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Right to Strike and Right to Fire; Balancing of Conflicting Interest under National and International Law

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Abstract
The conflict in industrial relation is almost inevitable because of the divergent interest and aspirations of the two parties in the relationship, which are the employer and employee. Oftentimes, this is necessitated by the demand for increase in wage or salary and welfare packages generally but it is important to also note that the terms of contract of employment can also act as a restricting factor, in that parties to contract of employment are bound by it particularly when it is in written form and this could give the employer the right to fire when this is breached, however where the required notices are jettisoned by the employer, then his action or power to fire could be null and void. This work seeks to address the right of workers to strike and employers' right to fire and to also make recommendations as to how we can resolve the conflicting interest of the parties involved in this relationship. A critical examination of the relevant legislations in Nigeria shows that there are too many stringent conditions which have almost denied the worker his right to strike. This paper recommends that these conditions be relaxed, particularly those giving wide powers to the employer to terminate the employee for breach of contract or deny him his other statutory benefits and it is part of my recommendation that dialogue should be employed at all levels to resolve labour-related matters and strike should be seen as the last resort to press home their demand

Keywords: Right to strike, Right to fire, Salary, employer, Nigeria

Introduction
The history of employer and employee relationship dates back into the old traditional agricultural era when men are physically involved through the use of their God-given energy to plough, cut, clear, burn and to prepare a virgin land for farming and then the industrial revolution where mechanized farming became the mode of engaging in commercial farming. The Industrial relations and labour law take their roots from the very

old practice of labour hiring or employment. The early stages of labour law were concerned with master and servant relationships limited only to the individual contract of hire. There are arrays of opinion in relation to employer and employee relationship and prominent amongst them is the social classification by Karl Marx where he grouped the worker(s) as the proletariat and the employee as the bourgeoisie particularly in a capitalist society believing that the proletariat are object of oppression and ridicule but only a tool for amassing wealth, he however opined that the only solution to this lies in revolution for a classless society. After an age-long struggle between the employer and the employee, the workers were able to achieve some results through protest or strike in pressing for a better welfare package and this will continue till the end of time. The master or employer unilaterally dictated the tune and the worker either obey or was at liberty to quit. There was no middle point. As time went by, wage earners began to structure themselves into groups to channel their cause through agitation to resist the tyranny of their Masters and to further collective bargaining with their employers for it was only by such unity that they could muster the power needed to effectively bargain for the improvement of their working conditions thus the birth of early unionism. With collective bargaining, trade unions were and still are today, able to obtain for their members through negotiations and dialogue improved or reviewed conditions of service either in the area of emoluments, security of tenure, welfare etc. It is only when the parties have reached an irreconcilable deadlock in these negotiations or when agreements duly reached are breached that the workers resort to one form of industrial action or the other, of which strike is a very significant aspect.

The right to strike is now seen as the most powerful weapon in the armoury of organized labour. The right is as a result of several years of struggle by the working class. The history of this struggle is one of constant class battles as earlier stated, fierce reprisals by the management and the authorities against strikers, who had to make heroic sacrifice. The right is an essential tool of trade unions all over the world for the defense and promotion of the rights and interests of their members. This is more so because the right to strike is seen as a necessary counter-veiling force to the powers of capital[1]. Take away the right to strike and workers and their trade unions will be dead corpse.

It was simply put by Uvieghara when he said that 'collective labour relation finds practical expression in voluntary collective bargaining and that it is through trade unions that the individual employee has been able to attempt to redress the inequalities that arise between him and his employer'[2].

Flowing from the above, Lord Wright in 1942 declared thus "where the rights of labour are concerned, the rights of the employer are conditioned by the rights of the men to give or withhold their services. "The right of workmen to strike is an essential element in the principle

1The strike plays the same role in labour negotiations that warfare plays in diplomatic negotiations.See J.G.Getman andF.R.Marshall, The Continuing Assault on the Right to Strike, Texas Law Review, Pt. 79 Vl. 3 (2000) 703. 301

2Prof. E. E. Uvieghara: The historical and Legal framework of Trade unionism

of collective bargaining"[3]. Neither employer's association nor a trade union can bargain effectively or hope to enforce the observance.

In the same vein, the ILO Governing Body Committee on Freedom of Association has consistently stressed that the right of workers and their organizations to strike is generally recognized as a legitimate means of defending their occupational interest and that the only restrictions on the freedom to strike can be imposed for groups of workers in sensitive areas of the public service. It however, emphasized that alternative procedures for channeling grievances and disputes in such services would then have to be made available[4].Also two international instruments, the European Social Charter and the International Covenant on Economic, Social and Cultural rights, have express provisions protecting the freedom to strike"[5]

Employer is defined by the Black's Law Dictionary as a person who controls and directs a worker under an express or implied contract of hire and who pays the worker's salary or wages[6] while Employee is defined according to Black's Law Dictionary as a person who works in the service of another(employer)under an express or implied contract of hire, under which the employer has the right to control the detail of work[7]. However, the relationship is founded upon a contract and it is from this contract of employment between the employer and the employee that gave birth to continuous agitation from the workers for a better welfare package and the best tool available to them is to invoke the power to strike which[8] seems to be the last resort. A strike action coexists within the template of contract of employment and the inherent terms, whether implied or express. It is at this juncture that there will be a need to briefly consider contract of employment within the scope of this work

What then is contract of employment: A contract of employment can best be defined as "any agreement, whether oral or written, express or implied whereby one person agrees to employ another as a worker and that other party agrees to serve the employer as a worker. This is simply seen as a master-servant relationship in the legal parlance and without the creation of employment there would be no right-to-strike at all; hence it is the contract of employment that determines what happens thereafter.

Meaning of strike

In ordinary sense, strike is a deliberate stoppage of work by workers in order to put pressure on their employer(s) to accede to their demands and this could come in different forms to wit; work to rule, slow-down, go-slow etc. Strike is defined by the **Business Dictionary** as a collective, organized, cessation or slowdown of work by employees, to force acceptance of their demands by the employer[9]. In **Wikipedia** it is defined as a work stoppage caused by the

3HandWoven Harris Tweed Co. Ltd. V Veitch (1942) A.C. 435 at P. 463

4Wogu Ananaba:The Trade Unioin Movement in Nigeria

5) Report of the fact finding and conciliation commission on Freedom of Association concerning persons employed in the on towards the workers Public Sector in Japan; 1966. at P. 490 - 2

6Bryan A. Garner 9th ed.pg604

7Supra 9th ed,pg602

8 Section 91(1) of the Labour Act Cap L1,LFN 2004

9Article 6 and Article 8 respectively.

mass refusal of employees to work, which usually takes place in response to employee grievances[10]. **In the Oxford Advance Learners Dictionary**[11] it is also defined as organized stopping of work by employees because of a disagreement. Technically it has been defined in Nigeria as the cessation of work by a body of persons employed acting in combination, or a concerted refusal or a refusal under a common understanding of any number of persons employed to continue to work for an employer in consequence of a dispute, done as a means of compelling their employer or any persons or body of persons employed, to accept or not to accept terms of employment and physical conditions of work; and in this definition:
(a) "cessation of work" includes deliberately working at less than usual speed or with less than usual efficiency; and (b) "refusal to continue to work" includes a refusal to work at usual speed or with usual efficiency.[12]"In the case of **Tram Shipping Corporation V. Greenwich Marine Incorp**[13] Lord Denning stated that a strike is "a concerted stoppage of work by men, done with a view to improving their wages or conditions of employment, or giving vent to a grievance or making a protest about something or sympathizing with other workmen in such endeavour. It is distinct from stoppage brought by an external event such as a bomb scare or by apprehension of danger". From these definitions, it is clear that a strike must satisfy some basic essential elements. One is the element of concerted action, which indicates that it has been planned, arranged, agreed on and settled between parties acting together pursuant to some design or scheme[14]. The emphasis is on acting together and not on pre-planning or prearranging. The parties who resort to strike may come to a common understanding at the time in question without any formal agreement or consultations but nevertheless the concerted action must be collectively combined on the basis of spirit de corpse[15]and must be combined together with the community of demands and interest with a view to compel the employer to accede to their demand of wages, bonus, allowances, hours of work, holidays and the likes. The length or duration of the "concerted" action is immaterial[16].
The second element is the stoppage of work. This is because usually strike is an instrument of economic coercion that seeks to deprive an "employer" of labour input and, thereby, diminish through loss of production, his earning capacity in the hope that the resulting economic strain would compel him to accede to workers' or strikers' point of view.
The third element is that the purpose of the cessation must be in connection with a dispute involving the terms of employment and physical conditions of work. This means that there must be a dispute between an employer and its workers and the action must be called in contemplation or furtherance of that dispute. There is a relatively broad statutory definition of that dispute. But it is important to bear in mind that it will not cover action in support of

10Whatisstrike?Definitionandmeaninginhttp://www.businessdictionery.com/definition/strike.html.Accessed on 15th March,2021@13:35:04

11Strike action- Wikipedia, the free encyclopedia on http://en.wikipedia.org/wiki/strike_action

12By Section 47 of the Trade Disputes Act, Cap. 432, Laws of the Federation of Nigeria 1990.

13 Section 2(q) of the Indian Disputes Act defines it to mean a cessation of work by a body of persons employed in any industry acting in combination, or a concerted refusal, or a refusal under a common understanding of any number of persons who are or have been so employed to continue to, work or to accept employment.

14(1975) ICR 261. See also Miles V Wakefield Metropolitan District Council (1997) 2 All E.R. 1081 where in Strike was defined as a concerted stoppage of work by men, done with a view to improving their wages or conditions of employment or giving employment and physical conditions of work.

15See the Indian case of Shammagar Jute Factory V Their Workmen (1950) LIJ 235 (IT).

16 See generally Srivastava S.C. Industrial Relations and Labour Laws (2009) Vikas Publishing House PVT Ltd. Jangpura, New Delhi, India.

disputes any third parties may have with their employees or which are not wholly or mainly about employment-related matters.[17]This featured in the protest by members of Non Academic Staff Union(NASU) against the management of the Adekunle Ajasin University in Ondo State prior to the 2012 governorship election. This means that the body of persons employed must be shown to be acting in combination, with their psychology directed to particular end, namely, the cessation of work … and … that the cessation of work was the direct common object of the body of persons acting in combination.

Distinction between Strike and Industrial Action

Here, it is important to clearly distinguish between a strike and an industrial action. While it is true to say that every strike is an industrial action, it is not every industrial action that is or will be a strike. There are other ways by which workers may draw attention to their plight, which is other forms of protest, for example the protest that greeted the pump price increase as a result of an attempt of removal of fuel subsidy and many other protests of the past against government policies other than by a concerted stoppage of work[18].In fact, in some cases workers may find it more expedient to resort to these other methods of industrial action to exert pressure on the employer while at the same time avoiding the consequences flowing from their contracts being broken which a strike inevitably involves[19].

Right to Strike

By provision of section 37[20] which provides that " *means cessation of work by a body of persons employed acting in combination or a concerted refusal or a refusal under a common understanding of any number of persons employed to continue to work for an employer in consequence of a dispute done as a means of compelling their employer or any person or body of persons employed, or to aid other workers in compelling their employer or any person or body of persons employed, to accept or not to accept terms of employment and physical conditions of work*" The actions that constitute strike, by the relevant provisions of the law, are "cessation of work" and "concerted refusal" to continue to work. These two components of strike are further defined in the laws. "Cessation of work" includes deliberately working at less than usual speed or with less than usual efficiency, while "refusal to continue to work" includes a refusal to work at the usual speed, or with usual efficiency[21]. Basically the legality to the exercise of the right derives from legislations, international conventions or collective agreements. **This right springs from the right to freedom of association and collective bargaining.** So it can be seen as a right arising from a failure of collective bargaining, as it is

17So a broader "political" reason for industrial action will not normally be a trade dispute).

18Examples of these other forms include work to rule or go slow, or ban on overtime whether the overtime is voluntary or compulsory or situations where workers are encouraged to 'work to contract' by withdrawing their enthusiasm and cooperation.

19In taking industrial action short of a strike, workers remain at work and get paid which is not so with strikes- where the rule of 'no work, no pay' may be implemented as provided by Section 42 of the Trade Disputes Act Cap. 432, Laws of the Federation of Nigeria, 1990

20 Trade Dispute Act

21Section 48(1) of the Trade Dispute Act, Cap. T8, Laws of the Federation of Nigeria, 2004.

used by trade unions as a weapon of last resort, to drive home their demands from the employer.

The conditional interest of the union and their members is to win wages and other concessions from the employer through collective bargaining. But where the employer fails to agree or refuses to implement the terms of an agreement, the union will be left with the weapon of industrial action as the only alternative. Hence, it can be seen as an instrument used by the unions either to achieve an agreement or to force the employer to implement an agreement earlier signed through negotiations[22].This method (strike action) was adopted by the Academic Staff Union of University (ASUU) to compel the Federal Government of Nigeria to implement the 2009 and 2011 agreement as well as the 2020 Agreement with the Federal Government of Nigeria. In Nigeria, the position at the beginning was that of unequivocal acceptance of the existence of a right to strike. Nigerian trade unions, unlike their British predecessors, enjoyed the Colonial administration's encouragement and statutory protection from the very beginning[23] and in response to lack of proper negotiating machinery, especially in the immediate post Second World War years, workers were frequently on strike[24]. It can correctly be said that until the emergence of the military regime, the right to strike was not, save in the case of workers employed in essential services, statutorily regulated in any way. The first trade union statute in Nigeria was enacted in 1938[25]and was in all material aspects, in pari material with the 1891 English Act. Before the 1938 Ordinance, trade union activities, if there were any, were not affected in any significant manner by the law. Indeed, the first semblance of a union had and pursued as its main object is the promotion of "the welfare and interest of the native members of the civil service"[26]. Uvieghara[27]records that it was not until 1931 that the first two trade unions, properly so called[28]were formed, and that with the outbreak of the Second World War trade unionism received a greater impetus in both membership and activities. The earliest Union organized strike in Nigeria is recorded to have taken place on January 9, 1920 when the Nigerian Mechanics Union of the Nigerian Railway stopped work to back their demand for war bonus due to an acute rise in the cost of living arising from the effect of the First World War (1914-1918). For the same reason, carpenters in the Public Works Department joined the strike on January 13 and it spread in pockets to such towns as Ibadan, Kaduna, Zaria, Offa and Benin City. The strike was brought to an end on January 19, 1920 through the mediation of Prince Eshugbayi Eleko then Oba of Lagos.[29]

By far the first most significant strike in the Nigerian Labour history in terms of coverage and effect is the General strike of 1945. The first general strike of 1945 was led by Michael Imoudu. The same economic crisis of the Second World War resulted to a lot of militancy

22V.C.Okene, Collective Bargaining, Strikes and the Quest for Industrial Peace in Nigeria, Nigerian Journal of Labour Law and Industrial Relations, vol. 2 (2008).

23 See S.4. Trade Unions Act of 1939.

24See A.A.Adeogun, Strikes – The Law and the Institutionalization of Labour Protest in Nigeria, Indian Journal of Industrial Relations Vol. 16, No. 1, 1980.

25 Trade Union Ordinance 1938

26 The Southern Nigerian Civil Service Union formed in 1912

27 loc. cit. p.3

28Railway workers Union and Nigerian Union of Teachers

29 Strike problems in Nigeria- Articles NG. at http://articlesng.com/strike-problems-nigeria visited on the 15th May, 2014.

among the unions especially the blue-collar workers. This militancy of workers especially that adopted by the railway workers union led to a successful general strike in 1945. Shortly after this general strike (may be because of its success) there were rapid spread of union activities which equally led to further spread and growth of unions and of course strikes.[30]

The Right to Strike and International Labour Organization (ILO)

There is no clear guarantee of the right to strike in the ILO Constitution or any of its Conventions or Recommendations[31] however, it has recognized the importance of the concept of the right to strike and its organs have had numerous occasions to take a position on the subject[32] They have built up a body of principles recognizing that the right to strike constitutes an intrinsic corollary to the right to organize and a fundamental right of the workers and their organization to collectively bargain. The ILO through the decisions of its supervisory bodies, especially those of the Committee on Freedom of Association (CFA), and the Committee of Experts on the Applications of Conventions and Recommendations (CEACR) has held that the right to strike is one of the essential means available to workers and their organizations for the promotion of their economic and social interest[33]

The jurisprudence of the Committee on Freedom of Association shows an explicit wish for a right to strike to be acknowledged in the ILO Conventions and/or Recommendations. As early as 1952, the Committee declared strike actions to be a right and laid down the basic principles underlying this right. It also made it clear that the right to strike is a right which workers and their organizations are entitled to enjoy. The Committee reduced the number of categories of workers who may be deprived of the right to strike, as well as, the legal restrictions on its exercise, which should not be excessive. It linked the exercise of the right to strike to the objective of promoting and defending the economic and social interests of workers[34].The development on the principle that the right to strike is a vital element of freedom of association can be explained through other international instruments such as the European Social Charter. The right to strike is stated in Article 6 of the Charter, and also in Article 8 of the International Covenant on Economic and Social Rights of Workers[35].

The United Kingdom's Perspective to Strike

In the UK, when workers embark on strike or resort to other forms of industrial action they will usually by doing so, be in breach of their contracts of employment or their contracts for services. This means that when trade unions officials, or others, call for, or otherwise organize industrial action they are in practice calling for breach, or interference with performance of

30 Anaba Wogu:Trade union Movement in Nigeria (1969) p.44 et seq

31 Freedom of Association is stated in the ILO Convention No. 87 on Freedom of Association and Protection of the Right to Organize 1948, and Convention No. 98 on the Application of the Principles of the Right to Organize and to Bargain Collectively, 1949 are seen as the fundamental conventions regarding human rights but they do not have explicit provisions on the right to strike.

32 In fact in the year 2000 there was a suggestion made by the International Trade Union Rights (ICTUR), that it was time to revise and modernize the content of the ILO Conventions, with the aim of clarifying the workers' rights, including the right to strike. See Novit, the right to strike, pg. 122.

33 ILO Freedom of Association Digest of Decisions and Principles of the Freedom of Association Committee Fifth (Revised) Edition.

34ibid

35SeegenerallyTheILOontheRighttoStrikeonwww.jurisdiction.su.se/juruppa+ser/2011_sandra_tenggrau.pdf visited on 05/17/21.

contracts. They may also be interfering with the ability of the employer of those taking the industrial action and of other employers to fulfill commercial contracts. This was basically developed by courts through case-law and passed by the parliament[36]

Accruable protection to workers under Lawful Industrial Action

There are some protection available to a protesting workers' or strikers in Nigeria, as explained above and these emanated from the immunities granted to workers and trade unions against civil and criminal liabilities for engaging in the industrial actions. Granted, to enjoy these immunities, the trade union or workers must meet certain statutory conditions when organizing the industrial action[37]. The Act[38] provides that an employer shall not declare or take part in a lock out and a worker shall not take part in a strike in connection with any trade dispute unless;

(a) The procedure specified in S.4 or 6 of this Act has been complied with in relation to the dispute; or
(b) A conciliator has been appointed under S. 8 of this Act for the purpose of effecting a settlement of the dispute; or
(c) The dispute has been referred for settlement to the Industrial Arbitration Panel under S.9 of this Act; or
(d) An award by an arbitration tribunal has become binding under S. 13(3) of this Act; or
(e) The dispute has subsequently been referred to the NIC under S. 14(1) or S.17 of this Act; or
(f) The NIC has issued an award on the reference.

The Act then makes it a crime for any worker or employee to engage in a strike action in connection with a trade dispute without first exhausting the procedures listed above.

By these provisions, the Act has severely circumscribed the workers' right to strike and introduced both voluntary and compulsory settlement of disputes. Before workers can go on strike in Nigeria, they are required to have completely exhausted the elaborate statutory procedure for settlement of trade disputes. This procedure starts by the parties attempting a voluntary settlement of their dispute themselves[39], if no settlement procedure exists or if an attempt at settlement fails, then the parties are to appoint a mediator to look into the dispute with a view to the amicable settlement of the dispute[40] where mediation fails, the dispute is to be reported to the minister of labour within fourteen days of such failure[41]. The Minister may then appoint a conciliator[42]and if unsuccessful, refer the dispute to the Industrial Arbitration

36 Trade Union Act 1875,Trade Dispute Act 1906

37Every right comes with its own duties. Most powerful rights have more duties attached to them. Today, in each country of the globe, whether it is democratic, capitalist, or socialist, give right to strike to workers. But this right must be used as a weapon of last resort, because, if the right is misused, it will create a problem in the production and financial profit of the industries, which will ultimately affect the economy of the country. It is for these reasons that th e state attaches conditions to the exercise of this right.

38Section 18.

39 Section 3 (1).

40 Section 3 (2). Where mediation fails, the dispute is to be reported to the Minister of Labour within fourteen days of such failure

41 Section 4 (1).

42 Section 7.

Panel[43]. To give force to these provisions, the Act[44]further prevents workers from going on strike and employers from imposing a lock out while negotiations or arbitral proceedings are in progress; neither can any industrial action be taken or initiated after the tribunal[45]might have finally determined the issue(s) in controversy[46]. Nigerian workers cannot therefore go on a legal strike unless these conditions stipulated by law are adhered to. Some writers on these provisions have argued that workers in Nigeria have lost their right to strike.

Right of Employer to Terminate Contract of Employment

As beautiful as the workers' right to strike is, so also the right has limitations and its negative effect on the striker and this is because the employer also has right to fire the employee but this cannot be done without the required notices and if the right to fire is exercised without the said notices, his actions will be null and void. However, in simple terms, a termination of employment occurs where an employee' employment is brought to an end. This may occur because of the actions of the employee or the employer. The employee may resign or the employer may dismiss the employee, each event will result in a termination of employment.

Dismissal

It is also important to discuss the concept of Dismissal since it has the colouration of how an employer can fire an employee summarily.The Fair Work Act, 2009 defines a dismissal by an employer as follows:

(1)A person has been dismissed if:

The person's employment with his or her employer has been

a. terminated on the employer's initiative
b. or the person has resigned from his or her employment but was forced to do so because of conduct, or
c. a course of conduct engaged in by his or her employer" but this law dwells on unfair dismissal. By S.9(7) of the Labour Act provides that a contract of employment shall be terminated by notice in line with S.11 of the Labour Act provides that;
    i. either party to a contract of employment may terminate the contract on the expiration of nptice given by him to the other party of his intention to do so.
    ii. sub-section2 of the above cited provision provides for the period of notices to be given to include;
        a. one day,where the contract has continued for a period of three months or less,
        b. one week,where the contract has continued for more than three months but less than two years;
        c. two weeks, where the contract has continued for a period of two years but less than five years; and
        d. one month, where that contact has continued for five years or more.

43 Section 8.

44In Section 17

45 This refers to the Industrial Arbitration Panel and the National Industrial Court.

46Contravention of these provisions is punished by a fine of N100 or to imprisonment for six months in case of an individual

The mode of notice in general shall be in writing unless where the notice may be related to S.11(2(a)above and S.11(8) further provides that where an employer gives notice to terminate the contract of employment of a worker who has been continuously employed for three months or more,the employer shall not be liable under this section to make any payment in respect of a period during which the worker is absent from work with the level of the employer granted at the request of the worker.

The Labour Act as it is, does not give any protection to the employer beyond the common law. But S .9(7) and S.11 of the Labour Act only restates the common law position that a contract of employment can be terminated by notice and the period of notices to be given are not even better or more protective than under the common law. It is submitted that the period of notice which the law should deem reasonably adequate to properly terminate a contract of employment at all times should take into consideration as well as the reasonableness of the notice and the motive behind the notice.

Where there is a termination by notice, the motive, which made the employer to give such notice of termination, is irrelevant to the lawfulness or wrongfulness or otherwise of the termination. Even where the employer, in giving the agreed or reasonable notice, has gone further to state other reasons for doing so; it is not necessary to prove same alleged. The only obligation imposed upon the employer is to establish that the contract of service was in accordance with the agreement between the parties.[47]The Supreme Court strengthened this common law principle in **Fakuade V. Obafemi Awolowo University Hospital**[48]where it was held 'A master can terminate the contract of employment with his servant at any time and for any reason or for no reason at all provided the terms of contract of service between them are complied with. The motive which led an employer to lawfully terminate his servant's employment is not normally a relevant factor and the court will have no business with such motive but will only give effect to the contract of service between the parties. This position was reinforced in **Chukwuma V.Shell Petroleum DC (Nig)Ltd**[49] when it held that: it is a well established principle of the common law and of Nigerian Law, that ordinarily a master is entitled to dismiss his servant from his employment for a good or for no reason at all.

Termination of Contract of Employment in Nigeria

In every employer and employee relationships just like in any relationship disputes are bound to arise and where the dispute is not properly managed it could lead to the termination of employment by either the employer or the employee but before then this depends on whether the termination is that of;

a. Termination of master and servant contract of employment;
b. Termination of Employment with statutory flavor; and
d. Termination of employment at will.

Termination of Employment with Statutory Flavour

An employment is said to have a statutory flavor when the appointment and termination is protected by statute or laid down regulations made to govern the procedure for employment and discipline of an employee. Any other employment outside that category is governed by the terms under which the parties agreed to be employer and employee. Where the contract is

47 UBN Ltd V. Ogoh(1995)2NWLR (380)

48 (1993)5NWLR (pt291) 47 @58

49 (1993) 4NWLR (pt289) 512@560.See alsoSogbeum v.Stirling Products(Nig)Ltd.(1973) NCLR323

governed by the provisions of a statute or where the conditions are derived from statutory provisions, it invests the employee with a legal status than the ordinary one of master and servant.[50]The rules and regulations which are claimed by an employee to be part of the terms and conditions of his employment capable of giving it statutory flavor and be of protection to the employee must:

a. have statutory reinforcement or at any rate, be regarded as mandatory,
b. be directly applicable to the employee or persons of his cadre,
c. be seen to be intended for the protection of that employment; and
d. have been breached in the course of determining the employment; before they can be relied on to challenge the validity of that determination.[51]An employer which is protected by statute must be terminated in the way and manner prescribed by the relevant statute and any other manner inconsistent with the statute will be null and void and of no effect.

Termination of Employment on Ground of Misconduct

Gross misconduct is defined as conduct of a grave and weighty character as to undermine the confidence which exists between the employee and his employer,or which works against the deep interest of the employer. Where an employee is found guilty of gross misconduct, he could be lawfully dismissed without notice and without wages-**UBN v. OGBOH**.[52]Where an employer removes an employeefor misconduct, his removal cannot be justified in the absence of an adequate opportunity being offered him to explain, justify or defend the alleged misconduct. The audi alterem partem principle imposes a duty upon an employer to act fairly by giving the employee an opportunity to explain himself before taking any decision which affects the employee's proprietary right. In the case of University of **Calabar v. Essien**[53], here the principle of natural justice was not in breach. However, it is submitted that even if it is an offence unknown to law, whether an employee should be tried before a court of law depends on the circumstance of each case.

Finally, employer and employee disputes may be resolved by meditation or negotiation and arbitration if it is so agreed in the contract of employment. However, due to the power of imbalance between the parties, some of these disputes are bound to end in the National Industrial Court for determination

Remedy of Specific Performance or Reinstatement for Breach of Contract of Service

The traditional common law rule which has been adopted and applied in many decisions of the courts will not grant specific performance in respect of breach of contract service. Thus, as a general rule, specific performance or reinstatement is not ordinarily the remedy for breach of contract of service. Special circumstances will be required before such a declaration is made and its making will usually be in the discretion of the court. Such special circumstances have been held to arise where the contract of employment has a legal or statutory flavor thus putting it over and above the ordinary master and servant relationship. Equally so, where a special legal status such as a tenure of public servant is attached to the contract of employment[54]. Where an agreement protected by statute is terminated unlawfully, the remedy is to declare such termination null and void and to reinstate the employee to his former position.[55]

50 Balogun v.University of Abuja(2002)13NWLR (pt 783) 42 @53, A,C-H 62,paras D-G

51 Idoniboye-Obu v.N.N.PC(2003) 2NWLR(pt805) 589 @624

52 (1995) 2NWLR Pt 380)647(SC)

53 (1996)10 NWLR(Pt 447)225@262

54 Olaniyan v.University of Lagos(1985)2NWLR (pt.9)599(SC)

55 See Iderima v.R.S.C.S.C (2005)16NWLR (Pt.951) 378 (SC)

Wrongful dismissal applies to a master servant relationship, and merely entitles an employee to the usual damages in terms of what he would have earned for the period of notice he is entitled to in the event of the termination of his employment. Unlawful dismissal applies to the employment governed and protected by statute. A person whose employment is wrongfully terminated cannot get both damages and reinstatement concurently[56]
In the case of Nigerian Produce Marketing Board v.Adewunmi[57]Fatayi Williams JSC(as he then was)held: In a claim for wrongful dismissal the measure of damages is prima facie the amount that the plaintiff would have earned had the employment continued according to contract. Where, however, the defendant on giving the prescribed notice has a right to terminate the contract before the end of the term, the damages awarded, apart from other entitlements should be limited to the amount which would have been earned by the plaintiff over the period of notice bearing in mind that it is the duty of the plaintiff to minimize the damage which he sustains by wrongful dismissal.

Balancing conflicting interest of Employer and Employee
The age-long conflict of interests between employer and employee can only be addressed through collective bargaining and negotiation. Professor Kahn Freund in 1954 opined when he wrote: "Collective bargaining as we understand it is unthinkable without social sanctions. By this we mean that neither an employer or of collective agreements, unless there is in the background the possibility of using economic and social pressure against the other side of the bargain. Collective bargaining cannot work without the Ultimate sanction of the strike and the lockout"[58]
He re-emphasized this in 1972 when he asserted that:"Effective collective bargaining is impossible where the workers do not have the freedom to stop work collectively and trade Unions cannot exist and function if collective bargaining is impossible. Quite clearly to suppress the freedom to strike means to undermine the existence of trade unions"[59]Similarly, a German Author writing on right to strike suggested that: "As long as employees remain personally dependent on the employer, the unconditional removal of the right to strike would hand them over helpless to the employer. The union could then still, it is true, assert demands, but they could have no means to make the employers agree to them. In this way freedom of association would have been devalued to become a sword without an edge"[60]. It can therefore be seen that the right to strike is an essential element in the principle of collective bargaining. However to protect such a right is not to approve (or disapprove) of its exercise in any particular withdrawal of labour but to recognize the fact that limits have to be set on the right to strike and lock out in order to control the strength which each party can in the last resort bring to bear at the bargaining table, particularly in this country where improvements in the structure of salaries and wages, allowances and other benefits have resulted from collective action on the part of the workers through agitations, demonstrations, strikes or threats leading to collective negotiations and agreements or reference to arbitration tribunal or the appointment of Commission of Inquiry but have not come about from the employers' own volition and as a proof of his kindly disposition towards the workers.But it is important to state that the employer has an edge over the employee since he has the power to hire and fire owing

56 Kabel metal Nig.Ltd v.Ativie(2002)10 NWLR,(775)250(CA)

57 (1972)NSCC 662 @665

58 The system of industrial Relations in Great Britain (1954) ed. Allan Flanders at P. 101

59Otto Kahn-Freund and Bob Hepple, Laws Against Strikes. Fabian Research Series. (1972) at P. 53.

60Ekkehart Stein. Staatsrecht, 1975. at P. 188

to the major problem of unemployment in Nigeria,this leaves the employee at the mercy of the employer.

Conclusion

In conclusion it can be seen that the right to strike is an essential element in the system of free collective bargaining. As it is now, Nigerian laws fail to recognize that employees have a positive right to strike, the conditions precedent to the exercise of the right to strike in Nigeria are virtually impossible to be satisfied. The right to strike would be meaningless if too stringent conditions are attached to its exercise, particularly considering the fact that even after satisfying all the conditions workers on strike can still be said to be in breach of their contract and therefore liable to be dismissed. There is the need for Nigeria, as it is in other jurisdictions and also in line with its international obligations, to provide a right to strike regime which will expressly protect lawful strike actions and give it precedence over the performance of contractual and other civil obligations. There has to be a return to a freer, not necessarily completely free, collective bargaining, which can only be guaranteed by a right to strike. The legal regime in Nigeria must be reformed to ensure that for the duration of a lawful strike, there should be no breach of contract on the part of the employee that will warrant his dismissal, at worst, the suspension theory can be used, such that the main obligations of the contract which involves the willingness to work on the part of the employee and payment of wages on the part of the employer can remain suspended, until when the strike is over. This seems commonly acceptable, being the practice in many other jurisdictions. It is also very unfair that workers lose their rightful placement while on strike, and are also denied other benefits, particularly rights in relation to promotion issues, all on account of lack of continuity of employment during the strike period. The laws on essential services also need to be reformed particularly on the definition of essential services, which is apparently too wide, as it is currently under the relevant laws, it is difficult to stop the rivalry and class struggle between the employer and employee. This work will not be complete after we have exhausted the rights available to workers and the overriding power of the employer to hire and fire. Even if I will agree that the only option available to employer is to engage in strike action to drive home their demands and to also enforce reinstatement through the Court upon unlawful dismissal but it is important to note that where the right to strike ends, there the right of employer begins because you cannot impose a willing employer on a unwilling employee. However, as it stands today, the right to fire may be difficult for employers to achieve considering contract of employment that is coated with statutory flavour. In recent times,the court has been proactive in reinstating employees who were at a time fired unlawfully. Also as it stands now,right of workers to strike has been affirmed by courts where necessary notices have been complied with by the labour unions.

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The strike plays the same role in labour negotiations that warfare plays in diplomatic negotiations. See J. G. Getman and F.R. Marshall, The Continuing Assault on the Right to Strike, Texas Law Review, Pt. 79 Vl. 3 (2000) 703. 301

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Report of the fact finding and conciliation commission on Freedom of Association concerning persons employed in the on towards the workers Public Sector in Japan; 1966. at P. 490 - 2

Bryan A. Garner 9th ed.pg604

Supra 9th ed,pg602

Section 91(1) of the Labour Act Cap L1,LFN 2004

Article 6 and Article 8 respectively.

Whatisstrike?Definitionandmeaninginhttp://www.businessdictionery.com/definition/strike.html.Accessed on 15th March,2021@13:35:04

Strike action- Wikipedia, the free encyclopedia on http://en.wikipedia.org/wiki/strike_action

By Section 47 of the Trade Disputes Act, Cap. 432, Laws of the Federation of Nigeria 1990.
Section 2(q) of the Indian Disputes Act defines it to mean a cessation of work by a body of persons employed in any industry acting in combination, or a concerted refusal, or a refusal under a common understanding of any number of persons who are or have been so employed to continue to, work or to accept employment.
(1975) ICR 261. See also Miles V Wakefield Metropolitan District Council (1997) 2 All E.R. 1081 where in Strike was defined as a concerted stoppage of work by men, done with a view to improving their wages or conditions of employment or giving employment and physical conditions of work.
See the Indian case of Shammagar Jute Factory V Their Workmen (1950) LIJ 235 (IT).
See generally Srivastava S.C. Industrial Relations and Labour Laws (2009) Vikas Publishing House PVT Ltd. Jangpura, New Delhi, India.
So a broader "political" reason for industrial action will not normally be a trade dispute).
Examples of these other forms include work to rule or go slow, or ban on overtime whether the overtime is voluntary or compulsory or situations where workers are encouraged to 'work to contract' by withdrawing their enthusiasm and cooperation.
In taking industrial action short of a strike, workers remain at work and get paid which is not so with strikes- where the rule of 'no work, no pay' may be implemented as provided by Section 42 of the Trade Disputes Act Cap. 432, Laws of the Federation of Nigeria, 1990
Trade Dispute Act
Section 48(1) of the Trade Dispute Act, Cap. T8, Laws of the Federation of Nigeria, 2004.
V.C.Okene, Collective Bargaining, Strikes and the Quest for Industrial Peace in Nigeria, Nigerian Journal of Labour Law and Industrial Relations, vol. 2 (2008).
See S.4. Trade Unions Act of 1939.
See A.A.Adeogun, Strikes – The Law and the Institutionalization of Labour Protest in Nigeria, Indian Journal of Industrial Relations Vol. 16, No. 1, 1980.
Trade Union Ordinance 1938
The Southern Nigerian Civil Service Union formed in 1912
loc. cit. p.3
Railway workers Union and Nigerian Union of Teachers
Strike problems in Nigeria- Articles NG. at http://articlesng.com/strike-problems-nigeria visited on the 15th May, 2014.
Anaba Wogu:Trade union Movement in Nigeria (1969) p.44 et seq
Freedom of Association is stated in the ILO Convention No. 87 on Freedom of Association and Protection of the Right to Organize 1948, and Convention No. 98 on the Application of the Principles of the Right to Organize and to Bargain Collectively, 1949 are seen as the fundamental conventions regarding human rights but they do not have explicit provisions on the right to strike.
In fact in the year 2000 there was a suggestion made by the International Trade Union Rights (ICTUR), that it was time to revise and modernize the content of the ILO Conventions, with the aim of clarifying the workers' rights, including the right to strike. See Novit, the right to strike, pg. 122.
ILO Freedom of Association Digest of Decisions and Principles of the Freedom of Association Committee Fifth (Revised) Edition.
ibid
SeegenerallyTheILOontheRighttoStrikeonwww.jurisdiction.su.se/juruppa+ser/2011_sandra_tenggrau.pdf visited on 05/17/21.
Trade Union Act 1875,Trade Dispute Act 1906
Every right comes with its own duties. Most powerful rights have more duties attached to them. Today, in each country of the globe, whether it is democratic, capitalist, or socialist, give right to strike to workers. But this right must be used as a weapon of last resort, because, if the right is misused, it will create a problem in the production and financial profit of the industries, which will ultimately affect the economy of the country. It is for these reasons that th e state attaches conditions to the exercise of this right.
Section 18.
Section 3 (1).
Section 3 (2). Where mediation fails, the dispute is to be reported to the Minister of Labour within fourteen days of such failure
Section 4 (1).
Section 7.
Section 8.
In Section 17
This refers to the Industrial Arbitration Panel and the National Industrial Court.
Contravention of these provisions is punished by a fine of N100 or to imprisonment for six months in case of an individual
UBN Ltd V. Ogoh(1995)2NWLR (380)
(1993)5NWLR (pt291) 47 @58
(1993) 4NWLR (pt289) 512@560.See alsoSogbeum v.Stirling Products(Nig)Ltd.(1973) NCLR323
Balogun v.University of Abuja(2002)13NWLR (pt 783) 42 @53, A,C-H 62,paras D-G
Idoniboye-Obu v.N.N.PC(2003) 2NWLR(pt805) 589 @624
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Olaniyan v.University of Lagos(1985)2NWLR (pt.9)599(SC)
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