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EFFECTS OF COVID-19 ON LABOUR RELATIONS IN NIGERIA: NAVIGATING THROUGH THE MURKY WATERS BY BALANCING CONTENDING INTERESTS

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Abstract

The outbreak of Covid-19 in Nigeria and the need for its curtailment, led the government to take drastic safety measures. Some employers have resorted to remote working which made apparent, the lack of usefulness of certain categories of workers. Some employers subsequently resorted to unilateral termination of employment, pay cuts, redundancy declaration, asking workers to proceed on leave with or without pay, no work, no pay, alteration of contracts of employment, all in a bid to remain afloat. Most of these measures, aside not meeting up to minimum best practices, are at variant with the socio-economic aspect of employment relations as they have exposed the affected workers and their dependants to hardship. This paper, adopts desk-based methodology in examining the effects of covid-19 on employment relations in Nigeria by interrogating the propriety of the cost cutting measures adopted by employers to weather the storm of covid-19 and their socio-economic effects on the workforce and the nation at large. It found that covid-19 has set at loggerhead, the interest of the workers and employers which requires balancing through dialogue and transparent renegotiations of terms and conditions of contract and creation of employment by the government. It makes recommendations on how to balance this contending interest for a buoyant and harmonious employment relation during and post covid-19 Nigeria.

Keywords: Covid-19, employment relations, employer, Nigeria, salary, worker.

1. Introduction

The *ex parte* outbreak of the novel coronavirus (Covid-19) pandemic first in Wuhan China, has disrupted all human activities all over the world.¹

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There is no sphere of human life, that its disruptive and destructive effect is not felt.² It has spread all over the world with an unprecedented momentum resulting in thousands of deaths and destruction of business enterprises. The virus was reported in Nigeria, in March, 2020 which was diagnosed from an Italian man who just returned from Italy. In a bid to curb its spread, the government at both the Federal and State levels, adopted restriction of movement and bound inter-state movements exempting frontline workers. Several places regarded as public places were locked down and this led to the shutting down of work places. Non-pharmaceutical methods such as observation of social distancing, regular washing of hands with soap and running water for at least 10 seconds, use of facemasks were introduced to curb the spread of the virus. Persons who own business places were urged to strictly comply with the covid-19 guidelines so that it could be defeated just like erstwhile Ebola virus. While most employees are willing and ready to report at work and employers willing to open their workplaces, they are unable to do so as this would amount to violation of the lockdown directives.

The continuous lockdown of workplaces and inability of workers to report at work as expected, has led to serious economic downturn on the balance sheet of many employers. Traditionally, the employer has a duty to provide work for its employees (subject to payment of remuneration), pay remuneration for work done, duty of care while the employee is expected to exercise reasonable care and skill and carryout faithfully, reasonable instructions of the employer.³ Covid-19 has negatively impacted on the ability of both parties to discharge their duties towards each other therefore warranting a rethink on how best to manage employer-employee duties amidst and post covid-19. Not surprisingly, in a bid to assuage the economic cum financial difficulties caused by the pandemic, some employers have resorted to automation of their operations and adoption of working remotely requiring their workers to work from home via the internet to keep operations on-going although at a low scale. The automation of certain operations and adoption of remote working, in some organisations, have made the lack of need of certain

¹See <<https://www.who.int/emergencies/diseases/novel-coronavirus-2019/event-as-they-happen>> accessed 19 June 2020.

²DT Eyongndi, 'The Nigerian Police and Human Rights Violations in the Enforcement of Covid-19 Lockdown Directives: An Appraisal' (2012) 2 *Uganda Police College Journal of Law Enforcement and Crime*, 199-242.

³*Sule v. Nigerian Cotton Board* (1986) 2 QLRN 102.

categories of workers apparent which was concealed before the invasion of the audacious covid-19 pandemic. This is capable of causing redundancy to set in culminating in the relieving of the employees whose services are no longer needed or crucial.

Due to the compelling disruptive effects of the pandemic, expectedly, most employers have found themselves in the dilemma of abiding by minimum labour standard and “saving” their businesses and some have responded by engaging in various cost cutting practices. Some employers have resorted to unilateral reduction of salaries of workers, compelling workers to go on compulsory leave with or without pay, retrenchment of workforce, declaration of redundancy, reduced working hours, earn as you work, non-payment of salaries, unilateral alteration of the terms and conditions of employment, etc. all in a bid to stay afloat. Work, is an integral aspect of human life and has its social and economic effects. When a man or a woman is gainfully employed, aside earning an income to meet his/her personal needs, the needs of the dependants like children, siblings, aged parents, wards, etc. are also met from the income hence, disengagement from employment, does not only affect the person directly working but other legitimate interests involved.⁴ In fact, without a means of livelihood, it is practically impossible, for any human being to lay claim to any other human rights as gainful employer as a precursor to livelihood, is the bed rock for the enjoyment of all other rights.⁵ This makes true the aphorism that a hungry man is an angry man and an angry man is an unreasonable and an unreasonable certainly, is of minimal value to him/her and cannot make any meaningful contribution to society.⁶

This paper is divided into six sections. Section one contains the introduction. Section two interrogates employee-employee duties amidst Covid-19 pandemic particularly the employer’s duty of care, provision of work and payment of remuneration. Section three discusses the trade

⁴ S Dane, M Akyuz and MI Opusunju ‘Effect of COVID-19 on the Performance of Small Businesses in Nigeria’ (2021) 9(8) *Journal of Research in Medical and Dental Science* 12-19.

⁵ DD Sasu, ‘Main worries for business in Nigeria due to the Coronavirus (COVID-19) Outbreak as of April 2020’ <<https://www.statista.com/statistics/1122741/main-worries-for-business-in-nigeria-due-to-the-coronavirus/>> accessed 26 November 2021.

⁶ OE Enesi, UA Ibrahim ‘Effect of COVID-19 Pandemic on the Performance of Small and Medium Business Enterprises in Abuja-FCT, Nigeria’ (2021) 9(5) *Open Journal of Business and Management* 2261-2276.

union/workers association as a navigator through the murky waters of balancing the contending interest in labour relations amidst covid-19. Section four interrogates suspension of contractual rights and obligations intra covid-19. Section five deals with how to balance contending labour relations interests in Nigeria during and post covid-19; while section six contains the conclusion and recommendations.

2. Explicating Employer-Employee Duties amidst COVID-19

The aim here is not to extensively comment on the duties of the parties to an employment contract but to highlight, selected few which are relevant to the subject of covid-19. From the meaning of a contract of employment, the employer agrees to remunerate the employee who in turns, agree to render his services and labour to the employer for the wages received.⁷ It is apposite to state at this juncture that the existence of an employer-employee relationship is the basis for corresponding rights and obligations between the parties. The contract of employment is what distinguishes employer-employee relationship from independent contractorship. Explicitly, the employer has a duty to remunerate or pay wages to the employee for work done. Thus, an employer owes the employee duty to pay wages or salary in accordance with the terms of the contract express or implied.⁸The quantum of wage payable by the employer is as expressly stated in the letter of employment or where in the unlikely event is silent, as reasonably inferred based on *quantum meruit* basis as was held in *Ekpe v Midwest Development Corporation*⁹ although, *quantum meruit* will not be used to overcome the express provision of the contract.¹⁰ Once the duty to pay wage exists, the employer is, at common law, to continue to pay such remuneration to an employee who is ready and willing to work, whether or not work is provided for the employee.¹¹

At common law, the sickness of an employee does not absolve the employer from payment of remuneration unless the contract of employment expressly state so hence, the employer's duty to remunerate subsists during the ailment of an employee.¹² Consequently, Oji and

⁷*Co-operative & Commerce Bank (Nig.) Ltd. Plc. v. Rose* [1998] 4 NWLR (Pt. 544) 37.

⁸*Browning & Ors. v. Crumlin Valley Collieries Ltd.* [1926] 1 KB 522.

⁹ (1967) N.M.L.R. 407.

¹⁰*Re Richmond Gate Property Co Ltd.* (1964) 3 All E.R. 936.

¹¹*Davonald v. Rosser & Son* [1906] 2 KB 728.

¹²*Warburton v. Cooperative Wholesale Society Ltd.* (1 K.B. 663); *Warren v. Whittingham* (1902) 18 T.L.R. 500; *Storey v. Fulham Steel Work* (1907) 24 T.L.R. 89.

Amucheazi¹³ have opined that it is in consequence, a legal misconception when Greer J in *Borwning v Crumlin Valley Collieries Ltd*,¹⁴ stated that ‘the consideration for work is wages, and the consideration for wages is work.’ However, a protracted sickness of the employee, may strike at the root of the contract thereby frustrating same and absolving the parties from the obligation of further performance. Section 16 of the Labour Act¹⁵ contains guidelines for remuneration when an employee is sick.

Moreover, the employer owes the employee duty of care and this could be regarded as paramount. It has been pointed out that the basis for this obligation on the employer towards the employee is the existence of a contract of employment. The employer, at all times, is duty bound during the subsistence of the contract of employment, to take reasonable measures to ensure the safety of the employee in the course of employment.¹⁶ Everything that would guarantee the safety of the employee in the course of the employment must be put in place while anything that can expose the employee to danger must be eliminated.¹⁷ Whether the employer acts personally or through its agent or representative, this duty is not displaced.¹⁸ The scope of this duty was stated by Parker L. J. In *Davie v New Merton Board Mills Ltd*.¹⁹ The liability of the employer for harm arising from breach of this duty is personal and vicarious as stated in *Paris v. Stepney Borough Council*.²⁰ The vicarious nature of this duty extends to volunteers offer help at the behest of the employee. The Supreme Court of Nigeria in *Iyere v Bendel Feed and Flour Mill Ltd*.²¹ reinstated the employer’s duty of care towards the employee. Hence, in all the circumstances of the case, the employer must take reasonable care so as not to expose the employee to avoidable and unnecessary risk particularly reasonably foreseeable one.²²

¹³ EA Oji, and OD Amucheazi, *Employment and Labour Law in Nigeria* Lagos: Mbeyi and Associates (Nig.) Ltd., 2015, 120-121.

¹⁴ (1964) 3 All E.R. 936.

¹⁵ Labour Act Cap. L1 Laws of the Federation of Nigeria (LFN) 2004.

¹⁶ *Wilson’s and Clyde Coal Co. Ltd. v. English* [1938] A.C. 57 at 84.

¹⁷ *Hudson v. Ridge Manufacturing Co. Ltd.* (1975) 2 QB 348.

¹⁸ CK Agomo, *Nigerian Employment and Labour Relations Law and Practice*, Lagos: Concept Publications Ltd., 2015, 134.

¹⁹ [1958] 1 Q. B. 210.

²⁰ [1951] 1 All E. R. 42 at 50.

²¹ (2008) 12 CLRN 1.

²² *Latimer v. A.E.C. Ltd.* [1959] AC 643.

Furthermore, the employer is not under a duty to provide work so long as the wages of the employee are paid.²³ Asquith J in *Collier v Sunday Referee Publishing Co*²⁴ stated the general position of the law on the issue of provision of work when he state thus ‘provided I pay my cook her wages regularly, she cannot complain if I choose to take any or all my meals out.’ The implication of this postulation is profound as it implies that once an employee is willing and ready to work; he is entitled to his/her pay whether or not he/she is actually provided with work.²⁵ It is not a breach of contract for an employer not to provide an employee with work so long as the employee is remunerated accordingly. This justifies the payment of salary in lieu of notice which has the implication that the employee should disengage without working for the period payment has been made.²⁶ However, the above position, is not absolute or untrammelled same is amenable to permissible exceptions. Thus, where failure to provide work will lead to loss of fringe benefits such as publicity or tips, payment of wages will not suffice²⁷ as in the case of *Clayton (Herbert) and Jack Waller Ltd v Oliver*.²⁸

Where the employees wage is contingent on the provision of work; eg, a commission earner,²⁹ the employer is duty bound to provide work.³⁰ Where the duty is not only to provide work but the work to be so provided, must be of a particular nature, the employer has a duty to provide same.³¹ Where the employee is a piece-worker, ie, the productivity determines the quantum of wage earned, the employer is duty bound to provide work to the extent the employee is willing and capable to perform.³² Where continuous work is required to sharpen the skill and increase the productivity of the employee that is where the employment of a nature that is ‘practice makes perfect’ provision of work cannot be overridden by payment of wages. The position in *Langton v*

²³*Turner v. Sawdon & Co* (1901) 1 KB 653.

²⁴ (1941) 2 KB 647 at 650.

²⁵ Oji and Amucheazi (n 11) 114.

²⁶ See *Konski v Peetc* (1915) 1 Ch. 530.

²⁷*Yetton v. Eastwood Froy Ltd* (1966) 3 All ER 353.

²⁸ (1930) AC 209.

²⁹*Turner v Goldsmith* (1891) 1 KB 544.

³⁰A Emiola, *Nigerian Labour Law*, (4th ed, Ogbomosho, Emiola Publishers Ltd, 2008) 96.

³¹*Clayton (Herbert) and Jack Waller Ltd v Oliver* (1930) AC 209.

³²*Devonald v Rosser & Son Ltd* (1906) 2 KB 728.

*Amalgamated Union of Engineering Workers*³³ the inherent right of man to work was emphasised by Lord Denning M.R. and payment of salary will not avail its detraction. Section 17 of the 1999 CFRN, enjoins the government to create an enabling environment for its citizens to secure suitable employment this is in recognition of the inherent right of man to work. Section 17 of the Labour Act buttresses the constitutional provision to the extent that for every day an employee, presents him/herself for work and is fit, the employer has to provide work and failure to so do, will not disentitled the willing and able employee from being remunerated.³⁴ It must be noted that, essence of working, is not just to make ends meet but there is a natural satisfaction that is derived from working which cannot be quantify in monetary terms and this, the law must protect.

Conversely, the employee on the other hand, is under a duty to carry out lawful and reasonable orders of the employer.³⁵ Where the employee fails to obey lawful and reasonable order of the employer, it amounts to repudiation of the contract of employment.³⁶ This duty, has nothing to do with sentiments or morals, it is simply an issue of whether the order is lawful and reasonable.³⁷ Whether or not, an employee will be adjudged to have breached the duty of obedience on a single act depends on the circumstances of the peculiar case.³⁸ Breach of this duty, is tantamount to gross misconduct and punishable with summary dismissal.³⁹ The breach strikes at the root of the contract and destroy confidence which is the basis for the interaction.⁴⁰ The duty of obedience does not extend to illegal acts.⁴¹

Furthermore, an employee is expected to offer faithful service to the employer in the course of the employment. Thus, the service of the employee must be with good faith and fidelity. The facts of a particular case will determine whether or not, the act or omission of an employee

³³ [1974] 1 All ER 980 at 987.

³⁴ *Agomo* (n 13) 133.

³⁵ *Sule v Nigerian Cotton Board*. (1986) 2 QLRN 102.

³⁶ *Pepper v Webb* [1969] 1 WLR 514.

³⁷ *Turner v Mason* (1945) 14 M & W 112.

³⁸ *Oji and Amucheazi*, (n 11) 129.

³⁹ *E. CN v Nicol* (1969) 1 N. M. L. R. 265.

⁴⁰ *Nigerian Arab Bank Ltd v Shuaibu* [1991] 4 NWLR (Pt 186) 450; *Sinclair v Neighbour* (1967) 2 WLR 1.

⁴¹ *Gregory v Ford* [1951] 1 All ER 121.

has breached the duty of faithful service.⁴²The personal interest of an employee must not intertwine with that of the employer throughout the course of employment.⁴³In *Osakwe v Nigerian Paper Mills Ltd*⁴⁴ it was held that an employee is expected to always be of good conduct by diligently serving the employer by protecting the property and interest of the employer as well as be in harmony with co-employees to engender efficiency in service delivery. Thus, the employee must shun any conduct that is injurious to the business of the employer as failure to do so would attract discipline.⁴⁵ Act such as absenteeism without permission, dishonesty, using the employer's money to gamble, disobedience, misappropriation of the employer's money have been held as breach of this duty by an employee.⁴⁶

The employee in rendering faithful service to the employer, must bring to bear skill and care. When the employee applied for the job, there was an implied undertaking that he/she, possessed the skill needed to perform the work satisfactorily.⁴⁷ By this warranty, he has a responsibility to demonstrate that skill in effectuating the employment contract.⁴⁸

3. Trade Union/Workers Association as a Navigator

One of the corner stones of healthy employment and industrial relations is, the existence and recognition of trade unions by employer. Although, the definition of trade under section 48 of the Trade Union Act, provides that, both employers and employees could operate trade unions, the real essence of trade unions, lies with employees trade unions. The underpinning philosophy of trade unionism, is best exhibited through employees' trade union that of employers, is a mere façade. Trade unions are the vanguard for the protection of workers' rights and serves as an intermediary between the employer and workers in settling disagreements

⁴²*Maja v Stocco* (1968) NMLR 372.

⁴³*Abukugho v African Timbers & Plywood Ltd* (1966) 2 All NLR 87.

⁴⁴[1998] 10 NWLR (Pt 568) 245.

⁴⁵*Lasis Yusuf v Union Bank of Nig Ltd* [1996] 6 NWLR (Pt. 457) 457 at 632.

⁴⁶*Udegbonam v Federal Capital Development Authority* [2003] 10 NWLR (Pt. 829) 487; *Mahah v Standard Bank (Nig) Ltd* (1976) ECLSR 199; *Olatunbosun v NISER* [1988] 3 NWLR (Pt 80) 25.

⁴⁷*Garabedien v Jamakani*(1961) 1 All NLR 177.

⁴⁸*Nunnink v Costain-Blansevoort Dredging Ltd* (1960) LLR 90.

or issues that have the potential of becoming a problem all in a bid to foster industrial harmony and peace within the work place.⁴⁹

Unfortunately, most employers, particularly within the private sector, neither permit nor recognise trade unions in their employ.⁵⁰ Trade unions operate to balance the imbalanced power equation between the employer and workers in an employment relationship especially in a clime like Nigeria where several factors tilt the labour pendulum in favour of the employer.⁵¹ The refusal to permit the forming or recognition of existing trade union is done basically to ensure that, when there is violation of workers' rights, as it is usually the case, there will be no concerted agitation against same from the workers.⁵² This obnoxious practice has continued despite being contrary to the provisions of the 1999 Constitution of the Federal Republic of Nigeria particularly section 40, the African Charter on Human and Peoples Rights (Ratification and Enforcement) Act as well as international human right legal instruments.⁵³ While no category of employees within the master servant employment sphere is immune, casual workers, are affected most as employers treat them as disposable waste. Aside being constrained to work under perilous employment conditions,⁵⁴ their lack of financial wherewithal (this is due to the fact that the hallmark of their employment is poor remuneration) to undertake litigation against employers who brazenly infract their right of freedom of association.⁵⁵

⁴⁹ PAK Adewusi, 'Trade Unions: Nuisance or Benefits in the Development of University Education in Nigeria?' (2008) 2(3) *Labour Law Review*, 117-123.

⁵⁰ CS Ibekwe, 'Protecting Non-Standard Workers' Right to Freedom of Association and Trade Unionism' (2015) 6(2) *Nnamdi Azikiwe University Journal of International Law and Jurisprudence* 170.

⁵¹ PAK Adewusi, 'The Role of Trade Unions in the Enhancement of Civil Liberties in Nigeria' (2007) 1(3) *Labour Law Review* 87-103.

⁵² GG Otuturu, 'Trade Unions (Amendment) Act 2005 and the Right to Strike in Nigeria: An International Perspective' (2014) 8(4) *Labour Law Review* 33-46.

⁵³ RA Denesi 'Contract Labour and the Right to Freedom of Association in the Oil and Gas Industry in Nigeria' <https://www.academia.edu/5441918/Contract_Labour_and_the_Right_to_Freedom_of_Association_in_the_Oil_and_Gas_Industry_in_Nigeria> accessed 23 March 2021.

⁵⁴ RA Danesi, 'Labour Standards and the Flexible Workforce: Casualization of Labour under the Nigerian Labour Laws' <www.ajol.info/index.php/eajphr/cart/view/39344/7848> accessed 15 March 2021.

⁵⁵ TM Fapohunda, 'Employment Casualization and Degradation of Work in Nigeria' (2012) 3(9) *International Journal of Business and Social Science* 257.

The government as regulator, has not helped the growth of trade unions but has seen them with suspicious eyes. The disassembling of the Nigerian Labour Congress (NLC) as the only central labour union is an attestation to this. The government being afraid of the growing popularity and power of the NLC under Adams Oshiomhole, sought a tactical way of whittling its power, the result was the amendment of the Trade Unions Act by the Trade Unions (Amendment) Act, 2005 which decentralised unions.⁵⁶ This singular act, has created a seemingly “divide rule” policy in trade unionism in Nigeria. Unfortunately, aside the anachronistic table-banking unproductive labour agitations by some central trade union bodies, these unions have failed or neglected to explore the option of litigation for and on behalf these affected workers under public interest litigation either to protect the constitution or enforcement of the rights of the affected employees.⁵⁷ At a time like this, when circumstances beyond the control and contemplation of the employer and employee have created critically hardship which threatens employment contracts, negotiation becomes a vital tool in navigating the murky waters.

The point must be noted that contract of employment is individual ie where an employer has a certain number of employees, each of them, has a separate and distinct contract of employment with the employer. Situation such as the pandemic, requiring negotiation, in the absence of a trade union, the employer can only legitimately vary the contract of employment, after negotiation with each and every employee individually. However, where there is in existence or operation, a trade union or recognise employees’ association, all that the employer need to do, is to engage the leadership of the union or association and negotiate with them as the lawful representatives of the employees.

It is therefore, mutually beneficial that employers recognise and respect the rights of their employees to form or join trade unions. The essence of trade unions within an employ, is not necessarily to engage in cacophonous activity against the employer.

4. Suspension of Contractual Rights and Obligations intra Covid-19

The issue here is, can an employer or employee, use covid-19 as a factor to suspend the performance of contractual obligation or assertion of

⁵⁶ RA Denesi, ‘The Trade Union (Amendment) Act, 2005 and Labour Reform in Nigeria: Legal Implications and Challenges’ (2007) 1(1) *Labour Law Review* 95-115.

⁵⁷ OO Animashaun, ‘Equality at the Workplace: The Challenges Ahead’ (2007) 1(3) *Nigerian Journal of Labour Law and Industrial Relations* 4.

accrued rights/privileges? It is worthy to note that labour relations stands on two basic common law principles, the principle of *laissez faire*⁵⁸ and *pacta sun servanda*.⁵⁹ By the former, everyone having the requisite legal capacity, is permitted to enter into contractual relations with others within the bounds of law.⁶⁰ By the later, once such contractual relationship is created, the parties are expected to perform their obligations under the contract and not to renege from same.⁶¹ Thus, when an employer and employee enters into an employment contract, they are under a duty to perform towards each other, their obligations arising from the contract and shall not abdicate from same due to inconvenience or other unpleasant occurrences.⁶² One generally acknowledged effect of covid-19 on employment relation is alteration of the position of the parties with attendant untold hardship especially the employer.

Under section two of this paper we have underscored the point that the employer has a duty to pay remuneration, provide work and tools with which the employee will use to work and ensure the safety of the employee in the course of effectuating the contract of employment. The employee on the other hand, has the duty to perform the work of the employer with the best skill and knowledge at his disposal, be honest and minimise or avoid exposing the employer to loss. Covid-19 has become an albatross to the fulfilment of these obligations as parties have adopted palliative measures. For instance, some employers have resorted to directing their employees to proceed on furlough or mandatory leave without pay for either a short or long period as a cost cutting measure instead of laying them off. . Some employers, have exploited this option but with half pay. It is apposite to note that employers who opt for the option of half-pay as an alternative to retrenchment must do so in compliance with Article 8 of the ILO Convention Protection of Wages Convention (Convention 95) of 1949 whose objective is to guarantee the payment of wages in full and timely by the employer. The Convention prescribes that wages deduction shall only be implemented in accordance with national laws, regulations, arbitral award or collective agreement reached between the employer and employees. In compliance with the

⁵⁸ E Chianu, *Employment Law* (Akure, Bemico Publishers (Nig) Ltd, 2004) 4.

⁵⁹ *Adedeji Adedoyin v African Petroleum Plc.* [2016] 67 N.L.L.R. (Pt 238) 1 at 37, paras E-H.

⁶⁰ *Attorney General Rivers State v Attorney General, Akwa Ibom State* (2011) 3 MJSC 1.

⁶¹ *Agomo* (n 13) 68.

⁶² *Oji and Amucheazi* (n 11) 12-15.

non-pharmaceutical covid-19 safety measures, it has become imperative for employers to require the employees to work remotely. It is important to note that, the fact that an employee is working remotely does not absolve the employer from the duties imposed on him/it discussed in section two above. The employer's duty of care like any other subsists because the remoteness of the work does not take it outside the confines of being "in the course of employment" and any injury sustained would have arisen from or connected to the employment as contemplated under section 7(1) and 8(1) of the Employees Compensation Act (ECA) and Article 5 ILO Employment Injury Benefits Convention Recommendation 121⁶³ Section 7 of the ECA makes an employee entitled to compensation for injury sustained outside the employer's principal place of work while Section 8, entitles an employee to compensation for mental stress. Thus, where the employee sustained physical injury while working remotely from home or some other place other than the employer's workplace or succumb to mental stress arising from working remotely, the employer will be liable to pay compensation. It is therefore necessary that the employer ensures that the working conditions and environment of an employee working remotely is safe and secure and the nature and volume of work to be done, is not such that would expose an employee to mental stress.

Another issue is, various measures put in place by the government have put a strain in many employment relationships making the performance of contractual obligations impracticable or at a high risk and even cost. The issue is, will the doctrine of frustration contract based on covid-19 inure a party, to abdicate from performing contractual obligations? Generally, where an incident, takes place subsequent to the consummation of contractual relationship and without the input of the parties or reasonably foreseeable by them, rendering further performance impracticable, such an event is regarded as a frustrating one and will absolve the parties from their obligation of further performance.⁶⁴ The Supreme Court of Nigeria, in *Mazin Engineering Ltd. v. Tower Aluminium (Nig.) Ltd.*⁶⁵ defined frustration as "a premature determination of an agreement between parties lawfully entered into, owing to the

⁶³ Article 5 ILO Employment Injury Benefits Convention Recommendation 121 of 1964.

⁶⁴ T Adeshina, and O Okonkwo, 'Frustration of Contract in Nigeria' <www.jacksonettiaandedu.com> accessed March 15 2021.

⁶⁵[1993] 5 NWLR (Pt 295) 526.

occurrence of an intervening event, or change of circumstances so fundamental as to be regarded as by law as striking to the root of the agreement and entirely beyond what was contemplated by the parties when they entered into the agreement.”⁶⁶ Thus, for an event to frustrate a contract, it must occur after the consummation of the contract, without the knowledge of the parties rendering its performance practically impossible, illegal or radically different from what the parties had intended as at the time they entered into the contract.⁶⁷ Also, the event sought to be relied upon, must not be within the contemplation of the parties, either of them by their action or omission, occasioned its occurrence or same is not so fundamental to have changed the basis of the contract.⁶⁸

Hence, does Covid-19 qualify as a frustrating event to absolve parties to an employment contract from further performance of their obligations thereunder?⁶⁹ The answer is not straightforward as it might seem. Before further adumbration, it is apposite to note that, frustrating events include but not limited to events such as outbreak of war, subsequent change in legal regulation, death or incapacitating ailment of either party,⁷⁰ destruction of the subject matter of the contract,⁷¹ protracted illness or imprisonment of either of the parties, outbreak of disease, etc.⁷² While it might be argued that covid-19 pandemic can justifiably suffice as a frustrating event, it can also be safely argued that covid-19, will not suffice as a frustrating event. There is consensus on the fact that covid-19 has brought unprecedented hardship having negatively affected individual and corporate economy. However, this is mere hardship or inconvenience that the law does not recognise as event that ordinarily, makes further performance impossible. In some other

⁶⁶*Gold Links Insurance Co Ltd v Petroleum Special Trust Fund* (2008) LPELR-4211 (CA); *NBCI v Standard (Nig) Engineering Co Ltd* [2002] 1 NWLR (Pt. 768) 104; *Addax Petroleum Development Nig Ltd v Loycy Investment Company Ltd & Anor* (2017) LPELR-42522 (CA).

⁶⁷*Diamond Bank Ltd v Prince Alfred Amobi Ugochukwu* (2007) LPELR-8093 (CA).

⁶⁸*Federal Ministry of Health v Urashi Pharmaceutical Ltd* (2018) LPELR-46189 (CA).

⁶⁹*Rockonon Property Co Ltd v NITEL & Anor* (2001) 7 NSCQR Vol 7 171 at 183.

⁷⁰*Okereke & Anor v Aba North Local Government Authority* Unreported Suit No CA/PH/179/2004; *Aiico Insurance Plc v Addax Petroleum Development Co Ltd* (2014) LPELR-23743 (CA).

⁷¹*UBN Plc v Omni Products (Nig) Ltd* [2006] 15 NWLR (Pt 1003) 660.

⁷²*Attorney General, Cross River State v Attorney General of the Federal & Anor* (2012) LPELR-9335 (SC).

instances, covid-19 has successfully crippled some business rendering them incapable of meeting their financial obligation towards their employees. It is apposite to note that, given the nature of employment relationship and its impact on the economy, what is expedient is for the employer and employee to seek creative solutions (such as the ones discussed in section five of this paper) in overcoming the challenges thrust at them by the pandemic in way that the relationship is not terminated but preserved to their mutual benefit.

Some employers may even be tempted to invoke *force majeure* amidst covid-19 to exculpate themselves from their obligations to their employees. While *force majeure* in deserving and legitimate instances, will exculpate parties from further performance, it is not a one size that fits all. Of course, there is no statutory definition of the term *force majeure* save that it is a common law creature and judicial meaning have been ascribed to it by Nigerian courts. In *Globe Spinning Mills (Nig) Plc v Reliance Textile Industries Ltd*,⁷³ *force majeure* was to be a common law clause in contracts which provides that one or both parties can cancel a contract or be excused from either part or complete performance of the contract on the occurrence of a certain event or events beyond the party's control. What this means is that, *force majeure* by itself, is a shapeless or colourless concept that means nothing except what the parties says it is.⁷⁴ What is being canvassed is that just like water takes the shape of whatever container it is put into and the colour of whatever substance it is mixed with, *force majeure* in itself, is meaningless and is only framed on whatever event (s) that the parties choose to tie it to. It must therefore be specifically provided by the parties and is exclusively applicable to the precisely mentioned occurrences and cannot be superimposed or presumed by the court. Whatever supervening event (s) the parties agree as a *force majeure* incident, is the only thing, as far as that contract is concerned, that the court will countenance. It is strictly interpreted and does not give any room for assumption or discretion. The Court have approved based on parties agreement that incidents regarded as act of God (eg earthquake, landslide, volcano, death) and man precipitated

⁷³(2017) LPELR-41433 (CA).

⁷⁴ M Dugeri, 'Covid-19 Pandemic-Impact on Performance of Contracts' <<https://mikedugeri.wordpress.com/2020/07/13/covid-19-pandemic-impact-on-performance-of-contracts/>> accessed 16 March 2021.

incidents like war, riot, strikes, crime, etc. are *force majeure* events.⁷⁵ It is worthy to note that *force majeure* clauses are predominant in commercial contracts and rarely in employment contract however, there is the possibility that, with the wake of covid-19, these clauses, will soon be a regular feature of employment contracts. While occurrences beyond the control of the parties, have come within the confines of *force majeure*, and covid-19 is one of such however, it is our vehement contention that, covid-19 without being expressly mentioned (or the use of other terms that are synonymous or depictive of covid-19 such as plagues, epidemic, pandemic, acts of government or include a sweeping phrase like "acts beyond the parties' reasonable control bearing in mind that the term 'Covid-19' was only coined after its occurrence) in an employment contract, will not qualify as *force majeure*.⁷⁶ This is because of the doctrine of sanctity of contract and the fact that both the court as well as parties, are bound by the terms of a contract and a court cannot in interpreting a contract, rewrite it hence, *expressio unius est exclusio alterius*.⁷⁷

At present, the level of unemployment and underemployment in Nigeria, is unprecedented. As at December, 2020, the unemployment rate of Nigeria stood at 27.1% which represents 21.7 million Nigerian while the underemployment rate stood at 28.6%.⁷⁸ A combination of this, placed the unemployment and underemployment rate at a whopping 55.7% and the number of persons, willing and able to work i.e. ages 15-65years is estimated to be 119, 871. 186 (One Hundred and Nineteen Million, Eight Hundred and Seventy One Thousand, One Hundred and Eighty Six) persons.⁷⁹ The labour market is saturated with unemployed graduates with no realistic plan to create employment opportunities by the government. Any action of an employee. that is capable of leading to an influx of persons into the labour market (such as mass retrenchment of employee), must be avoided at all reasonable cost. In other words, a situation where the action of an employer will lead to rendering

⁷⁵ *Globe Spinning Mills (Nig) Plc. v Reliance Textile Industries Ltd* (2017) LPELR-41433 (CA).

⁷⁶ *Baker Marine Nigeria Ltd v Chevron Nig Ltd* (2006) LPELR-715 (SC).

⁷⁷ EE Aloba, *Modern Nigerian Law of Contract* (Calabar, University of Calabar Press, 2012) 4.

⁷⁸ S Oyekanmi, 'Nigeria's Unemployment Rate Jumps to 27.1 as at 2020 Q2' <<https://nairametrics.com/2020/08/14/breaking-nigeria's-unemployment-rate-jumps-to-27.1/>> accessed 20 December, 2020.

⁷⁹ *Ibid.*

employees jobless, must be avoided particularly when the current level of unemployment in Nigeria is unprecedentedly high. The effect of unemployment is better imagined than experienced. Aside its impact on the economy, it is reasonable linked to criminality and other vices in the society. While the ultimate goal is security of employment but under the prevailing circumstances, job security, must be rigorously pursue. The government must ensure that the Ministry of labour and productivity watch against covid-19 related retrenchment or loss of It is acknowledge that the sudden occurrence of covid-19 brought about severe hardship and a swift change to human relations however it should not disrupt employment relations in a way and manner that unbearable hardship is inflicted on the employees by employers or *vice versa*. Disruptions such as this, are occurrences which humans must use their best skill and knowledge to surmount and ensure that only unavoidable minimal discomfort is caused.

5. Balancing Contending Interest During and Post CoVID-19

From the foregoing, it is crystal clear that, Covid-19 pandemic has heightened the contention between the interest of the employer and employee as parties in to an employment contract. While the employer seeks to remain in business, maximise profit and minimise cost, the employee on the other hand, seeks improved terms and conditions of employment, better working conditions, enhanced remuneration and security of employment even during insecure periods like the pandemic. The role of the law is to creatively create a balance between these contending interests with mutually beneficial outcomes. It is apposite to note that, covid-19 has exacerbated the rate of unemployment in Nigeria as many persons that were employed, have lost their jobs. Prior to the advent of Covid-19, one obvious fact about Nigeria is the unprecedented high level of unemployment and underemployment which is a situation that cannot be controverted by any reasonable person. Every year, thousands of graduates are churned into the already overcrowded labour market without hope of securing any job left not suitable job owing to the high level of unemployment and underemployment in Nigeria with the government not taking proactive steps to create jobs or an enabling environment of entrepreneurship.⁸⁰ This situation, has led to a significant

⁸⁰ I Ukazu, 'Unemployment: Too Many Graduates Fighting for Too Few Jobs' (*University World News: AFRICA Edition*, 24 November 2021)

rise in precarious forms of employment particularly casualization of labour in both the public and more in the private sector, buttress the high level of unemployment and underemployment that is ravaging Nigeria with no feasible, cogent and futuristic plan in place by the government at various levels.⁸¹ When job creation is mouthed by the government, and lifting of Nigerians from poverty, a careful examination of the strategy and implementation plan, would reveal that what is intended or done is “giving someone fish as opposed to teaching one how to fish.”⁸² They are mere palliative measures which have no sustainability and can therefore, only further impoverish the people than make them economic and financially buoyant.⁸³ It is therefore, pertinent that, the impact covid-9 has on employment relations in Nigeria, is creatively tackled and all contending interests, are beneficially balanced.

One of the ways out of the subsisting quagmire is for employers to engage their employees through their representatives of trade union in honest, transparent and insightful dialogue through collective bargaining to renegotiate the terms and conditions of employment. Employers must strenuously resist the temptation of unilateral alteration of the terms and conditions of employment and foisting same on their employees. Doing this could lead to catastrophic altercations which can disrupt employment relations. An employer who is unable to continue paying full salary, can tactfully and successfully negotiate with the employees to reduce the amount of salary being paid as an alternative to declaring some employees redundant. Giving the prevailing situation, employees, would prefer reduction in wages than being paid full and risk being without employment. This arrangement can subsist for the inclement financial period until the company’s financial fortunes improve and are able to

<https://www.universityworldnews.com/post.php?story=20211113143735211>

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accessed December 2021.

⁸¹ DT Eyongndi, ‘An Analysis of Casualization of Labour in Nigeria’ (2016) 7(4) *The Gravitas Review of Business and Property Law*, 102-116; PE Emechi and DT Eyongndi ‘Casualisation of Labour Practice in Nigeria and Ghana: What Lessons are there for Nigeria?’ 2017-2018, *Nigerian Current Law Review*, 121-162.

⁸² MN Umar, ‘Job Creation in Nigeria: Challenges, Opportunities and the Role of Micro, Small and Medium Enterprises (MSMEs)’ A paper delivered at the *3rd Annual CESA Economic Policy and Fiscal Strategic Seminar*, at Transcorp Hilton Hotel, Abuja, on 8 December 2011.

⁸³ E Ayeni and others, ‘Job Creation and Youth Empowerment in Nigeria, 2011 –2020 (2020)’ 2(1) *Iraqi Journal of Social Science*, 3-19.

revert to the *status quo*. At present, there is a greater need for job security in Nigeria, any reasonable measure that can be explored to achieve this has to be carefully examined by all the parties.⁸⁴

One reality which covid-19 has brought to the fore is that, employers and employees must begin to think outside the box and see themselves as partners in progress. The orthodox means of doing things has proven inadequate and obsolete in the face of prevailing realities. While the pandemic was at its prime, working remotely became an unavoidable option, being able to use internet enable devices and platforms for meetings became indispensable, these realities, are going to continue post covid-19. Employers must ensure that the necessary facilities and gadgets are acquired while employees must acquire the necessary skills and expertise to efficiently use these facilities. The new normal has become a way of life and everyone in an employment contract, must evolve and adapt otherwise, the person will be unfit for continuous employment.

6. Conclusion and Recommendations

Extrapolating from the above analysis, it is crystal clear that covid-19 has affected all facets of human endeavours and employment relationship is not an exception. Several measures have been adopted to prevent its spread and to cushion its effects. In employment relations, it has led employers to adopt various survival measures legitimate and illegitimate such as unilateral alteration of terms and conditions of employment, working remotely, termination or suspension of contract of employment, declaration of redundancy, mandatory leave. The employees on the other hand, desire continuity of the employment with secured benefits and privileges despite the ravaging situation. Thus, the interests of both parties, seems diametrically opposed and must be balanced so as not to abruptly disrupt the polity. Suspension of contractual obligations as a leeway would not be of mutual benefits hence, the parties, within the confines of the law, must seek creative measures that will balance their interest in a way and manner that is mutually beneficial. While the employer could resort to frustration of contract as a possible means of absolving himself from the burden of further performance, this option, although legal and legitimate, will have the negative effect of adding to

⁸⁴ GG Otuturu, 'Job Security and the Nigerian Workers: Issues, Prospects and Challenges' (2015) 9(2) *Labour Law Review*33-53.

the already saturated labour market, more unemployed persons with its attendant negative effects.

Negotiation and transparent dialogue is suggested as the best option in doing this. Thus, it is counterproductive for employers to engage in the practice of refusing their employees to form or join trade unions because, it is cheaper to engage in dialogue with employees through their union than having to renegotiate terms and conditions of employment with every single employee bearing in mind the personal nature of employment contract.

Also facilities that can aid renegotiated agreements to be seamlessly performed, should be provided by the employer while the employees, should acquire or upgrade their skills and knowledge to stay relevant in contributing their significant quota to the growth of their organisations.

The government as regulator-employer, through the Ministry of Labour, Employment and Productivity, should keep an eagle eye and swiftly intervene in cases of covid-19 induced retrenchment or mass termination to check against such and ensure that, only in deserving and genuinely unavoidable cases, can retrenchment or mass termination be allowed.

Human resources and personnel managers, is suggested that going forward, in drafting employment contracts, should carefully examine and incorporate well-crafted *force majeure* clauses which could aid amiable resolution in cases such as Covid-19. The government should intensify its effort on creation of gainful employment opportunities and provision of social security benefits which its citizens, could fall back on during and post covid-19 like it is done in more civilised climes.