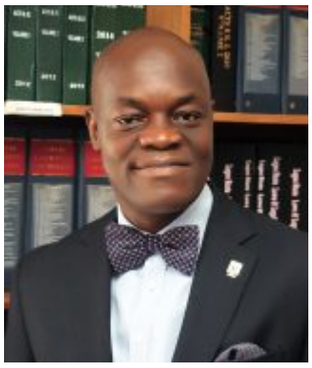
'Keeping Your Hiring Practices Legal':
Employment & Employee Issues FAQs in Nigeria

Thought Leadership | **By Afolabi Elebiju, Frank Okeke & Titi Adelekun** June 2018



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1. Introduction

The labour force is the backbone of every economy, and a major economic metric is the national employment rate. In Nigeria (and indeed globally), human capital is the most important asset in businesses. Thus, employment laws are very crucial in monitoring the relationship between an employer and employee.

The law of contract (leveraging contract of employment, collective agreement and staff handbook); the ***Labour Act (LA), Cap. L1, Laws of the Federation of Nigeria (LFN) 2004***, and the National Industrial Court (NIC) are the main tools used in determining these relationships. Other legislation include the ***Employment Compensation Act (ECA), Cap. E74, LFN 2004, Factories Act, Cap. F1 LFN 2004, Pensions Reforms Act Cap. P4, LFN 2004, Trade Union Act (TUA) Cap. T1 LFN 2004, etc.***

This Article highlights and answers various pertinent questions on issues around employer/ employee relationships in Nigeria.

2. Employer/Employee Engagement - Things to Note

One of the first things employers need to clarify is identifying who their **"employees"** are? This might seem obvious, but the definition of "employee" in the legal context, could vary from our general understanding. The ***LA*** defines an employee in ***section 91*** as "***a worker***" engaged under a contract of manual labour or clerical work in private and public sectors. The ***LA*** accordingly applies to only these low level, unskilled category of workers. Employees exercising *administrative, executive, technical or professional* functions fall outside the ***LA*** and are primarily governed by their respective contracts of employment. As a result, reliance is sometimes placed on judicial authorities to espouse aspects of labour and employment law.

3. Hiring Employees

3.1 What amounts to discrimination when hiring a staff?

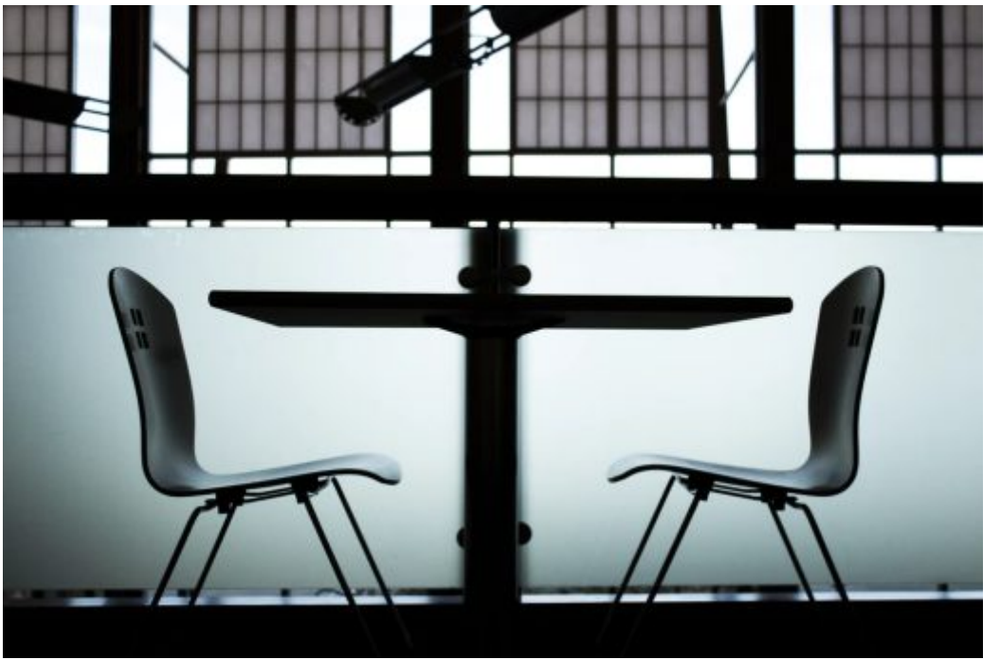
Discrimination is treating a particular group of persons or people differently (less favourably) due to certain attributes. These could be in respect of their race, colour, national extraction or social origin, sex, gender identity or sexual orientation, age, physical, intellectual, mental or psychiatric disability, religion, trade union, political opinion, pregnancy, relationship status, etc. Discrimination can be intentional or unintentional, direct or indirect.

3.2 Are there legislation prohibiting discrimination or harassment in employment?

I. ***Section 17(3), 1999 Constitution of the Federal Republic of Nigerian (1999 Constitution)*** deals with discrimination, sexual harassment, corruption and related matters and requires the State to direct its employment policies towards ensuring that *"there is equal pay for equal work without discrimination on account of sex, or any other ground."*

II. ***Section 9(6) LA*** precludes any contract of employment that causes the dismissal or otherwise prejudice an employee for belonging, not participating or being a member of a particular trade union. Thus an employer cannot dismiss an employee *"by reason of a trade union membership"*. It states that:
"(6) No contract shall- (a) make it a condition of employment that a worker shall or shall not join a trade union or shall or shall not relinquish membership or a trade union; or (b) cause the dismissal of, or otherwise prejudice, a worker- (i) by reason of trade union membership; or (ii) because of trade union activities outside working hours or, with the consent of the employer, within working hours; or (iii) by reason of the fact that he has lost or been deprived of membership of a trade union or has refused or been unable to become, or for any other reason is not, a member of a trade union."

We acknowledge the input of our alumnae, Neme Ezenwa who worked on the original draft whilst still with us.



3.3 ***Can employers run background checks on potential employees before hiring? Are there limitations on scope of check?***
Yes. The primary goal here is usually to verify/validate the person's education, work history, medical history, personal reference, criminal history etc. It is very important to conduct background checks as a hire may cost the company money through training, wasted human resources, loss of productivity and negative impact on employee morale. For instance, ***section 8 LA*** provides that: *"every worker who enters into a contract shall be medically examined by a registered medical practitioner at the expense of the employer."*

The major compliance issue with background checks is the consent (actual or deemed) of the prospective employee before such checks are carried out. Typically, prospective employees are deemed to consent as part of their submission to undergoing the employer's recruitment procedure.

3.4 ***Are there any legal requirements towards protecting employee privacy or personal data?***
Although Nigeria has industry specific regulations and guidelines on data protection, there is no generally applicable data protection statute. The usual recourse is to ***section 37, 1999 Constitution***, which guarantees the privacy of citizens, their homes, correspondence, telephone conversations and telegraphic communications. In practice, employers provide for data protection in their handbooks or employee contracts. Confidentiality provisions of employment contracts may give employees basis for legal action in case of breach of the non-disclosure obligations (i.e. where there is wrongful disclosure).

3.5 ***What is the status of National Youth Service Corps Scheme (NYSC) members and Interns in a work place?***
Industrial Trainees (interns) and NYSC members are generally not regarded as direct employees of the company where they are serving, even though expected to follow instructions, and be subject to oversight of supervisors who are employees of the company. The fact that these temporary personnel enjoy for example medical coverage or payment of some stipend cum allowances, does not change their status, even if the company may then have tax obligations arising from such financial payments. However, if an employer elects to engage them after the completion of their programme, they become full employees of the company and will be bound by the terms of their contracts of employment or statutes governing their employment where applicable.

4. Terms of Employment:

4.1 ***Must there be a written employment contract? If yes, what are essential terms that must be included in the contract?***
Section 7(1) LA requires that a written contract be made available to the employee within three (3) months of engagement, specifying: (a) the employer's name or group of employers; (b) the worker's name, address, position and date of engagement; (c) the nature of the employment; (d) the date of expiry, if the nature of employment is for a fixed-term; (e) the notice period for termination of contract; (f) wages; (g) hours of work, leave and pay during leave, sick pay and injury; and (h) special conditions of the contract. Signing of a contract is a general requirement to make it legally binding on the parties.

4.2 ***Can an employer unilaterally change the terms of an employment contract?***
By ***section 7(2) (a)*** and ***(b) LA,*** either party can change or amend terms after execution; however the employer is obliged to inform the worker of the nature of the change by a written statement not more than one month after it is made. Also, the general rule of contracts is that they can only be mutually revised; where a party proposes variation, the other must accept either expressly or by conduct, otherwise termination results.

4.3 ***Is there a statutory probation period for employees?***
There is no fixed probation period specified by the law. Industry practice is usually for probation periods of three (3) to six (6) months, to provide an employer time to evaluate an employee before "confirming" his employment. If the employee is allowed to continue his employment several months after the end of the probation period, the employee's contract would be deemed confirmed by the conduct of the employer.

4.4 ***What is the law regarding sick leave or sick pay?***
Section 16 LA provides that the employee is entitled to be paid wages up to twelve (12) working days in a calendar year during absence of work caused by temporary illness, certified by a registered medical practitioner.

The general rule of law is that parties are bound by their contract - ***Abdulraheem & 3 Ors. v. Olufe Ogba & 43 Ors. [2006] 17 NWLR (Pt.1008), 280 at 325***. So where there is no applicable statutory provision or the provision is insufficient, the parties are at liberty to make provisions appropriate for their circumstances, in line with their negotiations. Accordingly, the amount of an employee is entitled to on sick leave (SL) can be determined by both parties.

4.5 ***What is the law regarding annual vacation and leave?***
Section 18(1) LA states that a worker must have worked for at least twelve (12) months in order to qualify for annual leave and is entitled to at least six (6) working days with full salary. In practice, employees are given twenty working days per year for their annual leave.

Where an employee does not return to work after his permitted holiday, it must be implied that the employee has by his conduct repudiated his employment contract. There is no liability to the employer, except for accrued benefits. Also the employer can demand for payment in lieu of notice for such a repudiation based on the terms of the contract with the employee. The payment in lieu may be set off against any terminal entitlements of the employee.

4.6 ***Are female employees entitled to a salary when they go on Maternity Leave?*** ***Section 54 LA*** states that a pregnant woman is entitled to six (6) weeks leave before her expected delivery date and another six (6) weeks after delivery. In the event that the employee has worked with the establishment for six (6) months before proceeding on maternity leave, she would be entitled to at least 50% of the salary she would have earned if she had not been absent.

Furthermore, nursing mothers are allowed thirty (30) minutes twice a day during working hours to nurse their children. Where a woman is unable to resume work after her maternity leave because of conditions arising from her pregnancy, her employer cannot terminate her employment.

4.7 ***Is it necessary to have an employee handbook?***
This is not mandatory by law but is common practice for organisations to have a handbook containing additional details on matters incidental to the employer – employee relationship. This would form part of the contract between the employer and the employee especially where issues on interpretation of the employment letter arise.

4.8 ***Are employers obliged to give former employees references?***
There is generally no legal obligation for employers to give a reference, except where the employee's contract of employment provides for such reference. Nevertheless, if they do, it should be fair and accurate. Some employers would only give a factual reference stating dates of employment, job title and salary. Where an employer refuses to give a reference, the ex-employee may get co-workers or clients that can attest to the quality of his work and ability to act as referee. The need for the employer's precaution cannot be over emphasised because of the duty owed to the former employee and the new employer to provide reliable information.

4.9 ***13th month salary, am I entitled?***
This is not statutory and as such, not mandatory. It is a practice observed by organisations based on corporate policy, collective bargaining or contract of employment.

5. Labour Outsourcing

5.1 ***Is "triangular employment" recognised in Nigeria?***
This occurs when an employer contracts a third party (a staffing firm, consulting firm, or leasing firm) for labour rather than hiring an employee directly. Because of the principle of privity of contract, employees under such arrangements would only have recourse against the contractor who employed them and not the company that ultimately benefits from their services.

Ogebe, JCA *in* ***Nwuba v Ogbuchi [2008] 2 NWLR (Pt. 1072), 471 at 481C*** held that: *"it is settled law that a contract affects the parties to it and cannot be enforced by or against a person who is not a party even if the contract is made for his benefit."* However, this general principle admits a number of exceptions, including a contract made by an agent on behalf of an undisclosed principal, who as a general rule is entitled to sue and be sued on such contract.

5.2 **Tax Issues in Outsourcing**
For individuals working under an outsourcing arrangement, the responsibility to account for their PAYE tax and all matters connected therewith lies with their employer (i.e. the outsourcing company).

Key tax issues are usually as follows:

i. Is there any tax on the transaction itself, for example value added tax (VAT) and withholding tax (WHT) on the fees? Reimbursables are clearly excluded from VAT and WHT. If the outsourcing arrangement relates to running of office canteen where staff pay for lunch, will they also charge them consumption tax, pursuant to ***Hotel Occupancy and Consumption Tax Law?*** Can recipient of services be liable for defaults by outsourcer (e.g. failure to deduct and remit personal income taxes of employees)? Can Revenue successfully recover from the recipient because the outsourced staff are in substance working for, and subject to instructions of the recipient's staff, pursuant to "the Manager" principle? Statutory provisions and case law will have to come to the rescue. This is not a farfetched issue, given the aggressive enforcement stance of Lagos State IRS exemplified by their recent notices on tax treatment of transactions and contractual relationships.
ii. Is there VAT leakage on the service provider's charges? If a company outsources its services to a third party service provider, the services may (typically) be subject to VAT. Where the VAT cannot be recovered, it would be apposite for the cost savings to at least equal the VAT incurred.

6. Foreign workers

6.1 ***What approvals or permits do expatriates need to work in Nigeria?***
Foreign employees are subject to entry-visa and work permit requirements under the regulatory oversight of the Federal Ministry of Interior (FMoI); visas are issued by Nigerian embassies abroad but long term ones would be regularised in country. ***Section 8(1) Immigration Act, Cap. I1 LFN 2004*** states that persons entering Nigeria for business purposes must obtain consent of the Minister of the Interior.

Expatriate Quota (EQ) is the authorisation for long term employment of expatriates and EQ positions are strictly managed to prevent abuse. The general intent is that expatriates may only fill 'strategic' or highly skilled positions that there is a dearth of local resources to fill. There must also be a Nigerianisation plan – underpinned by training for the EQ positions with Nigerians within specified time frames.

Sectoral requirements may also apply, for example in the oil and gas industry, favourable review of the Department of Petroleum Resources (DPR) and Nigerian Content Development

Monitoring Board (NCDMB) is a prior requirement to grant of EQs by the FMoI. Temporary work permits (TWPs) are also granted for short term employment of not more than ninety days, but renewable in tranches for up to a year.

7. Restrictive covenants in an employment contact

7.1 What is a Restraint Of Trade clause? Are they enforceable in Nigeria?

It is important not to get "Restraint of Trade" clauses mixed up with Non-Solicitation clauses. Usually, certain clauses are inserted in contracts of employment which provide that an employee must remain in the particular employment for a specified period or, upon resignation from or termination of his employment, would not take up a similar employment or will not take up employment from a direct competitor to the employer. Such clauses are also used where the employer has invested in the employee for example through training - to enable the employer enjoy the returns on his investment by ensuring that the employee remains in the employment for a specified period.

As a subset is the question, *to what extent are covenants not to compete valid and enforceable?*

They are enforceable, provided that they are: (a) reasonably necessary to protect the interest of the employer in whose favour it is imposed; (b) not unreasonable as regards the person restrained; and (c) not injurious to the public. Such covenant must be supported with valuable consideration and the duration of the restraint must be reasonable. Also, trade secrets protected under intellectual property law may determine the duration of such covenant. The enforceability of the covenant is through legal action in the law court by any aggrieved employer. While the employers may have legitimate reasons for imposing restrictive covenants, they are often considered to inhibit competition and therefore, liable to be struck down by the courts if held unreasonable.

In ***Koumoulis v A.G. Leventis Motors Ltd (1973) All N.L.R. 789, Udoma JSC*** stated that generally covenants in restraint of trade are *prima facie* unenforceable in Nigeria. A restraint of trade clause merely to prevent competition will not be enforced by the Court as an employer cannot hide under the law to protect himself from competition. However, it can be enforceable where it is reasonable as it affects the interest of the parties (employer and employee), the public and does not amount to unfair labour practice.

7.2 Is there any legislation addressing the parties' rights with respect to employee inventions?

Generally, terms of contract (and any deemed appendices like collective agreement and Staff Handbook) will always be first point of call in any dispute. When this is not stated or in relation to the public sector, reliance could be had on ***Patents and Designs Act Cap. P2, LFN 2004*** which provides that where an invention is made in the course of employment or in the execution of a contract for the performance of specified work, the employer or commissioner of the work owns the patent right. However, where the inventor is an employee whose contract of employment does not require him to exercise any inventive activity but he has in making the invention used data or means that his employment has put at his disposal or where the invention is of exceptional importance, the employee shall be entitled to fair remuneration.

8. Employment Related Grants and Incentives

8.1 What are statutory obligations of employers for employees' welfare?

Employers are required to make some contributions for the benefit of employees, including the following: (a) *Industrial Training Fund (ITF) deductions* of 1% of annual payroll to the ITF (required of employers with five or more employees or with a turnover of up to N50 million). Employers may get up to 50% refund of their contributions if they satisfy ITF they have adequate training programmes; (b) *Pension contributions* of at least 10% of each employee's monthly salary to the employee's pension fund administrator (PFA). Every employer having three or more employees has this obligation: ***section 4(1) PRA***; (c) Life insurance for employees (cover must be a minimum of at least 300% of each employee's annual salary); (d) Employers must contribute 1% of total monthly payroll into the *Employees' Compensation Fund* (ECF): ***section 33(1) ECA.***

8.2 What employment-related taxes are mandated by law?

Every employee is mandated to pay the personal income tax (PIT), which is based on a Pay-As-You-Earn (PAYE) system, pursuant to the ***PIT Act, Cap. P8 LFN 2004*** (***PITA***). ***PITA*** effectively makes employers statutory agents of the Revenue for the purpose of enforcing PAYE for employees, upon pain of penal sanctions for default. The PIT rate is graduated and varies from 7% of taxable income to a maximum of 24% of taxable income. Personnel related costs are deductible expenses for company income tax (CIT) purposes.

9. Dismissal of employee

There is a difference between termination and dismissal. An employer is entitled to dismiss an employee, instead of terminating his contract of employment, where the conduct of the employee *"..... is of some grave and weighty character that it undermines the relationship of confidence which must exist between a master and a servant"* ***per Okoro JCA in UBN Plc v. Soares [2012] 11 NWLR (Pt. 1312), 550 at 575.*** Termination can be a conscious act that ends a contract, for example by written notice of termination. It can also be as a result of tenure expiration (without a new contract of employment being entered into).

9.1 Can a party terminate a contract without notice or payment in lieu of notice?

Where there is no agreement regarding the period of notice of termination, the notice period must be reasonable. ***Section 11(1) LA*** provides that where the contract stipulates the period of notice, the contract can be terminated based

on such period of notice: ***UBN Plc v. Soares (supra), at 571 F-G.*** It was held that when an employee commits an action considered as gross misconduct (working against the deep interest of the employer, e.g. stealing, fraud, fighting, forgery, such employee can be summarily dismissed. The consequences include the employee losing his rights to any terminal benefits.

The measure of damages where a party terminates the employment contract without notice is the salary for the period in lieu of the notice, including all the benefits accruable within the period.

9.2 ***Can an employer terminate an employment without stating a reason or must there be 'cause'?***
In ***SPDC Ltd v Olanrewaju [2008] 18 NWLR (Pt.1118), 8 at 19-20 G-A, Tabai, JSC*** held that an employer is not bound to give reasons for terminating the appointment of his employee. But where he gives reason or cause for termination, he has a duty to establish the reason to the satisfaction of the court. ***Section 11(1) LA***, states that either party to a contract of employment may terminate the contract on the expiration of notice given by him to the other party of his intention to do so. Any notice exceeding one week shall be in writing: ***section 11(3) LA.***

Where an employer dismisses or terminates the appointment of an employee on ground of misconduct all that the employer needs establish to justify his action is to show that the allegation was disclosed to the employee, that he was given a fair hearing, that is to say, that the rule of natural justice were not breached and that the disciplinary panel followed the laid down procedure, if any, and accepted that he committed the act after its investigation.

9.3 ***What are the procedural requirements for dismissing an employee?***
Where an employee is to be dismissed for a stated cause, the cause must be made known and he/she must be given an opportunity to make representation in his/her own defence to satisfy the constitutional requirement for fair hearing. This is common in statutory (public sector) employment and optimal risk management (especially reputational reasons) may impel such approach for the private sector as well.

In ***University of Calabar v Essien [1996] 10 NWLR (Part 477) Pg. 225 at 262, Iguh JSC*** stated: *"Where an employer dismisses or terminates the appointment of an employee on ground of misconduct all that the employer needs establish to justify his action is to show that the allegation was disclosed to the employee, that he was given a fair hearing, that is to say, that the rule of natural justice were not breached and that the disciplinary panel followed the laid down procedure, if any, and accepted that he committed the act after its investigation."*

9.4 ***Is Dismissal After Termination Feasible***
It is trite law that where an employee has been disengaged (whether by termination or resignation), he ceases to be a staff of the company/employer. That disengagement puts an end to any job or assignment the (ex-) employee was holding: ***Jombo v Petroleum Equalisation Fund Management Board [2005] 14 NWLR (Pt. 945), 442.*** This is more so, when his letter of termination/resignation was issued by, or has already been accepted by his employers. According to ***Black's Law Dictionary (9th Ed. Pg. 1609)***, termination of employment results in: *"the complete severance of an employer-employee relationship."*

It is not possible to convert a termination into a dismissal. This is because converting an already concluded termination to a dismissal would amount to resurrecting the employer-employee relationship between the parties. Furthermore, the Supreme Court in ***Underwater Engineering Co. Limited v. Duberfort [1995] 6 NWLR (Pt. 400), 156*** held that a dismissal cannot have a retrospective effect with a view to denying him of his vested right to his salary.

This would have been a legal impossibility because to do so, mutuality would have been required, as the law will not force an unwilling employee on a willing employer and *vice versa*. However, if the employee were to have been on (indefinite) suspension pending investigations, he could be dismissed upon conclusion of such investigations.

9.5 ***What is the procedure for carrying out redundancies in Nigeria?***
Section 20 LA describes "redundancy" as the "*involuntary and permanent loss of employment which usually arises as a result of excess manpower.*" Where a redundancy arises, an employer is required to inform the workers concerned of the reasons for and extent of the anticipated redundancy. The employer is to apply the principle of *'last in, first out'* in the discharge of the worker subject to factors like relative merit, including skill, ability and reliability; and use his best endeavours to negotiate redundancy payments to any discharged employees. Redundancy concerning employees that are not covered by ***LA*** would be regulated by the terms of the contract of employment.

10. Applicable remedies

10.1 ***What are the primary government agencies or other entities responsible for the enforcement of employment statutes and regulations?***
The Ministry of Labour and Employment (MLE) is directly responsible for issues relating to labour and employment. In the oil and gas sector, the DPR and NCDMB must approve disengagement of senior staff of operators in the sector. An aggrieved employee is not precluded from approaching MLE and other sectoral agencies for redress where his grievance could be addressed by the agency.

10.2 ***Which Nigerian Court has Jurisdiction to try labour and employment disputes?***
The National Industrial Court has jurisdiction to try labour and employment disputes. Appeals go from there to the Court of Appeal and thereafter to the Supreme Court: ***Skye Bank v. Iwu [2017] 16 NWLR (Pt. 1590) 24 at 37.***

10.3 What are the limitation periods for bringing employment claims?

Claims in respect of breaches of the contract of employment have a limitation period of six (6) years, as with other simple contracts. See for example, ***section 8(1) Limitation Law, Cap. L67, Laws of Lagos State, 2003.***

10.4 What reliefs are available to an employee whose employment was wrongfully terminated?

Where a court is to consider issue of damages for wrongful dismissal, the court is bound by the terms of the contract employment: ***UBN Plc v. Soares (supra), at 578 G-H.*** The measure of damages is, *prima facie,* the amount the employee would have earned had the contract been properly determined. This is subject to the deduction in respect of amounts accruing from any other employment which the employee in minimising damages either obtained, or should reasonably have obtained: ***SPDC Ltd v Olanrewaju (supra).***

Specific performance of contracts of employment in the private sector is generally not available because the courts will not impose a willing employee upon an unwilling employer. By the same token, also an employer cannot prevent an employee from resigning from his employment: ***UBN Plc v. Soares (supra).***

10.5 Would the court uphold payment of salary in lieu of notice where same is not specifically provided for in a contract of employment?

No. In this case, common law applies. By ***section 11(1) LA,*** notice to be given is: (a) one (1) day where the contract has continued for three (3) months or less; (b) one (1) week where the contracts has continued for more than three (3) months but less than two (2) years; (c) two (2) weeks where the contract has continued for over two (2) years but less than five (5) years; (c) one (1) month where the contract has continued for five (5) years or more.

10.6 Trade union/collective agreement issues

Section 12(4) TUA gives an employee or employees the freedom to join a trade union. This must not be inhibited by an employer either in the contract of employment or in practice, neither must the employee be prejudiced in any way by reason of his association with a trade union or by his trade union membership.

Collective agreements are not intended or capable of giving individual employees a right to litigate over an alleged breach of their terms even if conceived by them to have affected their interest. In other words, where an employer ignores or breaches a term of their agreement, resort could only be had, if at all, to negotiation between the union and employer or to a strike action, should the need arise: ***Rector, Kwara Polytechnic v Adefila [2007] 15 NWLR (Pt.1056), 42 at 48.***