

LEGAL ISSUES ARISING FROM THE REQUIREMENT FOR CENTRAL BANK OF NIGERIA'S APPROVAL OF TERMINATION OF EMPLOYMENT CONTRACTS BY BANKS

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1. Introduction

In the wake of the dreaded COVID-19 pandemic, several major regulatory decisions have been made across the world to manage the spread of the virus and curb its effect on global economies. Governments have instituted the shutdown of many businesses and enforced remote working policies as well as provided palliative measures to manage the economic effect of rising unemployment and bankrupt businesses. Nigerian regulators have not been left out of making these unprecedented decisions. One such notable decision is the recently issued press release by the Central Bank of Nigeria (CBN) (Press Release)² on behalf of itself and the Bankers' Committee, which noted the decision of the Bankers' Committee from its meeting held on May 2, 2020, to restrain banks in Nigeria from retrenching or laying off any staff member (whether full-time or part-time) without the express approval of the CBN. The decision was reached upon deliberation by the Bankers' Committee on the issues of the operating costs of banks in view of the disruptions resulting from COVID-19. The Bankers' Committee is made up of CBN officials and managing directors (MDs) of Nigerian deposit money banks which implies that the decision was jointly taken by the Bank MDs and the CBN.

While the intention of the CBN and the Bankers' Committee to "help minimize and mitigate the negative impact of the COVID-19 pandemic on families and livelihoods" is commendable and has been applauded in many circles, the weighty implication of the decision on employment contracts between the banks and their employees cannot be ignored. It is important to consider the implications of the statements in the Press Release requiring the express approval of the CBN in order to effect the disengagement of any bank employee.

Generally, private employment contracts may only be terminated in the manner agreed by parties, and employment contracts governed by statute may only be terminated in the manner prescribed by the relevant statute. The introduction of a second-limb requirement that the termination of the private employment contracts between banks and their employees should first be approved by the CBN goes against these general principles of law and raises questions as to the legality of the decision in the Press Release, the implications on contractual principles and other related issues. These considerations are discussed below.

2. Extent of the CBN's Powers on Bank Employment Contracts

The CBN exists pursuant to the Central Bank of Nigeria Act, 2007 (CBN Act) and it is statutorily

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² CBN Press Release, *CBN, Bankers' Committee Suspend Lay-offs in Banks*, 3 May 2020, available at <https://www.cbn.gov.ng/Out/2020/CCD/CBN%20Bankers%20Comm%20Suspend%20Layoffs.pdf>, accessed on 25 May 2020.

obliged to administer the CBN Act and the Banks and other Financial Institutions Act (BOFIA)³. As part of its core mandate, the CBN regulates the affairs of all banks established pursuant to the provisions of BOFIA. Notably, the CBN is statutorily interested in the employment of certain categories of persons who work in banks. For example, the CBN is required to approve the employment of persons who are to serve as directors (executive and non-executive) or chief executives⁴ and also has the power to sanction banks for the wilful employment of certain categories of persons who due to their criminal conduct or record ⁵are unfit for banking roles.

Although section 42(1)(c) of the CBN Act, which provides for CBN co-operation with Nigerian banks, grants the CBN the power to scrutinize proposed retrenchments by banks, neither the CBN Act nor the BOFIA requires a bank to seek the approval of the CBN before terminating the employment contract of any employee.. Section 42 of the CBN Act provides:

- 1) *The Bank shall wherever necessary seek the co-operation of and co-operate with other banks in Nigeria to:*
 - a) *promote and maintain adequate and reasonable financial service for the public;*
 - b) *ensure high standards of conduct and management throughout the banking system; and*
 - c) *further such policies not inconsistent with this Act as shall in the opinion of the Bank be in*

³ See Section 1 (1) and (2), BOFIA.

⁴ Section 48(1), BOFIA

⁵ Section 19 (1) BOFIA which prohibits Banks from employing or continuing the employment of (i) any person who is or at any time has been adjudged

the national interest. (emphasis ours)

It may be argued that the decision of the Bankers' Committee and the CBN as set out in the Press Release, is in furtherance of CBN's statutory powers to cooperate with other banks to establish policies that are not inconsistent with the CBN Act and are in the national interest. It may also be argued that the decision set out in the Press Release can be situated within the context of the CBN's core statutory object to promote a sound financial system within the country as mass retrenchment of bank employees during the COVID 19 pandemic may likely erode public confidence in banking institutions as depositors may see the same as an indication that the banks are struggling.

However, in order for section 42(1) of the CBN Act to be an adequate basis for the provisions of the Press Release and the CBN's imposition of its approval before the termination of any employment contracts in the banking industry, whether the decision in the Press Release is sufficiently qualified to be a "policy" within the meaning of the CBN Act needs to be considered and if so, whether there are limitations to the kind of policies contemplated by the section. Whether the CBN can, by a policy it considers to be in the national interest, change extant statutory principles of employment law such as the freedom of an employer to terminate an

bankrupt, suspended payment to or compounded with creditors or has been convicted for an offence involving fraud or dishonesty or professional misconduct.

employment contract in line with contractual terms needs to be considered.

In *Ogundipe v. The Minister of FCT & Ors*⁶, the Court of Appeal by Tur, JCA in his dissenting judgment at page 53, paragraph B – D defined policy as follows:

“A ‘policy’ is a ‘set of ideas or a plan of what to do in particular situations that has been agreed officially by a group of people, a business organization, a government or a political party.’ See *Cambridge Advanced Learned Dictionary, 2003 edition, page 958. In legal parlance, it is ‘The general principles by which a government is guided in its management of public affairs.’ See Black’s Law Dictionary (supra) page 1276.”*

In light of the principal objects of the CBN set out in section 2 of the CBN Act, the decision to grant the CBN supervisory authority over bank employment contracts does not fall within the core policy mandates of the CBN which are to: (a) ensure monetary and price stability; (b) issue legal tender currency in Nigeria; (c) maintain external reserves to safeguard the international value of the legal tender currency; (d) promote a sound financial system in Nigeria; and (e) act as banker and provide economic and financial advice to the Federal Government.⁷

Thus, it cannot be the intention of the legislature that the CBN will rely on Section 42(1) (c) to change provisions in the substantive legislation on employment law such as section 11 of the Labour Act which provides that parties

to an employment contract may terminate their contract by giving notice.

3. Privity of Employment Contracts between Banks and their Employees

Under contract law, the rights and obligations due under a contract enure for the benefits of the parties to the contract.⁸ Therefore, under an employment contract, the right to determine whether to terminate an employment lies with the parties to the contract which in this case are the banks and their employees. Since the employment contracts between banks and their employees exist for the benefits of the two parties only, any “interference” by the CBN to require any prior approval to enforce any of the terms of the contract including termination terms may amount to a violation of the doctrine of privity of contract.

Indeed, in agreement with the reasoning above, the CBN had by a press statement issued on 4 January, 2010 stated that issues relating to the engagement or disengagement of bank workers are best left to parties (banks and their employees) and particularly noted that those decisions are taken on the basis of business imperatives.⁹ The CBN further stated that it expected all banks to follow due process in honouring all contractual obligations with their employees. Clearly, the CBN’s 2010 press statement agreed with the position that it has no right under the employment contracts

⁶ (2014) LPELR-22771(CA).

⁷ By Section 1(2) of the BOFIA, the CBN has all the functions and powers conferred and the duties imposed on it under the Act and the CBN Act subject to the overall supervision of the Minister of Finance. None of these powers and duties relate to approving the termination of bank employees.

⁸ *Rebold Industries Ltd v. Magreola & Ors* (2015) LPELR-24612(SC).

⁹ CBN Press Statement, *The CBN and Disengagement of Banks’ Workers*, 4 January 2010, available at https://www.cbn.gov.ng/Out/2010/publications/pressRelease/GOV/PRESS%20STATEMENT_04012010.pdf, accessed on 25 May 2020.

between banks and their employees to direct or restrain employee terminations.

Can Bank Employees Rely on the decision in the Press Release to Challenge the Termination of their Employments?

The decision in the Press Release raises the question whether a bank employee whose employment is terminated by a bank in defiance of the Press Release, can maintain an action against the employer for breach of the Press Release.

As far as terms and conditions of an employment contract are concerned, Nigerian courts will look to the contract between parties as may be contained in an employment letter, staff handbook, collective agreements and any other policy in operation between the employee and the employer/ bank to determine the exact terms and conditions of employment.¹⁰ With the exception of statutory prescriptions or legal principles which parties cannot waive, the courts will not tamper with the intentions of parties.

However, another relevant consideration arises in the case of the Press Release – which is whether the decision amounts to a variation of some sort to written employment terms. This is because the decision in the Press Release was taken by the Bankers’ Committee which is mainly comprised of the MDs of Nigerian banks, as well as CBN officials. It is therefore important to consider whether banks (through the Bankers Committee) have varied their employment contracts with their employees to superimpose a new level of approval from the CBN before they are able to terminate employees.

Employment contracts, as with any other contract may be varied by words or by conduct. In this case, where the Press Release is a unilateral action of the CBN, an employee relying on the decision to challenge any termination will have a weak case since, as we have noted above, the CBN has no supervisory authority over bank employment contracts. However, as the Press Release is a decision of the Bankers’ Committee, a bank employee whose employment is terminated without the prior approval of the CBN may have a strong claim for wrongful termination based on estoppel.

The Nigerian Supreme Court, per Nnanemeka J.S.C, in the case of *Okonkwo & Ors v. Kpajie & Ors*¹¹ echoing the provisions of the Evidence Act of 2011,¹² has held that where a person by word or conduct willfully makes a representation of a state of facts to another and thereby induces that other to believe that the state of things were as represented by that person and that other took him by his words and acted upon that representation, then that person who made the representation either by himself or his representative in interest cannot turn around to say or act as if the state of things were not as he represented them. He is estopped from asserting the contrary. Estoppel is relevant in the case of the Press Release because Bank MDs (through the Bankers’ Committee) have made statements to the effect that the rights of banks (which they represent and act as agents for) to terminate the employment of bank employees have been suspended for the duration of the COVID-19 pandemic and to that extent, these

¹⁰ See *Daodu v. UBA* (2003) LPELR-5634(CA).

¹¹ (1992) LPELR -2483 (SC)

¹² Section 16g of the Evidence Act

banks may be unable to deny making such statements or go back on such representation.

The court will treat cases for wrongful termination of contract on their individual merits. However, for an employee to successfully make a claim of wrongful termination based on estoppel, such employee must meet the conditions for an estoppel claim, which include:

- (a). that a clear and unequivocal representation was made (in this case, by the bank through the Bankers' Committee);
- (b). that the representation was relied upon (by the employee);
- (c). that the bank must have intended the employee to rely on the statement; and
- (d). that the employee has relied on the representation to his or her detriment and it would be unfair for the bank to go back on its representation.

Remedy: Specific Performance (Reinstatement) or Damages?

Where a bank employee successfully relies on estoppel in a wrongful termination suit, the court has to award an appropriate remedy. In a case for wrongful termination of employment contract, the court is generally faced with the options of granting the remedy of specific performance (a possible reinstatement of the employee) or the remedy of monetary damages for breach of contract. An bank employment contract is a contract for personal service, and the courts generally do not grant specific performance as remedy for wrongful

termination of personal service contracts except for contracts of employment with statutory flavour.¹³ Damages are instead the adequate remedy for the wrongful termination of an employment contract. However, special circumstances may exist to necessitate a declaration of specific performance, e.g. where the services provided are unique. However, such declaration will normally be made at the discretion of the court¹⁴

4. Implications of the Decision on Banks' Powers to Discipline Employees by Summary Dismissal

The Press Release appears to have affected the powers of the banks to summarily terminate the employment of employees found to have compromised their employment. Worse still, an employee who runs foul the employer's code of conduct which warrants summary dismissal may rely on the Press Release to demand that he or she remain in the system until the CBN approves his or her termination. This certainly does not bode well for employment relationships and the sanctity of employment contracts.

Closely related to the above is the fact that the Press Release will create an aura of needless hostility if banks are to keep employees who are to be dismissed on their books pending the obtainment of CBN's approval. This is not helpful for already struggling businesses who will be unable to move on from an unwanted employee until the approval is received

¹³ Oluyemisi Dansu, (2016) Contractual Relations between Employer and Employee. Retrieved from

¹⁴ <https://www.linkedin.com/mwllite/feed/update/actvity:6670952441061638145>
Ilodibia v. N.C.C Ltd (1997) 7 NWLR (pt. 512).

including the attendant cost to the business and its shareholders.³⁵

5. Conclusion

The intention of the CBN and the Bankers' Committee to protect jobs in an unprecedented difficult time is laudable. However, the strategy adopted has statutory and workability hurdles to cross. The decision adopts a one-cap fit all approach to the termination of employments and fails to appreciate that there are many reasons for which employments may be terminated alongside the fact that time may be of essence on such occasions.

It is hoped that the CBN and Banker's Committee will reconsider their decision and work to bring it in line with extant labour legislation such as the Labour Act and other contractual principles while also keeping an eye on its practicality.

³⁵ PricewaterhouseCoopers, COVID-19 and its Impact on the Nigerian Banking Industry, 1 April 2020, available at

<https://www.pwc.com/ng/en/assets/pdf/covid19-nigeria-banking-industry.pdf>, accessed on 25 May 2020.