

Legal Implications of Covid-19 on the Employers' Duty to Provide a Safe Work Environment.

Chineze Sophia Ibekwe*

Department of Commercial and Property Law, Faculty of Law
Nnamdi Azikiwe University, Awka, Nigeria.

*cs.ibekwe@unizik.edu.ng

Abstract

World over, governmental, industrial, commercial, educational and virtually all types of facilities were shut down in an attempt to contain the spread of the novel corona virus (Covid-19) pandemic. After periods of complete shutdown during which enforced 'stay at home' and 'social distancing' policies were instilled into the populace, Nigeria has been gradually reopening her markets and work places. The aim of this paper is to contemplate the changes, adjustments and emphases in the Nigerian employment sector as a result of the Covid-19 pandemic as it relates to the employer's duty to provide a safe work environment. The paper expands on the employers statutory and implied duty of care in the employment relationship. It interrogates the extent of an employer's liabilities where an employee is infected at the place of work and whether having staff work remotely from home discharges the employer's work safety responsibility. The work also addresses whether there is a legal obligation on the employee to undergo medical tests before resuming work and the employee's right to privacy of health information. Can an employee be dismissed for disobedience to lawful and reasonable instructions if he refuses to work as a result of the employer's failure to provide a safe work environment and where said employee resigns, could such resignation be seen as constructive dismissal? In answering these potent questions, references are drawn from relevant statutes, decided cases, the Common Law, the National Policy on Occupational Safety and Health and precedents from foreign jurisdictions.

Key Words: Employer's duty of care, Covid-19 pandemic, Occupational safety and health law and policy, Employees compensation, Privacy of health information, Contract of employment in Nigeria.

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1. Introduction

Economies around the globe have contracted in the year 2020 due to the global impact of the corona virus (Covid-19) pandemic. Global supply chains were disrupted and Brent crude prices nosedived to less than one-third of their 2019 price. Governmental, industrial, commercial, educational and virtually every type of facility was shut down in an attempt to contain the virus. Travel bans, travel restrictions, international and domestic border closures and quarantine measures have all resulted in monumental declines in revenue of businesses with consequent effects on incomes of the workers. Although a few economies began to rally in the second and third quarter of the year, most are still reeling from the effect six months of economic and business lethargy due to enforced 'stay at home' and 'social distancing' policies aimed at curtailing the spread of the virus. Due to an inability to sustain their businesses, employers have been forced to adopt the unpalatable measures of pay cuts and/or outright lay-offs, redundancy procedures and even insolvency.

Nigeria is not exempt from the challenging economic rigors caused by Covid-19.¹ With an economy heavily reliant on the export of crude oil, the freefall of the benchmark price of oil in the international market has been devastating to the economy. Moreover, since a large percentage of her imports come from Asia, Europe and the Americas, the travel restrictions and border closure have hit Nigerian businesses hard. Commodities for sale and equipment for use are extremely hard to come by. Another major issue that businesses have had to tackle is the lack of liquidity for expenses such as staff salaries. Companies have had to weigh the cost of business continuity and paying employees much-needed benefits in this challenging season. As in other countries, Nigerian employers and

*C.S. Ibekwe, PhD, Head, Department of Commercial and Property Law, Faculty of Law Nnamdi Azikiwe University, Awka Anambra State, cs.ibekwe@unizik.edu.ng, 2348080239789.

¹ According to the Nigeria Centre for Disease Control figures as at 12th September 2020, Nigeria has recorded about 56,017 confirmed cases and 1,076 Covid-19 related deaths.

employees have had to adapt to new ways of doing business and analyze their respective rights and duties under the employment relationship.

2. The Employment Relationship

The employment relationship is a legal notion used globally to refer to the relationship between a person called an employee (or worker) and an employer for whom the employee performs work under certain conditions in return for remuneration.¹ Several statutes have variously defined employment as "...a professional engagement or otherwise under a contract for service...any trade, business, profession, office or vocation...any relationship whereby one person personally does work or performs services for another..."² The employment relationship is therefore, the main vehicle through which workers gain access to the rights and benefits associated with employment in the areas of labour law and social security. Employees work in return for payment, which may be in form of an hourly wage, by piecework or an annual salary, depending on the type of work or the sector in which the work is done.³ It is through the employment contract that reciprocal rights and obligations are created between the employee and the employer.⁴ A contract of employment is defined in Section 91 of Nigeria's Labour Act⁵ as "Any agreement whether oral or written, express or implied whereby one person agrees to employ another as a worker and that other person agrees to serve the employer as a worker." It follows that in the event of a dispute, the court is bound to restrict itself to the terms expressly agreed, implied or statutorily required of the parties in determining their respective rights and obligations.

2.1 Express Terms of a Contract of Employment

The terms of a contract are said to be express where they are spelled out by the parties, whether orally or in writing.⁶ The terms of a contract may be found in more than a single document provided that the original document and the other documents are connected to each other.⁷ Where several documents form the terms of the employment, the Supreme Court stated in *Ondo State University v Folayan*⁸ that the documents must be read together. Such documents include the letter of employment, employee handbook, staff manual, relevant collective agreements,⁹ circulars, internal memos, notices¹⁰ and similar work place documents which depict employment conditions. Although most modern contracts of employment are required to be stated in writing,¹¹ the absence of a written contract does not vitiate the contract.¹² Though, the provision that a contract of employment can be made orally is subject to certain statutory exceptions such as the provision by the law for the employer not later than three months after the beginning of a worker's period of employment provide the worker with a written statement specifying the terms and conditions of the employment¹³ and also the requirements of writing in a contract of apprenticeship.¹⁴

Statutory provisions regarding the employment relationship, although not discussed or expressly incorporated into the contract of employment by the parties, may also be regarded as express terms. This is because such terms are

¹ ILO, International Labour Conference, 95th Session, Confrep\ILC95(2006)\Report V(1)-2004-09-0068-1 Printed in Switzerland ATA, 2006.

² Statutes like the United Kingdom Trade Union and Labour Relations (Consolidation) Act 1992 (Sec 218), United Kingdom Employment Agencies Act 1973 (Sec 13) and the Social Security Contributions and Benefits (Northern Ireland) Acts 1992 (Sec 122)

³ D Stephen & A Scott, 'Predicting Job Performance: A Comparison of Expert Opinion and Research Findings' (1989) 5 *International Journal of Forecasting*, 187.

⁴ CS Ibekwe, OC Aduma, Legislating Disability Integration in Employment: Comparing Legal Solutions from Nigeria, South Africa and the United States of America, (2020) *IJOCLLEP*, Vol 1 (2)

⁵ Labour Act Cap L1 LFN, 2004 sec. 91 (1)

⁶ A. Emiola, *Nigeria Labour Law*, (4th edn, Ogbomosho: Emiola Publishers, 2000) p 74

⁷ *Paul Okoro v Ogara & Ors* (1964) 8 ENLR 99.

⁸ (1994) 7 NLWR (Pt. 192) 388, 413.

⁹ See *NURTW v Ogbodo* 1998 2 NWLR (PT.537), 189 @ 197 and section 47 of the Trade Disputes Act Cap T8 LFN 2004.

¹⁰ In *Petrie v. Mac-Fisheries Ltd* (1940) 1 K.B 258, the court held that a particular work rule displayed on a notice board at the work place over a period of time is deemed to have been incorporated into the employee's contract of employment.

¹¹ Sec 7(1) of the Labour Act require that a written statement of the terms of employment be issued to the employee by the employer within three months of commencement of the contract of employment.

¹² *Stabilini & Co. Ltd v. Obasa* (1997) 9 NWLR Pt. 520 Pg. 293; *Buhari v. Takuma* (1994) 2 NWLR Pt. 325 Pg. 183.

¹³ Sec 7 Labour Act, *Ibid*

¹⁴ Sec 50 *Ibid*

mandatory and legally binding on the parties, they cannot be contracted or negotiated away. The Labour Act for instance, makes elaborate provisions for the minimum contents of a contract of employment. It requires that every contract of employment must sufficiently state the particulars of the employer and the employee, the position and job description/functions, other terms and conditions of the contract including hours of work, remuneration, holiday and holiday pay, incapacity due to illness or injury, method of terminating the employment, etc.¹ Although the Labour Act leaves room for the parties to negotiate different terms as best suits them, where a misunderstanding arises as to the precise words and meaning of the words used in a contract, these minimum statutory terms cannot be easily discharged.²

Another instance of an express statutory term is the Pension Reform Act³ which requires every employer with a staff strength of 15 and above to set up and contribute a minimum of 10% of the employee's monthly salary to a retirement savings account (RSA) maintained in the employee's name by a registered Pension Fund Custodian (PFC). Similarly, the Employee's Compensation Act⁴ provides that every employer must contribute a minimum of 1% of the monthly gross salary of its total workforce to the National Social Insurance Trust Fund (NSITF) to cater for compensation for workers who die or sustain injuries including mental stress in the course of employment.

2.2 *Implied Terms of the Contract of Employment*

Common law implied terms of the contract of employment are those terms which, although not written are insinuated into the contract of employment and eventually form part of the contract.⁵ In *Malik and Mahmud v BCCI*⁶ the court stated that such implied terms operated as 'default rules.' They are implied into a contract of employment with an intention to fill clear gaps in the contract and are dependent upon being terms that neither party has addressed.⁷ On the part of the employer, the major implied terms are the duty to provide work, duty to pay remuneration for work done and the duty of care which essentially has to do with the provision of a safe work environment and system of work. We shall examine the employer's duty to provide a safe work environment in light of the obligations placed upon the employer and employees as a consequence of Covid-19.

3. **Duty of the Employer to Provide a Safe Work Environment**

3.1 *Statutory Duty of Care*

The Labour Act has commendable provisions concerning employment benefits such as wages and sick leave but places no specific obligation upon an employer to provide a safe system of work. Rather, it is the Factories Act⁸ which makes it the duty of the employer to ensure cleanliness, no overcrowding, ventilation, good lighting, efficient drainage and sanitary conveniences.⁹ The Factories Act also makes provision for an open and fair system of guaranteed compensation for all employees or their dependents for any death, injury, disease or disability arising out of or in the course of employment.¹⁰ In 2016, the Nigerian Senate introduced the Occupational Safety and Health Bill, 2016 (OSHB) which seeks to repeal the Factories Act, 1987 and set up a comprehensive framework for all health and safety related issues at the workplace. Unfortunately, the Bill has not scaled through the legislative passage process till date.

Another law which requires and regulates occupational health and safety in the general populace is the Employees' Compensation Act (ECA), 2010 which focuses on adequately compensating employees for injuries which occur in the course of employment. The ECA also established the Employees Compensation Scheme (ECS) to facilitate the timely payment of compensations and provision of rehabilitation for injured employees and replacement of

¹ Sec 7(1), *op cit*.

² See *Olatunbosun v NISER Council* (1988) 3 NWLR (Pt. 80) 25

³ Pensions Reform Act 2014

⁴ Employees Compensation Act 2010

⁵ See *Daniels v. Shell BP Petroleum Development Co* (1962) 1 All NLR 19, *Sagar v. Ridehalgh & Sons Ltd* (1931) 1 Ch 310, *Ibama v. Shell Petroleum Co. Nigeria Ltd* (1998) 3 NWLR Pt. 542 Pg. 493, *Meek v. Port London Authority* (1918) 1 H 415.

⁶ (1997) IRLR 462 HL

⁷ *Liverpool City Council v Irwin* (1977) AC 239 HL

⁸ Factories Act Cap F1 Laws of the Federation of Nigeria 2004.

⁹ *Ibid*, Part III – Safety (General provisions); Part IV – Welfare (General provisions); Part V – Health, Safety and Welfare;

¹⁰ *Ibid* Part VI – Notifications and investigation of accidents and industrial diseases; Part X – Offences, penalties and legal proceedings.

loss of productivity to the employer. The ECS is a no-fault claim scheme which is run by the Nigeria Social Insurance Trust Fund. The Board of the Nigerian Social Insurance Trust Fund (NSITF) is the main public social security institution responsible for compensation of workers with regards to disablement caused by occupational accidents or diseases, or death arising from such accidents or diseases. The National Environmental Standards and Regulations Enforcement Agency (NESREA)¹ also seeks to give guidance on environmental safety and health by promoting private sector compliance with environmental regulations such as air, water and noise quality control.² There are also numerous sector specific legislations enacted to provide for the safety and health of workers engaged in specific activities workforce.³ There is also the Disability (Anti-Discrimination) Act.⁴

Nigeria's Constitution in Section 17(3)⁵ encourages the government to direct its policy towards ensuring that the health, safety and welfare of all persons in employment are safeguarded and not endangered or abused. This section laid the foundation for the drafting of a National Policy on Occupational Safety and Health in 2006 the provisions of which are mainly culled from the ILO Convention No. 155 on Occupational Safety, Health and Working Environment (1981).⁶ The goal of this Policy is to facilitate the improvement of occupational safety and health performance in all sectors of the economy and ensure harmonization of workers' rights protection with regional and international standards. The body charged with enforcing the National Occupational Health and Safety Policy is the Department of Occupational Safety and Health of the Federal Ministry of Labour and Employment.

It is noteworthy that under the Constitution, the safety, health and welfare of labour is the purview of both federal and state legislative authorities.⁷ In the second schedule,⁸ it is provided that the National Assembly may make laws for the federation or any part thereof with respect to "the health, safety and welfare of persons employed to work in factories, offices or other premises or inter-state transportation and commerce including the training, supervision and qualification of such persons."⁹ Likewise (subject to the provisions of the Constitution), a (State) house of assembly may make Laws for that State with respect to industrial, commercial or agricultural development of the State.¹⁰

3.2 The Common Law Duty of Care

The liability of employers for injury sustained by their employees derives from both the common law and statutory provisions. The employers' duty at common law was summed up in the case of *Wilsons & Clyde Coal Co Ltd v English*¹¹ where an employee brought an action against his employer in respect of personal injuries suffered as a result of an allegedly unsafe system of work. In holding that damages could be recovered, Lord Wright, stated that:

This obligation is fulfilled by the exercise of due care and skill. But it is not fulfilled by entrusting its fulfillment to employees, even though selected with due care and skill. The obligation is threefold – the provision of a competent staff of men, adequate material and a proper system and effective supervision. It is however, important to note

¹ Established by the National Environmental Standards and Regulations Enforcement Agency (Establishment) Act, 2007

² Ibid, Part III

³ For example, the Nigerian Minerals and Mining Act 2007; Nigerian Nuclear Safety and Radiation Act 1995; Nigeria Basic Ionising Radiation Regulations 2003; Nigerian Radiation Safety in Nuclear Regulations 2006; Minerals Oils (Safety) Regulations 1962 and the Petroleum (Drilling and Petroleum) Regulations 1967.

⁴ CS Ibekwe and OC Aduma, "The Evolution of Disability Rights in Nigeria: Pitfalls and Prospects", (2019) *African Journal of Law And Human Rights* 3 (2), 137.

⁵ Section 17(3), Constitution of the Federal Republic of Nigeria 1999 provides that:

a) All citizens without discrimination on any group whatsoever have the opportunity for securing adequate means of livelihood as well as adequate opportunity to secure suitable employment; b) Conditions of work are just and humane and that there are adequate facilities for leisure and for social, religious and cultural life.; c) The health, safety and welfare of all persons in employment are safeguarded and not endangered or abused.

⁶ Ratified by Nigeria in 1994. Other older occupational safety and health Conventions ratified by Nigeria are C032 – Protection against Accidents (Dockers) 1932; and C019 – Equality of Treatment (Accident Compensation) 1925.

⁷ Item 34 of Part I, of the Second Schedule to the 1999 Constitution

⁸ Sections 17 and 18 in Part II of the Second Schedule to the Constitution delineate the extent of federal and state legislative powers

⁹ Ibid, section 17(a)

¹⁰ Ibid, section 18.

¹¹ [1938]A.C.57

that this duty to provide safety at the work place is a “personal” duty on the employer and therefore not to be delegated.

Likewise, the Supreme Court in the case of *Iyere v. Bendel Feed and Flour Mills Limited*¹ held that the employer is under a duty to take reasonable care for the safety of the employee in all the circumstances of the case so as not to expose him to an unnecessary risk. The Common Law duty of care falls under four main headings, namely:

- (i) The duty to provide a safe place of work.²
- (ii) The employer is under the obligation to provide adequate plant, appliance and premises.³
- (iii) The duty to provide a safety system/method of work and wears against hazards.⁴
- (iv) The duty of employer to provide a reasonably competent workforce. For example, the employer will be in breach of their duty to provide a reasonably competent workforce, if the conduct of an employee or a set of employees is likely to be a source of danger to others. Then the employers are under a duty to remove the danger and/or the dangerous employee to avoid being liable vicariously for his acts of omission or commission.⁵

4. The Employers Duty to Provide a Safe Work Environment during the Covid-19 Pandemic

In a bid to contain the spread of the coronavirus Nigeria’s president issued a nationwide lockdown directive on 30th March 2020. Places of work whether public, commercial or corporate were shut down, interstate transportation was closed and curfews restricting movement from dawn to evening were announced. Only the movement of food items and the travel of essential workers were permitted during the lockdown. Wearing of face masks in public places, shops and on public transport was made mandatory from 4th May a gradual reopening of businesses was permitted with strict measures to mitigate the spread of the virus. with skeletal services provision. For instance, in Lagos State markets for non-food items were allowed to open on Mondays, Wednesdays and Fridays only while food stores were opened for business only on Tuesdays, Thursdays and Saturdays. The shops, offices and markets were only open between 9am and 3pm.⁶ Schools, bars, cinemas and places of worship remained shut, while only senior government officials were cleared to return to work ostensibly to enable them put proper safety measures in place before other workers resume their duties.

It is imperative that both public and private sector employers set measures in place to ensure that workers and employers are not exposed to Covid-19. Considering the highly contagious nature of the virus and the fast rate of transmission amongst individuals and groups, employers needed to have extremely clear, detailed and carefully enforced procedures on ground before allowing work to be carried out on the employment premises.

How then can an employer create a Covid-19 safe workplace? By establishing such health and safety protocols as deep cleaning, disinfecting common areas, extensive temperature checks on entry into the business premises and other public places, hand washing, ensuring provision of hand sanitiser to all employees and customers, wearing non-medical face masks, limiting staff physically working in the office to between 30% to 50% of the usual number, Limiting number of customers/clients/visitors to allow for physical distancing of 2 metres between people,⁷ leaving windows open to allow for wind ventilation.⁸ Governments to set the pace in adhering to these measures by restricting staff allowed to resume to essential workers and those from Grade Levels 13 - 17 who would work

¹ (2008) LPELR-SC.309/2002

² *Julius Berger Nig Plc v Ogundehin* 2014 2 NWLR pt 1391 p. 388, *Samson Ediyagbonya V. Dumez* (1986) 3 NWLR PT 31 P. 53 *Salihu v Tin Associated Minerals Ltd* (1958) NMLR 56

³ *Chukwu v Makinde* (2007) 9 NWLR pt 1038, 195- a case of negligent and reckless (indiscriminate) parking of a trailer leading to an injurious collision.

⁴ *In Ozigbu Eng. Co. Ltd v. Iwuamadi William* 2009 16 NWLR PT 1166 P 44, The respondent lost one of his eyes. See also *Cullen v Scan Building Services Ltd* [2018] SC EDIN 15

⁵ In *Owolabi v Akinwumi Motors and Anor*, (1980) HIF/7/79 Judgment delivered 7/3/80, the court awarded damages in favour of the University lecturer who was completely paralyzed in a motor accident due to negligent driving of first defendant’s servant.

⁶ <https://www.aljazeera.com/news/2020/05/businesses-reopen-nigeria-eases-coronavirus-lockdown-200504094440082.html>

⁷ NCDC, Guidelines for Employers and Businesses in Nigeria, <<https://www.tralac.org/documents/resources/covid-19/countries/3517-guidelines-for-employers-and-businesses-in-nigeria-ncdc-may-2020/file.html>> accessed 14/8/2020

⁸ NCDC, Simple ways to prevent the spread of COVID-19 in your workplace <https://ncdc.gov.in/WriteReadData/1892s/18679749311583919448.pdf> accessed 14/8/2020

only on Mondays, Wednesdays and Fridays between 8a.m. and 2p.m. As a precautionary measure and if permitted by the contractual terms, employers could request or insist that workers undergo medical examinations before resuming work.¹

Moreover, businesses were urged to develop policies and practices that enable employees to work more flexibly and remotely i.e. working from home; to leverage technology to arrange virtual meetings with employees and clients and where possible, to move their services online.² Employers were also advised to consider the staggered re-introduction of staff members into the office using staff rotas and flexible work hours or work shifts. Where possible, businesses should provide transportation for their employees to limit their use of public transport. Put into place flexible workplace policies to respond to staff absenteeism with an efficient process to ensure the smooth handover of work from one staff member to the other when required. Take advantage of delivery companies to limit staff movement outside the office.³

If, in spite of these precautionary measures someone on the premises develops Covid-19 symptoms, the employer is required to immediately self-isolate the person in a separate room in the office or business premises and call the state helpline or contacting NCDC for guidance. While awaiting laboratory test results, the employee should be in self-isolation and employers should carry out a risk assessment to ascertain whether there is a need to close the office or business premises. Employers or businesses may also encourage such staff to work from home until the outcome of test results is known. Employers should also continue to ensure basic hygiene advice is followed, work premises are kept clean and waste is disposed of appropriately.⁴ Should the results come out positive, the State Ministry of Health will contact the workplace to identify people who have been in close contact with the infected employee and advise on further actions or precautions that should be taken, based on assessment of the work premises which would include shutting down temporarily and disinfecting the premises. Employee who are contacts would be asked to self-isolate for 14 days from the last time they had contact with the confirmed case. Employees who are living in a household with a confirmed case of COVID-19, should also be asked to self-isolate for 14 days until all members in the household receive a negative test confirmation.⁵

5. Legal Issues Arising from the Employers Duty of Care during the Pandemic

5.1 Obligation on the employee to undergo medical tests before resuming work

During the pandemic, employers are mandated by the NCDC guidelines to conduct COVID-19 screening which includes a temperature check. Employers may ask employees if they are experiencing symptoms of the virus such as fever, chills, cough, shortness of breath, or sore throat etc. Employers must maintain all information about employee illness as a confidential medical record in compliance with the Nigerian Data Protection Regulation.⁶ Once testing becomes readily available in Nigeria; it will also be important to determine whether employers can mandate testing and whether an employee must be symptomatic before such test is required. Aside from the employee's right to privacy and non-discrimination, there are bigger issues of public safety and personal sovereignty at stake in this question.

Until such a time, the current position of the law is that a medical exam can only be mandated where the employer has reason to believe that a particular employee poses a threat to the workplace (public safety) due the existence or likelihood of a medical condition.⁷ With regard to prospective employees, the Labour Act expressly permits employers to conduct medical examinations after a conditional offer of employment is made, but before an individual begins working, provided that all employees in the same job category must be subject to the same examination requirement.⁸

It must be observed that the current rules around testing are not neither comprehensive nor permanent. It is anticipated that when COVID-19 is no longer deemed a threat, the NCDC guidelines may no longer apply but the law should

¹ Ibid.

² <https://covid19.ncdc.gov.ng/media/files/COVID19GuideforBusinesses_2.pdf>

³ Ibid.

⁴ NCDC.gov, covid19.ncdc.gov.ng info@ncdc.gov.ng Guidelines for Employers and Businesses in Nigeria 11

⁵ Ibid.

⁶ Nigeria's principal data protection legislation is the Nigeria Data Protection Regulation 2019 (NDPR). The NDPR was issued by the National Information Technology Development Agency ("NITDA) on 25 January 2019 pursuant to Section 32 of the NITDA Act 2007 as subsidiary legislation to the NITDA Act 2007.

⁷ NCDC, op cit.

⁸ ILO Discrimination (Employment and Occupation) Convention, 1958 (No. 111)

have evolved to contemplate these situations. What remains constant however, is the illegality of discriminating against or firing an employee on the grounds of testing positive for COVID-19.¹ Despite the silence of the Labour Act on the issue of discrimination in employment, the National Industrial Court of Nigeria (NICN) recognizes the concept of unfair labour practices - an enlarged jurisdiction which has led to the emergence of decisions condemning employment discrimination.² The NICN has a unique jurisdiction³ to enforce international best practices, including international conventions, treaties and protocols that relate to employment/labour issues⁴ which are ratified by Nigeria.⁵

5.2 *Legal duty on the Employer to notify relevant authorities and fellow employees in case an employee is infected with the COVID-19*

According to directives from the Presidential Task Force for the Coronavirus and the Federal Minister of Health, the general public (including employers) are required to report any suspected case of covid-19 to the National Centre for Disease Control (NCDC). This directive was issued pursuant to the powers of the President under the Quarantine Act 1926. Some states have enacted laws along these lines. For instance, the Public Health Law of Lagos State, 2015 (PHL) mandates an occupier/owner of any building or structure to notify the authorities of any occupant suspected of suffering from an infectious disease.⁶ Failure to report a case of an infectious disease under the PHL is an offence punishable with a fine of N1,000,000 (approx. US\$2,778) or any non-custodial sentence.

On the other hand, there is no legal obligation on the employer to notify other employees in the event that one or some of their co-workers are infected with covid-19. This is because disclosure of an employee's health status can be deemed as a breach of that employee's right to privacy as enshrined under the Constitution.⁷ However, as a result of the common law duty placed on the employer to ensure the safety of its employees, the employer must comply with the NCDC protocol on actions to take when an employee is COVID-19 infected as discussed above. Failure to do so could lead to liability. The employer is obligated to close its place of work if the closure is necessary to safeguard the safety of other employees. It must also take appropriate measures to ensure that the workplace is safe before reopening it.

5.3 *Employer's liabilities where an employee is infected at the place of work*

As discussed in the preceding section, an employer is legally obligated to provide a safe work environment, observe health and safety measures and ensure the safety of its employees. Liability of an employer for breach of these duties depends on the injury or loss sustained by the employee as a result of such breach. It would be extremely challenging however, for an employee to prove causation. To do this, he must show that he contracted the coronavirus while at work, rather than through other means such as riding public transportation, shopping, interacting with family, friends and neighbours etc. Put succinctly, the employee must establish that he contracted the virus as a result of occupational exposure arising out of and in the course of employment and that the infection led to an illness from which he suffered damage/injury.⁸ The employee must adduce competent medical evidence to establish these facts.

¹ Ibid.

² For instance, *Folarin Oreka Maiya v. The Incorporated Trustees of Clinton Health Access initiative, Nigeria & 2 ors* [2012] 27 NLLR (PT. 76) 110 NIC – a case unfair dismissal.

³ Granted by Constitution of the Federal Republic of Nigeria (Third Alteration) Act, 2010 which took effect from 4th March, 2011.

⁴ For instance, the ILO Convention No. 111(supra), Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) 1979 and African Charter on Human and Peoples' Rights, 1981.

⁵ Section 7(6) of the National Industrial Court Act. See also B.B. Kanyip, "Advancing the Frontiers of Employment Law and Practice in Nigeria through Law Reporting: Nigerian Labour Law Reports as a Case Study" A Discussion Paper presented at the First Colloquium on Employment Law and Practice in honour of Enobong Etteh, to mark his 50th birthday which held at Quad.7 Event Centre, 171 Gbagada Express Way, Lagos on 31st January, 2015.

⁶ The Infectious Diseases (Emergency Prevention) Regulations, 2020 of Lagos State defines a 'potentially Infectious Person' as a person who is or may be potentially infected with covid-19.

⁷ Section 37 of the 1999 Constitution provides that: "The privacy of citizens, their homes, correspondence, telephone conversations and telegraphic communications is hereby guaranteed and protected."

⁸ *Onasanya v Western Nigeria Marketing Board* [1975]5CCHCJ825 PER Gomes J; *Adewale v Solawe* [1972]6 CCHCJ 70 at p.73 per Adesanya J

In addition to causation, the employee would have to prove that the employer is to blame for his infection as a result of the employer's failure to put all safety measures in place at the workplace, that is – a breach of the duty of care.¹ In order to debunk this claim, the employer need only show that all the NCDC regulations for running businesses were strictly followed and enforced.² Nevertheless people whose job involves close contact with coronavirus patients, such as nurses and other front line health workers, may have a stronger claim as they could well argue their job exposed them to a greater risk of contracting the virus regardless of how rigorously protective gears and measures were put in place.

Common law claims in negligence would only be possible if a worker proved that an employer was negligent and ignored safety measures and caused the worker to catch the virus. In the event that the worker proves his case, claims could cover compensation for pain and suffering, loss of wages and medical costs where applicable.³ The judge has a duty to consider what is fair and reasonable compensation for injuries sustained.⁴ Under the Employees' Compensation Act however, the employee need not prove negligence, he must only show that he sustained injuries in the course of employment. He would thereafter be entitled to receive temporary total disability benefits in lieu of wages, reasonable and necessary medical treatment and an award for any resulting permanent disability (e.g., reduced respiratory capacity, etc.) through the NSITF.⁵ Rather than facing the uphill legal task of proving a Common Law breach of the duty of care in an action for negligence, most employees would opt to avoid a lawsuit and instead file a worker's compensation claim.⁶

5.4 *Employee's Dereliction of Work*

The question to consider under this heading is whether an employee is legally protected if he refuses to come to work due to the potential risk of contracting coronavirus. Following that, is an employer entitled to mete out disciplinary measures against an employee who refuses to work where the nature of the job is such that it can only be done with the physical presence of the employee? In a situation where the government has declared a complete lockdown, the employee has good reason to stay at home. Where there is no lockdown but the employee is able to perform the same caliber of work from home, it would be inconsiderate of the employer to insist on the employee's physical presence. Nonetheless, where the employer has put in place all workplace health and safety measures, the employer is entitled to demand that the employee report to work formally, especially where the employee's job is considered key to the running of the enterprise.

Employees are not allowed to be away from the workplace without reasonable cause. Where the employee has no reasonable basis for the fear of being infected by COVID-19 virus, any absence from work would attract sanctions in accordance with the employment contract. The usual practice is to deduct the day(s) of absence from their leave days or to prorate the salary for the day(s) of absence and deduct the same from the salary. In extreme cases, absence from work without reasonable cause may be a ground for termination of the employment contract. Such action is justifiable because there is an implied duty on an employee in every contract of employment to obey the employer's lawful or reasonable instructions and a failure of an employee to obey such instructions may be regarded as a fundamental breach of the contract.⁷ The belief by the employee that the employer has breached a

¹ *Donoghue v Stevenson* [1932] A.C.C.562 at p619

² In *Western Nigeria Trading Company Ltd v Busari Ajao* [1965] NMLR 178, it was held that an employer is under an obligation not only to provide safety devices but also to give strict instructions followed by reasonable supervision.

³ *Owolabi v Akinwumi Motors and Anor* (1980) HIF/7/79 Judgment delivered 7/3/80

⁴ *S.C.C (Nig) Ltd v Elemadu* (2005) 7 NWLR Pt. 923 P. 28; *Conway v. George Wimpy & Co.* (1950) 2 All ER 331; *Wise v. Kaye. Ante* (2003) 18 NWLR pt. 851 P. 79

⁵ The Nigeria Social Insurance Trust Fund (NSITF) is authorized to "...assess employers for such sums in such manner, form and procedure as the Board may from time to time determine for the due administration of the Employee's Compensation Act." The Employee's Compensation Act provides for payment of compensation to employees suffering from occupational disease and injuries (S. 9), rehabilitation of employees affected by work related disabilities (S. 16) and even dependents of a deceased employee whose death is due to an occupational injury or disease (S. 7).

⁶ There are exceptions to these. The employer is not liable to pay compensation for an injury which does not incapacitate the employer/workman for three (3) consecutive days from earning full wages or where it is proved that the injury to the workman was due to serious and willful misconduct of the workman. See ECA S. 3(2)(a)(b).

⁷ *Laws v London Chronicle Ltd* (1959) 2 ALL ER 285 CA

term of the contract of employment such as failure to provide a safe work environment, is no justification for failing to obey lawful and legitimate instructions.¹

On the other hand, the employer should not be high-handed in handling employee's discomfort. In case an employee expresses reservations about going to work in the current pandemic, the employer should take these concerns seriously and ask for the exact reasons. The employer and employee together can look for possible solutions, such as a modification of the workplace, paid or unpaid leave. It should be noted that an employee's resignation as a result of the employer's failure to provide a safe working environment may be seen as constructive dismissal.² Where an employer fails in his duty of care³ or makes unilateral changes to the terms and conditions of the contract of employment without notice to the employee and/or without his consent,⁴ it is regarded as a fundamental breach of the terms and conditions of the contract of employment for which the employee may successfully plead constructive dismissal. The same is the case where there is an evidence to show that there was some kind of threat, coercion or negative persuasion made by the employer and as a result of which the employee is compelled to tender his resignation letter.⁵ A successful claim of constructive dismissal entitles the employee to appropriate damages, as in the case of wrongful termination.⁶

5.5 *Employee's Right to Privacy of Health Information*

Information regarding medical information of an employee, such as whether the employee is suffering symptoms of coronavirus or has been diagnosed as having the virus are personal data under and must be protected to avoid penalty for breach of the employee's privacy rights.⁷

In this pandemic period, the ministry of health through the NCDC mandated that information concerning employees COVID-19 symptoms be shared with them. Although this federal government directive should not overrule the citizens right to privacy, the President's declaration of a state of emergency in the health sector as a result of the pandemic is sufficient to permit certain infractions of individual rights in the interest of public health and safety.⁸ Obviously, an employer can share protected health information with health service providers to help in treatment, or with emergency relief workers to help coordinate services. More importantly, information can be disclosed to authorized personnel without permission of the person whose records are being disclosed if disclosure is necessary to prevent or lessen a serious and imminent threat to the health and safety of a person or the public.⁹

5.6 *Whether working remotely from home discharges the employer's work safety responsibility*

Ever since the Covis.19 lockdowns, increasing numbers of employees are required to work remotely but there is no clear legal position in Nigeria on the liability of employers to ensure safe work environment and system of work in employee's home. The Employees Compensation Act (ECA) defines 'workplace' to include any premises or

¹ *Macari v Celtic and Athletic Football Club Ltd* (1999) IRLR 787; *Creswell v Board of the Inland Revenue* (1984) IRLR 190

² In employment law, constructive dismissal is a situation where an employer creates such working conditions (or so changes the terms of employment) that the affected employee has little or no choice but to resign. In alternative sense, constructive dismissal occurs when an employee resigns because his/her employer's behaviour has become so intolerable or heinous, or such behaviour has made life so difficult that the employee has no choice but to resign. Given that the resignation was not truly voluntary, it is in effect a termination. *Miss Ebere Ukoji v Standard Alliance Life Assurance Co. Ltd* (2014) 47 NLLR (Pt. 154)531 NIC, *Western Excavating; Mr. Patrick Modilim v United Bank for Africa Plc* Suit No. NICN/LA/353/2012; *ECC Ltd v Sharp* (1978) 1 All ER 713.

³ *Lewis v Motorworld Garages Ltd* (1985) IRLR p 465.

⁴ *Norman v National Audit Office* (2015) IRLR 634 EAT. See also *Farber v Royal Trust Co.* (1997) 1 SCR 846.

⁵ *Silas Liman v Access Bank* Suit No: NICN/JOS/15/2012

⁶ *Isievwore v NEPA* (2002) 13 NWLR (Pt. 784) 417 at 437-438

⁷ Data Privacy Regulations, *supra*.

⁸ President Buhari called upon emergency powers to deal with covid-19 without having declared a state of emergency under Section 305 of the Constitution which is the better-known method. Rather, the President relied on his emergency powers under the Quarantine Act of 1926. The Act gives the President wide powers to prevent the introduction into and spread in Nigeria, and the transmission from Nigeria, of dangerous infectious diseases and to make regulations for associated purposes. Pursuant to this Act, the President has issued a number of Regulations (COVID-19 Regulations 2020) declaring Covid-19 a "dangerous infectious disease" and making lockdown orders in Lagos, Abuja and Ogun States. State governors have the same powers as the president under the Act and have made similar Regulations in their states.

⁹ Covid-19 Regulation 2020.

place where a person performs work or needs to be or is required to be in the course of employment.¹ The import of this definition is that, where injury occurs while the employee is working outside the normal workplace, compensation shall be paid to the employee under the ECA provided that the employee would also have been entitled to said compensation if the injury occurred in the workplace. To make this claim, the employee would need to show that:

- the nature of the business of the employer extends beyond the usual workplace
- the nature of the employment is such that he is required to work both in and out of the workplace
- he has the authority or permission of the employer to work outside normal work place²

In direct contradiction, the National Policy on Occupational Safety and Health defines ‘workplaces’ as all places where workers need to be or to go by reason of their work and *which are under the direct or indirect control of the employer*.³ This means that the before an employer can be held liable for breach of duty of care, the employees’ residence or venue for remote work must be under his control. The position of the law is therefore unclear on this issue.

Looking at other jurisdictions for guidance, Section 1 of the *Canada’s Occupational Health and Safety Act (OHSA)* defines ‘workplace’ to ‘mean any land, premises, location or thing at, upon, in or near which a worker works’ - a definition which is even broader than the ECA rendering. COHSA however, delimits the scope of the word by stating that it does not apply to private residences.⁴ Canadian law therefore exempts employers from the obligation to protect employees from the hazards of their home offices. In Australia, the duty of care extends to anywhere work is performed. Once an employee is asked to work from home, the employer is responsible to ensure this does not pose a risk to the employee’s health and safety.⁵

In the United Kingdom, an employers’ duty of care includes ensuring the health, safety and welfare of those who are working from home.⁶ Risk assessments should be carried out that identify all risks that might cause harm and then set out reasonably practicable methods to eliminate them and if that is not possible reduce them. This assessment should pay particular attention to the employee’s equipment, electricity, first aid, accidents and work-related stress caused by the employee living and working in the same environment.⁷ The employer should also ensure that any work equipment which it has provided, like laptops and mobile phones, are safe as they will be liable for any damage caused by their malfunction.⁸ In addition, and as a matter of good practice, during both during current ad-hoc homeworking arrangements and more permanent homeworking arrangements, employers should keep in regular contact with their employees and set out agreed weekly meetings or calls so that concerns can be raised and employees are not left feeling isolated.⁹

6. Conclusion

Nigerian workers are moderately well protected by health & safety law. The Common Law obliges employers to

¹Section 73

² Ibid.

³ Section 11(1)(b). Emphasis mine.

⁴ COHSA section 3(1) states that “This Act does not apply to work performed by the owner or occupant or a servant of the owner or occupant to, in or about a private residence or the lands and appurtenances used in connection therewith.”

⁵Queensland Health Work and Safety Act 2011. Division 3(2) 8 defines a workplace as “... a place where work is carried out for a business or undertaking and includes any place where a worker goes, or is likely to be, while at work.” All duties under the WHS Act are qualified by the term ‘reasonably practicable’. <https://www.worksafe.qld.gov.au/laws-and-compliance/workplace-health-and-safety-laws/definitions>, accessed 19th August 2020.

⁶ UK Health and Safety at Work Act 1974, Section 2(2)(e) provides that it is the duty of every employer to ensure “the provision and maintenance of a working environment for his employees that is, so far as is reasonably practicable, safe, without risks to health, and adequate as regards facilities and arrangements for their welfare at work.”

⁷ Department for Business, Enterprise and Regulatory Reform, Improving outcomes from health and safety A Report to Government by the Better Regulation Executive, 2009. Available at: <http://www.bis.gov.uk/files/file47324.pdf>

⁸ A Litchfield et al, “How Can Employers Discharge Their Duty to Protect the Health, Safety and Welfare of Employees Who Are Working From Home?” Gowling WLG, 27 March 2020, <https://www.mondaq.com/uk/health-safety/909192/how-can-employers-discharge-their-duty-to-protect-the-health-safety-and-welfare-of-employees-who-are-working-from-home>

⁹ A Rayment, et al “Employment Law Considerations for Homeworking – What Do You Need To Know?” *Walker Morris*, 28 July 2020 <https://www.mondaq.com/uk/health-safety/952686/employment-law-considerations-for-homeworking-what-do-you-need-to-know?type=mondaqai&score=71> accessed 19th August 2020.

take reasonable measures to provide a safe place of work, a safe system of work and safe equipment. The Factories Act makes more explicit (though dated) safety regulations whilst the Employees Compensation Act makes the employer liable for employee's injuries incurred in the course of employment. It remains to be seen whether the National Industrial Court (NICN) would classify Covid.19 infection as an actionable workplace injury. Although the Constitutional policy on health and safety of all persons in employment and the National Policy on Occupational Safety and Health are not legally binding, the NICN is empowered to enforce the ILO Convention on Occupational Safety, Health and Working Environment and other international best practices.

Employers need to safeguard themselves from liability for exposing their workers to covid.19 infection. Every workplace should conduct a thorough and well documented risk assessment to identify all practicable steps which will reduce risk as far as reasonably practicable. Employers should be flexible to explore new and safer work practices including provision of protective supplies and equipment, minimized work hours, staggered work days/hours and remote work where possible. Requiring employees to physically report for duty and risk their health will be harmful to morale and could result in a costly civil claim. Mutual negotiation and accord is the best way to manage employee's health and safety expectations during this unprecedented and largely unregulated health crisis. Employers should discuss with employees and their trade unions as to which safety measure could reasonably be put in place. The fact that a particular precaution is costly to a business might not be a good defense in case of a claim for breach of duty of care. Although risks to employees cannot be totally eliminated, employers must prepare themselves to pay a high economic cost to keep their workers safe.

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