



## LABOUR ISSUES IN A GLOBAL CORONA VIRUS-DEPRESSED ECONOMY

### Introduction

Recent statistics reveal that the global outbreak and continuing spread of Corona Virus “COVID-19” has occasioned the death of about 14,700 people across various continents<sup>1</sup>, and the pandemic has severely impacted and had far-reaching effects across global economies and socio-political structures and operations. According to CNBC<sup>2</sup>, the outbreak of the disease has brought about slump in oil prices, service contraction, decreased manufacturing activities, reduction in stock prices etc. The International Labour Organization (ILO) has therefore estimated that almost 25 (Twenty-Five) Million jobs could be lost worldwide as a result of the COVID-19 pandemic as a result of self-quarantine and social distancing<sup>3</sup>. In this light, the COVID-19 pandemic has been described as not just a health crisis, but also a significant labour market and economic crisis.<sup>4</sup>

Many employment contracts do not contemplate or make provisions for employment relationships in the event of a force majeure or unforeseen pandemic. This raises issues such as whether and in what circumstances an employer can rescind the obligation to pay salaries or an employee who is unable to come to work may not be able to insist on a right to receive salary.

Labour plays a crucial role played in shaping and driving global economy. It is therefore intended below to incisively consider and devise creative solutions that would significantly lower the impact of the pandemic in the workplace and on businesses.

### Traditional strategies

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<sup>1</sup> <https://www.worldometers.info/coronavirus/> accessed on March 20, 2020

<sup>2</sup> <https://www.cnbc.com/2020/03/12/coronavirus-impact-on-global-economy-financial-markets-in-6-charts.html> accessed on March 20, 2020

<sup>3</sup> <https://economictimes.indiatimes.com/news/international/world-news/about-25-million-jobs-could-be-lost-worldwide-due-to-coronavirus-united-nations/articleshow/74705919.cms> accessed on March 20, 2020; The CEO of Delta Airline has recently estimated that the company would lose US\$10 billion as a result of the corona virus. See [www.cnbc.com/amp/2020/03/20/delta-warns-second-quarter-revenue-to-fall-10-billion-because-of-coronavirus.html](https://www.cnbc.com/amp/2020/03/20/delta-warns-second-quarter-revenue-to-fall-10-billion-because-of-coronavirus.html) accessed on March 21, 2020

<sup>4</sup> Mr. Guy Ryder, the ILO Director-General at a Press Conference in Abuja on the 19<sup>th</sup> day of March 2020

### *Termination and the doctrine of contractual frustration*

Companies are shutting down their operations and laying off employees<sup>5</sup> in order to cut down on running cost and avoid insolvency.

A valid legal basis for doing so under Common Law and Contract Law is the doctrine of frustration, as a contract may become 'frustrated' when an event outside the control of the parties makes a contractual obligation "*incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract.*"<sup>6</sup>

An event which merely makes the performance more cumbersome or expensive will ipso facto not render the contract frustrated<sup>7</sup>, neither would minor temporary concerns likely frustrate a contract<sup>8</sup>.

Whether or not the doctrine of frustration will apply to the COVID-19 pandemic will most likely be on a case by case or merit based and dependent on the nature of the business and impact of COVID19 on workplace and work output: this may constitute a headache and escalate costs for an Employer, including in considering future litigation backlash.

Termination may also **be without any reason** being given upon compliance with required notice to the affected employee or salary in lieu. There are however two flip sides to this: first is cost (inclusive of any contractual benefits and entitlements accruing for expectedly a significant number of employees), the second is the fact that the sheer number may cause same to be interpreted as redundancy.

### *Lay off, Short-time work and Redundancy*

An attractive though still risky short-term measure for employers is to temporarily lay-off<sup>9</sup> employees without cause and/or make provision for short-time work as a quick fix. This works well in certain industries such as construction or any other industry where there exists an implied contractual right to lay off or introduce short time working conditions. Otherwise, liability may arise and could extend to payment of salary and claims for constructive dismissal.

An employer may also explore the redundancy option in order to reduce staff strength and diminished business costs. However, the process is risky litigation wise, particularly

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<sup>5</sup> Especially in the retail, food, aviation, hospitality, service and entertainment industries with many businesses and productions completely shutting down.

<sup>6</sup> *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337.;

<sup>7</sup> *Davis Contractors Ltd v Fareham Urban District Council* [1956] AC 696.

<sup>8</sup> *FA Tamplin Steamship Co Ltd v Anglo-exican Petroleum Products & Co td* [1916] 2 NSWLR 540, 557

<sup>9</sup> Layoff in this context refers to a temporary measure where an employer neither provides employees with work nor pay for a given period whilst still retaining them as employees.

in the absence of a redundancy policy or a permissive statutory framework. A well thought out and planned redundancy selection exercise coupled with reasonably onerous legal obligations of dialogue and negotiations with recognised trade union or specifically elected representatives is required. The negotiations not only require reasonable time and skill to achieve the best and most objective outcome, but also imposes an obligation on the employer to make provision for severance payment to the affected employee – a financial burden many employers may be unwilling to undertake at this critical time.<sup>10</sup>

## **Creative options**

### *Requesting Employees to work from home*

Cutting down on running cost during the COVID-19 pandemic while also implementing quarantine and social distancing and protecting employees' interests, is by asking employees to work from home<sup>11</sup>. The employer would still be bound to pay the remuneration of its employees as consideration for the work done from home during this period. Commuting, Telecom, Energy, Maintenance and Utilities costs of operation are generally reduced and sometimes shifted to the employee who is also saving on transport. Telecommuting is still not suited for all jobs, and there are risks associated with it, such as lack of proper performance monitoring, cybersecurity risk, amongst many others, but may be the ideal WIN-WIN option in view of the pandemic crisis.

### *Unpaid leave*

Another suitable alternative that is somewhat similar but markedly different from lay-off, which may be adopted by employers is unpaid leave to employees. Employers can offer their employees unpaid leave from work throughout the epidemic<sup>12</sup>. This would absolve employers of any financial obligation towards employees and also ensure that employees are not rendered permanently unemployed as a result of the pandemic which is assumed to be temporary.

### *Review of remuneration*

Another strategy may be the abrupt restructuring of the salary or compensation due and payable to each employee. Employers can propose<sup>13</sup> a specific percentage pay cut to

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<sup>10</sup> Please see S20 of the Labour Act

<sup>11</sup> Google directs more than 100,000 North American Employees to work from home. **See** <https://www.bbc.com/news/amp/technologt-51828782> accessed on March 21, 2020

<sup>12</sup> 10,000 Delta Airline employees volunteered to take unpaid leave.

<sup>13</sup> In some rare cases, employees propose taking a pay-cut in order to save their jobs or share the loss being suffered by the employer. The employees of a German Football Club, Borussia Monchengladbach proposed a 50% pay cut to the Club's Management.

employees or a decelerating pay reduction structure which protects low earning employees as an alternative to redundancy or termination.<sup>14</sup> Employers can also offer a deferred payment system, by which employees are rewarded after the pandemic and when the employer has acquired sufficient cashflow to effect payment of the deferred remunerations.

A review or reduction in the remuneration of employees is not illegal.<sup>15</sup> Still, employers should engage the employees in discussions and negotiation before effecting the proposed payment structure, which could be detailed in a Collective Bargaining Agreement (CBA) executed by representatives of both parties or in a circular issued by the employer. Employees are more likely to accede to taking a pay cut or a deferred payment, as against losing their employment. More so, where this is combined with working from home, emoluments like transportation cost will be taken off employees.

## **Conclusion**

The outbreak of COVID-19 has underlined the need for creative, stringent and decisive steps and protocols to manage the ripple effects of the pandemic in the workplace and the economy. It is therefore crucial for employers to review their employment contracts, handbooks and policies to provide robust and detailed tools to manage the risks in the event of a force majeure or unforeseen pandemic.

The aftermath of the crisis may indeed provide a viable template for the future of work globally.

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<sup>14</sup> Under this reduction structure, the salaries of high earning employees are reduced by a larger percentage. The chargeable reduction percentage gradually decreases till it gets to low earning employees.

<sup>15</sup> The provision of the Nigerian Labour Act only prohibits punitive deductions from the salaries of employees. See Section 5 of the Labour Act.