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EMPLOYER'S DUTIES AT COMMON LAW AND UNDER STATUTES: SOME REFLECTIONS*

A. INTRODUCTION

The government recognizes the need to secure the livelihood of Nigerians in paid employment and provides the legal framework for this protection by making provisions for employment and fair treatment of the employed. The constitution¹ provides that 'the State shall direct its policy towards ensuring that –

- (b) “Conditions of work are just and humane; and that there are adequate facilities for leisure and for social, religious and cultural life.
- (c) the health, safety and welfare of all persons in employment are safeguarded and not endangered or abused;
- (d) there are adequate medical and health facilities for all persons;
- (e) there is equal pay for equal work without discrimination on account of sex, or on any other ground whatsoever;²

These provisions are found in chapter II of the Constitution which contains rights generally categorized as 'non-justiciable.' However, if the provisions are considered along side with other statutes like the Labour Act, the rights will find enforceability in our courts.

Characteristically, an employment contract has all the basic legal features of a contract.³ Basically these essential and imperative

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1. The Federal Republic of Nigeria (CFRN), 1999.

2. Section 17(3)(b) CFRN 1999.

3. Oladosu Ogunniyi, *Nigerian Labour and Employment Law in Perspective*, 2nd ed., Folio Publishers Limited, Lagos, 2004.

attributes of a contract which must be present in a contract of employment are:

- (i) Offer (an expression of willingness to contract with the intention to make the contract binding once it is accepted),
- (ii) Acceptance (an expression of a final and unqualified assent to the terms of an offer);
- (iii) Consideration (the price for which the promise is bought);⁴
- (iv) Capacity to contract (which requires that both parties must possess the capacity to contract under the law). In contract of employment, the law puts a restriction on the employment of a person under 16 years of age.⁵
Even where there is a contract of apprenticeship with a young person who is up to 16 years, such a contract must be duly attested to by a Labour Officer and the term of apprenticeship cannot exceed five years, otherwise it is void.⁶
- (v) Legality (which means that the contract must not be for an illegal purpose such as the commission of a crime, like smuggling or employment for sexual activities like prostitution, etc.

In **Chivers v. Davies of America**⁷ for instance, a contract of employment entered into in breach of section 9 of Nigeria's Immigration Act was held unenforceable. The Immigration Act prohibits the employment of a person on a visitor's visa and the plaintiff in contravention of that law took up an employment as a General Manager of the Defendant's Company while on a visitor's visa. The court held that "*The contract was unenforceable for illegality because it was entered into in breach of the law.*"⁸

- (vi) Certainty (the terms of a contract of employment must be certain, the parties must be certain or must be reasonably

4. Sir Fredrick Pollock, Principles of Contract, 13th ed. P. 133.

5. Any contract entered into by an infant which is not for necessities can be avoided under common law. Section 9(3) of the Labour Act 1974 also provides that "except in the case of a contract of apprenticeship, no person under the age of sixteen years shall be capable of entering into a contract of employment under this Act. Also, section 58 of the Act places restriction on the employment of children under the age of sixteen while section 54 prohibits the employment of women except for nurses and such other exceptions.

6. Sections 50 and 53(2), Labour Act.

7. Suit No. 1972/CCC HJ 121.

8. Also see Pan Bisbilder Ltd v. First Bank Plc (2000) FwLR Part 2, page 177, SC; (1998) NWLR part 542, 339 at 343.

identifiable, the subject matter of the contract must be certain as well as all essential terms)⁹. The terms of a contract may be express or implied.¹⁰

(vii) Intention to enter into legal relations (the parties' intention to be bound by the contract is usually inferred from the consideration.¹¹

Consequently, both at common law and under statutes, employers and employees have certain reciprocal duties in their contractual relationship in an employment. The basis for their obligations or duties is their employment 'contract'. It is necessary to clarify the terms 'employment', employee and employer. The paper starts with this introduction, followed by a conceptual clarification of the terms employment, employee and employer. The third part of the paper discusses the employer's duties in an employment contract in details and lastly the conclusion.

B. CONCEPTUAL CLARIFICATIONS

Employment – The word employment has no universally accepted definition like many other concepts in law. An author has argued that the word has no definition while another source has stated that whether or not there is an employment relationship between two parties in most instances, is both a question of law and of fact.¹² Employment has been defined as “work especially when it is done to earn money and as the state of being employed.¹³ It is however important to differentiate an employment contract from a contract for service. In the latter, an independent contractor is not in law, an employee of the person that contracted him or her. In the former, the employee is engaged in a contract of employment. The legal implications and consequences of both types of contracts are different.¹⁴ This leads to the question, who is an employee?

9. Oladosu Ogunniyi, (op. cit, note 1) p. 14.

10. *Ebun Omoregie v Brettenburger Portland Cement Fabrik* (1962) 1 ANLR 156.

11. Bamidele Aturu, *Nigerian Labour Laws: Principles, Cases, Commentaries and Materials*, Friedrich Ebert Stiftung (FES), Frankad Publishers, Lagos, Nigeria, 2005, pp 9-11.

12. Bamidele Aturu, *Ibid*, p. 15.

13. *Oxford Advanced Learner's Dictionary*.

14. Bamidele Aturu, op. cit. p. 15.

Employee: The employee is also often referred to as a 'worker' and sometimes even a 'servant' under Nigerian laws and these terms are often interchangeably used. For instance, in the Trade Disputes Act CAP T8 LFN 2004, a worker has been defined

*"as any employee, that is to say any public officer or any individual (other than a public officer) who has entered into or works under a contract with an employer; whether the contract is for manual labour, clerical work or otherwise, express or implied, oral or in writing, and whether it is a contract of service or of apprenticeship."*¹⁵

This same definition is repeated in the Trade Unions Act¹⁶ in exactly the same words.

The Labour Act however, defines a worker differently.¹⁷ It provides that a *worker means any person who has entered into or works under a contract with an employer, whether the contract is for manual labour or clerical work or is expressed or implied or oral or written, and whether it is a contract of service or a contract personally' to execute any work or labour.*

The act lists exceptions by spelling out persons who are not covered by the term worker and specifies that 'worker' does not include:

- (a) any person employed otherwise than for the purposes of the employers' business, or
- (b) persons exercising administrative, executive, technical or professional functions as public officers or otherwise, or
- (c) members of the employer's family, or
- (d) representatives, agents and commercial travelers in so far as their work is carried on outside the permanent work place of the employer's establishment, or
- (e) any person to whom articles or materials are given out to be made up, cleaned, washed, altered, ornamented, finished, repaired or adapted for sale in control or management of the person who gave out the articles or the materials or
- (f) any person employed in a vessel or aircraft to which the laws

15. Section 48(1)(b) of the Trade Disputes Act Cap T8 LFN 2004.

16. Section 54 Trade Unions Act CAP T14 LFN 2004.

17. Section 91(1) CAP L1 LFN 2004.

regulating merchant shipping or civil aviation apply;¹⁸

The Act is more comprehensive in streamlining who an employee is and who is not a worker for the purposes of an employment contract. One of the values of these details in the definition by the Labour Act is that it will help both the employee and the employer to appreciate the legal status of a given contract for the performance of a task between them. It will also assist the courts and limit its discretion over the specified issues. In this paper, employee and worker will be used interchangeably. It is notable that there are two broad categories of workers¹⁹ and the classification of workers is very important, particularly for the purpose of termination of the contract.

Employer: Employer means any person who has entered into a contract of employment to employ any other person as a worker either for himself or for the service of any other person, and includes the agent, manager or factor of that first-mentioned person and the personal representatives of a deceased employer.²⁰

While the Trade Unions Act does not define an employer, the scope of the definition of an employer under section 91 of the Labour Act only applies to 'workers' so strictly defined and does not, for example, apply to a manager or to categories of staff regarded as a projection of management, whose employment conditions are taken to be regulated by the common law.

The Workmen's Compensation Act lists person who are employers and states that the term "employer" includes—²¹

- (a) the Government of the Federation of Nigeria and of any state;
- (b) anybody of persons corporate or unincorporated and the legal personal representative of a deceased employer;
- © where the services of a workman are temporarily lent or let on

18. Ibid.

19. Workers may be categorized as workers who are employed under common law and workers whose employment have statutory flavour. The classification has also been done according to Public Officers (who are also called public servants) on the one hand, and individuals who work under a contract with employers which are also called common law employees on the other.

20. Section 91(1) Labour Act.

21. Section 41(1)(b) of the Workmen's Compensation Act (Cap 470) 12th June 1987.

hire to another person with whom the workman has entered into a contract of service or apprenticeship, the latter shall, for the purposes of this Act, be deemed to continue to be the employer of the workman whilst he is working for that other person; and

(d) in relation to a person employed for the purposes of any game or recreation and engaged or paid through a club, the manager or members of the managing committee of the club shall, for the purposes of this Act, be deemed to be the employer.”

C. EMPLOYER'S DUTIES

The employer's duties are of focal importance, being the core subject matter in this paper. These duties will be considered both at common law and under the various statutes that regulate labour relations in Nigeria. Under the common law, it is assumed that employers and employees have certain fundamental reciprocal duties in their contractual relationship.²² The employee on his part owes the employer the duty to work in accordance with their lawful orders, to co-operate with their employer, to serve the employer faithfully and honestly and exercise skill and care in the performance of work.²³ The worker's duties are the duty of fidelity,²⁴ obedience to orders²⁵ (which of course must be lawful orders too) and duty of care and skill. These are also implied obligations on the employee in a contract of employment.²⁶

Conversely, the employer has his reciprocal implied duties to the employee at common law apart from the duties specified by statutes.²⁷ These duties will first be highlighted and then discussed seriatim. According to Nwazuo, the duties of the employer are: to pay wages or salary,²⁸ to provide work,²⁹ to treat with respect and to take reasonable care.³⁰ Also highlighting the duties of the employer,

22. Steven D. Anderman, *Anderman: Labour Law – Management Decisions and Workers' Rights*, Butterworths London, Dublin, Edinburg 1992, p. 32.

23. *Ibid.*

24. *Maja v Stocco* (1965) 1 All NLR 141; (1968) NMLR 372 where the Supreme Court stated categorically that “a servant .. may be dismissed.. if, unknown to his employer, he enters into transaction whereby his personal interests, conflict with his duty as a servant.”

25. *Teliat Sule v. Nigerian Cotton Board* (1985) 2 NWLR (pt 5) 17; (1985) ANLR 291; (1985) 6 SC. 62.

26. Implied duties of the employee include: The duty of obedience, The duty of adaptability, Implied terms in fact and flexibility, The duty of fidelity, The duty of skill and care.

27. *Op. cit* (note 20) p. 40.

28. Sections 1 – 4 of the Labour Act on the duty of an employer to pay wages, and the ways and means of payment.

29. Section 17 of the Labour Act provides for the duty of the employer to provide work.

30. Tony Nwazuo, *Introduction to Nigerian Labour Law*, the Department of Public Law and Jurisprudence, Faculty of Law, Olabisi Onabanjo University, (2001) p. 31-47.

Akintunde calls them the master's responsibilities³¹ and states that they arise from a master and servant relationship and take two forms which are:

- (I) the duties owed to the servant, and
- (ii) his liability both to the servant and to a third party.³²

The master's duties to his servant are fixed partly by the express terms of the contract and partly by the terms which the courts will hold to be implicit in the nature of the contract³³ It is generally agreed that the duty to take reasonable care for the safety of the servant is a paramount implied duty of the employer. The various duties of the employer will now be discussed under common law and statutes simultaneously in more details under at least nine sub heads, including the duty to pay wages, duty to provide work, duty to provide a safe plant and duty to provide a safe system of work.

1. Duty to Pay Wages

The employer's duty to pay contractually agreed remuneration has generally been rated as 'the most significant consideration which an employer may give in return for the work performed or the services rendered to the employer'.³⁴ The payment of wages may take the form of legal tender such as cheque, cash, or postal orders.³⁵

A failure to pay agreed remuneration is so fundamental that it gives rise to action for damages or debt and can amount to repudiation, justifying constructive dismissal.³⁶ In **Miller v. Hamworthy Engineering Ltd**,³⁷ a foreman put on short time work for a period of time was able to claim for the net loss of earnings suffered during the short time working period. Also, in **Rigby v. Ferodo Ltd**,³⁸ an employee who was subjected to a unilateral wage cut was able to sue the employer for the difference between the amount paid to him and contractual earnings owed to him. These are cases where there was specifically agreed

31. Akintunde Emiola, Nigerian Labour Law, pp 58-68.

32. Akintunde Emiola op. cit. (note 29) p. 68.

33. Ibid.

34. Oladosu Ogunniyi, op. cit (note 1), p. 67 Also see Anderman, op. cit. (note 20) p. 40.

35. Ogunniyi Oladosu, Ibid p. 67.

36. Andersman op. cit (note 20) p. 40.

37. (1986) 1 RLR 461, CA.

38. (1988) ICR 29 91987) 1RLR 516, HL.

remuneration. What about instances where no precise amount is agreed upon between the employer and the employee? What is to be paid in such instances? It is submitted that in such cases, a reasonable amount (in relation to the task and agreement of parties generally), may be implied. The court will imply the term of payment, basing its decision on what it considers to be a reasonable sum having regard to the circumstances of the case as was done in **Peters of Oron v Symmons**.³⁹

In that case, it was held that where no rate of remuneration is fixed or agreed, the rate shall be that which is current in similar trades in the area or what the custom or trade dictates. What exactly is then is a wage and what form does the law prescribe for it? The Labour Act spells out the protection of wages and provides that: (1) (i) Subject to this section –

- (a) the wages of a worker shall in all contracts be made payable in legal tender and not otherwise; and
- (b) if in any contract the whole or any part of the wages of a worker is made payable in any other manner the contract shall be illegal, null and void.⁴⁰

The Act however, recognizes the difficulties that may result in cases where it is not possible to pay as prescribed in its section 1(i) and goes further to provide for additional means and modes of payment of wages in section 1(2). It provides that an employer may provide food, a dwelling place or any other allowance or privilege as a part of a worker's remuneration if the food, dwelling place, allowance or privilege is prescribed by law, by a collective agreement or by an arbitration award because it is customary or desirable in view of the nature of the industry or occupation in which the worker is engaged; but in no case shall an employer give to any worker any intoxicating liquor or noxious drug by way of remuneration.

By this provision, it is clear that the Act seeks to protect the worker against possible abuses by the employer using other tender to pay wages, or paying with substances which may harm the worker out rightly, or predispose him to destructive habits like drunkenness. In further addressing additional modes of paying wages, the Act requires that except where it is expressly permitted by the Labour Act itself,

39. (1924) 5NLR 79.

40. Section 1(1)(a) and (b) of the Labour Act.

wages payable in money are to be paid only in legal tender. Also, with prior consent of the worker, (which must be in writing of the worker concerned), cheque or postal order maybe used. Any other forms of payment or purported payment in any other form shall be illegal, null and void.⁴¹

Payment of wages and industrial action: Conflict is a natural part of human relations and labour relations also bring along disputes between the employer and the employee. Where due to disputes between the parties and consequently a strike action is embarked upon by the employee, what is the position of the law on wages? If the employer decides to withhold pay in response to various forms of industrial action, the common law rules apply with equal force whether to salaried or manual workers⁴² If the employee stops work completely or refuses to work in accordance with instructions issued within the employer's contractual authority, the employer can dismiss summarily or withhold payment.⁴³ This is in accordance with the principle of 'No work – no pay'. For instance, in **Creswell v Board of Inland Revenue**,⁴⁴ the court stated that:

*This is such an obvious principle, founded on the simplest consideration of what the plaintiff would have to prove in any action for recovery of pay in respect of any period where he was deliberately absent from work of his own accord.*⁴⁵

Other pecuniary benefits which mark the relationship of the employer and employee and import duties on the employer will now be highlighted.

Land allowance – (normally expressed as a percentage of the annual basic salary) as a matter of common practice.

End of year bonus – This benefit should normally be tied to

41. Ibid sub section 3.

42. Anderman op.cit p. 43.

43. Ibid.

44. (1984) ICR 508, (1984) IRIL 190.

45. The employee's action for payment was rejected by the court because they were not working the new computerized equipment in accordance with the employer's contractual agreement and instruction and therefore the employer was entitled to withhold pay according to the "No work, no pay" principle.

individual performance in terms of productivity. This is especially necessary in a developing country but the general practice at present, (except in a few companies) is for employers to give and for employees to expect every year, a bonus, sometimes designed as the "13th month pay".

Overtime – by section 13(2) of the Labour Act, overtime is defined as the hours which a worker is required to work in excess of the normal hours fixed under subsection (1) and for this excess payment is normally made to the categories of workers eligible.

Sick pay – section 16 of the Labour Act provides:

Subject to the Workmen's Compensation Act, a worker shall be entitled to be paid wages up to twelve working days in any one calendar year during absence from work caused by temporary illness certified by a registered medical practitioner: Provided that this section shall not apply unless:

- (a) the contract remains in existence during the period of absence and the worker is ready and willing to perform his part of the contract save for the incapacity produced by the illness, and
- (b) the worker, if so requested by the employer, consents to be examined by a qualified medical practitioner nominated by the employer.

Thus, the entitlement to sick pay is made statutory. Although the Labour Act provides for a minimum of twelve working days in any one calendar year, in practice, sick pay provision is normally graduated according to seniority or length of service and in some cases, particularly in the case of very senior employees, sick pay provision in any one calendar year could run for six months or more. After the expiration of six months of absence on grounds of sickness, it is the normal practice for higher management to decide what further action to take, taking into account many factors, including length of service of the individual concerned, record of service, nature of illness and prospect of recovery. It is common for the employer to demand and

receive regular medical reports from the medical practitioner taking care of the sick employee.

2. Duty to provide work

The common law position on the duty to provide work will first be examined, and then the position under statutes.⁴⁶ In the past, the position was generally that an employer was not bound to provide work in so far as wages were paid.⁴⁷ However, even when this view was widely held, some exceptions were recognized. In contracts with actors and others, contracts with skilled employees where they need to regularly work so as to maintain, improve or sharpen their skills, a duty on the employers to provide work has been long recognized in countries with advanced standard of industrial relations practice.⁴⁸ Another instance where a duty exists to provide work, is where remuneration depends (wholly or partially) on commission payments.⁴⁹ Also, where it may be considered that part of the consideration for the work is the opportunity to gain publicity or experience, work must be provided.⁵⁰ Lord Denning MR in **Langsten v. Allen** put the matter in perspective when he said:

"We have repeatedly said in this court that a man has a right to work which the courts will protect; see Nagle v Feilden and Hill v C.A. Pearson and Co. Ltd. I would not wish to express any decided view, but simply to state the argument which could be put forward for Mr. Langston. In these days an employer, when employing a skilled man, is bound to provide him with work. By which I mean that a man should be given the opportunity of doing his work when it is available and he is ready and willing to do it. A skilled man takes pride in his

46. Labour Act Cap in particular will be in focus.

47. *Turner v. Sawdon and Collier v Sunday Referee Publishing Co. Ltd.* (1901) 2 KB 653, (1940) KB 647; (1940) All ER 234.

48. *Ogunniyi Oladosu op.cit.* (note 1).

49. *R v Welch* (1853) 2 E & c 357, also see *Turner v. Goldsmith* (1891) 1 QB 544.

50. *Langsten v Allen* (1974) 1 All ER 980.

work. He does not do it merely to earn money. He does it so as to keep himself busy, and not idle, tax his skill, and to prove it. To have the satisfaction which comes of a task well done. To my mind, therefore, it is arguable that in these days a man has by reason of an implication in the contract, a right to work."

The common law position over the obligation of an employer to provide work has evolved greatly over the years. Initially, the popular position was as stated by Asquith J. who expressed the common law position in **Collier v Sunday Referee** when he said:

*"It is true that a contract of employment does not necessarily or perhaps normally oblige the master to provide the servant with work. Provided I pay my cook her wages regularly she cannot complain if I choose to take all my meals out."*⁵¹

More recent cases have shown clearly that the position above is no longer sustainable. In **Clayton (Herbert) & Jack Waller Ltd v. Oliver**⁵² for instance, an American actor was held entitled not only to the amount of remuneration due on the contract but also to damages for loss of the publicity that normally went with the leading part she would have normally played. Also in **Breach v. Epsilon Industries**⁵³ the duty of the employer to provide work for an Engineer (as a skilled workman) was upheld by the court. These cases generally point to the fact that a worker looks for more than just his wages in a job. Other benefits that an employer expects from a job include "satisfaction from a particular job."⁵⁴ In the words of Lord Denning, an employee also as a skilled man, 'takes pride in his work.'⁵⁵

51. *Collier v Sunday Referee* op. cit. (note 45).

52. (1930) A.C. 209; (1930) All ER Rep. 414.

53. (1976) KR 316.

54. *Ogunniyi Oladosu* op. cit. (note 1).

55. *Langsten v Allen* (1974) 1 All ER 980.

Statutory provisions have established the duty of the employer to provide work. Section 17 of the Labour Act spells out the duty of the employer to provide work in the following terms:

“Except where a collective agreement provides otherwise, every employer shall, unless a worker has broken his contract, provide work suitable to the worker's capacity on every day (except rest days and public holidays) on which the worker presents himself and is fit for work; and if the employer fails to provide work as aforesaid, he shall pay the worker in respect of each day on which he has so failed wages at the same rate as would be payable if the worker had performed a day's work:”

The Act provides some exceptions to this rule in cases of temporary emergency and where the worker is suspended or under other forms of punishments. It will be worthwhile to ask how the employer determines “the employee's fitness for work”. Is it on a daily basis? Is the employee to be subject to daily medical testing? Constraint of space will not permit detail enquiries in this paper however. Laudable as this statutory provisions are, Ogunniyi has noted rightly, that the level of enforcement still leaves much to be desired. He also rightly notes that an action for “unfair” dismissal would be more appropriate than action for “wrongful” dismissal where there has been failure to provide work by the employer, but unfortunately, there is no remedy for unfair dismissal yet under Nigerian law. Section 17(1) of the Labour Act nonetheless, provides hope for fairness to employees in Nigeria in respect of the employer's duty to provide work.

3. Duty to provide safe plant

The term “plant” has been defined as denoting all manner of things employed in the course of the work.⁵⁶ It has been said to include various things like hammer, goggles, protective cream, scaffold and motor vehicles.⁵⁷ More recently the list may include personal computers, MP3s, Generators and Printers. The list is open ended and provided the item is employed in the course of work, it will fit into the term ‘plant’ in

56. Munkanan, *Employer's Liability* (9th edn) p. 99.

57. Nwazuoke Tony, *Introduction to Nigerian Labour Law*, op. cit. (note 29) p. 50.

my view. Both the provision and maintenance of safe plant are covered by this duty and may be breached in several ways which will be highlighted here. Breach may occur by:

(a) Non provision of necessary appliance – In **Paris v. Stepney Borough Council**,⁵⁸ failure to provide an employee's official car with heater resulted in frostbite and damages was awarded. In **Western Nigeria Trading Co. Ltd v. Busari Ajao**,⁵⁹ the plaintiff/respondent was blinded by a splinter of steel which flew into his eye while working in defendant/appellant's workshop. Damages was awarded against the defendant for failing to provide goggles to the plaintiff to protect him. The court went further, to state that not only was the defendant under a duty to provide goggles (protective appliances) but also had a duty to “ensure by strict orders”, followed by reasonable supervision, that they were used.⁶⁰ This position of the court is commended. In **Obakoro v. Forex Co. Inc.**,⁶¹ Atake J, held the employers liable in negligence for failing to provide the plaintiff/employee with protective gloves.

(b) Failure to provide enough plant⁶²

© Provision of defective and dangerous plant

(d) Where a tool provided by an employer is defective, the employer cannot escape liability by asserting that he delegated the selection of the tool to a third party.⁶³

The duty to provide safe plant obliges the employer to also adequately provide and make sure appliances provided are in good state to ensure safety of the employees. Where the employer provides a vehicle or vessel for the purposes of subsection (1) above, he shall ensure that the vehicle or vessel is suitable, is in good sanitary condition and is not over crowded.

4. Duty to provide a safe system of work

This duty deals with the supervision and safety precautions which the employer uses in the operation. The law binds the employer to provide and maintain safe sanitary system for the employee, facilities and

58. (1951)AC 367.

59. (1965)NMLR 178.

60. Per Fatayi Williams, J., while affirming the decision of the Learned Magistrate.

61. (1973)3 U.I.L.R. 91.

62. See *Machray v Stewart and Lloyd's Ltd* (1964) 3 All ER 716.

63. *Smith v Baveystock* (1945)All ER 531, per Lord Goddard.

arrangements which comply with such regulations specified by appropriate government authorities.⁶⁴ An employer must give proper instructions and reasonable supervisions where appropriate. In **Busari Ajao v Western Nigerian Trading Co. Ltd.**,⁶⁵ the court held an employer liable to provide not only safe devices but also to give strict instructions followed by reasonable supervision. It is a question of fact whether a particular operation requires a system of work in the interests of safety, or whether it can reasonably be left to the employee charged with the task. It is usually applied to work of a regular type where the proper exercise of managerial control would specify the method of working, give instruction on safety and encourage the use of safety devices. Although normally thought of in terms of physical safety, it is clear that the obligation to provide a safe system of work also extends to an employee's mental health.⁶⁶

There are two aspects to the provision of a safe, system of work: (a) the devising of a system; and (b) its operation. Even if the system itself is safe a negligent failure to operate the system, whether by another employee or an independent contractor, will render the employer liable.⁶⁷

5. Duty to provide a safe place of work

Under this duty, the employer is under an obligation to provide a safe place where the employee is to perform his work wherever the employee is working within the scope of his employment. The phrase "within the scope of his employment" is a technical term often used in issues that concern the vicarious liability of the employer.⁶⁸ In **Bryce v. Swan Hunter Group Plc and others**⁶⁹ employers were held liable for the death of an employee when through their negligence and breach of statutory duty, they failed to take precaution against exposure to asbestos dust. The precautions which ought to have been taken were

64. Sections 63 and 66 of the Labour Act.

65. (1965)NMLR 178.

66. Employer's Liability Lecture: Common Law Duties, Retrieved on 7 March 2010 at: <http://www.lawteacher.net/employment-law/Employers-Liability-Lecture.php>.

67. Michael Pickering, Publish Date: August 14, 2009, retrieved on 20/2/2010.

http://www.laqlawyers.com.au/document/Employment-Law-_-Employee-and-Employer-Duties-in-Common-Law-Employment-Contracts.aspx.

68. Ogunniyi Oladosu. Op.cit., (note 1), p.76.

69. London Times Law Report, February 19, 1987, a case decided before Mr. Justice Phillips as cited by Ogunniyi O., *Ibid.*, p.76.

decided according to the state of knowledge at the time. An employer must take such steps as are reasonable to see that the premises are safe. This rule has been accepted by the courts. The employer is also under a duty with respect to the premises of a third party even though he has no control over the premises, but the steps required to discharge this duty will vary with the circumstances.⁷⁰ In **Cook v Square D Ltd.**⁷¹ The court held that a duty may also be owed under regulation 5 of the Workplace (Health, Safety and Welfare) Regulations.⁷²

6. Duty of confidentiality

The employer has a duty not to disclose confidential information about the employee while the employee has a reciprocal duty not to disclose confidential information about his employer's business. This duty does not depend on any express or implied term of the contract.⁷³ This duty also continues even upon cessation of employer-employee relationship

7. Duty to have safe and competent employees

In the selection of employees, the employer has a duty to use reasonable care as failure to do so will make him liable if the negligence of the incompetent fellow servant causes damage to a fellow employee.⁷⁴ In **Hudson v. Ridge Manufacturing Co. Ltd.**, an employee of the defendant for nearly four years and to the knowledge of the defendants, played practical jokes on his fellow employees, such as tripping them. The foreman on many occasions reprimanded him to no avail. One day, he tripped the plaintiff who was a fellow employee and a cripple, and injured him. The plaintiff brought a claim for damages against the employers on the ground that they had failed in their duty to maintain such discipline among their employees as would protect him from dangerous horse play. The defendants were found liable. Stretfield J. held that it was the duty of the employers who knew the potentially dangerous misbehaviour of the employee to have prevented the occurrence by removing the source of the danger by, for example, dismissal. They were found liable to the plaintiff for failing to

70. <<http://www.lawteacher.net/employment-law/Employers-Liability-Lecture.php>>, retrieved on 7/2/2010.

71. [1992] ICR 262, 268 and 271.

72. 1992 (SI 3004).

73. *Dalgleish v. Lothian and Border Police Board* (1991) 11 RLR 422 SLT 721, CT of Session.

74. *Cole v. De Trafford* (1953) 1 QB 617 at 626 per Scrutton LJ.

take reasonable care of his safety. In some cases a warning of the danger to a skilled employee will be sufficient to discharge the employer's duty, and in others it may be reasonable to expect experienced workers to guard against obvious dangers.⁷⁵

8. Duty to pay redundancy benefits in accordance with agreed procedure⁷⁶

The Labour Act defines redundancy as "an involuntary and permanent loss of employment caused by an excess of manpower"⁷⁷ The Act which provides that:

(1) In the event of redundancy –

(a) the employer shall inform the trade Union or worker's representatives concerned of the reasons for and the extent of the anticipated redundancy;

(b) the principle of "last in, first out" shall be adopted in the discharge of the particular category of workers affected, subject to all factors of relative merit, including skill, ability, and reliability; and

© the employer shall use his best endeavours to negotiate redundancy payments to any discharged workers who are not protected by regulations made under subsection (2) of this section.

The Act also empowers the Minister to make regulations providing generally or in particular cases for the compulsory payment of redundancy allowances on the termination of a worker's employment due to his redundancy.⁷⁸

9. Duty to meet vicarious liability to third parties

Where a worker enters a contract on the express or implied authority or subsequently ratified by the employer, the employer is liable under such a contract. Where a worker is liable tortuously to third parties in the course of employment (notwithstanding a master's general

75. *Baker v. T. Clarke Ltd.* (1992)PIQR 262, 267. See also *Rozario v. The Post Office* (1997) PIQR P15.

76. Section 20 of the Labour Act.

77. Section 20(3) of the Labour Act.

78. Section 20(2) of the Labour Act.

warning), the employer is also made liable, as was the case in **Ayodele James v. Mid Motors (Nigeria) Ltd.**⁷⁹

10. Duty to act in good faith

Australian employers are increasingly under an implied duty to act fairly and in good faith. This is an emerging doctrine in the courts. The doctrine has been accepted in the United Kingdom. However, no senior appeal court in Australia has yet declared that the doctrine of trust and confidence is part of employment law. It is likely, however, that such a doctrine will be allowed in some form. For instance, there is existing authority in Australia for similar duties where, for instance, an employer breaches the employment contract to act in good conscience and in good faith to employees where the employer has arbitrarily refused to offer an employee certain benefits made available to other workers and where employees are demoted without good reason upon their return from maternity leave.⁸⁰

11. Duty to provide written statement of terms of employment within three months of the servant's assumption of duty⁸¹

Such written letter shall specify details of the contract including the employer's name; name and address of worker; nature of employment; date of expiration if contract is for a fixed time; period of notice required to terminate the contract; etc.

12. Duty to grant periodical leave with pay to an employee⁸²

13. There is also a duty on the employer to give at least one work-free day per week to an employee.⁸³

14. Duty to indemnify servants for expenses and losses which are lawfully and reasonably incurred in the course of performance of their duties

An employee has a right to be indemnified for all liabilities and losses properly incurred in the course of his duty and therefore there exist a

79. (1978) 11 & 12 SC 31.

80. Op.Cit. (note 66 above).

81. Section 7 of the Labour Act.

82. Section 18 (1). Labour Act.

83. Section 13 (7) of the Labour Act.

corresponding duty on the employer to pay indemnity for all losses and liabilities that properly arise in the course of performing lawful duty by his employee.

15. Duty to provide references

An employer is not under a duty to provide a reference or testimonial on behalf of his former employee. However, where a reference is given, the content must be true. If such content is not true, the employee has a right to sue such an employer for defamation.⁸⁴ Furthermore, the new employer can also bring an action (against the former employer who issued a misleading reference) for deceit if it was done deliberately or for negligent misrepresentation if carelessly made.⁸⁵ In **Imarsel Chemical Co. v. National Bank of Nigeria Ltd.**,⁸⁶ a bank was requested to furnish reference on one of its customers. A bank Manager then issued a reference to a pharmaceutical Company requiring it. The statement was untrue and the company upon reliance on the bank manager's statement, suffered loss. The bank was held liable for its manager's statement. This same principle of duty of persons exercising special skills to take due care in using such skills to assist another person if he knows or ought to reasonably believe that the other person would rely on it, was stressed in **Banmeke v. Union Bank Nigeria Ltd.**⁸⁷

D. Conclusion

The employer and the employee have been assigned duties and rights both under common law and statutes. The law fails to protect the employee adequately if the duties of the employer are not adequately enforced, since the rights of an employee are directly predicated upon the performance of the employer's duties. The rights of an employee necessitates a corresponding duty on the employer and the removal of duties of an employer mean the negation of the rights of an employee, thus making the duties of the employer of uttermost importance. In Nigeria, the legal protection of the employee's rights through adequate enforcement of the employers' duties is of uttermost importance in

84. Akintunde Emiola, *Nigerian Labour Law*, Emiola (Publishers) Ltd., Ogbomoso, Nigeria 2000, p.70.

85. See the cases of *Hedley Byrne & co. Ltd. V. Heller & Partners Ltd.* (1964) A.C. 465, (1963) 2AER 575. Also the case of *Agbonmagbe Bank Ltd. V. CFAO Ltd.* (1966) 1 ANLR 140,145, or (1976) NMLR 173, 177.

86. (1974) 4 EC SLR 355.

87. (1982) 3 F.N.R. 151.

view of the scarcity of employment opportunities, which predisposes the employed to unfair terms of employment, especially in the private sector. Stiff and stringent penalties need to be applied against employers who fail to discharge their duties to their employees, as deterrence to others. The level of competitiveness in the labour market in Nigeria today, justifies every effort to clearly stipulate the employer's duties under Nigerian law, which is the primary aim of this paper.

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