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Covid-19 and the Rights and Obligations of Parties under Contracts of Service: A Re-examination

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Abstract

The continuous spread of COVID-19 is negatively affecting businesses in all sectors across the world. Amid curfew, travel bans, restrictions, unprecedented business closures, partial or total lockdown and cancellation of events, businesses are embarking on survival strategies while the crisis lasts. As businesses develop strategies for addressing immediate short term needs and post-recovery processes, the need for contract review becomes imperative for contracting parties to fully understand their rights and obligations. Under the employer-employee contract, otherwise known as contract of service, the rights and obligations of parties need to be re-examined, especially in the wake of the second wave of the pandemic (B117) now ravaging most parts of the world. Employees, in the wake of this reality, now face the possibility of redundancy, salary cuts, or even layoffs as most businesses operate below capacity while some have shut down completely. The legal implications of these business decisions need to be re-examined within the context of the rights and obligations of contracting parties. This paper focuses on these issues, with a conclusion that legal and mutually beneficial compromises should be reached by the parties while the pandemic lasts. Among others, it recommends that force majeure clauses should subsequently be incorporated into future contracts of service as is been done in some other jurisdictions.

Keywords: COVID-19; Pandemic; *Force Majeure* Clauses; Rights; Obligations; Contract of Service; Employers; Employees.

1.0 Introduction

The COVID-19 pandemic is having an unprecedented adverse impact on the normal operations of businesses worldwide, thereby disrupting business operations and hindering their ability to perform their contractual obligations. Following this, many contracts are being delayed, interrupted, or even terminated either because a party or both parties have found themselves in a situation where it is no longer feasible to comply with the contractual obligations. This was seen as an opportunity by some to be released from their obligations under existing contract of service. When such unusual circumstances occur, parties need to examine their contractual rights and obligations as well as business continuity plans. In Nigeria, between March to July 2020, the government restricted the movement of persons and goods virtually throughout the country,

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especially in the places that were then put on technical lockdown by the government,[1] in a bid to curtail further spread of COVID-19. The possibility exists that there may be another lockdown in some parts of the country as a result of the outbreak of the second wave of the pandemic.[2] As a matter of fact, some groups expressed reservation that Nigeria is taking a very big risk by ordering the re-opening of Schools when the pandemic is still ravaging the country.

Some offices have been shut, making it impracticable for employees to come to the office to do their work. Though some businesses have remained virtually functional as their employees continue to work from home, the quantum of business conducted remotely has continued to reduce. Even in situations where employees are available to work from home, employers are incapacitated from providing enough work to keep them fully engaged, coupled with the fact that not every type of work can be performed effectively on-line. The effects of all of these on business financial income will mean that employers may not be able to sustain current payroll costs. They will, therefore, be compelled by this reality to make decisions on how to manage the covid-19 induced challenges.[3]

2. Contract of Employment or 'Contract of Service'

A contract of service is quite different from a contract for service. In a contract of service, the employer controls the work of the servant, and the servant is bound to obey the orders or instructions of the master. On the other hand, under a contract for service, which is otherwise known as independent contractor, the contractor (not employee) undertakes to render the service in a manner devoid of the principal's control. He is free to use his discretion. The line demarcating an independent contractor from an employee is very thin, and the two concepts sometimes overlap. In this situation, the question about the relationship of employer and employee will depend on the circumstances and facts of each case as to who the parties to the contract are, who pays the wages, who has the power to dismiss, the nature of the job, and the place of executing the job. Out of so many tests, the most prominent, up till now, is the element of control and supervision of work. Some law scholars are of the view that the contract of employment denotes a relationship between economic dependence and social subordination.[4] This might not, however, capture the exact relationship between an employer and an employee in a contract of service.[5] What is important to us in this paper, however, is that there are contractual

[1] These places are Lagos state, Ogun state and the Federal Capital Territory (FCT).

[2] Already, there is total lockdown in Britain and some other countries as a result of the outbreak of the second wave of the pandemic, which has been code-named B117 in Britain. See generally https://www.cidrap.umn.edu/news-perspective/2021/01/global-covid-rise-continues-50-nations-report-b117-variant, visited 27 January 2021.

[3] See generally, Nduka Ikeyi and Taofeek Shittu 'Covid-19 and Contract of Employment' culled from https://iclg.com/briefing/11368-covid-19-and-employment-contracts visited 18 May 2020.

[4] For instance, a labour lawyer, Sir Otto Kahn-Freund, has said that:The relation between an employer and an isolated employee or worker is typically a relation between a bearer of power and one who is not a bearer of power. In its inception it is an act of submission, in its operation it is a condition of subordination, however much the submission and the subordination may be concealed by the indispensable figment of the legal mind known as the 'contract of employment'. The main object of labour law has been, and... will always be a countervailing force to counteract the inequality of bargaining power which is inherent and must be inherent in the employment relationship. See also, *Labour and the Law*, Hamlyn Lectures, 1972, 7.

[5] In the US case of Adair v. United States, 209 U.S. 161, 175 (1908), the Supreme Court held that: The employer and the employee have equality of right and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract which no government can legally justify in our free land.

rights to be enjoyed, and there are obligations to be performed by the parties to a contract of service. We shall then consider the effects of COVID 19 pandemic on these rights and obligations of the parties under a contract of service.

3. Rights and Obligations of Employers and Employees under Contract of Service

Industrial peace and harmony in the workplace are non-negotiable, as nothing can be achieved in a hostile industrial environment. The employer-employee relationship, otherwise called contract of service, is governed by employment laws. While it is expedient for the employers to respect the fundamental rights of employees, the employees should, in turn, reciprocate by rendering their obligations to the employers as agreed under the contract. Suffice to say, therefore, is that once a contract of service is consummated, certain rights are outlined to be enjoyed by both parties, who must also bear reciprocal obligations. In other words, the rights of the employer are the obligations of the employee and vice versa.

3.1 Obligations of an Employer (Rights of the Employee)

We would not be able to go into extensive discussion on the obligations of an employer to the employee under a contract of service. However, in addition to special stipulations in the contract of employment, the employer has the following obligations to the employee:

1. To pay the employees, salaries, emoluments, and other necessary payments as agreed under the contract.
2. To provide work to the employee according to the contract of employment.
3. To provide him with the materials necessary for the performance of the work.
4. To respect the employee's human dignity.
5. To ensure that standard occupational safety and health measures are in place to secure the health and lives of the employees while at work.
6. To be responsible for the medical bills of the employee whenever such a need arises.[6]

The employer should not sanction the employee on the ground that he exercised his right. There should be no discrimination against female workers in matters of remuneration on the ground of their gender. The employer cannot discriminate between workers based on nationality, sex, religion, political opinion, or any other conditions. Termination of employment should meticulously follow the terms stated for termination in the contract. If it is employment with statutory flavour, the words of the statute regarding termination must be followed to the letter to avoid the termination being declared unlawful by the Court. An employer cannot compel any worker to join or not to join or to cease from being a member of a trade union or to vote for or against any given candidate in elections for trade union offices. The employer should avoid the imposition of any work capable of endangering the health of the employees.

[6] It is only a healthy workforce that can render the expected services under the contract. This makes the employer responsible for the physical health and well being of the employees.

3.2 Obligations of an Employee (Rights of an Employer)

The employee shall have the following obligations:

1. To personally render the service specified in his contract of employment. He can not delegate the work to others based on the principle of *delegates non-potes delegare.*
2. To obey lawful order as stipulated in the contractual terms.
3. To handle the employer's instruments and tools entrusted to him for work.
4. To always report for duties in fit mental and physical conditions.
5. To promptly inform the employer of any act capable of endangering himself or his fellow employees or which may affect the company's interests.
6. To be loyal to the employer and use the employer's time for the employer's work.
7. To observe the provisions of collective agreements, work rules and directives issued in accordance with the law.

It is illegal for an employee to deliberately commit, in the place of work, any act capable of endangering life and property or remove any property of the employer without due authorization. He must always ensure that he keeps away from acts capable of earning him dismissal on the ground of gross misconduct. Such acts include taking bribe, drunkenness, being lethargic, refusal to obey lawful order of the employer, and so on. He should also avoid any situation that can lead to conflict of interests between him and the employer.

4. Covid.19, Contract of Service and *Force Majeure* Event

Obviously, COVID-19 pandemic, including its strain called B117 and their multiplier effects, have changed the workplace. Travel restrictions, work-from-home order, and mandatory closures in some cases, imply that it is no longer business as usual for most employers. The unusual events of some months[7] ago have compelled many employers, facing major business disruptions or closures, to make tough decisions such as recruitment, furloughs, layoffs, and compensation. Some of these employment decisions are capable of adversely affecting written employment contracts and collective bargaining agreements that contain "*force majeure*" clauses, which excuse performance if and when certain events happen.

According to Black's Law Dictionary, *force majeure* is "an event or effect that can be neither anticipated nor controlled."[8] The nature of the industry will determine the frequency of *force majeure* clauses.[9] The concern of many employers now is whether COVID-19 can constitute a ground to invoke *force majeure* clauses in their employment contracts to justify their inability to perform their contractual obligations. The answer to this is that it depends on the circumstances. Employers are expected to carefully examine the language and scope of the contract because not all force majeure clauses are equally created. Some contracts may specifically provide for

[7] The months here refer to the period from December 2019 in China when the pandemic broke out and most especially, from March 2020 when it spread to Nigeria up to the emergence of the second wave of the pandemic late 2020.

[8] Bryan A. Garner, Black Law Dictionary, 8th edition, USA: Thomson West Publishing, 2004, p 673.

[9] In the healthcare industry for instance, *force majeure* clauses became more common in employment agreements after Hurricane Katrina. Other industries may follow suit in the wake of this pandemic.

"pandemics," "epidemics," or "outbreaks of disease" as *force majeure* events. In some other contracts, however, there are provisions for more general *force majeure* clauses which are "Acts of God" or "events that are beyond the control of the parties."[10] Many parties might end up litigating whether COVID-19 qualifies as a *force majeure* event under these more general clauses.

Regardless of whether or not a contract of service envisages a *force majeure* event such as the COVID-19 pandemic, the employers still need to consider so many other issues. In the first place, there should be consideration of whether the contract of service mandates the party invoking the force majeure event to timeously notify the other party of its inability to perform under the contract. For instance, there may be provisions in the collective bargaining agreements which require employers to timeously notify the union of the employer's inability to perform under the contract of service as a condition to rely on the clause. Secondly, there is a need to consider whether the *force majeure* provision completely excuses the employer's non-performance, or only during the period of the force majeure event. For example, if an employer has made an employment offer to a prospective employee, but the business has stopped operating due to a lockdown or quarantine order as presently obtains, the employer should consider whether the force majeure provision permits him to withdraw the offer entirely or simply delay the prospective employee's resumption date until the business can resume operations.

Lastly, an employer may still be under a duty to reduce the impact of the COVID-19 on its ability to perform under the contract of service when seeking to rely on a *force majeure* clause. It is possible the contract delineates the mitigation steps to be taken by the employer. For example, many employers have tried to reduce the impacts of the lockdown orders by permitting their employees to work from home. One of the lessons from COVID-19 is to embrace contingency planning and ensure that business continuity plans are in place. Preparing for business disruptions in situations like this may avoid the need for some employers to invoke force majeure clauses. In Ireland, some executive type contracts of service may contain a force majeure clause, and most contracts of employment refer to the statutory relief which provided for *force majeure* in the Parental Leave Act 1998. Usually, a force majeure clause will have the effect of suspending the obligations of one or both parties in certain exceptional circumstances.[11] Under Irish law, however, there is no presumption of a force majeure event; thus, the parties must specify what events are intended to be covered by the force majeure clause. Without this express provision, it may be impossible to enforce the clause on the grounds that it is void for uncertainty and lack of clarity around it. Therefore, the precise scope of the *force majeure* provision will depend on the context in which it is used.[12]

[10] See https://www.law360.com/articles/1260929/the-future-of-force-majeure-in-employment-contracts, visited 25 May 2020.

[11] Culled from https://employmentrightsireland.com/force-majeure-clauses-in-the-employment-contract-and-the-coronavirus-covid-19/ visited 19 May 2020.

[12] '*A force majeure clause should be construed in each case with a close attention to the words which precede or follow it, and with a due regard to the nature and general terms of the contract. The effect of the clause may vary with each instrument.*' See Lebeaupin v Crispin [1920] 2 KB 714.

In cases of contracts that lack an express *force majeure* clause, the common law doctrines of impossibility, impracticability and most especially, frustration of purpose may fill that gap, and applicable state law will define the contours of these three defences. Impossibility may provide a defence where events or occurrences outside the parties' control render the employer's performance impossible. It should be noted that the force majeure clause supersedes the doctrine of impossibility if the parties make provision for the clause in the contract of service. Similarly, under the impracticability defence, performance may still be possible but difficult due to the unforeseeable events. Lastly, frustration of purpose occurs where the unforeseen event or occurrence destroys the fundamental premise of the contract of service. It is important to note that while force majeure allows the contracting parties to assign risk under defined circumstances, the common law doctrines may be ambiguous or not suitable in the circumstance. According to Richard Posner, a former U.S. Circuit Judge, the doctrine of impossibility is the off-the-rack option where the parties (to a contract of service) have not drafted a provision that otherwise assigns the risk.[13] Employers should reclarify any vague or ambiguous force majeure clauses and ensure that the words: pandemics, epidemics, and other outbreaks of disease are expressly provided for as force majeure events. Omnibus force majeure clauses that do not expressly include pandemics in their definitions may not provide the needed protection during a future pandemic if the courts discover that such events have now become foreseeable.[14]

5. Available Options to Employers During the Covid.19 Pandemic

The options available to an employer would depend on several factors and the industry in which the employer operates. First of all, consideration will be given to whether there are *force majeure* clauses in the relevant contracts of employment, and this is very likely. Secondly, the nature of the employer's industry[15] and the effect of the COVID-19 containment measures of the pandemic will also come into play, as well as the nature of each individual employee's job specifications. The effect of the measures on the ability of the employer to provide work to employees should be considered, as well as the ability of the employee to continue to attend and perform work. Another factor to consider while evaluating available options is whether the relevant employees are "employees" within the meaning of the Labour Act,[16] and the Employees' Compensation Act.[17]

[13] Culled from https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/force-majeure-and-the-workplace-in-the-covid-19-era.aspx visited 20 May 2020.

[14] Equally important, employers should also consider the contractual remedies available to the parties if a force majeure event should occur. For example, employers should consider whether to include liquidated damages remedies in the event that a force majeure event requires termination of the contract. Employers should also review the "choice of law" provisions in their employment contracts and determine how widely or narrowly the courts in the chosen jurisdiction have interpreted force majeure clauses. See further, https://www.law360.com/articles/1260929/the-future-of-force-majeure-in-employment-contracts, visited 21 May 2020.

[15] For instance, employers in the aviation industry could not provide work for their workers during travel ban order by the government.

[16] Cap L1 Laws of the Federation of Nigeria, 2004.

[17] Employees Compensation Act, 2010.

5.1 Temporary Suspension of Contract of Service

The creation and termination of contracts of service are also subject to the general principles of contract law.[18] Therefore, just like any other contract, the performance of a contract of service may be suspended or delayed, or its non-performance excused, on account of the occurrence of a *force majeure* event, if it is expressly provided for in the contract.[19] Thus, an employer may rely on a contractual provision which enables him to suspend the contract performance or a *force majeure* clause entitling him to temporarily suspend the contract of service till normalcy is returned if the consequence of the COVID-19 incapacitates the employer from providing work to its employees, and (or) the employee is not able to execute the work provided by the employer. In such situation, the employer may, by virtue of the applicable provision, suspend the parties' rights and obligations under the relevant contract(s) of service till such a time as the employer can provide work for the employee(s), or the employee(s) are able to do their work.[20] If there is no enabling contractual provision, it will be illegal for an employer to unilaterally suspend the employment of its employee without pay, or act contrary to the terms and conditions of the existing contract of service due to COVID-19 crisis, unless the employer can show any mandatory statutory provision that applies to the contract of service which enables him to so act. This is because any action contradicting the terms and conditions of a contract is a breach of contract,[21] except where the supposed contrary action is permitted by an applicable mandatory statutory provision.[22]

5.2 Labour Act permits suspension of Contract of Service

The Labour Act[23] allows an employer who, due to a temporary emergency or other circumstances beyond its control, is incapacitated from performing its contractual obligation of providing work to its employees, to avoid payment of salaries to the employees, if the situation continues for a period of seven days or more as may be approved by an authorised labour officer. In such circumstance, the employees shall be entitled to wages only on the first day of the period in question. Obviously, the COVID-19 pandemic is apt here as it has lasted for almost one year now.[24]

While it appears to have nosedived at a time, the second wave of the pandemic presently ravaging the entire world is an indication that the pandemic is not yet over. Applying the Labour Act therefore, an employer can suspend payment of employees' salary under the respective contract of service pending the return of normalcy subject to the approval of an authorised labour officer.[25] The fact that the relevant contract of service does not expressly contain a *force majeure* clause, or a provision which permits the suspension of the employment of any employee by the

[18] *Olaniyan & ors. v Unilag & anor.* (1985) LPELR -2565(SC) 133.
[19] *Addax Petroleum Development Nigeria Limited v Loycy Investment Company Limited & anor.* (2017) LPELR-42522(CA).
[20] Culled from https://iclg.com/briefing/11368-covid-19-and-employment-contracts visited 20 May 2020.
[21] *Cameroon Airlines v Otutuizu* (2011) LPELR – 827(SC).
[22] (*Afrab Chem Ltd. v Owoduenyi* (supra).
[23] See section 17 of the Labour Act, Cap L1, LFN 2004.
[24] The effect of the pandemic began in March 2020 in Nigeria and it is still ongoing as at February 2021 when this paper was written.
[25] It appears the phrase 'return to normalcy' is inapplicable under Covid-19 situation as no one can adequately predict when normalcy can return in view of the outbreak of the second wave of the pandemic.

company in the circumstance is immaterial.[26] In some jurisdictions, employers are expected to treat employees that are unable to report for work due to *force majeure* event as being on leave for that period, with the effect that his salary payment must continue. For instance, in Ireland, *force majeure* is given statutory recognition under Irish law in the Parental Leave Act 1998 which provides in section 13(1) thus:

This paper submits that similar provisions be incorporated in Nigerian Employment law and the Labour Act to take care of these and similar situations if and when they occur in the future.

5.3 Variation Of Contract of Service

Another option the employer may exercise is to propose or negotiate with the relevant employee(s), either directly or through their trade union, a variation of the contract of service to provide for reduced working hours, part-time work, pay cuts, temporary layoff, voluntary leave without pay, or other interim arrangements suitable to the employer to address the COVID-19 crisis.[27] All these options appear reasonable, in our mind, as they address the interests of both parties to the contract of service. There is a possibility of effecting a change in the terms and conditions of employment during the subsistence of the contract of employment as provided for under the Act.[28] However, the employees can either accept the change, expressly or by conduct, i.e. by continuing in his employment under the new terms,[29] or reject it by terminating the contract of service under the relevant provisions of the contract. Nigerian law would only allow the variation of a contract of service if the concerned employee(s) agreed to it. However, the employer will have a valid reason to terminate the employee's employment if the employee refuse to accept a variation of the contract in this circumstance.

5.4 Termination of Contract of Service based on Frustration

Generally, a contract stands frustrated if a later event occurs which makes performance of the contract impossible, illegal, or radically different from what the parties originally contemplated when they entered into the contract. In such circumstances, the parties are discharged from further performance of the contract by the operation of law.[30] In the case of *A.G., Cross River State v. A.G., Federation & anor,* [31] the it was held that the doctrine of frustration is applicable to all categories of contracts.[32] Therefore, where frustration exists, it must also be shown that it is

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[26] This position was strengthened by the National Industrial Court of Nigeria (NICN) in the case of *Sule O. Usman v Union Bank of Nigeria Plc,* Unreported judgment of the NICN in Suit No. NICN/LA/56/2012 delivered on 21 May 2014, where the court held that section 15 of the Labour Act which provides for periodicity of payment of wages whilst the employment subsists does not seek to grant a right to wages for any period that work was not done, whether or not the employment contract is expressed to exist. It is important to note however, that section 17 of the Labour Act is limited in operation to employment regulated by the Labour Act. It is important to note however, that section 17 of the Labour Act is limited in operation to employment regulated by the Labour Act.

[27] The principle of variation of contract involves a definite alteration of contractual obligations by the mutual agreement of both parties. See *Unity Bank v Olantunji* (2014) LPELR-24027 (CA).

[28] S. 7(2) of the Labour Act.

[29] *Ajayi v Texaco Nig. Ltd* (1987) 9 – 11 SC.

[30] *A.G., Cross River State v A.G., Federation & anor.* (2012) LPELR -9335(SC).

[31] Ibid.

[32] Obviously, contract of service will be inclusive. In *C.C.B. v Onyekwelu*(2000) 4 KLR (Pt. 101) 1247 (CA), the Court of Appeal took for granted that frustration could affect a contract of service by holding that the doctrine did not avail the employer-bank because the purported frustration was self-induced. It is trite that contract of service is

impossible to continue with the performance of the contract with respect to each employee. Thus, where work can be efficiently and significantly done by virtual means, outside the confines of the office and without the need to get to the physical workplace, the doctrine of frustration may not apply.[33] Also, contract of service in respect of employees who work in industries which are exempt from movement restriction order(s), or whose work can be remotely done and who are able to perform their duty notwithstanding that their employer's industry is under the restriction order(s), may, notwithstanding, be held to be frustrated if their employers can show that the overall effect of the pandemic has prevented them from providing work for the employee(s) over a substantial period of time.[34] It appears, however, that a contract will not become frustrated if the relevant event gives rise to a 'wait and see' situation.[35]

5.5 Termination of Contract of Service on the Ground of Redundancy

In circumstances where the effect of the COVID-19 crisis on an employer's business is not of such magnitude as to sustain a plea of frustration, the outcome may still lead to a reduction in the volume of work which is usually available for the employees. Consequently, the work available may be insufficient to fully engage the number of employees whose contracts are not frustrated. The employer may, therefore, consider terminating some contracts of service on the ground of redundancy. What is paramount in a redundancy is that the employment of the affected employees will have become redundant due to restructuring of the employer's operations necessitated by the need to reduce cost and improve profitability.[36] Procedurally, Section 20 of the Labour Act only mandates employers to give notice to the representative of the workers of the reasons for, and the extent of, the redundancy prior to termination on account of redundancy.

However, Article 13 of the ILO Termination of Employment Convention 1982[37] requires an employer to so notify the workers' representatives, and consult with them on measures to avert or minimise the resultant terminations and on measures to minimise the adverse effect of the eventual terminations on the affected workers. The ILO Convention No. 158 is not yet ratified by Nigeria. However, section 254C(1)(f) of the Constitution[38] empowers the National Industrial Court of Nigeria to apply any of its provisions, which is pleaded and proved as international best

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personal or domestic to each of the persons; in the event of a breach, the persons do not have collective right to sue or be represented in a suit. See *C.C.B. (Nig.) Plc v Rose* (1998) 4 NWLR (Pt. 544) 37, 50.

[33] It should be noted that where work cannot be done remotely, the doctrine of frustration may not apply so long as the parties still have a reasonable expectation that the work would resume within a reasonable time and under the same circumstances as contemplated by the parties at the time of contracting.

[34] What amounts to substantial period of time for purposes of frustration of an employment contract is determined upon consideration of multiple factors.

[35] This is a situation in which the parties reasonably believe that performance would continue in no distant time; but the contract will become frustrated if the parties, upon their re-assessment, come to the definitive conclusion that the delay is getting to the root of the contract, such that even if performance were to continue later, the circumstances of the continued performance would have become different from what was contemplated by the parties at the time the contract was made. For further details on this, see *Edwinton Commercial Corporation and Global Tradeways Ltd v Tsavliris Russ (Worldwide Salvage and Towage Ltd (The "Sea Angel")* [2007] EWCA Civ 547.

[36] *Union of Shipping, Clearing and For-warding Agencies Workers of Nigeria v Management of Transaltic Nigeria Limited* (unreported judgment of the National Industrial Court in Suit No. NIC/14/87 delivered on 26 February 1988).

[37] ILO Convention No. 158.

[38] 1999 Constitution of the Federal Republic of Nigeria (CFRN) as amended.

practice.[39] The combined reading of Section 254C(1)(f) of the Constitution and the ILO Convention No.158, is capable of undermining the decision in *National Union of Hotels and Personal Services Workers v Imo Concorde Hotels Ltd.*[40] Realistically, the notification and consultation process, aside providing evidence that the employer followed the procedure required by law, also provide a good opportunity for the employer to communicate its present challenges to its employees. Through this, the affected employees would be convinced that the employer does not act arbitrarily, while the employees not affected by the terminations would not view the employer's management with suspicion on account of the terminations.

5.6 Deciding whom to lay off and the Management of Redundancy Payments

The ILO Convention No.158 of which Nigeria is yet to ratify does not provide for the means of determining employees whose contract of service would be terminated due to redundancy. However, section 20 of the Labour Act provides for the adoption of the "Last-In-First-Out" ("LIFO") principle, which requires that those whose employments were later in time should first be disengaged. However, the principle is made subject to all factors of relative merit such as skill, reliability and ability as may be determined by the employer. Thus, the LIFO principle is not quite helpful as the employer has extensive discretion in deciding those whose employments are to be terminated in a redundancy exercise.[41] Section 20 of the Labour Act has been interpreted by the Court of Appeal to mean that the termination of contract of service on ground of redundancy does connote the payment of any benefit by the employer except the benefit provided in the contract of service.[42]

However, the application of the provision will be limited to "workers" within the meaning of the Labour Act. Concerning employments that are not regulated by the Labour Act, the duty to pay and the quantum of redundancy payments will be governed by the respective contract of service. A company may make *ex gratia* payment when redundancy occurs even though it has no contractual obligation to make any payment.[43] The prospect of re-engaging some of the employees whose employments may be terminated pursuant to a COVID-19 redundancy, and the cash flow challenges confronting employers at this time, may necessitate a creative approach in dealing with redundancy payments. First, it is possible for an employer to negotiate the period within which it may make a redundancy payment to date in the future which is acceptable to both parties, where a term of the contract includes the obligation to make such payment. Secondly, it is equally possible to agree that if an employee is subsequently re-engaged, the employee will refund all or part of the redundancy payback to the employer. The reasoning of the law here is

[39] *Ferdinand Dapaah & anor v. Stella Ayam Odey* [2019] 16 ACELR 154,181.
[40] (1994) 1 NWLR (Pt. 320) 306. The decision in this case is that a trade union does not have a right of action against an employer who fails to notify it prior to the implementation of a redundancy in which its members are affected.
[41] *Guinness (Nigeria) Ltd. v Agoma* (1992) 7 NWLR (Pt.256) 728, 741.
[42] *Peugeot Automobile case* (1997) LPELR – 6331(CA).
[43] Such payment, supported with a properly drafted separation agreement or waiver clause, provides consideration for an employee to release the employer from any past or future obligation or claims related or arising from the employment relationship. Such payment and related separation agreement may also provide additional evidence of compliance with ILO Convention No. 158.

that an employee should not be allowed to eat his cake and have it.[44] An employee may accept such an offer on the condition that the redundancy would be cancelled if he was re-engaged within the agreed period, with the effect that, the period he was out of employment would, among other benefits, still count in the computation of his length of service with the employer.[45]

6. Conclusion

Applying the meaning of "employees" within the Labour Act, it is possible for an employer to suspend the employee's salary payment obligation pending the end of the COVID-19 crisis, subject however, to an authorised labour officer's approval. It is irrelevant that the contract of service does not expressly contain a *force majeure* clause, or a provision that allows the suspension of obligations or the contract in the present circumstance. However, regarding other employees, the option of suspending employment contracts during the duration of the pandemic would only be available if the contracts in question contain an enabling provision. The outbreak of the second wave of the pandemic has made it difficult to determine when COVID-19 is likely to end. In other situations, an employer may chose to negotiate a variation of the employment contracts, treat the contracts as frustrated, where there are frustrating conditions or implement a redundancy exercise. Another possibility for an employer is to negotiate the structuring and payment of termination or redundancy benefits in such a way that contemplates and provides for the re-engagement of the employees whose employments may be terminated as a result of the COVID-19 crisis.

7. Recommendations

Ancient natural disasters like floods or hurricanes are seemingly no longer age-long events. Instead, they appear normal, like any other periodic occurrence. Global pandemics such as COVID-19 and other disasters in the waiting may also become far more regular events. The outbreak of the second wave of the pandemic which occurred when it was thought to be over attests to this. COVID-19 now appears as the 'new normal' as opposed to being 'abnormal'. Indeed, the outbreaks of EBOLA MERS, SARS, and COVID-19 all occurred within seventeen years. Thus, as similar events become normal, disaster planning should be prioritised by all employers, as *force majeure* clauses may likely become a disaster-planning tool.

Also, *force majeure* clauses are not to be included without fully considering the potential consequences. Employers should clarify any vague or ambiguous force majeure clauses to adequately address and define anticipated risks. They should also ensure that words like 'pandemics', 'epidemics' and 'other outbreaks of disease' are mentioned explicitly as *force majeure* events. Omnibus *force majeure* clauses which do not expressly include pandemics in

[44] He has had a redundancy payment to compensate him for loss of his job. In the event, however, that he still has his job by reason of the re-hiring, the employer will be entitled to reclaim the redundancy payment made to him.

[45] Infact, the refund of redundancy pay by a re-engaged employee should effectively repair the break in continuity caused by the redundancy payment; and thus restore continuity of employment without any break in the chain of his employment with the employer. See further, Ian Smith, *Harvey on Industrial Relations and Employment Law* (United Kingdom: LexisNexis, 2016) Vol. 2, Issue 204. This arrangement may also be justified by reliance on ILO Termination of Employment Recommendation 1982.

their definitions may not provide the needed legal protection during a future pandemic if courts find that such events have now become foreseeable as the 'new normal.'

In the course of negotiating a *force majeure* clause, employers need to consider how the parties will share the risk if a *force majeure* event occurs, and draft the available rights and remedies accordingly. For instance, employers should consider whether to include liquidated damages remedies when a *force majeure* event requires termination of the contract. They should also review the choice-of-law provisions in their contracts of service and determine how narrowly or widely courts in the chosen jurisdiction have interpreted *force majeure* clauses. All organisations or employers should, as a matter of urgency, proactively assess risks related to contract failure and begin discussions with contractual partners to understand and resolve critical business failures and delays. They should also review and rank contracts by significance and possibility of failure. They should determine what qualifies as a *force majeure* event under the contracts in question, because there is no common law right to invoke *force majeure*.

It is also necessary to consider whether COVID-19 (or its consequences) qualifies as a *force majeure* event in the light of the particular contract of service. Where COVID-19 qualifies as a *force majeure* event, employers should determine what the specific agreement requires to invoke the provision, and consider whether other contract provisions or insurance coverage could mitigate the risks. One of the lessons from COVID-19 is to embrace contingency planning and ensure that business continuity plans are in place. Preparing for business disruptions in situations like this may avoid the need for some employers to invoke *force majeure* clauses. Employers should, therefore, incorporate the lessons learned from COVID-19 into their future employment contracts.