

## **EFFECTS OF BUSINESS COMBINATIONS ON CONTRACTS OF EMPLOYMENT IN NIGERIA \***

### **ABSTRACT**

This research acknowledges the need for Nigerian labour law to adequately protect employees in situations where there is a change in the business ownership. The focus of this paper is the need to secure and protect employees' right especially the remuneration, welfare packages and severance benefits whenever there is transfer of employment and change of business ownership. In the course of the research, it was further discovered that the Nigerian labour laws are inadequate to protect employees in this regard. A brief comparative analysis of the legal framework for transfer of employment in other jurisdictions such as the United Kingdom and France is also attempted. The paper also suggests reforms to invigorating legal and regulatory framework for efficient protection of employees in event of transfer of employment within the Nigerian jurisdiction.

### **INTRODUCTION**

The aim of this research is to explore the adequacy or otherwise of the rights of employees in Nigeria in event of transfer of employment and business ownership. This work examines the purview of the rights of employees, if any, and the extent of protection of these rights. The work will further reconcile the common law principle of the employers' right to hire and fire at will with the employees right to be protected during transfer of employment, and a comparative study of the Transfer of Undertakings Protection of Workers (TUPE) Regulations applicable in the United Kingdom and the relevant provisions of the Nigerian Labour Act.

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The significance of the study is to identify the lacunae in the protection of workers in Nigeria and the more effective ways in protecting workers in event of transfer of employment resulting from change of business ownership.

### **CONTRACT OF EMPLOYMENT**

Employment is the relationship of employer and employee or at common law, a master/servant relationship.<sup>1</sup> An employment contract is an agreement or contract between employer and employee in which the terms and conditions of employment of the employee are provided.<sup>2</sup> An employee is a person employed to perform specified task in consideration of the payment of wages or salary. An employee is a person in the service of an employer under any contract of hire, express or implied, oral or written, where the employer has the power or right to control and direct the employee in the material details of how work is to be performed.<sup>3</sup>

On the other hand, an employer is one who employs the services of others; one for whom workers work and who pays their wages or salaries.<sup>4</sup> The Employee Compensation Act (2010) defines an employer to include any individual, body corporate or Federal, State and Local Government or any government agency that enters into a contract of employment to employ another as an employee or apprentice.<sup>5</sup> The Labour Act defines an employer as any person who enters into a contract of employment to employ any other person as a worker either for himself or for the service of any other person, and includes the agent, manager or factor of that first mentioned person and the personal representative of the deceased employer.<sup>6</sup>

The same Act also defines a contract of employment as any agreement whether oral or written, express or implied whereby one person agrees to

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1. Sam Erugo 'Security of Employment in Nigeria: A case for Statutory Intervention' Nigerian Journal of Labour Law and Industrial Relations vol. 1 no.1 2007 p 58.
  2. Black's Law Dictionary, 6<sup>th</sup> ed, p 525. See also Union Bank of Nigeria Ltd v Edet (1993) 4 NWLR (pt 287) 288.
  3. The Trade Dispute Act also defines an employee as an individual who works under a contract of employment. This definition was applied in the case of Apena v National Union of Printing, Publishing and Paper Products (N.U.P.P.P) (2003) 8 NWLR (Pt 822) 426.
  4. Riverbend Country Club v Patterson tex. Civ. App., 399 S.W. 2d 382.
  5. Employee Compensation Act (2010) Section 71.
  6. Nigerian Labour Act, Section 92(1).

employ another as a worker and that other agrees to serve the employer as a worker.<sup>7</sup> The contract may be inferred from the conduct of the parties, if it can be shown that such a contract was intended although not expressed.<sup>8</sup> It was succinctly put in the case of *Central Bank of Nigeria v. Igwillo*<sup>9</sup> that

*The law is settled that there are now roughly three categories of contract of employment: first, are those regarded as purely master and servant, second, are those where the servant is said to hold an office at the pleasure of an employer and third, are those where the employment is regulated by statute. Any other employment outside the third category is governed by the terms under which the parties agree to be master and servant.*<sup>10</sup>

### **CONTRACT OF EMPLOYMENT AT COMMON LAW**

The Nigerian law has adopted a considerable amount of the English Legal System; principal among these laws is the common law and all its retrogressive attributes.<sup>11</sup> At common law, an employer can bring the appointment of his employee to an end for any reason or no reason at all.<sup>12</sup> This position is applicable in the Nigerian jurisdiction and was the decision of the courts in the cases of *Chukwumah v Shell*<sup>13</sup> and *Arinze v*

7. Supra. The Act is inapplicable to certain classes of persons including those in the Public Service performing administrative, executive, technical or professional functions.

8. *Johnson v Mobil Nigeria Unlimited* (2010) 7 NWLR (pt 1197) 471.

9. (2007) 4-5 SC 167.

10. The principle was also applied in *Ogunke v National Steel Development Authority* (1974) NMLR 128; *Fakuade v Obafemi Awolowo University Teaching Hospital* (1993) 5 NWLR (pt 291) 47; *Ideh v University of Ilorin* (1994) 3 NWLR (pt 330) 81; *Shitta-Bay v Public Service Commission* (1981) 1 SC 26; *Imolome v West African Examination Council* (1992) 9 NWLR (pt 265) 303; *Udo v Cross River State Newspaper Corporation* (2001) 14 NWLR (pt 732) 166.

11. Fred Agbaje 'Defining the limits of Employers Disciplinary Powers in Industrial Relations' Nigerian Journal of Labour Law and Industrial Relations Vol. 1 No. 1 2007 p. 15.

12. *Hill V. C.A. Parsons & C Ltd* (1971) 3 A.E.R. 1350, *Osuma v Edo Broadcasting Service* (1995) All FWLR (pt 253) 773.

13. (1993) 4 NWLR (pt 289) 512. The court held that "it is a well established principle of common law and of Nigerian law, that ordinarily, a master is entitled to dismiss his servant from his employment for good or for bad reasons or for no reason at all. Consistent with this principle, is also the law that the court will not impose an employee on an unwilling employer. Hence, an order for specific performance of contract of employment is an aberration which is rarely made"

First Bank of Nigeria.<sup>14</sup> In the case of *Ajayi v Texaco Nigeria Limited*,<sup>15</sup> the Supreme Court held that “In ordinary case of master and servant, the master can terminate the contract with his employee or servant at anytime for good or for bad reasons, or for none.” The Supreme Court in the case of *Katto v Central Bank of Nigeria*<sup>16</sup> held that in a purely master and servant relationship devoid of any statutory flavour and in which the relationship is purely contractual, termination of employment by the employer cannot be wrongful, unless it is in breach of contract, notwithstanding that the employer gave a totally untenable reason for termination.

At common law, a contract of employment was regarded as a personal contract and as such when there is a change of either employer or employee, the contract of employment comes to an end.<sup>17</sup> Where there is a transfer of employment, the consent of the former employer, the new employer and the employee has to be obtained for the contract to continue.<sup>18</sup>

#### **CONTRACT OF EMPLOYMENT UNDER PUBLIC SERVICE**

Where the conditions of employment or determination of a contract of service are governed by the provisions of a statute, such that the determination or appointment is predicated on satisfying such statutory provisions, such contract is said to have statutory flavour.<sup>19</sup> For a contract of employment to enjoy statutory flavour, the statute must be expressly incorporated into the contract of employment of the parties.<sup>20</sup> An employment has statutory flavour if the employment or contract of service is one which the terms or tenure of the employee is protected by a statute or regulation.<sup>21</sup>

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14. (2004) 12 NWLR (PT 888) 663. This principle has also been applied in a plethora of cases: *Osisanya v. Afribank Plc* (2007) 6 NWLR (pt 1031) 565, *Katto V Central Bank of Nigeria* (1999) 6 NWLR (pt 607) 390, *Daodu V UBA Plc* (2004) 6NWLR (pt878) 276.

15. (1987) 3 NWLR (pt 62) 577.

16. 1999 6 NWLR pt 607 page 390.

17. Also, the common law doctrine of privity of contract presupposes that the change of legal identity of the employer automatically terminates the employment contract between the erstwhile employer and the employee.

18. *Nokes v Doncaster Amalgamated Collieries* 1940 AC 1014.

19. *Isievwore v NEPA* (2002) 13 (pt 784) 417.

20. *Ilobachie v Philips* (2002) 14 NWLR (pt 80) 25. See also *College of Education, Ekiadolor v Osayande* (2010) 6 NWLR (pt 119) 427.

21. *Bamboye v University of Ilorin* (2001) 10 NWLR (pt 622) 690; *Eperokun v Unilag* (1986) 4 NWLR (pt 34) 162. *Shittabey V Federal Civil Service Commission* (1981) 1 SC 40. It was further stated in *Oloruntoba-Oju v Abdul-Raheem* (2009) 13 NWLR (pt 1157) 83 that whether the contract of employment is governed by statute or not depends on the construction of the contract itself or relevant statute.

### **TRANSFER OF EMPLOYMENT**

Different reasons may necessitate the change of ownership of a company or an enterprise. Such change of ownership affects the stakeholders of the business particularly the employees. Therefore, there is the need to adequately ensure that the rights and welfare of the employees are protected by legislation.

Transfer of undertakings is explained by the Oxford Dictionary of law as a situation that may arise when a business or part of a business changes ownership and staff and transfer to the new owner (the transferee).<sup>22</sup> A transfer is the process whereby an employee is moved from one employer to a new employer in the same office.

### **FORMS OF TRANSFER OF EMPLOYMENT**

Transfer of employment can occur in various forms. It can be through any form of business combinations such as mergers, acquisitions, takeovers, outsourcing, privatisation and insolvency. The current economic realities have necessitated companies to embrace these forms of business combinations as a survival strategy.<sup>23</sup>

The International Financial Reporting Standards defines business combination as a transaction or other event in which an acquirer obtains control of one or more businesses. Transactions sometimes referred to as 'true mergers' or 'mergers of equals' are also business combinations. The words mergers, acquisition and takeovers are usually used interchangeably and are all referred to as business combinations.

A business combination, which involves the fusion of two or more corporate entities on equal terms into one, is referred to as a merger. The evolving entity could assume an entirely new name or retain the identity of one of the merging companies.<sup>24</sup> An acquisition is the purchase by one company of the controlling interest in the share capital of another

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22. Oxford Dictionary of Law ed by Elizabeth A. Martin, Jonathan Law Oxford University Press 6<sup>th</sup> ed 2006 p. 452.

23. Nelson C.S Ogbuanya Essentials of Corporate Law Practice in Nigeria 2010, Novena publishers Ltd p. 587.

24. Nelson C.S Ogbuanya (n23) above.

company.<sup>25</sup> A takeover is similar to an acquisition. The slight distinction is that while an acquisition is based on friendly terms and mutual agreement, a takeover can either be hostile or friendly. Many mergers significantly change the company's economic makeup and the degree of control the shareholders exercise.<sup>26</sup> For this reason, the ownership and other component parts of the new company changes including the contents of the contract of employment. Where there is a change of ownership, it is regarded as the 'death' of the former employer. A contract of employment being a personal contract will come to an end upon the death of either party to the contract.<sup>27</sup>

### LITERATURE REVIEW

It is the duty of the government to put in place measures to ensure the satisfaction of business stakeholders. Joelle Riley submitted that upon business restructuring, there is usually tension by the retained employees who hope that there will be no diminution in their pay and welfare packages. On the other hand, the business owner naturally hopes to minimise cost as a justification for taking over an ailing business in the first place. The attempt to balance these two sets of interests has posed a challenge in recent labour law.<sup>28</sup>

This is similar with the submission of Worudji and Ekpoundo, that the unequal bargaining position of parties in the labour relations creates room for frequent strife, unrest and conflict in the system. They further submitted that the conflicts are due to the difference in expectations of the employer and the employee.<sup>29</sup>

Jordaan is of the view that the different interests of the employer and employee are the labour law implications in the transfer of undertaking.<sup>30</sup>

25. Scribd, Mergers and Acquisition <http://www.scribd.com/doc/9675002/Mergers-and-Acquisition> (16 August 2014).

26. Andreas Cahn, David C, Donald Comparative Company Law Text and Cases on the Laws governing Corporations in Germany, the UK and the USA Cambridge University press 2010 p 654.

27. Nigerian Labour Act, Section 9 (7) (b). This was also the opinion of the courts in *Nokes v Doncaster Amalgamated Collieries Ltd* (supra).

28. Joelle Riley 'Transfer of Business under Fair Work Act' University of Sidney Law School Legal Research paper No. 10/66 July 2010 <http://ssrn.com/abstract=1649903> (11 September 2014).

29. E. Worudji, A. Ekpoundo Institutional Mechanisms for the Settlement of Labour Disputes in Nigeria: The Prospects for Maintaining Industrial Peace (2008) 2 Nigerian Journal of Labour Law and Industrial Relations 47.

30. Jordaan B "Transfer, closure and insolvency of undertakings" 1991 Industrial Law Journal 935.

From the above submissions, it is clear that the genesis of the issue emanates from the balancing of interest between the new employer and the employees.

Nicola Smit observed the importance of a legal regime to effectively regulate the transfer of undertakings; as such a law is imperative in the attainment of social justice.<sup>31</sup> This law will act as a panacea in protecting employees' rights and welfare during transfer of employment.

### **THE NIGERIAN EXPERIENCE**

The high rate of unemployment in Nigeria has led to the employed holding unto their jobs like a drowning man would hold unto a straw. In cases of mergers and acquisition, some workers are relieved of their jobs while others are retained. The retained workforce are often forced to accept whatever terms and conditions are contained in the contract of employment of the acquiring undertaking as they do not want to join the ever increasing unemployment market. Such employees are not in the position to discuss the terms in the ready made contract of employment since thousands others are waiting in the wings to take the place of the “recalcitrant employees”.<sup>32</sup> This status quo has led to employers providing substandard employee welfare in comparison with the conditions of service workers were used to when they were under the employment of the acquired company.

### **THE LEGAL FRAMEWORK**

There are laws, agencies and courts protecting the rights of workers. The provisions of the Nigerian Labour Act and the Companies and Allied Matters Act on transfer of employment shall be examined here.

### **THE NIGERIAN LABOUR ACT**

The Nigerian Labour Act makes a minimal attempt to resolve this challenge. The section provides that:

- (1) The transfer of any contract from one employer to another shall be subject to the

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31. Nicola Smit 'Labour Law Implications of the Transfer of an Undertaking' [http://books.google.com/books/about/Labour\\_Law\\_Implications\\_of\\_the\\_Transfer.html?id=ZS2JNwAACAAJ](http://books.google.com/books/about/Labour_Law_Implications_of_the_Transfer.html?id=ZS2JNwAACAAJ) (3rd September 2014).

32. Oyesola Animashaun 'Unfair Dismissal, A Novel Idea in the Nigerian Employment Law?' (2008) 2 Nigerian Journal of Labour Law and Industrial Relations 1.

consent of the worker and the endorsement of the transfer upon the contract by an authorised labour officer. (2) Before endorsing the transfer upon the contract, the officer in question- (a) shall ascertain that the worker has freely consented to the transfer and that his consent has not been obtained by coercion or undue influence or as a result of misrepresentation or mistake; and (b) if by the transfer the worker will- (i) change his form of employment from one which is the subject of an exemption order made under section 8 (2) of this Act; or (ii) be subject to such a change of conditions as in the officer's opinion renders such a course advisable, may require the worker to be medically examined or re-examined, as the case may be.

The import of this section is that the transfer of contract from one employer to another shall be subject to the consent of the employee and endorsed by the authorised labour officer provided the consent was not obtained by coercion, undue influence, mistake or misrepresentation.<sup>33</sup>

This provision is certainly inadequate to protect workers as same is silent on the quality and content of the new contract. And because bargaining powers between the affected employees and the new employer are not equal, such contracts are often riddled with unfair terms and conditions.

The Labour Act, which is the principal legislation, has been heavily criticised for inadequately protecting workers under the transfer of employment from the whims of new employers.<sup>34</sup>

### **COMPANIES AND ALLIED MATTERS ACT<sup>35</sup>**

The Act provides that a company upon incorporation may ratify any contract entered into by the company, or on its behalf prior to the

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33. Nigerian Labour Act, Section 10.

34. F. Adewunmi and A. Adenuga, *The State of Workers' Rights in Nigeria: An Examination of the Banking, Oil and Gas and Telecommunication Sectors*. Friedrich Ebert Stiftung Publishers (2010) p. 1.

35. Cap C20 Laws of the Federation of Nigeria 2004.

existence of the company. Prior to ratification by the company, the person who purported to act in the name of or on behalf of the company shall, in the absence of express agreement to the contrary, be personally bound by the contract or other transaction and entitled to the benefit.<sup>36</sup>

The consequence of this statutory provision is that prior to the transfer of employment, the new employer's existence was unknown to the contract between the employer and the employee. Therefore, the new employer is under no obligation to ratify a contract it was not a party to except there is an express agreement to the contrary.

### COMPARATIVE ANALYSIS

#### United Kingdom

The Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) was enacted to protect workers' when the business is transferred to a new owner, in situations when the transfer falls within the ambit of the Regulations. It applies where there is transfer of an economic entity, which retains its identity. If the change of ownership falls within the scope of TUPE Regulations, there is an automatic transfer of the workers' contract of employment.<sup>37</sup> However, under the UK jurisdiction, the parties to the contract of employment are barred from varying the terms of the contract in such situations.<sup>38</sup> Reg. 4 (4) of TUPE Regulations 2006 provides that any attempt at varying the workers' contract will be void except where the transfer is done for economic, technical or organisational reason.<sup>39</sup> TUPE is not limited to the transfer of an employer during sale but extends to a wide range of events including the termination of a lease and a change of service provider. The Act expressly protects employees.

The employees' of the transferring business will transfer automatically to

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36. Section 71 (1) & (2). See also *Edokpolor v Sem-do Wire Industries Ltd* (1984) 7 S.C. 119.

37. *R.C.O. Support Services Ltd v Unison* (2002) EWCA Civ 464.

38. *Wilson v St Helens BC* (1992) 2 AC 52; *Meade and Baxendale v British Fuels Ltd* (1996) IRLR 541; *Credit Suisse First Boston (Europe) Ltd v Lister* (1998) IRLR 700. In the case of *University of Oxford v Humphreys and Associated Examining Board* (2000) ICR 405, the court held that where an employee resigns as a result of well founded fears that the conditions of work under the new employer will be worse than the conditions of work of the previous employer, the employee is protected under the Act. See also the *Tapere v South London and Maudsley NHS trust* (2009) ICR 1563.

39. Rutledge Revision Lawcards Employment Law 7<sup>th</sup> ed 2012.

the new business on the same terms and conditions including collective agreements made on behalf of the employees at the erstwhile business.

A situation where the employee is dismissed as a result of the transfer of business, subject to a few exceptions, will amount to an unfair dismissal. The transferee company takes over the contracts of employment and the rights and obligations arising from including collective agreements and the recognition of any union the employee belonged to.<sup>40</sup>

### **FRANCE**

Employees are protected under the Labour Code in France.<sup>41</sup> The code provides that where there is change in the legal status of the employer without limitation through inheritance, sale, transformation of the business or creation of a company, the contract of employment will automatically be transferred. The consequence of the transfer is that the transferee takes over all the elements of the individual contract of employment such as the length of service of the previous employer, the amount and types of remuneration and calculation of remuneration, the position of the employee, pension scheme and contribution rate, collective agreement e.t.c.

### **CONCLUSION**

This paper has described the nature of employment contracts in Nigeria. It has also analysed the necessities of business combinations and its effects on the employees contract. The paper also looks at the salient provisions of applicable laws such as the Nigerian Labour Act and the Companies and Allied Matters Act. It posits that these Acts donot adequately protect employees in event of change of ownership of the organisation. When there is a change of business ownership or the employer, the employees are usually left at the mercy of the new company. The new employer may decide to layoff workers, terminate their existing contract of employment and pay the employees off or retain the employees with welfare packages and emoluments less favourable than that which the employees had with the former employer. We also attempt

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40. The terms of the transfer of employment will be varied where the reason for the variation is unconnected with the transfer.

41. Labour Code, Article L.1124-1.

a brief comparative analysis of legal framework for transfer of employment in the United Kingdom and France. The employees in the United Kingdom and France are better protected by legislation than their Nigerian counterparts.

### **RECOMMENDATIONS**

It is therefore recommended that a law should be enacted to prevent the employers from varying the terms of the contract of employment to the detriment of the employee. Penal sanctions should be imposed for default in compliance. This can be done by amending the relevant provisions of the Labour Act or by enacting the Nigerian Transfer of Undertakings (Protection of Employment) Act.

The amendment Act or the new legislation, as the case may be, should protect employee rights in event of change of ownership of business. Transfer of employment, in event of change of ownership, should be on no less favourable terms than the previous employment.