a

duty on the employer to keep his machines in proper state of repair and maintenance and to take all reasonable care to maintain his plant, machinery and equipment in such condition as to be safe for those working in the factory.

See. *JOHN SUMMERS & SONS LTD V. FROST* [1955] M.C. 740.

However, before an employer will be held liable for injuries sustained by his employees as a result of unfenced machineries, the points in the next subsection must be established;

3.4 Proof of Liability

It is part of the general principle of law of evidence that he who alleges must prove-it is the plaintiff (*i.e. the employee in case of an action for breach of duty*) who has the evidential burden of proof.

The House of Lords in *BOYLE V. KODAK LTD.(1969)2 ALL E.R. 437*.held that before the plaintiff can be said to have discharged the burden, the following four conditions must be satisfied.

- a. He must show that the Act imposes a duty on the defendant –the factory owner or occupier.
- b. He must satisfy the court that the duty is owed to him or to a class of people to which he {*the plaintiff*} belongs.
- c. He must show that the defendant was in breach of the duty owed to him.
- d. Finally, he must show that in consequence of that breach, he has suffered injury or that the breach has caused his injury.

3.4.1 The principle of res ipsa loquitur as a basis of liability

While proof usually involves the establishment of acts or omission which can be regarded as negligent, in certain cases however, the courts will be prepared to infer from the immediate circumstances of the injury.

Res ipsa loquitur is a rule of practice or evidence not a rule of law. It is to assert the right of party claiming injury and damages due to the negligence of the other party. There must however be evidence of negligence in a reasonable way before the rule, which is a convenient way to explain an unusual accident can apply.

See *.AKANMU V. ADIGUN* [1993] 7 NWLR (pt.204) 218.

The potency of this rule was demonstrated in the case of *ODEBUNMI V. ABDULLAHI* (1997) 2 NWLR [pt 489] 526. This was an action under

the Fatal Accident Act where a trailer tanker ran into a Volkswagen car which was stationary and killed the driver/owner.

In view of the strict liability imposed on employees {factory owners and occupiers} by the Factories Act, it would appear that an employee does not really need to raise this presumption nor does he have to rely on the maxim in order to succeed in an action for damages for breach of statutory duty. Although there is so far a paucity of Nigerian cases in regard to liability under the Factories Act, one may fairly confidently assume that in view of the language of the Act and the strict liability imposed on an employer, an employee injured at work will almost certainly get a favourable treatment under the law. As most of the sections of the Act confirm the rules of common law, reference cannot but be made to the provision and requirements of common law as to liability arising from the duty of care.

3.4.2 Foresight

The basis of the test of duty of care laid down in the popular dictum of Lord Atkin in *DONOGHUE V. STEVENSON* [1932] A.C. 562 at 580 is still relevant today. The learned Lord Justice said;

“You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who then, in law is my neighbour? The answer seems to be persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.”

The foregoing statement has generally been regarded as the “*Forceability Test*”. How then is foresight measured? It is to be measured in the light of knowledge and experience possessed or reasonably expected at the time of the alleged negligence.

3.4.3 Duty of care

The duty expected of the employer is that of a reasonable man and a reasonable man does not hold himself out as possessing specialized skills without expecting to be judged by the standards of each representation. The standard of care required is judged by the state of knowledge at the time in question. If the danger is unknown at the time, then it will not be foreseeable.

3.4.4 Balancing the risk against precautions

As earlier noted, many of the statutory provisions of the Factories Act are a confirmation of common law duties imposed on the employer. A typical example is that, under common law an employer has a duty to take care of the health, safety and welfare of his employees. An identical provision is contained in section 48 of the factories Act. In essence, an employee may bring his action at common law with the need to prove negligence or lack of care under the provision of the Act.

See: *WESTERN NIGERIA TRADING CO.LTD V. BUSARI AJAO* [1965] NMLR 178.

In the same vein, the degree to which care must be taken depends on a balancing of the risk against the precautions necessary to affect it. The risk is measured not only in terms of frequency, but also in terms of seriousness. All the facts of the care are taken into account not the least the particular sensibility of the plaintiff.

The balancing act is done mainly in regard to the duties imposed by common law, as balancing exercise is often discarded as demonstrated by the various reports of the cases in favour of absolute liability.

3.4.5 Attributes of the Employee

The law in this respect is that the employer must take the worker as he finds him. What this simply means is that if the employee is susceptible to a particular type of injury to which other employees may not be susceptible, and the employee owing to his peculiar susceptibility to such a risk, the employer will not be excused from the resulting liability simply because of the plaintiff (employee's) peculiar susceptibility.

On the other hand the employer is entitled to rely on the particular employee's, experience and knowledge. As regards statutory duties it may be necessary to give instructions to an experienced man. Experience is not of course general and must relate to the work in hand, although a job may be so straight forward that it is reasonable to leave it to an unskilled man, without instruction.

3.4.6 Causation

The general rule in respect of this is that the courts must, from all the causes which have led to the injury, establish, whether the negligence of the defendant can be said to be the cause of the injury.

Industrial injury could be the result of negligence of a number of persons often bound together by contract. In such a case, the injured

employee can bring an action against any or all of them, leaving the defendant to seek contribution from his other tortfeasor

In some other cases however, the injured employee may have contributed to his own injury. This is often covered by the doctrine of contributory negligence's.

SELF ASSESSMENT EXERCISE 3

Examine the various elements of civil liability in cases of injury sustained by an employee in the factory.

3.5 Defences

3.5.1 Remoteness of Damage

The question of remoteness of damage is closely allied to the issue of causation, and it is a general defence to all torts. Where the employer's default is not the proximate or predominant cause of the injury, he will escape liability.

Thus in *THOMAS REREWI V. BISIRIYU ODEGBESAN* [1976] NMLR 89, the Supreme Court held that a person cannot be held liable for negligence unless the damage is caused by the negligence or as a consequence of it.

3.5.2 Volenti non fit injuria

This defence is usually open to the defendant, usually the employer. It is useful to a defendant where the plaintiff voluntarily assumes a risk. Its essential features are;

1. That the plaintiff must have known of the risk of the harm.
2. He must have freely accepted that risk.

Once these two essential features are present, then the defendant will be exculpated from liability.

An offshoot of this rule presupposes that an employer will not automatically be free of liability merely because a workman continues with his duty with the knowledge of the risk involved. To free the defendant from liability, the plaintiff workman must voluntarily and freely accept to take the risk.

See *SMITH V. BAKER* [1891] A.C. 235 H.L., where the House of Lords held in that case that the defence of violent non fit injured could not

succeed because, although the plaintiff knew of the risk, he had not freely accepted it.

3.5.3 Contributory negligence

This is another defence which can shield the employer from bearing the whole liability arising from the injury suffered by his workman. At common law, contributory negligence is a complete defence. The party who had the last opportunity of avoiding the accident bares the whole responsibility. Where such a party is the plaintiff, then he would lose his claim.

When contributory negligence is offered as a defence all the defendant need to prove is that the plaintiff failed to take reasonable care for his own safety. This is a defence both to negligence and breach of statutory duty, but the onus of proving same is on the defendant.

In Nigeria, the defence of contributory negligence is regulated by the following laws;

- I. Civil Liability (Miscellaneous Provisions) Act.
- II. Fatal Accidents Act.
- III. Section 8 of the Old Western Nigeria Torts Law.

These laws and provisions are similar in content and application to the English Law Reform [Contributory Negligence] Act, 1945 which provides that where the faults of the person injured and another contribute to the injury, the claim shall not be defeated but the damages recoverable shall be reduced to *“such extent as the court thinks just and equitable having regard to the claimants share in the responsibility for the damage.”*

In *ALIDU OREKOYA V. UNIVERSITY OF IFE* (1972) HIF/3/72, Thompson J. reduced by 50% the damages awarded to a typist who scrambled to take a bus in the university campus with the umbrella in his hand and thereby sustained injury resulting in deformity in one of his legs.

Forceability is a relevant factor in this defence and according to Lord Denning in *JONES V. LOVOX QUARRIES* (1952) 2 Q.B. 608;

“A person is guilty of contributory negligence if he ought reasonably to have foreseen that if he did not act as a reasonable prudent man he might hurt himself; and in his reckonings he must take into account the possibility of others being careless.”

The corpus of this doctrine therefore is that the plaintiff, though in no way contributing to the accident, has by his negligence, contributed to the degree of injury.

See *FROOM V. BUTCHER* [1975] 3 ALL E.R. 520.

3.5.4 Limitation of action

There is an absolute need for a plaintiff to bring his action within the time allowed by law if he is not to lose his right.

Limitation of Action is the principle of law which establishes the rule that a plaintiff must seek his remedy within a time limit stipulated by law after which period his action will become statute barred. The limitation period can be used as a defence to an action in tort and the defendant can plead that the time within which the plaintiff should have brought his action had expired or that the action had become statute barred.

This defence must be specifically pleaded as it may otherwise be deemed to have been waived. There are two basic reasons for evolving the principle of limitation. These are:

- 1) It will be contrary to public policy for a potential defendant to have the possibility of legal proceedings hanging like a sword of damocles over his head for an indefinite duration.
- 2) Where an action is moderately delayed for several years after the event which gave rise to it has occurred, memories of witnesses might have become hazy and, in some cases, vital witness may have died with the result that the truth may get depreciated.

The limitation period starts to run from;

- I. the date on which the cause of action accrued; or
- II. the date of knowledge, if later, of the person injured.

Example of existing limitation laws in Nigeria are;

1. Limitation law of Lagos state (1994) cap. 118.
2. Section 2 of the Public Officers Protection Act (POPA) cap 379, LFN, 1990.

Finally, it is apposite to state that whatever any of these defences is well articulated and pleaded, avail a defendant may be exculpated from liability.

SELF-ASSESSMENT EXERCISE 4

Examine the various defences available to a defendant in an action relating to injuries sustained by a plaintiff (employee) under the Factories Act.

4.0 CONCLUSION

The submission made in this unit is not exhaustive and students are hereby advised to embark on further reading to broaden their knowledge of the topic. However, it is a good starting point of reference. It contains basic and essential requirements.

5.0 SUMMARY

At the end of this unit, you have been able to establish the following:

The basis of the enactment of the Factories Act.

The importance of fencing of industrial and factory's machineries.

The various elements at civil liability at the suit of an injured plaintiff (employee) who seeks redress against the dependant [employer, occupier or owners of the factory].

The various defences recognized by the law and available to the defendant (owner or employer).

6.0 TUTOR MARKED ASSIGNMENTS

1. Explain the basic concept behind the enactment of the Factories Act.
2. What is the relevance of fencing an industrial or factory machinery?
3. Enumerate and discuss the various elements of civil liability in an industrial relation suit.
4. Enumerate and explain the various defences available to a defendant (employer) to the suit of a plaintiff (employee) in a case of injuries sustained in the factory.

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UNIT 6 THE WORKMEN'S COMPENSATION ACT

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1.0 INTRODUCTION

The Workmen's Compensation Act, cap 470, laws of the Federation of Nigeria 1990 (hereinafter referred to as the Act) was promulgated as a decree on the 12th June, 1987. It actually replaced the Workmen's Compensation Act of 1958 which hitherto had been the subject of severe criticisms on account of its narrowness of scope, obsolescence and irrelevance to modern industrial needs. It was major these stationary that the new Act was promulgated to correct and it has so far lived up to its biddings.

2.0 OBJECTIVES

Unlike the corpus of the Factories Act (already discussed) which was enacted to protect employees and in appropriate cases, other person working in factories, from occupational accident and diseases, this Act provides for the payment of Compensation to workman for injuries sustained in the course of their employment.

This unit is therefore going to show the various conditions under which an employee will be entitled to compensation from an employer. It will also reflect on the other conditions incidental to the promulgation of the Act. There are meant to show the student the way and manners by which the Act had been put to use.

3.0 MAIN CONTENT

Under the Act compensation does not depend on the negligence of the employer but on whether the injury or death was caused by an accident arising out of and in the course of employment of the workman. In essence, the major consideration for the determination of whether or not an employee is entitled to any compensation under the Act is whether the course of his injury occurred or arose out of and in the course of his employment. The second consideration will be whether he is an employee or not in the employment of the employer. These and many more are subject of discussion in the main body of this unit.

3.1 Who is a Workman?

Section 1 of the Workmen's Compensation Act provides that:

“A person shall be deemed to be a workman if either before or after the commencement of the Act, he has entered into or is working under a contract of service or apprenticeship with an employer whether by way of manual labour, whether the contract is expressed or implied, oral or in writing.”

Certain categories are however excluded from the application of the Act by virtue of Section 2 (2) and 3 (2) (a) --- (f) of the Act.

Therefore, by necessary implication, from the definition provided by the Act, a workman now includes practically everybody from cleaner to the managing director or the permanent secretary in the civil service, as section 2 (1) of the Act states that it shall apply to a workman employed in the public service of the Federation and of any state thereof; and in the Nigeria police.

3.2 Who is an Employer?

By the provision of section 41(1) of the Act, an employer includes;

- a. The Government of the federation and of any state in Nigeria,
- b. Any body of persons corporate or unincorporated and the legal personal representative of a deceased employer.
- c. Where the services of the workman are temporarily lent on hire to another person by the person with whom the workman has entered into a contract of service or apprenticeship, the original or permanent employer would continue to be the employer of the workman while he is temporarily working for that other person.

- d. In relation to persons employed for the purposes of any game or recreation and engaged or paid through a club, the manager, or members of the managing committee of the club, shall for purposes of the Act, be deemed to be an employer.

SELF-ASSESSMENT EXERCISE 2

Name the categories of people recognized as employers under the Act.

3.3 When is a Workman Entitled to Compensation?

For the purpose of entitlement to compensation under the Act, the workman (or his dependant, in fatal accident cases) must prove, except where the Act otherwise provides, that he has suffered personal injury by accident arising out of and in the course of the employment.

See section 3(3) (a) & (b) on meaning of “*out of and in the course of employment*”.

The general rule is that an employer is not liable to pay compensation in respect of any injury which does not incapacitate the workman for a period of at least three consecutive days from earning full wages at the work at which he was engaged. Furthermore, no compensation is payable where the injury is attributable to the serious and willful misconduct of the workman.

Where however an accident results in death or occasions a permanent incapacity of the workman, the accident would be deemed to have arisen ‘out of and in the course of his employment’, notwithstanding that the workman was at the time of the accident acting in contravention;

- a) Of any statutory or other regulation applicable to his employment; or
- b) Of any orders given by or on behalf of his employer, or
- c) That he was acting without instructions from his employer, if such act was done by the workman for the purpose of and in connection with his employer’s trade or business.

The significant effect of the above instances is that misconduct of the workman would not disentitle him from claiming compensation, so long as he misconducts himself in the interest of his employer’s trade or business. The contrary would be the case where death or incapacity was due to a deliberate self-injury.

Similarly, no compensation is payable in respect of death or incapacity resulting from personal injury, if the workman has at any time

knowingly misrepresented to his employer that he was not suffering or had not previously suffered from that injury or similar one.

SELF-ASSESSMENT EXERCISE 3

Under what situations is an employee entitle to compensation?

3.4 What is Accident?

The liability of an employer to pay compensation depends on the occurrence of an accident in the course of his workman's employment. The word 'accident' was not defined anywhere in the Act. However, the word has been judicially interpreted under the repealed Workmen's Compensation Acts of England.

In *FENTON V. THORLEY* [1903] A.C. 443, the House of Lords, in construing the word "accident" under section 1(1) of the Workman's Compensation Act, 1897 [section 1(1) is identical to section 3(1) of the Nigeria Act], held that "accident" should be given its popular and ordinary meaning and when so construed, it meant any mishap or unflawed event not expected or designed.

The law in respect of an accident giving rise to a disease which results to an injury is that the injury would be treated as arising from the accident itself. In *BRINTONS LTD V. TURVEY* [1905] A.C.200, a bacillus passed into the eye of a workman from the wool which he was sorting. He became infected with anthrax of which he died. *Lord Mac Naghten*, while explaining the nature of the "accident" in the case said; inter alia;

".....It was an accident that this noxious thing escaped It was an accident that the thing struck the man on a delicate and tender spot in the corner of his eye....."

SELF-ASSESSMENT EXERCISE 4

Describe what an accident is under the Act.

3.5 Course of employment

The general rule is that for an employer to be entitled to the insurance benefit provided for the injury suffered by him or her, he or she must prove that the injury, accident or death arose out of and in the course of employment. This is the position of section 40 of the Act.

In the same vein, section 3(1) of the Act contains the criterion governing the payment of compensation. The basic fact is that the injury or death

for which compensation is being claimed must have been caused by an accident “*arising out of and in the course of employment*”. It should be noted that this phrase is not defined in the Act.

In the absence of any clear cut definition, it is possible to draw from case-law three considerations which may be relevant in determining whether an accident has arisen out of and in the course of employment. To wit;

When does the workman employment begin and end?

Where did the accident occur?

What was the workman doing at the time of the accident?

See *ADE SMITH V. ELDER DEMPSTER LINES LTD* [1944] 17 N.L.R.

In *M'NEICE V. SINGER SEWING MACHINE* [1911] S.C.12, where a vehicle overran salesman who was cycling in the course of his duty in a public street; his employers were held liable because it was part of the obligations of the workman that placed him within the zone of special danger.

By the foregoing decision, it is clear that it is not enough that the workman was at his place of work and with the duration of the day's employment when the accident occurred. He must go further and must say, “*The accident arose because of something I was doing in the course of my employment or because I was exposed by the nature of my employment to some peculiar risk*”. The accident which befell the workman must be “*peculiar*” or “*special*”. In the sense that it could only have arisen out of the nature of his employment, i.e., as a consequence of the plaintiff's employment.

At the time of an accident, a workman to be entitled to compensation, must be discharging his contractual duties or doing something incidental to his employment. A thing is said to be incidental to employment if it is either causally connected to it or expressly or impliedly permitted by the employer.

Summarily, for an accident to have arisen out of and in the course of employment, the employee must have gone outside the sphere of his employment by either;

1. Doing a work he was not engaged to do or
2. Being in a territory in which he has nothing contractually to do.

SELF-ASSESSMENT EXERCISE 5

What do you understand by the phrase; “*Arisen out of and in course of employment*”?

3.6 Categories Of Compensation

The Act made provisions for four categories of compensation namely;

- (i) Compensation in fatal accident cases.

There are the cases where death results from the injury. section 4 of the Act provides, inter alias, that a sum equal to the deceased workman's forty –two month's earning shall be paid to the dependants wholly dependant on his earnings.

- (ii) Compensation in the case of total permanent incapacity.

Incapacity is total and permanent where it completely disables the workman for future employment. Section 5 provides that the amount of compensation payable in such cases shall be fifty-four month's earnings of the workman.

- (iii) Compensation in the case of partial permanent incapacity.

This is an incapacity which permanently reduces the workman's pre-accident earning capacity. Section 7 provides, inter alia, that the workman shall be entitled to a percentage of his fifty-four month's earnings as specified in the second schedule to the Act, being the percentage of the loss of earning capacity caused by that injury.

- (iv) Compensation in the case of temporary incapacity

In the case of temporary incapacity, the workman shall be paid as compensation his basic pay for the first six months of his incapacity. Thereafter, if the incapacity continues, he shall be paid half of his basic pay for an additional period of three months, and if the incapacity thereafter continues, he shall be entitled to a quarter of his monthly salary for a succeeding period of fifteen months.

Any such sum paid under this head shall be deducted from any sums eventually paid to the workman as compensation.

The provision of sections 12(1) and (3) of the Act are to the effect that compensation payable under the above categories shall be paid to the court, and any sum so paid shall be paid to the person entitled thereto or be invested or otherwise be dealt with for his benefit in such manner as the court thinks fit. This is subject however, to the provision of section 19 of the Act, which provides that an employer is not entitled to end or diminish any payment which he is bound to pay under the Act.

SELF ASSESSMENT EXERCISE 6

List and explain the various categories of compensation available to an injured employee under the Act.

3.7 Agreement as to Compensation

Within the purview of labour law, compensation can be described as a monetary payment made to an injured workman in respect of injury which he has sustained in the course of employment. Such compensation may be as agreed by the employer and the workman or as may be approved by the court.

Section 16(1) of the Act provides the situations and conditions by which the employer and the employee may agree in writing as to the compensation to be paid by the employer. These include;

1. That the compensation agreed upon shall not be less than the amount payable under the provisions of the Act.
2. That where the workman is an illiterate, the agreement shall not be binding against him unless;
 - (a) It is endorsed by a certificate of an authorized labour officer to the effect that he read over and explained to the workman the terms thereof (and that they were, in appropriate cases, interpreted to him in a language which he understand);
 - (b) That the workman appeared fully to understand; and
 - (c) Approved of the agreement.

However, any agreement as to compensation may be cancelled by the court on the application of any of the party to it, if it is proved;

- (i) That the compensation agreed was not in accordance with the provisions of the Act, or
- (ii) That the agreement was entered into under a mistake as to the true nature of the injury, or

- (iii) That the agreement was obtained by fraud, undue influence, misrepresentation or other improper means as would in law, be sufficient ground for avoiding it.

SELF-ASSESSMENT EXERCISE 7

Examine the various vitiating circumstances to an agreement reached illegally under the provisions of section 16(1) of the Act.

3.8 Claiming Compensation

The general position of the law going by the provision of section 13 of the Act is that no proceedings for the recovery of compensation under the act shall be maintainable unless;

- a) Notice of the accident has been given to the employer, by or on behalf of the workman,
- b) The application for compensation with respect to that accident has been made within six months from the occurrence of the accident causing the injury or in the case of death, within six months from the time of the death.

The failure to give notice or to make an application within six months would however not be a bar to any proceedings for compensation, if the failure to give notice did not prejudice the employer in his defence or there were reasonable grounds for not making an application within six months.

Therefore, once an employer is in receipt of the notice of accident, it is obligatory on him to arrange as soon as reasonably possible to have the workman medically examined free of charge. The examination, under the law, is necessary in order to determine the degree of incapacity suffered and, consequently the liability of the employer.

However, in fatal accident cases, the Act imposes an obligation on the dependants of the deceased workman to give to his employer a medical certificate as to the cause of death.

In the event of any of the foregoing, an employee has twenty-one days from the receipt of notice to reach an agreement, in writing with the injured workman as to the amount payable as compensation. At the expiration of that period, the workman may, in the prescribed manner, make an application for enforcing his claim to compensation to the High Court having jurisdiction in the area in which the accident giving rise to the claim occurred.

SELF-ASSESSMENT EXERCISE 8

How is compensation claimed?

4.0 CONCLUSION

Apart from the major provisions of the workman's compensation Act relating to the compensation of an injured employee while in the employment of the employer, the provisions of the old Fatal Accidents Laws of the various regions of the country are now harmonized into the Workmen's Compensation Act.

By and large, it is hoped that learners will now be better informed of the intents and purposes of the Act, particularly in the area of compensation payable, in case of death or injury.

5.0 SUMMARY

At the end of this unit you should now be able to:

- define who a workman is
- define who an employer is
- explain how and when an employer is entitled to compensation.
- discern acts that would be regarded as accident
- explain when an accident arises out of and in the course of employment.
- know the various categories of compensation.
- know when and how an agreement as to compensation should be made.
- know how a claim for compensation is made.
- know the nature of Fatal Accidents and
- define compensation generally.

6.0 TUTOR MARKED ASSIGNMENTS

1. What is the relationship between the Factories Act and the Workmen's Compensation Act, if any?
2. What categories of people are not regarded as workman under the Act?
3. Who are those regarded as employer by the Act?
4. Under what condition will an employer or workman be deprived or denied of his claim for compensation under the Act?
5. When is an act regarded as an accident?
6. Explain the phrase "arisen out of and in the course or employment".

7. Explain the various heads of compensation available to the families or dependants of a deceased workman or an injured workman.
8. Differentiate between agreement as to compensation and claiming compensation.

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