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Verbal Harassment in the Workplace, Co-Employer Liability and Termination of Employment: A Review of Cheick Ouedraogo v. Uber Technologies System Nigeria Ltd & 2 Ors

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Introduction

In the case of *Cheick Ouedraogo v. Uber Technologies System Nigeria Ltd & 2 Ors,*[1] the National Industrial Court of Nigeria (the "Court" or "NICN") examined the Claimant's allegations of workplace harassment and discrimination and found that the Claimant was subjected to verbal harassment, retaliation and wrongful termination. The Court also affirmed the principle of co-employer liability in employment relations, and stated that an employer should state the reason for termination of employment. This case commentary discusses these aspects of the Court's decision.

Case Summary

The Claimant (Cheick Ouedraogo) applied for the role of Senior Business Associate, Vehicle Solutions – Sub Saharan Africa which was advertised on the 2nd Defendant's (Uber International) career website. The Claimant passed the interview and was offered employment by the 2nd Defendant (Uber International) and posted to the 1st Defendant's office (Uber Nigeria) who issued the Claimant a letter of employment dated 22nd July 2019. Not long after the Claimant resumed, he complained that on many occasions the 3rd Defendant (Mimi Omokri, an employee of the 1st Defendant - Uber Nigeria) who was also his first-line manager called him "Drogo" a name he did not like and which he claimed belonged to a barbarian character in the TV series Game of Thrones. In line with the reporting policy of the 1st & 2nd Defendants (Uber Nigeria & Uber International), the Claimant complained about the name calling to the 3rd Defendant (Mimi Omokri) and his 2nd line Manager (Justin Sprat, an employee of the 2nd Defendant). No real investigation or action was taken about his complaints and his relationship with the 3rd Defendant (Mimi Omokri) deteriorated.

[1] NICN/LA/424/2020, Judgment delivered 13/05/2022

Three (3) months after resumption in the 1st Defendant's office (Uber Nigeria) his employment was terminated by the 1st Defendant (Uber Nigeria). The Claimant complained to the 2nd Defendant (Uber International) that the 3rd Defendant (Mimi Omokri) retaliated against him for reporting her and also victimized and forced him to work in a hostile work environment which affected his performance. The 2nd Defendant (Uber International) put the termination on hold to investigate the complaints. When the termination was upheld by the 2nd Defendant (Uber International), the Claimant sued.

The Court among many other findings decided that the name-calling amounted to verbal harassment and that both the 1st and 2nd defendants were liable because their relationship with the claimant is that of co-employment. The Court also held that the Claimant's employment was wrongfully terminated, because he was clearly terminated with reason, even though the employers failed to state the reason in his termination letter which is not in line with international best practice with respect to employment relations. These issues are discussed below.

1. Co-employer Liability Status

When an employee is employed by one entity for the benefit of another entity, a co-employer status or triangular employment is said to be in existence.[2]

The effect of the Holdco, for example, hiring for its subsidiary or exercising management control over the subsidiary means they may be jointly liable in the event of wrongful termination. In this particular Case, the Claimant alleged that the 2nd Defendant operates in Nigeria through the 1st Defendant and exercises control over the 1st Defendant's activities including policy formulation, business management, staff recruitment and general operations. He also argued that the 1st Defendant employed him based on the outcome of the recruitment exercise conducted by the 2nd Defendant, making him a co-employee of both the 1st and 2nd Defendants. It was held that although the 1st & 2nd Defendants have distinct legal personalities, they are interconnected, and the 2nd Defendant was the directing mind of the 1st Defendant, giving rise to co-employer status with respect to the Claimant.[3] From the decision in this case, a co-employment status may be inferred if any of the following is present:

i. Recruitment – Officers of two entities are involved in a recruitment or termination process.

ii. Control – one entity is perceived to have policy, managerial or similar control over the other entity.

iii. Definition of the Entity – The employment handbook or other official documents of one entity refers to the entity as including another entity.

The Court noted that if companies are for all intent and purposes one, their corporate veils could be pierced and each could be liable for the action of the other.[4]

[2] *Luck Guard Ltd v. Adariku & ors* (2022) LPELR – 59331 (CA) Per Stephen Jonah Adah, JCA (Pp 29 - 30 Paras D - B)/ Judgment delivered on 15th December 2022

[3] Ibid at page 49 of Judgment

[4] Ibid at page 49 of Judgment

In a similar vein, the Supreme Court has also held that where a subsidiary is integrated with and under the control of the parent company to the extent that the subsidiary is for all intents and purposes "the agent", "employee" or "tool" of the parent company, the Court will regard them as co-employers.[5] In the instant case, the 1st and 2nd Defendants were held to have condoned the actions of the 3rd Defendant and were jointly liable for those actions because they failed to properly investigate or address the Claimant's allegations even though the Claimant complied with the reporting policy contained in the employee handbook.

2. Verbal Harassment in the Workplace

The Claimant alleged that on several occasions the 3rd defendant called him 'Drogo' in a condescending manner, which he found offensive and abusive given his national origin of Burkina Faso; one of the world's poorest countries. He alleged that after reporting her, she retaliated against him by reducing communication with him, she also stopped assigning him tasks, cancelled several meetings with him and refused to include him in teamwork, all of which led to his poor performance, and eventually, his termination. The 3rd Defendant admitted to calling the Claimant 'Drogo' but claimed that she stopped all personal jokes to protect his boundaries when he complained about the name. The Court noted that the employee handbook of the 1st and 2nd Defendants defined unlawful harassment to include verbal conduct such as epithets, derogatory comments, slurs or unwanted comments and jokes etc., and held that the Claimant established a case of unlawful harassment against the 3rd Defendant. It further held that the circumstances surrounding the termination of the Claimant's employment and events subsequent to the termination point irresistibly to retaliation by the 3rd Defendant against the Claimant, in breach of the 1st and 2nd Defendant's policy on unlawful harassment and retaliation, which also constitutes unfair labour practice.[6]

3. Stating Reasons for Termination of Employment

The Supreme Court on several occasions has held that an employer can terminate a contract of employment without stating any reason.[7] However, in some other relatively recent cases including the case under review, the NICN has made it a requirement for employers to give reasons for termination.[8] In the case under review, no reason was stated in the Claimant's termination letter instead, the employers relied on a clause in the Claimant's letter of employment which gave the employers the right to exercise discretion to terminate the employee at any time during the period of probation. A portion of the Judgment of the Court addressing the issue is reproduced below (emphasis added).

"The fifth relief seeks a declaration that the wrongful termination of the Claimant's employment and the failure of the 1st and 2nd Defendants to give reason for the termination of the Claimant's employment in his termination letters dated 18th November 2019 and 19th December 2019 constitute unfair labour practice, contrary to international best practices and are in contravention of the provisions of the ILO Termination of Employment Convention of 1982 [No. 158] and the ILO Termination of Employment Recommendation, 1982 [No. 166]…

[5] *Moruf Adeyemi Adesanya v. First Spring Franchise Services Ltd & Heritage Bank Ltd*, SUIT NO: NICN/LA/411/2016/ Judgment Delivered on 1st December 2022.

[6] Ibid at page 52 of Judgment

[7] *UTC (NIG) PLC v. Peters* (2022) LPELR - 57289 (SC) Per Amina Adamu Augie, JSC (Pp 17 - 17 Paras B - E); *Francis Adesegun Katto v. Central Bank of Nigeria* (1999) LPELR-1677(SC)

[8] Mrs. *Sharon Philip v Notore Chemical Industries* Suit No: NICN/Yen/56/2015/Judgment delivered on July 29, 2022

Article 4 of the Convention provides that ***the employment of an employee shall not be terminated without a valid reason connected with his capacity or conduct or based on the operational requirements of the undertaking****…An employee is not a piece of article that can be tossed away at will. It needs be said that, arising from the peculiar facts of this case, the fact that the Claimant was on probation does not negative(sic) the application of the Termination of Employment Convention of 1982 [No. 158] and the Termination of Employment Recommendation, 1982 [No. 166]".*[9]

This case is reminiscent of the case of *Sharon Philip v. Notore Chemical Industries*.[10] In this case, the employee, following a whistle-blowing policy of the company which encouraged staff to speak out, testified before an ethics committee set up by the company to investigate unethical business practices amongst some senior staff members of the company. The employee's testimony led to the one-year suspension of her immediate superiors (Mrs. Tola Mbachu and Mr. Apollo Goma).

When the Claimant's superiors resumed after the suspension, the Claimant alleged that they defamed, victimized and oppressed her, including orchestrating issuance of a query for fraud, in respect of which the Claimant was found innocent. The Claimant was then said to have received a report from the superiors that removed the Claimant from the supposed new structure of the department where she was working. With this action, the Claimant found herself essentially floating with no scheduled duty or reporting line in the company, which resulted in the termination of her employment. The Claimant's termination letter simply stated that her services were no longer required (which was a valid ground for termination based on the Claimant's letter of employment). The Court found that the ordeal suffered by the Claimant after the resumption of her superiors amounted to victimization and that there was an obvious link between the Claimant's victimization and her subsequent termination, despite the efforts of the employer to hinge the termination on a clause in the letter of employment and separate the termination from the victimization alleged by the Claimant. The Court found, based on the foregoing, that the Claimant's termination was wrongful.

It is clear that the two cases above certainly require reasons to be stated where it can be shown that the employee was terminated for cause. However, just 6 months after the decision of the NICN in *Cheik Ouedraogo*, the Court of Appeal in *Ikoro v. PHED,*[11] reached a completely different decision from the NICN concerning giving reasons for termination.

In *Ikoro v. PHED*, the employment of the Appellant was summarily terminated for alleged misconduct. The Appellant's letter of employment did not make it a requirement for the employer to state the reason for termination and so the letter of termination did not state any reason except that *"Management wishes to inform you that your services are no longer required with immediate effect".*[12] The Court held that the termination was in compliance with the letter of employment and further stated:

"*It is settled law that parties are bound by the terms embodied in a contract of employment…Where the*

[9] Ibid at page 53 of Judgment
[10] Ibid page 3 Footnote 8
[11] *Ikoro v. PHED* (2022) LPELR – 59058 (CA) Per Oludotun Adebola Adefope-Okojie, JCA (Pp 19 - 20 Paras D - A)/Judgment delivered on 18 Nov 2022
[12] Ibid page 3 Footnote 11

terms spell out unambiguously how and when to terminate the employment and the termination is carried out in the manner provided by the terms, that termination is not wrongful…The law is that the employer can terminate the contract with the employee at any time and for any reason, or no reason at all".[13]

Based on the above and due to the conflicting position of the Courts of Appeal and the NICN on whether an employer is required to give a reason for termination, it may be beneficial for employers to give reasons for termination considering the following:

i. The position of the NICN requiring employers to give reasons for termination based on international best practices (In another article, we go into an in-depth analysis on the requirement to give reasons for termination and the NICN's application of international best practices in the light of constitutional provisions).

ii. Appeals do not lie as of right from the NICN to the Court of Appeal except in fundamental rights cases and criminal matters. In all other civil matters, appeals are only with the leave of the Court of Appeal[14], so the opportunity to have the decision of the NICN overturned by the Court of Appeal is not always guaranteed.

iii. Giving a reason for termination may be a good attempt to avoid unnecessary litigation challenging the termination on the ground that reasons were not given.

Additionally, if an employer decides to give a reason for termination, such reason should be justifiable, because as stated by the Court in *Ikoro v. PHED*, had the employer given a reason that they failed to justify, the employer would have been found liable for wrongful dismissal.[15]

Key Takeaways from the Cheick Ouedraogo Case

i. Despite having a distinct legal personality, an entity can be liable for the labour/employment issues of another where both entities are integrated or one is under the control of the other.

ii. Workplace harassment and similar wrongdoing should be properly addressed by employers to avoid being held to have condoned the offending acts.

iii. Lastly, the NICN decided in this case, as it has in several others, that employers should give reasons for termination, notwithstanding the provisions in the employee's letter of employment.

Considering recent developments in employment law and the unpredictability of court decisions, it is wise for employers to seek legal advice concerning employment issues including employment/appointment terms, grievance and disciplinary procedure and termination.

* This article is not legal advice. The position of the law may change. Some comments in this article may not apply to your circumstances. Please contact a lawyer for advice on your specific legal issues.

[13] Ibid page 3 Footnote 11

[14] Sky Bank v Iwu (2017) 16 NWLR Part 1390 Page 24 (SC); Ochei v Heritage Bank (2022) LPELR – 58913 (CA).

[15] Ibid page 3 Footnote 11