

CONTRACTS OF EMPLOYMENT: SOME LEGAL ISSUES TO CONSIDER

Introduction

The search for talented human capital can be an expensive and harrowing experience, from the employers' perspective. A common experience is prospective employees failing to resume for duty even after collecting letters of employment or spending only a short period in the employment, and leaving with vital and confidential information. Employers sometimes focus more on the prospective employees fitting the job description at the expense of some other equally important needs, which should be considered in the contract of employment entered into with the employees. The essence of this article is to review some vital legal issues that should be considered by parties to a contract of employment.

The Contract of Employment

A contract of employment is usually called a Letter of Employment or a Letter of Engagement. An employment relationship must be construed in accordance with the express terms of the contract - the courts will not imply a term which is not necessary to carry out the main intentions of the parties, as was held in *Ihezukwu v. University of Jos (1990) 4 NWLR (Pt. 146) p.598 at p.608, para F-G*. See also *Ezekiel v. Westminster Dredging Ltd ((2000) 9NWLR (Pt. 672) p. 248 at p. 256 para H*.

The law gives a lot of latitude to both employer and employee in an ordinary master and servant relationship to determine the contract as they deem fit. The position of the courts has been that an employer cannot be compelled to keep an employee that it does not want, and an employee cannot be prevented by his employer from resigning, to seek greener pastures elsewhere (See *Taduggoronno v. Gotom (2002) 4 NWLR (Pt. 757) p. 453 at p.503 para B-F*).

occupies, a job description and other terms and conditions of employment including hours of work, remuneration, holiday and holiday pay, provisions for incapacity due to illness or injury, etc. invariably starve terrorists of funds, hence the need to have stiff penalties aimed at preventing terrorist transactions/offences.

The contract of employment should also contain provisions relating to contributions that are statutorily required to be made by the employee and or the employer such as pensions under the Pension Reform Act Cap P4 LFN 2004, Health Insurance under the National Health Insurance Scheme Act Cap N42 LFN 2004, the Housing Fund under the National Housing Fund Act Cap N45 LFN 2004, etc.

Confidentiality

In today's increasingly competitive world, many businesses have learnt the hard way that their inventions, business know-how and trade secrets must be protected. One sure way of doing this is to ensure that letters of employment to prospective employees contain a clause defining what the employer considers to be confidential information. The clause should state the situations in which such information may be divulged and require the employee to warrant not to divulge such information in any other situations. The confidentiality clause might contain so much information as to be too lengthy for a letter of employment and it is entirely acceptable for the letter to state that the employee will be required to read and execute a Confidentiality Agreement with the employer upon resumption of duty, which must provide maximum protection to the employer and be tailored to suit the employer's business.

... many businesses have learnt the hard way that their inventions, business know-how and trade secrets must be protected. One sure way of doing this is to ensure that letters of employment to prospective employees contain a clause defining what the employer considers confidential information.

Contents of the Contract of Employment

The Labour Act Cap L1, Laws of the Federal Republic of Nigeria (LFN) 2004 remains, in the absence of any other applicable statute, the primary law in Nigeria in relation to employment matters. It serves as a guide in all employment issues, although its provisions are only applicable to unskilled and manual labour. (See *Shena Sec Company Ltd v. Afropak Limited (2008) 4-5 SC (Pt 11) 117*).

Section 7 of the Labour Act provides that every employee must receive a written contract within three months of his/her services being engaged. The Act states that every contract of employment must sufficiently state the particulars of the employer and the employee, the position the employee

The question then remains as to what remedies an employer would have if a prospective employee divulges confidential information prior to the resumption date. Such a situation would be novel, as employers do not usually grant access to work documents or environments until the employee has fully reported for duty. If a contract of employment has not been offered to the prospective employee, the employer can bring an action in tort, as the prospective employee will be guilty of a civil wrong. The success of such an action will depend on whether the prospective employee ought to have reasonably known that such information is confidential and the effect divulging such information can have on the employer.

Where the prospective employee has entered into a contract of employment with the employer and then divulges confidential information prior to resuming for work, then the employer can, in addition to bringing an action in tort, also sue on the basis of the employee/employer relationship. The contents of the employment contract will play a big role in the portion of the action founded on the employee/employer relationship and may even serve to further prove the liability of the employee if for instance the contract clearly contains provisions relating to confidential information.

Failure to Resume Duty and Resigning Prematurely

Failure to appear for work on the agreed resumption date is a common problem faced by employers. Since the fundamental principle in Nigerian Employment Law is that you cannot foist a willing employee on an unwilling employer, and vice versa, it may not be practical to seek to penalise a new employee that failed to take up his appointment. The remedies open to the employer will be dependent on the terms of the contract of employment. It must be stated here that the acknowledgement of the receipt of a contract of employment by a prospective employee does not constitute acceptance of its terms and as such employers must ensure that provision is made for the employee to state that he/she accepts the terms contained in the letter of employment.

The liability of an employee for resigning after less than a month after resuming work, would be to forfeit a month's salary in lieu of a month's notice to resign the appointment. This is in line with the rule that general damages are the only remedy for a breach of a contract of employment where the breached term is expressly stated in the contract. The quantum of damages recoverable by a party for breach of a contract of employment will largely depend on whether the breach was the failure to give notice or an alleged malpractice.

It should also be noted that most contracts of employment contain provisions to the effect that an employee may be summarily dismissed prior to being confirmed and that confirmation of appointment will only take place after a certain number of months. Should such an employee fail to resume for duty after entering into such a contract of employment or should he resign after less than a month of employment, there can be no penalty against him for failure to give notice of his intention to resign as per **Ihezukwu V University of Jos** (Supra).

When an employer informs an employee prior to the agreed date of resumption that his position is no longer available, the employee is not only entitled to claim general damages, he will also be entitled to special damages if he can prove to have suffered such. As was stated in **Ihezukwu's case**

... Since the fundamental principle in Nigerian Employment Law is that you cannot foist a willing employee on an unwilling employer, and vice versa, it may not be practical to seek to penalise a new employee that failed to take up his appointment.

Most contracts of employment stipulate the terms of employment in such a manner that the contract takes effect from the date of resumption of the employee, while the remainder takes effect upon confirmation of the employee. In such a situation, the employer/employee relationship commences on the proposed resumption date. If the employee fails to resume on the proposed resumption date, the contract becomes frustrated, oftentimes at great cost in terms of time and opportunities lost by the employer.

A more practical solution to such a situation would be for the contract of employment to stipulate that the employee must resume for duty as soon as reasonably possible (usually one month). Putting the resumption date far into the future might lead to some undesirable situations for both the employee and the employer.

above, where the breach relates to the failure to give notice, the courts have held that the employee is entitled to the amount which would have been earned by him over the period of notice, or for general damages only, except where special damages can be proved.

Conclusion

The Letter of Employment is the cornerstone of the employee/employer relationship, which should be drafted with great care to prevent employers from incurring unintended liabilities. Parties in an employment relationship have a duty to mitigate loss by being careful in their selection of partners. It is hoped that there will be changes in the law to bring more certainty into employment contracts.

Editor's Note

The recent discovery of scams in the Police Pension Fund and the fiasco of the House of Representatives probe of the Security and Exchange Commission on the Nigerian capital market seems to have put probity back into the business lexicon, and a question mark of the integrity of funds custody in Nigeria. The proposed amendment of the Railway Act by the National Assembly may excite prospective investors in the transportation sector. However, it is yet to be seen if the Senate, can for once, slay the dragon of gas flaring through the resuscitation of the Gas Flaring (Prohibition) Bill 2011?

W: <http://www.austen-peters.com/>

Lagos: Penthouse Floor, Foreshore Towers, 2a Osborne Road, Ikoyi, Lagos, Nigeria. T:+23418990901, F: +23412713240
Abuja: Suite 06, 3rd Floor, Obum Plaza, Plot 1140, Adetokunbo Ademola Crescent, Wuse 2, Abuja. T: 234 (9) 870 2139

DISCLAIMER NOTICE. Business Law Digest (BLD) is a free educational material, for general information and enlightenment purposes ONLY. BLD does not create a Client/Attorney relationship between the reader and Austen-Peters & Co. Readers are advised to seek our professional legal counselling to their specific circumstances. Questions, comments, criticisms, suggestions, new ideas, contributions, etc are always warmly welcomed. However, BLD is protected by Intellectual Property Laws, but It may however be used provided that our Authorship is always specifically acknowledged.