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Lenses: 'Employers as Victims' of Inappropriate Consensual Employee Relationships (ICERs)

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This Newsletter discusses the issues around Inappropriate Consensual Employee Relationships (ICERs), how ICER could be potentially harmful to employers, and the scope for recourse that such employers who suffer resulting damage, can have against the 'erring' employees.

Introduction

Employee to employee inappropriate workplace behaviours occur in various forms. They are any behaviour that goes against the employer's documented corporate policies, applicable statutory and regulatory provisions, codes of conduct etc., with potential for negative consequences such as: poor morale, employee stress, sub-optimal productivity, high employee turnover, toxic work environment, reputational damage/impairment of brand equity, direct and indirect financial losses, etc.[2] Some examples of employees' inappropriate workplace behaviour include bullying, sexual harassment (SH), victimisation, favouritism and grant of unfair advantage, verbal abuse, physical violence, connivance (for example to commit fraud), etc.

Whilst some of the improper employee's conducts are expressly forbidden – and many upon the pain of severe sanctions, because of the potential or presumed injury to employers – one that is always taken for granted as not being harmful to employers, is consensual romantic liaisons or trysts. We submit that *it is seemingly, but actually not, innocuous*. Some may wonder, *why should the employer be concerned about relationships between [two] consenting adults, especially if there are no obvious negative impact on the concerned employees' productivity? Would enquiry into such relationships not amount to a breach of the employees' right to privacy? Is it not more 'convenient', especially when star performers are involved, to turn a blind eye and not rock the boat?*

Background Assumptions: The Employer's Work Environment and 'Culture'

For the purposes of this Newsletter, we have assumed that the typical employer engages staff in furtherance of its strategic business objectives, and provides them with the platform and resources (safe work environment, adequate training, agreed compensation, requisite work equipment, etc.) to enable them perform the duties of their employment. Employees (who probably met for the first time at their employer's organisation), have their individual contracts of employment with their employer, and *an incidence of that is that they are required to collaborate with fellow employees for optimal realisation of their employer's corporate objectives*.[3] A major component of such corporate objective is sustainable and profitable operations - which is critical to corporate growth and expansion. In turn, this may underpin whether such employees continues to have a job, because a failed business will usually lay off employees, if not totally shut down operations.

Also, depending on sectors (which could impact *whether or how regulated the employer is*, exemplified by the employer's compliance requirements, etc.), and importantly, the employer's specific cultural context (its culture), employees have a sense of how unwelcome/unacceptable or otherwise, the ICER is.[4] They fully understand that *such is not an incidence of their contract of employment and the employer probably does not consider it important for the purposes of the employees delivering on their performance targets*.

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[1]The authors acknowledge the input of **Frank Okeke, Esq.** whilst discussing the Outline of this article. However, the authors take full responsibility for the views expressed herein including for any errors.

[2]Geraldine Grones, ***'Addressing Inappropriate Work Behaviour (and Preventing Them)'***, *Human Resources Director (HRD), 17.12.2019*: https://www.hcamag.com/us/specialization/workplace-health-andsafety/ addressing-inappropriate-work-behavior-and-preventing-them/194847 (accessed 18.01.2021).

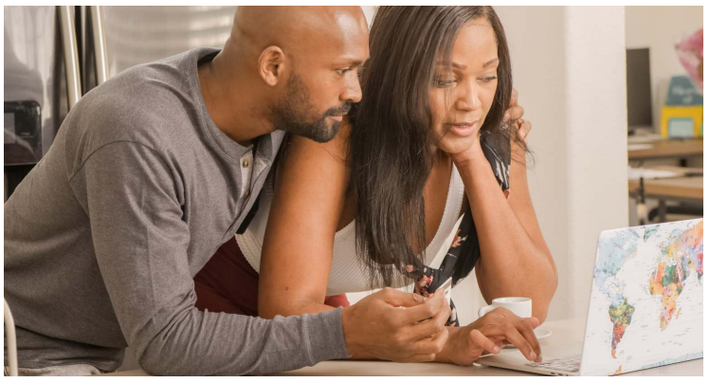
[3]Whilst it is in the employer's interest for employees to socialise and develop professional relationships in the workplace (and indeed most employers encourage such), arguably it may sometimes be necessary to draw the line at ICER. A school of thought contends that ICER in workplaces seemingly poses no threat to the employer and should be tolerated, citing studies that ICERs stimulate creativity, enhance communication, infuse excitement and create a healthy work environment. See Lisa Mainiero, ***'A Review and Analysis of Dynamics in Organizational Romances'***, *The Academy of Management Review, Vol. 11, No. 4 (Oct., 1986), pp. 750 -762* :https://doi.org/10.2307/258394 (accessed 27.01.2021); and Marcy Crary, ***'Managing Attraction and Intimacy at Work'***, *Organizational Dynamics, Vol. 15, No. 4 (March 1987), pp 27-41 at* p.34: https://www.researchgate.net/publication/247141747_Managing_attraction_and_intimacy_at_work (accessed 27.01. 2021).

[4]A highly skilled workforce or the professional ethics of such workforce may frown at ICERS, whilst in another setting a consensual relationship may not even be ICER because it is not considered as inappropriate. A leisure and hospitality business may take a more lenient or permissible view of such relationships compared with say, an hospital, a listed financial institution or a consulting firm.

In order to attract, retain, and motivate (especially skilled), talent - which will in turn positively impact the employer's business strategy and operating performance - the employer knows that a *positive, enabling, growth facilitating work environment is a sine qua non*. Presumably, employees have the same appreciation, affecting their responses to offers from prospective employers, consideration of whether to remain at their present roles with their current employers, etc.

As noted, the ICER may not attract much scrutiny or be regarded as invidious, because *"no one is getting hurt"*, unlike say, an SH scenario,[5] or connivance to commit a fraud or subvert the employer's corporate interest. Whilst a SH situation can arguably 'morph' into ICER (because the other party, for some reason, now 'willingly' agrees to such relationship), or an ICER could transform into SH, when one party 'wants out', but the other refuses. And other complications could arise because one 'partner' in an ICER becomes jealous if the other one attempts or gets into ICERs with other employees or sexually harasses them, thereby making the initial ICER, no longer exclusive between the two employees.[6] Undoubtedly, *office romances are not without risks.*[7]

Whilst an ICER may typically not result in a potential award of judgment against the employer/company, we respectfully submit that the *lack of awareness that the employer/ company could also be a victim thereof in other respects, does not mean that such potential exposure is non-existent*.[8]This could be particularly troubling where an employer has done everything within its power to ensure a professional work environment, but certain erring staff still go against its policies. Such an employer could suffer losses by way of damaged reputation, drop in stock prices, resignation of valued staff, cessation of relationships by key stakeholders such as investors, vendors, clients, etc.



Should such an employer not be entitled to compensation (whether *vide* indemnification or otherwise), or remedies against any erring staff? What scope of (contractual, statutory) remedies are available, and if too narrow, how can they be widened? It will also be apposite to see how some other common law and emerging market jurisdictions have dealt, or are dealing with, this issue. Our thesis is that it may be necessary for employers (especially listed, regulated entities or Nigerian subsidiaries of reputable multinationals), to begin to sensitise their staff on the inherent risks to the employer arising from ICER and how they can empower themselves to seek ICER related redress or compensation against erring employees.

X-rays: How Can ICER Hurt Employers?

By way of preface, ICERs can be of two types, between: (a) a *'senior' and 'junior' employee* (whether or not there is a direct or dotted reporting relationship between their job functions or roles); or (b) *both employees on the same level*, with no 'seniority' or 'power' imbalance in the relationship. In either (a) or (b) scenario, the employees may be in the same department, division or unit. Presumably, the employer's potential to suffer injury may be less in the (b) scenario,[9] but the actual impact will be a function of the employer's (and employees') circumstances.[10]

We now discuss in a bit more detail, the various ways that ICERs could prejudice employers, with varying degrees of severity.

Conflict of Interest

Conflict of interest is a situation *where an employee's duty to the employer is or could be compromised by self-interest or the interests of another – including those of another employee with whom he/she is romantically involved*.[11] This situation can arise where an ICER participant/employee directly or indirectly influence the advancement, promotion, salary/compensation structure, working conditions of his/her paramour.

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[5]SH unlike ICER is unsolicited and unwanted. It is *"a type of employment discrimination consisting in verbal or physical abuse of a sexual nature, including lewd remarks, salacious looks, and unwelcome touching"*: Bryan A. Garner, ***'Black's Law Dictionary'***, (9th ed.,) p.1499. Also, what constitutes SH in a work place is not definite, and could be determinant on the written policies of the particular organisation. It is therefore prescient for every organisation to have workplace policies prohibiting SH, workplace training, and a complaints process that protects employees from SH.

[6]A 1998 a survey of the Society for Human Resources Management cited in an online publication revealed that 25% of SH claims resulted from the dissolution of a workplace romance: https://in.sagepub.com/sites/default/files/upm-binaries/23945_5___Romantic_Workplace_Relationships.pdf (accessed 26.01.2021).

[7]See Michael J. Wietrzychowsk, ***'Addressing Romantic Relationships in the Workplace Through a Conflict of Interest Policy'***, *06.06.2018*: https://www.schnader.com/blog/addressing-romantic-relationships-in-the-workplace-through-a-conflict-of-interest-policy/ (accessed 06.02.2021). More recently the idea of consent has been questioned in ICERs where there is a power imbalance especially where one party has control over the finance and career of the other party. A notorious example is the former United States President's affair with Monica Lewinsky. At the time of the impeachment she insisted that the relationship was strictly consensual. However, in a recent interview with Vanity, she admitted that the relationship was influenced by an inappropriate abuse of position, privilege and station: Monica Lewinsky, ***'Monica Lewinsky: Emerging From "The House of Gaslight" in the Age of #Metoo'*** *Vanity Fair, 25.02.2018*: https://www.vanityfair.com/news/2018/02/monica-lewinsky-in-the-age-of-metoo (accessed 10.02.2021).

[8]In ***Colin Ramon Reguero- Puente v. City of Rockingham [2018] FWC 3148***, the Australian Commission upheld the dismissal of a Manager for sending salacious texts to younger female co-workers. The Commission rejected his argument that the messages were welcomed and reciprocated, given the power imbalance caused by his seniority. *Per Deputy President Binet held* that *"In this day and age young women should not have to tell their older superiors that they do not want to be sent salacious texts during or after working hours, nor have comments of a sexual nature made about them, or be directed towards them in their workplace."* See further discussion in Michael Byrnes, ***'Salicious Facts, Important Principles'***, *Mondaq, 27.06.2018*: https://www.mondaq.com/australia/unfair-wrongful-dismissal/714000/salicious-facts-important-principles (accessed 10.02.2021).

[9]*"Nonfraternization policies typically do not allow relationships between managers and employees who directly or indirectly report to them."* See Amelia Lucas and Kate Rogers, ***'McDonald's Chief People Officer is Leaving the Company in the Wake of its CEO's Departure'***, *CNBC, 04.11.2019*: https://www.cnbc.com/2019/11/04/mcdonalds-chief-people-officer-is-leaving-the-company-in-the-wake-of-its-ceos-departure.html (accessed 27.02.2021).

[10]*Cf.* with SH. According to a commentator, empirical studies consistently document that a majority of harassers are male and more likely to be at the same or at a higher organisational level than their victims: Joni Hersch, ***'Sexual Harassment in the Work Place'***, *IZA World of Labor Website, October 2015*: https://wol.iza.org/articles/sexual-harassment-in-workplace/long (accessed 28.01.2021). In ***Janzen v. Platy Enterprise Ltd. [1989] 1 S.C.R. 1252***, *Dickson CJ* of the SC of Canada stated that in most cases of SH, the perpetrator misuses *"a position of power to import sexual requirements into the workplace thereby negatively altering the working conditions of employees who are forced to contend with sexual demands."* See also, ***Nolan C. Lickey, et al, 'Responding to Workplace Romance: A Proactive and Pragmatic Approach'***, *The Journal of Business Inquiry 2009, Vol. 8, pp. 100-119*:https://www.researchgate.net/profile/Gregory-Berry-2/publication/265928528_Responding_to_Workplace_Romance_A_Proactive_and_Pragmatic_Approach/links/54b8088a0cf2c27adc48a7e1/Responding-to-Workplace-Romance-A-Proactive-and-Pragmatic-Approach.pdf?origin=publication_detail (accessed 06.03.2021), for a couple of interesting case studies at *pp. 107-109*.

[11]Michael J. Wietrzychowsk*i **(supra)***.

In one example, the University of Berkeley had to terminate its Assistant Vice Chancellor services after discovering that she increased the salary of her paramour from US$41,000 to US$120,000 over a five year period, despite protests of the paramour's direct supervisor that the steep pay rises were not merited.[12] During redundancies, decisions could be ICER biased, such that an employee participant (latest joiner and weak link in the team), who should be disengaged is retained for another who ought to have been retained.

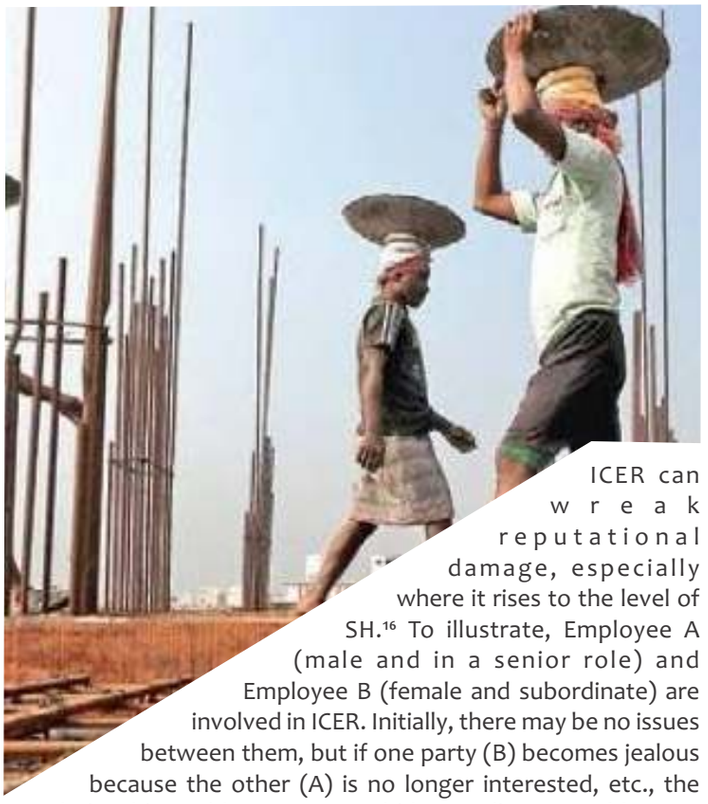
In ***Abrams v. RTO Asset Management,***[13] a long-serving manager was dismissed for failing to disclose to his employer, a sexual relationship in which he was engaged with another employee. Prior to dismissing the employee, the employer conducted an investigation that uncovered: (a) the existence of the relationship; (b) the fact that the employee was improperly providing his lover with information about company-related events; and (c) that the employee had lied when questioned about the relationship. The employee subsequently brought a claim for wrongful dismissal, seeking damages. He was unsuccessful, as the Court held that the employee had deliberately placed himself in a conflict of interest situation, and acted dishonestly (thereby further violating his employer's trust to justify dismissal), with his false answers when questioned.

It is saying the obvious that it would be hard to be objective when an ICER employee is overseeing, making input to or directly conducting performance review of an ICER partner.[14] On the flip side, even where a promotion is well earned, 'perception can be as strong as or stronger than reality'; thus colleagues aware of the ICER may believe that the promotion resulted from favouritism, with attendant negative effects on morale and team dynamics that can lead to a toxic work environment.

In this regard, an analogy can be drawn with a foundational legal principle, to underlie the force of perception of fairness – *"justice should not only be done, but should manifestly and undoubtedly be seen to be done"*.[15] Conduct must pass 'the sniff test'. What will an uninterested third party who is aware of the circumstances think? More likely, that there was conflict of interest. In Easterbrook (ex-CEO of McDonald's) case, subsequent revelation about the grant of stock options to an ICER partner clearly reinforces the conflict of interest.

Injury to the Employer's Brand/Reputation

Undoubtedly, ICER could negatively impact an employer's reputation, especially in sectors where goodwill and brand equity are key drivers of the employer's competiveness.



ICER can wreak reputational damage, especially where it rises to the level of SH.[16] To illustrate, Employee A (male and in a senior role) and Employee B (female and subordinate) are involved in ICER. Initially, there may be no issues between them, but if one party (B) becomes jealous because the other (A) is no longer interested, etc., the relationship could turn sour. In a bid to retaliate, B could report that she was sexually harassed by A, or that she gave in to A's advances because she feared for her job. Or if the employer terminates B's services, she could believe that A had a role in it, and the likelihood of litigation against the employer would be very high.

With litigation would come the inevitable (unwanted and presumably negative) media attention; and if as is often the case, B wins (because the courts are more sympathetic, regarding her as a victim who really feared for her job), the negative reputational ripples could be substantial.[17] Such resultant scenarios calls into question, the credibility, fairness, integrity, management decision making, culture and the general practices of the employer.[18]

It is worse when one of the persons involved is the Chief Executive Officer (CEO), since the CEO is often 'the face' of the employer in the marketplace. Ordinarily, part of his role is to promote the company's positive image, but the employer suffers huge disservice when the CEO is an ICER participant, despite the employer's rules to the contrary.

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[12] Matt Krupnick, ***'Secret Sex Partner's Pay Gets Former UC Assistant Vice Chancellor Fired',*** *Mercury News, 04.05.2012:* https://www.mercurynews.com/2012/05/04/secret-sex-partners-pay-gets-former-uc-berkeley-assistant-vice-chancellor-fired/ (accessed 09.02.2021). *Cf. "McDonald's lawsuit also claims that Easterbrook approved a stock grant worth hundreds of thousands of dollars to Employee 2 in the midst of their sexual relationship. According to the complaint, the approval of the grant came 'shortly after their first sexual encounter and within days of their second.'"*

[13] ***2019 NBQB 129.***

[14] *Amy Gallo,* ***'How to Approach an Office Romance (and How Not To)',*** *Harvard Business Review, 10.02.2019:* https://hbr.org/2019/02/how-to-approach-an-office-romance-and-how-not-to (accessed 08.02.2021).

[15] *Per* ***Hewart, CJ in R v Sussex Justices exparte McCarthy [1924] 1 KB 256, at 259***. See also ***Abacha v Eke-Spiff [2009] 7 NWLR (Pt. 1139), 97 at 128B-H.***

[16] In a research carried out by members of UCLA's Anderson School of Management and the University of Amsterdam, it was shown that SH affects public perception of an organisation's gender equity where SH claims has been filed as against others where none has been filed. Unsurprisingly, the studies revealed that the people viewed an organisation where SH claim has been filed as less equitable than one with a claim for financial misconduct: Serena Does, *et al,* ***'Research: How Sexual Harassment Affects a Company's Public Image'****, Harvard Business Review, 11.06.2018:* https://hbr.org/2018/06/research-how-sexual-harassment-affects-a-companys-public-image (accessed 20.01.2021). *"Expanding the latter finding, we also find that people see a sexual harassment claim as more indicative of a culture problem than a bad apple problem - even compared to a claim of fraud." Ibid.*

[17] In 2019 , *The Financial Times* published a list of CEOs or top executives who were forced out of their position because of ICERs, they include Intel's Brian Krzanich, McDonald's Easterbrook, Priceline's Darren Huston, Lockheed Martin's Christopher Kubasik, Best Buy's Brian Dunn, HP's Mark Hurd and Boeing's Harry Stonecipher: Archie Hall, *et al,* ***'Forbidden Love: the Changing Attitudes to Office Romance',*** *Financial Times, 02.11.2019:* https://www.ft.com/content/d4247c24-0147-11ea-b7bc-f3fa4e77dd47 on 05.02.2019 (accessed 07. 02.2021). See also ***'Boeing Fires CEO over Relationship',*** *CNN, 07.03.2005,* https://edition.cnn.com/2005/BUSINESS/03/07/boeing.quit/ (accessed 28.02.2021): *"Boeing has ordered its Chief Executive Harry Stonecipher to step down because of what the U.S. aircraft giant said was an improper relationship with a female executive. … its board of directors had asked for and received the resignation of Stonecipher after an investigation by internal and external legal counsel into the personal relationship. Following the probe, 'the board concluded that the facts reflected poorly on Harry's judgment and would impair his ability to lead the company,' Platt said in a statement. 'The resignation was in no way related to the company's operational performance or financial condition, both of which remain strong,' Boeing said in a statement. 'However, the CEO must set the standard for unimpeachable professional and personal behavior. And the board determined this was the right and necessary decision under the circumstances.'"*

[18] In another case, ABC News reported a consensual relationship between two police officers in Ohio, USA: a 30 year old female and her 57 year old boss (the Police Chief) who were caught on camera by the Police cruiser dash cam romancing each other, whilst transporting a burglary suspect at the backseat. Subsequently, the Chief (who was already close to retirement), was allowed to retire whilst the female officer was fired. This resulted in a successful anti-discrimination suit by the aggrieved junior officer. See Abbie Boudreau and Suzanne Yeo, ***'Ruling: Officer Caught on Tape Kissing Boss was Improperly Fired',*** *ABC News, 08.12.2010:* https://abcnews.go.com/amp/US/ruling-kissing-cops-firing-discriminatory/story?id=12350164; https://youtu.be/BCm2oAU3TqU (accessed 08.02.2021). In our view, in addition to attracting negative publicity to the Police Department, ***the instant ICER exemplifies how dereliction of duty can also result therefrom.***

James Easterbrook, McDonald's recently ousted CEO, reportedly conceded that his relationship with an employee demonstrated poor judgment and violated company policy prohibiting manager relationships with employees. *"This was a mistake,' Easterbrook wrote in an email. 'Given the values of the company, I agree with the board that it is time for me to move on.' "*[19] As discussed elsewhere in this article, Easterbrook's conduct which is now the subject of McDonalds' litigation against him is actually still keeping McDonalds in the news for the wrong reasons. For example, *"the company has also come under fire from its workers for how it handles sexual harassment in its restaurants."*[20]

In sectors where a company's principal asset or one of its most significant assets is goodwill (as an intangible asset), negative fallouts from ICER may spell the end of such company, or may reduce its valuation in prospective mergers and acquisition (M&A) transaction, thereby giving the employer company (and its shareholders), the short end of the stick.

An analogy may be drawn with sex for marks or other favours' scandals in tertiary institutions or ICER relationships between academic staff that have career advancing implications for one of the ICER pair, owing to the influence of the other. Ultimately, these harm credibility and reputation of such institutions, creating perception or actual performance issues for unmeritorious graduates and academic staff, but which also rubs off negatively on brilliant, hardworking staff and students. The latter become unwilling bearers of the related stigma. It is unlikely that universities notorious for such scandals will be highly rated in global, regional or national university rankings, deterring prospective students and faculty. Such conduct does injustice to the vision and efforts of the university's founders and financiers.[21] Unsurprisingly, ***University Regulations*** or ***Bye-Laws*** forbid such conduct with sanctions, but they still happen.

Financial Losses

Within a day of the shock firing of its CEO for ICER related reasons, McDonalds reportedly lost about US$4 billion in market capitalisation, when its stocks dropped by 3%.[22] Prior to this, *"Easterbrook oversaw a turnaround of the company. McDonald's shares have risen 96% to $193.94 since Easterbrook took over as CEO in 2015."*[23] The financial losses can even be prospective: where a company loses a high-performing CEO due to ICER, and the performance of his replacement is not as effective or even where the company has to stumble through a haze of leadership transitions in order to eventually find an impactful, high performing CEO like the one who departed for ICER reasons. Harry Stonecipher's sudden exit from Boeing in 2005 unsettled plans at his 'second coming' for him to stay long enough in the role in order to consolidate the positive reversal of the company's fortunes.[24]

Another illustration on how ICER can cause instability at top echelons of a company's management (presumably to its hurt), is Intel Corporation. In June 2018, CEO Brian Krzanich, *"was forced to resign because of a 'past consensual relationship with an Intel employee.' "* Robert Swan (erstwhile CFO and reluctant successor) was named Intel's permanent CEO in January 2019, but *"under Swan, the company has struggled, losing market share to competitors in key business segments and dealing with manufacturing delays."* In January 2021, Intel was reported to have *"named [Intel alumni] Pat Gelsinger as its new [CEO], replacing Bob Swan after a rocky two-year run."*[25] Although Intel reportedly stated that the shuffle *"is unrelated to Intel's 2020 financial performance"*, the fact that *" Intel (INTC) shares rose nearly 8% following the news, while VMWare (VMW) [a competitor's] shares slipped almost 8%.."* must mean something.

[19] See Emma Newburger and Amelia Lucas, ***'McDonald's Fires CEO Steve Easterbrook for Violating Policy over Relationship with Employee'***, *CNBC, 04.11.209*: https://www.cnbc.com/2019/11/03/mcdonalds-steve-easterbrook-is-out-as-ceo-due-to-a-consensual-relationship-with-an-employee.html (accessed 27.02.2021). It appears that subsequently McDonald's discovered that Easterbrook had affairs with two other employees, and McDonalds is suing for rescission of separation agreement with him on that basis.

[20] *Ibid. " 'It's clear McDonald's culture is rotten from top to bottom, 'Fight for $15 and a Union, a fast-food workers' rights group, said in a statement. '...The company needs to be completely transparent about Easterbrook's firing and any other executive departures related to these issues. 'Fight for $15 has filed several dozen complaints on behalf of McDonald's employees against the Chicago-based company. McDonald's* Chief People Officer David Fairhurst departed on Monday *[4th November 2019], the company confirmed."*

[21] For a detailed discussion, see Tope Fasua, ***'How the Sex-for-Marks Phenomenon Damages Nigeria'***, *The Cable, 12.10.2019*: https://www.thecable.ng/how-the-sex-for-marks-phenomenon-damages-nigeria; and Eric Fredua-Kwarteng, ***'Sex for Grades is a Scandal, No Matter Who Raises It'***, *Times Higher Education, 20.01.2020*: https://www.timeshighereducation.com/opinion/sex-grades-scandal-no-matter-who-raises-it (both accessed 06.03.2021).

[22] Yusuf Khan, ***'McDonald's Loses $4 Billion in Value after CEO Fired over Relationship with Subordinate'***, *Market Insider, 04.11.2019*:https://markets.businessinsider.com/news/stocks/mcdonalds-stock-price-billions-wiped-from-value-on-fired-ceo-easterbrook-2019-11-1028654817 (accessed 05.02.2021).

[23] Newburger and Lucas, (***supra***).

[24] See ***'Boeing Fires CEO Over Relationship'***, *CNN, 07.03.2005*: https://edition.cnn.com/2005/BUSINESS/03/07/boeing.quit/ (accessed 28.02.2021). *"But Cai Von Rumohr, SG Cowen aerospace analyst, said the move was bad news for the company, given Stonecipher's record over his brief tenure. 'I think under other circumstances it's possible this is something the board might have overlooked,' Von Rumohr told CNN. 'They're going to get good points for that.* ***But I think the issue is that Harry had done enough good things in terms of commercial (aircraft) marketing and cash redeployment that it will be difficult to maintain that momentum in this transitional period.' When he came out of retirement in December 2003 at age 67 to assume the top job, his comments suggested he intended an extended stay.*** *'We're not here on an interim basis, 'he said. 'I have a lot of work to do before I start looking for a successor. I didn't come here to start looking for a successor.' But it had seen its stock rally 52 percent since he took over, the third best performer among Dow industrial components in 2004, as its earnings per share increased to $2.31 from $1 in 2003. Last month, it said it expected 2005 and 2006 sales to top Wall Street expectations."*

[25] Ian King, ***'Intel CEO Bob Swan Is Replaced by VMware's Pat Gelsinger'***, *Bloomberg, 13.01.2012*: https://www.bloomberg.com/news/articles/2021-01-13/intel-ceo-bob-swan-is-said-to-be-replaced-by-vmware-s-gelsinger. See also: Jordan Valinsky and Clare Duffy, ***'Intel Ousts CEO and Names Successor'***, *CNN Business, 13.01.2021*: https://edition.cnn.com/2021/01/13/investing/intel-new-ceo-pat-gelsinger/index.html; and Edward Helmore, ***'Intel CEO Brian Krzanich Quits Over Relationship With Employee'***, *The Guardian, 21.06.2018*: https://www.theguardian.com/technology/2018/jun/21/intel-ceo-brian-krzanich-company-relationshipemployee#:~:text=Intel%20chief%20executive%20Brian%20Krzanich,the%20company's%20non%2Dfraternization%20policy (all accessed 28.02.2021).

Although not an ICER scenario, an illustration of how work related sexual relationships, abuse or related criminal conduct can be harmful or deleterious, is the notorious case of Harvey Weinstein, erstwhile powerful media mogul and co-founder of the Weinstein Company. These ultimately led to the bankruptcy filing of the Weinstein Company, with the court approved plan including settlement to some of his female accusers.[26] Essentially, it is safe to say that the demise of the Weinstein Company is directly related to Harvey Weinstein's work related sexual escapades – the price can indeed be very steep, with drastic losses to all stakeholders: owners, employees, clients, vendors, etc.

Vicarious and Other Liability

ICER may expose employers to vicarious liability claims from disgruntled ex-participants (who might have left the services of the employer in whatever circumstance); believing they are entitled to one relief or the other, they may fancy that the principle of *respondent superior* (let the employer respond) may avail them better chances of recovery.[27] Obviously the employer represents deep pocket, and from recovery quantum perspective may not only be an easier target, but may be more willing to quickly settle any claim and thereby obviate negative publicity.

Analogy may be drawn with the recognition of the condonation principle where an employer becomes liable for omissions that effectively result in an enabling environment for SH: ***Maduka v. Microsoft Nigeria Ltd & Ors***.[28] In the ***Microsoft*** case**,** the NIC gave a judgement which laid the foundation of Nigerian caselaw that in certain circumstances, the employer may be vicariously liable for workplace SH. There, the employee claimed her employment was unfairly terminated having been the victim of SH by her supervisor. Microsoft, sought to have its name struck out considering that it had a policy, ***(Anti–Harassment & Anti- Discrimination Policy and Complaint Procedure)*** to address workplace SH in all its branches.

It was also brought to the attention of the Court that when Microsoft Corporation became aware of the allegations of SH in its Nigerian company, it launched an investigation on the report in United States of America. However, there was no evidence put before the Court that the employee was invited or interviewed in respect of her allegations when the investigation commenced, neither was there any evidence of the outcome of the investigation commended to the Court.

The Court held that by *"the inaction and silence of the 1st and 2nd Respondent, they both tolerated and ratified the 3rd respondent's conduct which is against their policy of prohibition and non-tolerance of sexual harassment, gender discrimination and retaliatory action."* The Court went on to hold that Microsoft was in breach of its duty of care and protection to the employee and was vicariously liable for the SH acts of the 3rd Respondent.

Consequently, it can be deduced that where an employer becomes aware of a workplace SH (or ICER) incidence and takes no administrative decision to investigate and address it, *such employer may be liable for breaching its duty of care owed to the employee to protect the employee's fundamental rights*.[29] Where an employer has condoned either expressly or indirectly (for example if the fact of the condonation can be inferred from the attitude of the employer), then the employer will be unable to dismiss the employee for the same misconduct which he had previouslycondoned: ***Ekundayo v. University of Ibadan***.[30] By the same token, it stands to reason that an aggrieved ex-employee could use the same fact to claim against the employer.[31]

In ***Microsoft***, although the supervisor (3rd Respondent) was ordered to pay the Claimant ₦13.225 million/₦30,000 as damages and costs, the two Microsoft entities (1st and 2nd Respondents) were

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[26]*"A US bankruptcy court judge has approved the Weinstein Co's liquidation plan, which sets aside $17m for women who accused co-founder Harvey Weinstein of sexual misconduct. Judge Mary Walrath, presiding over a remote hearing from Wilmington, Delaware, overruled an objection from a handful of women who have been looking to pursue appeals of their claims outside the bankruptcy court. She noted that 83% of sexual misconduct claimants in the bankruptcy 'have expressed very loudly that they want closure through acceptance of this plan, that they do not seek to have to go through any further litigation in order to receive some recovery, some possible recompense ... although it's clear that money will never give them that.' The Weinstein Co sold its assets to Lantern Entertainment, which later became Spyglass Media Group, for $289m after it filed for bankruptcy in 2018. The bankruptcy was precipitated by widespread claims of sexual misconduct against company founder, Harvey Weinstein, who is serving a 23-year prison term after being convicted of sexually assaulting a former production assistant and raping an actress."* See ***'Weinstein Co to Pay Out $17m Over Sexual Abuse Claims as Part of Liquidation'***, *The Guardian*, 26.01.2021: https://www.theguardian.com/world/2021/jan/26/weinstein-co-to-pay-out-17m-over-sexual-abuse-claims-as-part-of liquidation#:~:text=A%20US%20bankruptcy%20court%20judge,Harvey%20Weinstein%20of%20sexual%20misconduct.&text=The%20Weinstein%20Co%20sold%20its,filed%20for%20bankruptcy%20in%202018;(accessed28.02.2021)

[27]According to a learned author, the doctrine *"fixes liability on the employer for the tortious act of the employee committed in the course of employment and causing injury to a third party, without any necessary element of fault on the part of the employer."* See Oladosu Ogunniyi, ***'Nigerian Labour and Employment Law in Perspective'***, (2nd *ed., 2009*), 193. The employer will only have a defence where the employee is deemed to have gone "on a frolic" of his own (acted outside the scope of his employment). See ***Techno Mechanical (Nig.) Ltd v. Ogunbayo (1999) LPELR-6760(CA); Eseigbe v. Agholor [1993] 9 NWLR (Pt. 316)128; Quinn v. Horsfall & Bickham Ltd [1956] 2 ALL ER 467; General Cleaning Contractors Ltd v. Christmas [1953] AC 189.***

[28]***Unreported Suit Number NICN/LA/492/2012, Obaseki-Osaghae , J's judgement of 19 December 2013.***

[29]An employer can condone an act of misconduct either by ignoring same and not taking any action on it at all or by keeping silent, and subsequently promoting the employee concerned in recognition of other good services rendered. See generally, Oladosu Ogunniyi ***(supra)***, *273.*

[30]***[2000] 12 NWLR (Pt. 681), 220 at 241D.***

[31]Two decisions of the US Supreme Court in ***Burlington Industries v. Ellerth524 U.S. 742 (1998)***; and ***Faragher v. City of Boca Raton. 524 U.S. 775 (1998)*** affirmed amongst others that a defence may be available to the employer if it can prove that it exercised reasonable care to prevent and promptly correct any sexually harassing behaviour (and by extension, ICER).

also respectively ordered to pay similar sums each to the Claimant.[32] With increasing awareness, we may see more of such suits and potentially more substantial damages against employers in the future, in Nigeria.

Demotivation/ Demoralisation of Workers

Some of the consequences of ICER related conflict of interest scenarios is its negative impact on team spirit, disillusionment with the fact that the company is not walking its talk thereby potentially weakening the strands of loyalty and commitment to the company, reflective in low morale and productivity. Gradually a toxic work environment may be the outcome. Erstwhile passionate staff may become lethargic, after all what is the point of 'going above and beyond' the call of duty when favouritism and departure from due process per the stipulated corporate governance could be the order of the day? When there is a departure, based on tone from the top, from insistence that everyone lives the values of the organisation?

Space constrains a full discussion of the dimensions of the foregoing. Not only is it the case that employees cannot deliver their best in a toxic environment, same may be a catalyst in the loss of employees who can no longer put up with the negative changes in the work atmosphere. When star employees depart for competitors, the employer loses in two ways: weakening of the employer's team, and strengthening of their competitors. Replacing such departed staff comes at cost of time, efforts and money; there is also a risk that newly recruited employees may not be as talented as the departed ones, because the employer's work environment becomes less attractive for recruiting star performers. How will a company secure its competitive position in the market place in such circumstances?

Employers' Remedies: Scope and Reform issues

Based on the foregoing, let's face it, it would even be better for companies to permanently deter and discourage such relationships, because most of the time it never ends well for them, but employers have not really been successful with this. For example, some employers have tried by imposing strict "no dating" policies, but the experience with policies forbidding dating is that they are almost impossible to enforce equitably, tend to chill the reporting of SH, and/or adversely affect employee morale by making the employer appear like Big Brother to employees (and to the outside world once someone anonymously posts the policy on social media).[33]

Pursuant to the legal principle of *ubi jus ibi remedium (where there is a wrong,* there is a remedy), a claimant must have the means to vindicate his right and a remedy, if he is injured in the enjoyment or exercise of it: ***Bello vs. A.G Oyo State.***[34] This maxim is so fundamental to the administration of justice that where there is no remedy provided by common law or statute, the Courts have been urged to create one, and in most instances have done so. The Courts cannot therefore be deterred by the novelty of an action; as it is a hollow concept to imagine a right without a remedy. The law being an equal dispenser of justice leaves none without a remedy, because *ubi jus ibi remedium* comes in. The Courts are enjoined, through requisite judicial activism, to provide appropriate remedy, whether or not the wrong is remedial under a known head of tort or form of action: ***Promasidor (Nig) Ltd & Anor v. Asikhia.***[35]

Certainly it is erroneous to assume that employers cannot be prejudiced by ICER situations. We submit that where necessary, employers are entitled to protections and reliefs. Criminal action against ICER participants who collude to defraud an employer, may often afford insufficient relief; the employer must be made good *vide* restitutionary reliefs against the employees. This is where *ubi jus ibi remedium* can come to the rescue. The traditional view that employers cannot sue employees regarding how they perform their duties is now outdated and must clearly admit of exceptions.[36] Any obvious gaps despite judicial activism can be filled *vide* legislative action.

32See *Orders 4-7* at ***p. 31*** of the Judgment: *"4. **Each of the Respondents (1st, 2nd and 3rd) is to pay to the Applicant the sum of ₦13,225,000.00 … as general damages for the violation of the applicant's rights** as guaranteed under Sections 34 and 42 of the Constitution of the Federal Republic of Nigeria 1999 (as amended) and Articles 2, 5, 14, 15 and 19 of the African Charter on Human and People's Rights (Ratification and Enforcement) Act Cap A9, Laws of the Federation, 2004. 5. The 1st and 2nd Respondents are to immediately implement the sexual harassment policy to prevent a recurrence of a hostile working environment sexual [for] harassment in the 1st Respondent. 6. Cost of ₦30,000.00 is to be **paid to the applicant by each of the Respondents**. 7. The sums are to be paid within 30 days."* (Emphases supplied).

33Michael J. Wietrzychowski, ***(supra).***

34(1986) 5 NWLR (Pt. 45), 828. Also see ***LAU vs. PDP (2017) LPELR (42800) 1, at 60-61.***

35(2019) LPELR-46443(CA).

36Conceptually, employers should not be able to sue employees for poor or even negligent performance of their functions – because many factors leading to such was within the control of the employer who exercise judgment as to whether the employee is a suitable and competent candidate, having gone through the recruitment or selection process. Also the employer either supervises or is supposed to train the employee in order to perform his job function satisfactorily. However, where the employee's conduct in breach of the employer's policies lead to economic and other losses, the employer should be able to pursue recovery or loss mitigation claims against such employee(s).

McDonalds' suit against its ex-CEO who was alleged to have had ICERs with three employees, for damages or rescission of a separation agreement on grounds of fraudulent inducement and breach of fiduciary duty, has been making headlines.[37] Employers also have access to employees that were aware of the ICER situation and who may be willing to testify in furtherance of the employer's claims against any party.[38]

If the ICER participant who takes related biased decisions or actions is a director, the provisions of ***section 306 Companies and Allied Matters Act 2020 (CAMA)*** becomes relevant. It prohibits conflict of the personal interest of a director regarding any of his duties as a director under **CAMA**; prescribes that directors are not to *"make any secret profit or achieve other unnecessary benefits"*, in the course of their management duties; they are accountable for any secret profit made or any benefit derived thereby; and the duty not to misuse corporate information survives their tenure of office, such that they still remain accountable and can be restrained by an injunction from misusing such information, etc. Also, 'after-the fact' disclosures will not relieve directors from liability to account for secret profits.

Will undue conferment of benefits on ICER participant to the presumed detriment of the employer company by a director amount to *"secret profits"* or *"unnecessary benefits"*, since the director did not directly confer such benefit on himself? We submit that *the employer is entitled to seek recovery from either or both parties, particularly the erring director, by way of damages represented by the unmerited grant and also interest on such damages subject to satisfying evidential burdens.*

The foregoing is underlaid by ***section 305 CAMA*** which categorises directors as fiduciaries of the company, and must exercise utmost good faith in their dealings with and on behalf of the company. Particularly, by ***section 305(3)-(5)***:

> *"3. A director shall act at all times in what he believes to be the best interests of the company as a whole so as to preserve its assets, further its business, and promote the purposes for which it was formed, and in such manner as a faithful, diligent, careful and ordinarily skilful director would act in the circumstances ... (4) The matters to which a director of a company is to have regard in the performance of his functions include the interests of the company's employees in general, as well as the interests of its members. (5) A director shall exercise his powers for the purpose for which he is specified and shall not do so for a collateral purpose, and the power, if exercised for the right purpose, does not constitute a breach of duty, if it, incidentally, affects a member adversely.*

The corollary of ***section 305(5) CAMA*** is that *power exercised for improper purposes constitutes breach of duty, which is actionable.* By ***section 305(9)***, *"any duty imposed on a director under this section is enforceable against a director by the company."*

Employers' Risk Management Approaches

It is important that employers, especially those subject to stringent sectoral or regulatory requirements for example *"public interest entities"* under the ***Financial Reporting Council of Nigeria Act 2011***[39] who are mandatorily subject to the ***Nigerian Code of Corporate Governance 2018*** (**NCCG**), devise approaches to minimise their ICER potential exposure. This is because of the implications of same for their compliance status under the regulatory provisions.[40] It is also instructive to note that the **NCCG** has imposed *additional or complementary obligations* (to **CAMA's**) on directors.[41]

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[37] ***McDonald's Corporation v. Stephen J. Easterbrook C.A. No. 2020-0658-JRS, (ruling of Slights, VC of 02.02. 2021):*** https://kemfe.org/fraud-warning/mcdonalds-corporation-v-stephen-j-easterbrook/ (accessed 27.02. 2020). The Court ruled against Easterbrook on both grounds of his preliminary objection seeking to dismiss McDonald's suit. See factual excerpts: *"The parties entered into the Separation Agreement after McDonald's discovered Easterbrook had engaged in a sexual relationship with a subordinate. While McDonald's initially considered terminating Easterbrook for 'cause,' it ultimately decided that a voluntary separation was best for the Company and thereafter negotiated with Easterbrook regarding the terms of his termination 'without cause.' The product of that negotiation, the Separation Agreement, provided Easterbrook with substantial severance compensation in exchange for his leaving the Company voluntarily with a full release of claims against the Company. After his separation, McDonald's discovered Easterbrook had engaged in several other inappropriate work-place relationships with subordinates notwithstanding his representation that the relationship that prompted his termination was an isolated transgression. McDonald's also learned that Easterbrook had orchestrated a substantial grant of equity to one of the employees with whom he was having a sexual relationship in clear violation of Company policy."*

[38] McDonald's case provides another illustration of this point: *"a former McDonald's employee accused of having a sexual relationship with the company's ousted CEO has agreed to be deposed in a lawsuit against the former executive. On Friday, McDonald's attorneys announced in a filing that "Employee 2" had agreed to appear for a deposition in a court battle between the fast-food giant and its former CEO, Steve Easterbrook."* See Judie Simms, ***'McDonald's Employee Accused of Sexual Relations with CEO to be Deposed'***, *FinTech Zoom, 27.02.2021:* https://fintechzoom.com/fintech_news_mcdonalds/mcdonalds-mcdonalds-employee-accused-of-sexual-relations-with-ceo-to-be-deposed/ (accessed 27.02. 2021).

[39] ***Section 77*** defines *"Public Interest Entities"* as meaning *"governments, government organizations, **quoted and unquoted companies and all other organizations which are required by law to file returns with regulatory authorities and this excludes private companies that routinely file returns only with the Corporate Affairs Commission and the Federal Inland Revenue Service."*** For a discussion on the import of the definition, see Afolabi Elebiju, *et al,* ***"Definitions And Developments: Corporate Governance Implications Of Judicial Interpretation Of 'Public Interest Entities' In Eko Hotels Limited v. FRCN FHC/L/CS/1430/2012",*** *LeLaw Thought Leadership, July 2019:* https://lelawlegal.com/add111pdfs/PIE-ARTICLE.pdf (accessed 06.03.2021).

[40] The ***FRCN Act*** established the FRC which amongst others is empowered to "enforce and approve enforcement of compliance with accounting, auditing, ***corporate governance*** and financial reporting standards in Nigeria" (***section 7(2)(a)***). Pursuant to its statutory powers, the FRC prepared the **NCCG** for issuance by the Minister of Industry, Trade and Investment. One of FRC's key departments is the *Directorate of CG (DCG)*, whose objectives/functions (*per* ***section 50 FRCN Act***) include to: *"(a) develop principles and practices of corporate governance; (b) promote the highest standards of corporate governance; [and] (c) promote public awareness about corporate governance principles and practices".*

[41] Examples: Under ***Principle 28 (Disclosures), Para 28.1*** obligates the Board to ensure *"that the Company's annual report includes **a corporate governance report** that provides clear information **on the Company's governance structures, policies and practices** as well as environmental and social risks and opportunities." Per* ***Para 28.7(a)***: *"A Director who has serious concerns about the activities of a Company should ensure that the following are promptly raised to the Board for resolution: (a) any unreported cases of conflict of interest, ... related party transactions, fraud or any illegal or suspected illegal activities".*

To illustrate, the ***NCCG*** mandates every company to have conflict of interest policy.[42] *Per* ***Para 25.2***, *"The policy on conflict of interest should be communicated, supported and monitored to provide reasonable assurance that all potential conflict of interest situations will be disclosed."* Such policy could be designed or revised to include ICER elements by way of (anti-) fraternisation provisions – even though the ***NCCG*** does not explicitly includes such advisory.[43] However such a proactive approach can be justified by the jurisdiction of the Board's Nomination and Governance Committee.[44] The Company Secretary also has a role to play in supporting such initiative.[45]

In addition, companies with sufficient sensitivity to ICER can make it an issue by including preferred approach in contracts of employment; for example, acknowledgement of either an absolute prohibition or undertaking to comply with the employer's policy on it,[46] it being clear that non-compliance could be a ground for dismissal or other specified disciplinary action. The higher the rank of the staff, the more imperative the need to have such clauses, as ICER between two junior employees may not present as much exposure as ICER between a management staff and a mid or low level employee.[47]

It is also important that the clauses be appropriately worded, for example with employer indemnification rights, application of severance package towards settlements, etc.[48] Indeed, all employees can sign annual ICER declarations, in the same way they sign other Code of Conduct type annual declarations.[49] That way, the employer reinforces the prohibition of, or signals its serious view of compliance with guidelines on such relationships.

Where the employer permits such relationships, employees can be required to sign *'Love Contracts' (LCs)*, where they express their wilful choice to enter into such relationship, undertake it will not affect their professional work and output, and absolving the employer in case of negative fall-outs in future.[50]

Obviously, based on privity of contracts (which disentitles non-parties from suing, or relying on contractual provisions), the employer has to be a party. This result can be achieved by having reference to such in the Staff Handbook, such that the employer would be deemed a party for the purposes of claiming defences or benefits of such.

Another variant is the *Consensual Relationship Agreements (CRAs)*[51] with employees, also in a bid to protect the employer from any liability that might arise from erstwhile 'compliant' office relationships.

As earlier mentioned, where the employer does not absolutely forbid employee romantic relationships, it may be prudent to have some policy guidelines (*'Employee Relationships in the Workplace Policy'*) to set boundaries and define expectations, so there is 'upfront clarity' on behaviours and consequences.[52] Such a policy especially if very broad, may well prove to be *"a stitch in time that saves nine"*; they provide helpful context for the LCs and CRAs. The whole arrangement should be underpinned by sentiments such as *"at any point, we will keep our employees' freedom and individual rights in mind and follow the law."*[53]

[42] In addition to the establishment of policies on insider trading and related party transactions: ***Para 25.1.1.***

[43] The ***CAMA*** and several other legislation tend to adopt traditional views of "relationship" for conflict of interest purposes, familial ties (blood or marriage) than non-marital relationships amongst professional colleagues. See for example, ***section 321(8) CAMA*** on *"connected persons"* in evaluating related partytransactions: *"spouse, child or step-child, including illegitimate child."* However, as this article has shown, current realities make a wider scope definition or equal recognition of the latter type of relationship as biological and marital relationship, world view more appropriate.

[44] For example one of their responsibilities is to "ensure the development and periodic review of Board charters, Board committee charters and other governance policies, such as ***the code of ethics, conflict of interest and whistleblowing policies among others***." ***Para 11.2.5.10*** (emphasis supplied).

[45] By ***Para 8.6.6,*** the Company Secretary is to *"Provide a central source of guidance and advice to the Board and the Company on matters of ethics, conflict of interest and good corporate governance."* The title of ***Part D NCCG*** (comprising ***Principles 24*** and ***25***) is instructive: *"Business Conduct with Ethics"*. ***Principle 24*** focuses on the fact that *"The establishment of professional business and ethical standards underscores the values for the protection and enhancement of the reputation of the Company while promoting good conduct and investor confidence."* On its own part, ***Principle 25*** recognises that *"The establishment of policies and mechanisms for monitoring insider trading, related party transactions, conflict of interest and other corrupt activities, mitigates the adverse effects of these abuses on the Company and promotes good ethical conduct and investor confidence."*

[46] Where the employer permits office fraternisation but staff are expected to comply with stipulated guidelines. Non-compliance could be visited with sanctions such as suspension (without pay), loss of ranking or being by-passed for promotion, forfeiture of bonuses or *ex-gratia* payments otherwise payable at the discretion of the company, termination/forced resignation or dismissal. Such disengagement could also impact terminal benefits or severance packages as discussed under ICER prohibition scenario.

[47] Obviously, the introduction of such clauses amounts to variation of the relevant employment contracts, which becomes effective and binding from the date of execution (or any other agreed date). Staff that have reservations are unlikely to want to disengage on the basis of such clause, given the negative "optics" of departure in those circumstances. In any event the employer may consider any departure on that basis as good riddance, given the zero ICER tolerance intent underpinning the initiative.

[48] Yet to vest bonus shares and other forms of incentive compensation could also be available as part of the pot. Experience has shown that financial sanctions can have *"deterrence effect"*, encouraging people to stay compliant. The prospect of leaving money on the table (effectively the reverse of a caution deposit, or better still like a retention for defects liability in construction contracts) can make employees think long and hard before involvement in ICER. This 'proactive approach that prevents payouts to erring employees may be better than a reactionary scenario whereby the employer is suing to recover monies already paid out as in ***McDonalds v. Easterbrook***. There could also be a cooling off time within which to pay say half or more of any severance package, such that the retained amount serves as security for any financial exposure that the company may have as a result of any improper acts by top management whilst in office. Whilst employees may find this objectionable, it is arguably legal to the extent that the employee or director agreed to same *vide* contract.

[49] Like Conflicts of Interest forms by Directors, *Independence and Ethics Declaration Forms* in audit firms, banks and capital market operators, etc.

[50] *'Love Contracts'* are agreements between the company and its employees stating that the employees' relationship is consensual, voluntary, will not result in favouritism or interfere with the performance of their duties. In the event of break-up, neither employee will be suing the employer for SH, especially where a superior and a subordinate is involved. Whilst it may offer some level of protection to the employer from a subsequent SH claim; it arguably does not amount to a waiver of the right of the employee to join the employer in a SH claim. Notably, employees can always claim they were forced into signing the contract, and the wider the divergence in professional standing between the employees, the more sympathetic a court is likely to be such argument by the more junior employee. For detailed discussion, see Ian J. Silverbrand, ***'Workplace Romance and the Economic Duress of Love Contract Policies'***, *Villanova Law Review (2009) 155, p.174*: https://digitalcommons.law.villanova.edu/cgi/viewcontent.cgi?article=1075&context=vlr (accessed 06.02. 2021). Silverbrand (***supra***), *at p. 5, (footnote 26)* refers to: *"Nick Mathiason, Salaiy, Hours, Benefits, Holiday Entitlement. .. and a Love Contract, OBSERVER (U.K.), Dec. 23, 2007, at 3* (***'There is evidence that a significant number of directors have benefited from an office affair****. A survey out this weekend from TakeLegalAd- vice.com reveals that* ***4 percent of directors of companies with more than 1,000 employees say either that their career benefited from an affair, or that they promoted a lover.***'*).*" Emphasis supplied.

[51] See Jack Sawyer, ***'Consensual Relationship Agreements as a Defence against the Employer's Vicarious Liability in Sexual Harassment Cases'***, https://www.ivoryresearch.com/samples/consensual-relationship-agreements-as-a-defence-against-the-employers-vicarious-liability-in-sexual-harassment-cases/ (accessed 27. 02.2021).

[52] See a very good example at: https://resources.workable.com/workplace-romance-policy-example (accessed 25.02. 2021). Its opening statement is as follows: *"Customize this workplace romance policy based on your company's attitude toward employee dating. Add or delete parts to communicate applicable rules regarding romantic relationships in the workplace and preserve harmony and fairness among all employees."*

[53] *Ibid.* Privacy rights is a very important issue, especially given the provisions of *the* ***Nigerian Data Protection Regulations 2019 (NDPR)*** which imposes significant compliance obligations on employers, in order to safeguard the rights of employees (data subjects).

Another option employers may explore is to ensure provision for ICER in their whistleblowing policy and mechanism, possibly with a first-resolve-within approach and non-disclosure clauses in employee contracts. This could help nip matters in the bud and obviate negative publicity and litigation that often result from ICER blowouts. Regular sensitisation and workshops can also be organised to train and caution against ICER, where such is not permitted.

The National Industrial Court (NIC) Jurisdiction Question

By virtue of ***section 254C(1)(g) 1999 Constitution,*** the NIC has exclusive jurisdiction on civil causes and matters *"relating to or connected with any dispute arising from discrimination or sexual harassment at workplace".*[54]As part of the ICER discussion, some jurisdictional questions become pertinent. *Will employers generally be able to proceed against employees at the NIC, irrespective of the scope and nature of their claim?*

For example, in the light of appellate decisions that defamation claims by employees against their employers are not cognisable by the NIC,[55] will employers' claims for restitution/damages for loss of goodwill, reputational damage, etc resulting from ICER be triable by the NIC? If not, maybe claims for other financial damages will be admitted? Should employers not be able to file counter-claims on SH claims against them and named employee(s)?

We expect more questions emerging out of the woodwork and the inescapable crafting of answers to them, as ICER related issues call for increased analysis and attention, going forward.

Conclusion

The foregoing discussion shows that ICER could have far-reaching, multifarous effects on the employer, other employees and the public at large. The employer does not have to retreat into a corner, licking its financial and reputational wounds from negative ICER impact, and hoping that the inevitable adverse publicity will soon pass away. Employers have rights like employees, and they do not have to be soft targets based on vicarious liability principles just because they have more at stake. The traditional narrative whereby no one looks in the direction of employers, as also potential beneficiaries of ICER related reliefs, despite same being to their detriment, does not have to continue that way. Employers can take proactive measures, re-jig their CG processes and mechanisms, with a view to optimizing their risk exposure as discussed under '*Risk Mitigation Strategies*' herein.

The key message is that ICER is now a very serious matter and all stakeholders, especially employees and employers can no longer afford to make light of it or not have a plan for managing it. And when push comes to shove, employers can also be on the offensive against erring ICER employees – despite wrong presumptions the law does not vest the monopoly of relief on only employees. Maybe if employees realise the gravity of what injury their actions could pose to their employers, and the potential reliefs employers could seek against them, they would not treat the issue of ICER with levity.

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[54]See also ***section 254(2)*** which states that *"Notwithstanding anything to the contrary in this Constitution, the National Industrial Court shall have the jurisdiction and power to deal with any matter connected with or pertaining to the application of any international convention, treaty or protocol of which Nigeria has ratified, relating to labour, employment, workplace, industrial relations or matters connected therewith".*

[55]See ***Ecobank (Nig) Ltd & Ors. v. Idris (2021) LPELR – 52806 (CA)***, at ***p. 22B-E***, where *Adefope-Okojie, JCA* held that: *"the claim before the lower Court was not connected with labour and employment matters, for which it is the National Industrial Court only that has jurisdiction. See: NUE v. BPE (2011) ALL FWLR (Pt. 525); Olufuso v. GSDI (2013) 8 WRN 36.* ***The claim was for damages for defamation of character, which it is the High Court of the State that, by Section 272(1) of the Constitution of the Federal Republic of Nigeria 1999 (as amended), has jurisdiction to entertain. The lower Court thus rightly dismissed the objection of the Appellant challenging its jurisdiction.*** *"* Further, in ***Emmanuel Akpan v. University of Calabar (2016) LPELR – 41242 (CA)*** per *Otisi, JCA* at ***pp 34-35E-B*** held that: *"****The National Industrial Court is a Court of limited jurisdiction in terms of subject matter****, as clearly spelt out in Section 254C of the 1999 Constitution, as amended. Its jurisdiction is limited to matters closely related to labour and employment matters. The National Industrial Court cannot entertain any matter outside its constitutionally prescribed subject matter area…* ***A careful examination of the provisions of Section 254C of the 1999 Constitution, as amended will not reveal that its powers extend to entertaining a claim in tort, at all.*** *"* (All emphases supplied). See also, ***Bisong v. UNICAL (2016) LPELR – 41246 (CA)*** per *Otisi, JCA* (***pp 37-38E-E***).