



Dispute Resolution Guide **2016**

Featuring contributions from

Arias Fábrega & Fábrega
Dillon Eustace
Erdem & Erdem
Marval O'Farrell & Mairal
Niederer Kraft & Frey
Rajah & Tann
Udo Udoma & Belo-Osagie
Verus Advocates

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The shadow of uncertainty

Uzoma Azikiwe and **Festus Onyia** of **Udo Udoma & Belo-Osagie** discuss the seminal decisions that have changed Nigeria's employment law landscape

The landscape of Nigerian labour, employment and industrial relations law is undergoing rapid changes. This is because of the National Industrial Court's (NIC) willingness to disregard principles of common law that it considers anachronistic to modern day labour and industrial relations. The NIC has exercised its jurisdiction to apply international labour standards and best practices as well as the relevant treaties, protocols and conventions when deciding on labour, employment and trade disputes.

As a result, several momentous decisions from the NIC have changed hitherto settled principles of Nigerian employment law. It is necessary to take note of this development because of the recent amendment to the Constitution of the Federal Republic of Nigeria (the Constitution). This amendment elevated the NIC to a superior court of record and vested it with an exclusive and expanded jurisdiction in civil cases, matters relating to labour, employment and industrial relations and matters arising from the workplace.

Background

The NIC was established in 1976 pursuant to the Trade Disputes Decree No. 7, which later became the Trade Disputes Act (TDA) (chapter 423) Laws of the Federation of Nigeria (LFN) of 1990. Although it appears that the intention of the law-makers was for the NIC to be a superior court, when the 1979 Constitution was enacted the NIC was not listed among the superior courts. An attempt to address this was made in 1992 with the enactment of the Trade Disputes (Amendment) Decree No. 47, which made the NIC a superior court of record. However, with the return to democratic civilian rule in 1999 and the subsequent constitutional amendment, the problem resurfaced. This is because the NIC was, once again, not included among the courts created under the 1999 Constitution.

Consequently, a debate ensued regarding the NIC's status. The controversy continued even with the 2006 enactment of the NIC Act. This purported to elevate the NIC to the status of a superior court of record. One school of thought held the view that the NIC was an inferior court because, although the 1999 Constitution empowers the National Assembly to establish courts other than those created by the Constitution, the jurisdiction of these courts would be subordinated to the High Court. The NIC, as created under the NIC Act of 2006, remained an inferior court, which was believed to have limited the effectiveness of its decisions.

Several decisions have changed hitherto settled principles of Nigerian employment law

To settle the controversy surrounding the NIC's status, the Constitution was amended in the Constitution (Third Alteration) Act, 2010. This included the NIC among the courts created by the Constitution. In addition to the inclusion of the NIC as a superior court of record, the NIC's jurisdiction was expanded to deal with any matter connected with the application of any international convention, treaty or protocol that Nigeria has ratified relating to labour, employment, workplace or industrial relations.

In addition, the Third Alteration Act provides that there is a right of appeal from decisions of the NIC to the Court of Appeal on questions of fundamental rights as enshrined in the Constitution as it relates to matters on which the NIC has jurisdiction. The Third Alteration Act provides that there is a right of appeal from the decisions of the NIC to the Court of Appeal as may be prescribed by an Act of the National Assembly. Where this right is created by the National Assembly, the decision of the Court of Appeal is final. Some Nigerian lawyers have contended, with some judicial support, that a decision from the NIC can only be appealed on questions of fundamental rights as enshrined in the Constitution. Others hold the view, also supported by some judicial authorities, that the Court of Appeal has jurisdiction to adjudicate on appeals from the NIC as of right and with leave of court.

Remedies

Award of damages

The position of the law, as affirmed by the Supreme Court and several decisions in Nigeria, is that the remedy for an employee whose employment has been wrongfully terminated lies in an award of damages. As a general rule, the measure of recoverable damages is the amount of salary or wages the employee would have earned in employment for the period of notice required to lawfully terminate the contract. Injury to feelings and reputation cannot be taken into consideration in assessing damages for wrongful termination. Neither are general damages recoverable. The decisions of the Supreme Court and other Nigerian courts have their foundations in the common law.

The NIC could apply any convention, treaty or protocol that has not been ratified

The NIC's approach is different to that of the Supreme Court and other courts. The NIC has declared a willingness to chart a new path from the hitherto settled common law standard of compensation or remedy for wrongful termination. The NIC is more inclined to award damages far in excess of what would have been recoverable under the common law in cases where the grounds for termination or dismissal involve allegations of wrongdoing that the employer is unable to establish during trial. For instance, in the case of *Adema v. NSPMC* where the termination was based on a criminal allegation which the employer was unable to establish, the NIC held that an award of damages on the basis of what the employee would have earned would not adequately compensate the employee. The NIC awarded him six months' salary as compensation.

In the case of *Murphy Shipping & Commercial Services v. Maritime Workers Union of Nigeria*, the NIC held that the termination letter suggested that the employee had done something wrong and awarded the employee six months' basic salary, housing and transport allowances, as well as one month's salary in lieu of notice. In another case, where the employee was dismissed on the basis of allegations that were found to be false, the NIC awarded the employee 12 months' salary.

Reinstatement

The traditional view under common law is that the equitable remedy of reinstatement is available to an employee whose contract is statutorily protected but not an employee in a master and servant relationship. This is justified on the basis that the master can hire and fire and that the court cannot impose a willing employee on an unwilling employer. In many cases, the Supreme Court and other Nigerian courts have upheld this principle.

In this area, the NIC has not strictly followed the decisions of the Supreme Court and common law. It has shown that it would order reinstatement in two scenarios, namely when:

- i) the employment is statutorily protected and the termination or dismissal was wrongful; and,
- ii) the motive for the termination was due to the employee's involvement in trade union activities. Thus, in the case of *Bakare & Anor v. CGC Nigeria*, the NIC ordered the reinstatement of an employee whose employment was terminated as a result of his involvement in trade union activities. The NIC's decision was based on the provisions of the sections 9 (6) (b) (ii) of the Labour Act and 42 (1) (b) of the Trade Disputes Act.

In a few cases, the NIC has also ordered reinstatement on the basis that due process was not followed in terminating an employee's employment. For instance, in the case of *Petroleum and Natural Gas Senior Staff Association v. Schlumberger Anadrill Nigeria*, the NIC held that the employment of an employee who was a member of the appellant union was wrongly terminated on the grounds that due process was not followed and that the termination was null and void. The NIC ordered that he be reinstated. The NIC also declared that members of the appellant's union who had accepted the respondent's redundancy decision were cajoled into doing so as the industrial arbitration award had yet to be affirmed when the redundancy decision was given effect. The NIC consequently ordered that they be reinstated in the employment of the respondent.

In *Peter Omokaro v. Union Bank of Nigeria*, the NIC ordered the claimant's reinstatement. It held that the termination of employment was void because the termination decision was taken by the bank's executive committee and not its board of directors.

International conventions, treaties and protocols

Before the constitutional amendment under the Third Alteration Act, the legal position in Nigeria as set out in the 1999 Constitution was that a treaty between Nigeria and any other country would only have the force of law where it had been enacted by the National Assembly. In other words, treaties were required to be 'domesticated' before they could have legal effect in Nigeria.

However, section 254C (2) of the 1999 Constitution confers jurisdiction on the NIC for matters relating to the application of any international conventions, treaties or protocols relating to labour and employment that have been ratified by Nigeria, notwithstanding anything to the contrary in the Constitution. The effect of this provision is that in matters relating to labour and employment, the so-called domestication requirement no longer applies. All that is required for any such treaty, convention or protocol to have legal effect in Nigeria is for Nigeria to have ratified it. The NIC has often relied on its jurisdiction in this regard to apply the provisions of treaties, conventions and protocols relating to labour and employment, including the International Labour Organisation (ILO) jurisprudence that has developed from such instruments. The NIC has jurisdiction in matters relating to unfair labour practices or international best practices in labour, employment and industrial relations or international labour standards.

In *Maduka v. Microsoft Nigeria*, the NIC applied the United Nations Convention on the Elimination of All forms of Discrimination against Women and the ILO Discrimination (Employment and Occupation) Convention, which have been ratified in Nigeria, in deciding that the applicant's rights against discrimination had been violated.

In the cases of *Duru v. Skye Bank* and *Aloysius v. Diamond Bank*, the NIC relied on the ILO's Termination of Employment Convention of 1982 to decide that employment must not be terminated unless there is a valid reason connected to the employee's capacity or conduct, or based on the operational requirements of the undertaking, establishment or service. The NIC held that the need to base termination of employment on a valid reason is

the global position on employment relationship and therefore the current international labour standard and best practice.

Although the NIC noted that the convention has not been ratified by Nigeria, the NIC relied on its jurisdiction in relation to international best practices in labour, employment and industrial relation matters and application or interpretation of international labour standards pursuant to section 254C (1) (f) and (h) of the 1999 Constitution as the basis to apply the Convention. According to the NIC, that provision provides it with a basis to move away from what it described as the harsh common law position that allows an employer to terminate employment for good, bad or even for no reasons at all.

In *Aero Contractors Co. of Nigeria v. National Association of Aircraft Pilots and Engineers*, the NIC held that only members of the defendant's unions who worked at the control tower qualified as being engaged in essential services and so could not embark on strike action. The NIC further held that all other workers in the aviation sector in Nigeria could exercise their right to embark on any strike action.

In arriving at its decision, the court noted that Nigeria has ratified the Freedom of Association and Protection of the Right to Organise Convention 1948 and the Right to Organise and Collective Bargaining Conventions 1949 and that it had the jurisdiction to apply those conventions, including the jurisprudence that the ILO has developed around them. Thus the NIC relied on the publications of the ILO's committee of experts to decide that essential services, where the right to strike may be subject to major restrictions or prohibitions, are those services whose interruption would endanger life, personal safety or health in respect of the whole or part of the population such as a hospital sector, electricity services, or water supply services.

The NIC held, based on the ILO jurisprudence, that the only members of the defendant union prevented from embarking on strike action were those working in air traffic control. All other workers in the aviation sector do not qualify as workers engaged in provision of essential services and had the right to embark on the strike action.

The NIC arrived at the decision despite the fact that essential services as defined in section 48 of the TDA includes services for maintenance of aerodromes or in connection with transportation of persons and goods by air.

Labour outsourcing

The practice whereby a company or labour contractor employs workers and then seconded them to companies is common in Nigeria, particularly in the oil and gas sector. Based on the principle of privity of contract, employees under such arrangements would only have recourse against the labour contractor who employed them and not the company that ultimately benefits from their services or to which they have been seconded. The doctrine of privity of contract is a fundamental principle of the law of contract that has been affirmed by the Supreme Court of Nigeria.

However, the NIC has held that privity of contract is not an absolute concept. In appropriate cases, the NIC said it would disregard the parties' characterisation of the relationship and hold the ultimate beneficiary of the labour services responsible as an employer. In the case of *Stephen Ayaogo v. Mobil Producing Nigeria and Blue Chip Services*, the NIC relied on a report from the ILO and held that in such so-called triangular employment arrangements it would, irrespective of how the parties have described their relationship, examine the nature of the relationship to determine whether it in fact amounts to what it termed an objectively ambiguous or disguised employment relationship. This relationship is meant to either:

(i) mask the identity of the employer, where the person designated as employer is an intermediary with the intention of releasing the real employer from any involvement in the employment relationship and above all from any responsibility to the workers; or

(ii) mask the form in which the relationship is established, by intentionally misrepresenting the nature of the relationship in order to deny certain rights and benefits to the dependent workers.

Empirical evidence suggests that employee-protective labour laws positively impact development and growth. It is, therefore, critical that the rights of employees are safeguarded to encourage labour as a factor of production

It is not known whether there is an appellate court to help resolve this uncertainty

and for economic development and growth. However, those rights would not be well protected where there is uncertainty in the law that is engendered when the NIC overrules or ignores established decisions of the country's apex court.

The NIC's jurisdiction to apply international conventions, treaties and protocols that have been ratified by Nigeria has widened the scope of Nigerian labour law. As shown in the cases discussed above, they are now part of Nigerian labour law even though the legislative process for their codification has not been completed.

However, the jurisdiction to apply international best practices in labour, employment and industrial relations or international labour standards has created a shadow of uncertainty in the law. This is because what constitutes international best practices or international labour standards are not defined in the Third Alteration Act. The NIC's reliance on its jurisdiction in matters relating to unfair labour practices or international best practices in labour, employment and industrial relations, or the interpretation or application of international labour standards, as a basis for reliance on the Termination of Employment Convention of 1982 which has not been ratified by Nigeria means that the NIC could apply any convention, treaty or protocol which that has not been ratified by Nigeria. In the authors' view, such an approach amounts to an abuse of section 254C (2) of the 1999 Constitution which empowers the NIC to apply an international convention, treaty or protocol of which Nigeria has ratified relating to labour, employment, workplace, industrial relations or matters connected therewith.

The lack of clarity on the status of appeals from the decisions of the NIC other than those relating to questions of fundamental rights as enshrined in chapter IV of the Constitution has not helped matters. It is not known whether there is an appellate court to help resolve the uncertainty created by NIC decisions, or whether the NIC is the final court on matters adjudicated by it, subject only to the right of appeal on matters relating to the fundamental rights that are provided for in the Constitution.


Uzoma Azikiwe

Partner, Udo Udoma & Belo-Osagie

Lagos, Nigeria
 T: +234-1-4622307-10
 E: uubo@uubo.org
 W: www.uubo.org

About the author

Uzoma Azikiwe is a partner and head of the firm's litigation, arbitration and alternative dispute resolution team. He provides advice in maritime, aviation, employment and energy matters.

He trained as an international commercial arbitrator with several organisations, including the ICC Institute of World Business Law, the Chartered Institute of Arbitrators in the UK, the Chartered Institute of Arbitration in Nigeria, and the Chartered Institute of Mediation and Conciliation. He obtained a diploma in international commercial arbitration at St. Anne's College, Oxford and has benefitted from PIDA training in international commercial contracts and training from the Chartered Institute of Taxation of Nigeria.

He has made presentations and given evidence as a legal expert on Nigerian law before various foreign courts. He has published articles on commercial law and presented papers at seminars for various major service companies in the oil industry in Nigeria on employment and labour matters.


Festus Onyia

Managing Associate, Udo Udoma & Belo-Osagie

Lagos, Nigeria
 T: +234-1-4622307-10
 E: uubo@uubo.org
 W: www.uubo.org

About the author

Festus Onyia is a managing associate at Udo Udoma & Belo-Osagie and is with the firm's litigation and alternative disputes resolutions team. He specialises in commercial and tax litigation and arbitration and has acted for local and international companies in the petroleum, shipping, banking, energy, telecommunications and financial services sectors in complex disputes before various courts and tribunals in Nigeria. He has advised on a variety of Nigerian law issues that arose in arbitral tribunals and courts in the US and the UK. His responsibilities include overseeing the teams that evaluate the litigation portfolios of target companies involved in financings, investments, mergers and acquisitions.

He has attended training on international commercial arbitration at the International Chamber of Commerce in Paris, as well as the Chartered Institute of Arbitrators UK. He has contributed articles published in the *Global Arbitration Review*, *International Financial Law Review*, and *Nigerian Tax Law Review*, among others.