Workplace and Employment Dispute Resolution.

By

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POINTS TO NOTE

1. Issues calling for discussion are:

- the mechanisms best suited for the resolution of workplace and employment disputes;
- conflict triggers in the workplace;
- internal conflict management; the mechanisms available for the resolution of conflicts in the workplace;
- the place of ADR in resolving workplace conflicts;
- the place of ADR in resolving employment disputes;
- the trade disputes regulated by the Trade Disputes Act;
- conciliation and arbitration under the Trade Disputes Act - the Powers of the Industrial Arbitration Panel (IAP);
- the role of the Multi-Door Court House in the National Industrial Court, etc.

These issues would not be addressed in any order of importance.

2. Labour law itself is today facing a crisis, a crisis of identity.

3. This is matched by a job crisis in Nigeria. The national unemployment rate is not improving; and the percentage of the labour force is in formal waged employment is not high, the rest being in low paid, unsecured informal sector. Youth unemployment

is equally high yielding to youth restiveness. In the midst of all this, the rate of job loses is a source of concern.

4. One sad trend in the country is the fact that within the body polity, it seems that we have reached that point where nothing can be secured without some form of agitation to force; and this is evident in the world of work where strikes seem to be the norm. At the July 29, 2010 Roundtable on Strikes and Collective Bargaining organized by the Nigerian Institute of Advanced Legal Studies, Lagos, while addressing the issue of the cost of industrial actions, labour did not relent in reminding the audience to also consider the cost of the absence of industrial action. Yet one must not be unmindful of the fact that industrial action does not bring any economic benefits in itself. A strike may damage the employer′ s business and may have substantial indirect effects on other firms, consumers and the public. The man-hours often lost as a result of strikes can be astonishing.

5. Conceptually, the talk of resolving labour-related disputes seems to preclude the question of preventing them in the first place. Yet labour dispute resolution and labour dispute prevention are but two sides of the same coin. They are often addressed together as the attempt must first be to prevent disputes from arising; and where they arise, given their inevitability, to resolve or settle them using appropriate measures sanctioned by the legal system. Whether it is labour dispute resolution that we talk of or labour dispute prevention, the central concept within the context of ILO jurisprudence and indeed the labour laws of the country is social dialogue.

6. By social dialogue, I mean the engagement/consultations amongst the social partners (government, employers and employees) in the world of work and as the case may be in the search for the appropriate equilibrium regarding issues that may arise. The dialogue may be tripartite (tripartism) where it involves the three social partners or it may involve any two of the social partners. The effectiveness of labour policy in the quest to prevent or resolve labour disputes, therefore, depends on the nature of social dialogue that goes on in particularly the workplace. The social partners possess unique experience and specialised knowledge of the realities of the workplace and so are vital to modernizing work organisation, achieving higher

growth and employment. The ILO has long recognised the central role of social dialogue, which is a key element of the Declaration on Fundamental Principles and Rights at Work adopted in 1998. Social dialogue is, therefore, a gospel preached by the ILO and recommended to all its members. In countries where the ILO has been invited to assist in labour law reform, the entrenchment of social dialogue has always been central to such reform. This is the case in Nigeria where on the inception of democratic rule in 1999, the ILO assisted the country under the auspices of the DECLARATION PROJECT — NIGERIA not only to initiate the reform of labour laws of the country, but to instill social dialogue as part of the capacity building measures required for the labour regime in the country.

7. The demands of freedom of association and collective bargaining as enjoined by the Freedom of Association and Protection of the Right to Organize Convention No. 87 (C.87) and the Right to Organize and Collective Bargaining Convention No. 98 (C.98) presuppose that social dialogue can yield to strong levels of social partner involvement in workplace issues in the areas of wage determination, working time, modernising employment relations and work organisation, continuing training, health and safety, better integration of disadvantaged groups, active ageing, and reconciliation between work and family life. Involving social partners through consultation in drawing up labour policies will certainly improve governance. Areas where the social partners can contribute meaningfully include the search for concrete initiatives in the promotion of adaptability and new forms of work organization especially in the light of globalisation, the search for the right balance in issues of flexicurity (a word coined from the words 'flexibility' and 'security' and is meant to denote a form of labour market organisation combining a flexible labour force able to adapt to new markets and technologies with security that guarantees workers' living and working standards; in other words, it is used to denote the need to have the twin ideals of flexibility of working conditions and employment in terms of the right of the employer to hire and fire at will, and security of employment and jobs that workers generally demand) in addition to issues of restructuring, ageing workforce, labour market integration of the young, investment in lifelong learning and life-cycle approach to work.

8. In content, social dialogue accordingly incorporates the three fundamental issues of freedom of association, collective bargaining and dispute resolution and prevention. Implicit in the jurisprudence of collective bargaining, are the principles relating to dispute resolution. For instance, the Collective Agreements Recommendation No. 91 of 1951 (R.91) provides that disputes arising out of the interpretation of a collective agreement should be submitted to an appropriate procedure for settlement established either by agreement between the parties or by laws or regulations as may be appropriate under national conditions. The Labour Relations (Public Service) Convention No. 151 of 1978 (C.151) then provides for negotiation, mediation, conciliation and arbitration as acceptable means of settling disputes as to the terms and conditions of employment. The Collective Bargaining Convention No. 154 of 1981 (C.154), which is general in scope goes on to provide that bodies and procedures for the settlement of labour disputes should be so conceived as to contribute to the promotion of collective bargaining. The framework of the Trade Disputes Act (TDA) 2004, for instance, accommodates the processes of negotiation, mediation, conciliation, arbitration and adjudication of only trade disputes, inter and intra-union disputes. Other forms of labour disputes are outside the pane.

9. One noticeable impact of the breakdown of social dialogue is the prevalence of strikes and other forms of industrial actions. The response to this is often the imposition of restrictions on the right to strike, a fact that often escalates the dispute in issue. ILO jurisprudence permits strikes where the dispute in issue is especially a dispute of interest as distinct from disputes of rights. And while disputes of interest can only be conciliated or arbitrated upon, disputes of rights may proceed to the adjudicative processes of the courts. Through the process of collective bargaining, disputes of interest may crystallise into rights if the issues involved are agreed upon and endorsed in a collective agreement. All of this is not necessarily the norm. In Nigeria, for instance, the Trade Unions (Amendment) Act 2005 permits strikes in respect of disputes of rights as distinct from disputes of interest; and even at that, only upon the satisfaction of other stringent conditions which in effect makes the right difficult to exercise. The reversal of principle here by allowing strikes only when the dispute is a dispute of right means that the permissibility by the ILO of strikes in cases of disputes of interest has been legislated out.

10. It is foolhardy to talk of labour dispute resolution without also addressing the related concept of labour dispute prevention. Dispute prevention is now emphasized as against dispute resolution given difficulty of enforcement may be an issue regarding the question of dispute resolution. Emphasis is this placed on the optimal combination of process and procedure that effectively prevents and resolves disputes — a system that is legitimate, independent and efficient. Effectiveness of dispute resolution is not sufficient. Dispute prevention measures such as the development of codes of good practice and model agreements to guide employer and workers' conduct, and enterprise level capacity building to transform a pervasive culture of adversarial labour relations, is equally important.

11. Under the DECLARATION PROJECT it was found the system of dispute prevention and resolution applicable within the country to suffer from the following shortcomings —

- Dispute prevention measures are virtually non-existent.
- The dispute resolution procedures are cumbersome and slow, with the institutions grossly overburdened and experiencing huge backlogs.
- Options to address disputes are limited in the main to administrative and adjudicative processes, which may not even be specialised.
- Many of the dispute resolvers are poorly paid, inexperienced and poorly qualified.
- The dispute resolution systems have tended to promote forum shopping affording disputants the opportunity to select forums which they believe give them the best strategic advantage, impervious to issues of cost and delay.

12. In consequence, the DECLARATION PROJECT recommended a new system under the Draft Collective Labour Relations Act hinged on the following benchmarks of best practice —

- Speed in dispute processing. Disputes are to be dealt with as early and as quickly as possible.
- The dispute resolvers (mediators/conciliators, arbitrators and judges) are to enjoy legitimacy, be independent and professional.

- The processes and procedures are to be simple, user friendly and fair.
- The system is to be accessible, especially to the weak, the marginalised and those who live in rural areas.
- The system should promote the prospect of agreed outcomes at first such as being conciliated before resort to industrial action or arbitration or adjudication.
- The system is to be underpinned by fairness and outcomes should be predictable, just and final.
- The system must be effective and cost effective.
- The system should incorporate measures which promote dispute prevention.
- The system is to be transparent.
- The users are to be informed and equipped to use the system.
- Decisions are to be easily enforceable. Enforcement provisions should, therefore, not be bureaucratic and cumbersome.

13. On the need to give more prominence to the issue of dispute prevention, the DECLARATION PROJECT noted and recommended the following as essential in the new labour regime to be operated in the country —

- Pre-emptive interventions by conciliators in sectors where there is a high incidence of disputes, to encourage self regulation through the voluntary adoption of measures to reduce the number of disputes.
- Ministerial intervention to invoke conciliation where disputes that may impact upon the national interest appear likely.
- The development of 'soft law' in the form of codes of best practice, guidelines and model agreements to influence and promote fair conduct in the workplace.
- Empowering the institutions for settling and preventing disputes to facilitate relationship building and giving advice.

14. Whether the issue is one of dispute resolution or prevention, it is useful to understand the different types of disputes that labour jurisprudence envisages given

that they often command different kinds of processes and procedures for especially their resolution.

15. Industrial harmony in the workplace does not imply the absence of conflict. Conflict in the dynamic relationship between management and labour is inevitable, as the voice of dissent is the hallmark of industrial democracy. As a matter of fact, the legitimate expectations of the employer and labour are inevitably in conflict, translating in practice to a power game between the two blocs. For instance, while the employer expects that labour will be available at a price, which permits a reasonable margin of profit for investment, labour expects that the level of real wages must be reasonable and steadily increased; the employer has an interest in obtaining the most qualified worker for each job, labour is interested in each worker who is unemployed obtaining a job or those employed in retaining the same; the employer expects that arrangements of society, through law or otherwise, should ensure labour mobility in a geographical and occupational sense, labour on the other hand expects reasonable job, or at least employment, security to enable workers plan their own and their families' lives; the employer expects to plan production and distribution on the basis of calculated costs and risks and a guarantee against interruption of these processes, labour on its part realises that without the power to stop work collectively, it is impotent, and so it expects to be able to interrupt the economic process if this is necessary to exercise the requisite pressure. These conflicting interests generate different kinds of disputes and indeed different responses from legal policy, the hallmark of the mediatory, conciliatory, arbitral and adjudicative processes of the TDA 2004, the National Industrial Court (NIC) Act 2006 and of course the Third Alteration to the 1999 Constitution.

16. The varying types of disputes often calling for prevention or resolution are:

- recognition disputes;
- refusal to remit or pay check-off dues;
- victimization/intimidation of union officials and workers;
- refusal to pay salaries and allowances and non-implementation and payment of monetization benefits;

- redundancy/retrenchment as to workforce;
- unjust or wrongful lock-out and demotion/termination/dismissal of workers;
- hike in the pump price of petroleum;
- refusal to embark or continue with i.e. breakdown of collective bargaining;
- breach/non-observance of collective agreement;
- casualisation and outsourcing of workforce;
- pension disputes;
- university funding, university autonomy and academic freedom;
- arbitrary and high tax;
- privatization disputes and unfair/anti-labour practices.

While some of these disputes such as the disputes relating to taxation, privatization and the pump price of petroleum may not qualify as trade disputes under the TDA 2004, they may sufficiently relate to socio-economic interests of workers as to justify any strike action on them within the context of ILO jurisprudence. See *The Federal Government of Nigeria & anor v. Nigeria Labour Congress (NLC) & anor* unreported Suit No. NICN/AB/179/2016, the judgment of which was delivered on 15th July 2016.

17. These respective factual disputes can be variously categorized. They may come as individual or collective disputes.

- An individual dispute can, however, develop into a collective dispute, particularly where a point of principle is involved and if it is taken up by a trade union. In general, however, a dispute is individual if it involves a single worker, or a number of workers as individuals (or the application of their individual employment contracts).
- A dispute becomes a collective dispute if it involves a number of workers collectively. But even in this regard, a dispute which has the appearance of being a collective dispute because it involves several workers may be no more than a series of individual disputes e.g. the dismissal of several workers involved in a fight in the workplace. Before June 14, 2006 when the NIC Act 2006 became operative, the NIC could only deal with trade disputes, which by definition referred to only collective labour disputes. Today, however, given section 7 of the NIC Act and section 254C(1)

of the 1999 Constitution, the NIC now entertains individual labour/employment disputes.

18. It is often difficult to draw the individual/collective dispute distinction. Consequently, modern systems of dispute resolution adopt the dispute of right/interest distinction with particular procedures for special types of disputes such as retrenchment, recognition and strikes. The Trade Unions (Amendment) Act of 2005 has, for instance, introduced the dispute of right/interest distinction in our legal system but only within the limited context of the right to strike.

- By definition, a rights dispute is a dispute concerning the violation of or interpretation of an existing right (or obligation) embodied in a law, an award, a collective agreement or an individual contract of employment.
- An interests dispute is one which arises from differences over the determination of future rights and obligations (e.g. what the next wage should be), and is usually the result of a failure of collective bargaining. It does not have its origins in an existing right, but in the interest of one of the parties to create such a right through its embodiment in a collective agreement, and the opposition of the other party to doing so. Disputes of interest, if settled, invariably create rights and obligations, although traditional thinking in law may hold those rights/obligations as unenforceable.

The procedures for resolving these kinds of disputes are different, although both kinds of dispute are in the first instance referred to mediation/conciliation. Where this fails, disputes of rights are referable to arbitration and adjudication by a specialist court, while disputes of interests are resolved through pressure in the form of industrial action requiring a procedure quite different from one involving a reference to arbitration or to adjudication.

19. There are certain types of disputes that are often dealt with procedurally different because they tend to be more sensitive or complex or because their outcome tends to affect many people, or because they involve considerations of principle which have policy implications for the society at large. These disputes, if not susceptible to settlement by mediation/conciliation, tend to be dealt with by adjudication in the

courts (given that courts, not arbitration, create precedent) and not by the less formal process of arbitration, unless the parties agree otherwise. These disputes are: discrimination and sexual harassment, retrenchment, organisational rights, core labour rights and standards, and recognition disputes. Within the structure of the TDA, these species of dispute are generally treated as collective disputes and so treated as such, except for discrimination and sexual harassment complaints which are hardly pressed by victims under our labour jurisprudence.

20. There are a number tension points in the Nigerian industrial relations scene that deserve special mention here. These include:

- The demand for parity in terms and conditions of work especially as to salaries and allowances, an issue bedeviling the States and the health and education sectors.
- The no work, no pay rule.
- The impact of technology (automation) in the workplace.
- Employers trying to have a say in the management and running of trade unions in their workplaces.

21. The TDA specifically deals with trade disputes, a term defined under section 48(1) of the TDA as any dispute between employers and workers or between workers and workers, which is connected with the employment or non-employment, or the terms of employment and physical conditions of work of any person. See the extended meaning of a trade dispute in section 54(1) of the NIC Act 2006. Also dealt with by the TDA are inter and intra-union disputes (organisational disputes), terms that are not defined in the TDA. See also section 54(1) of the NIC Act. Case law jurisprudence on these concepts may be daunting. Note that disputes relating to the conclusion or variation of a collective agreement and an alleged dispute do not feature under section 48(1) of the TDA in the definition of the term 'trade dispute'; neither do disputes in relation to federations of employers' or employees' organizations. And inter and intra-union disputes have expansive definitions well beyond that given to the terms under the now repealed section 25 of the TDA 2004.

22. Globally, the resolution of labour disputes is guided, among others, by this principle: *it is better to have a bad decision quickly than a good one too late*. This is a variant of the adage, 'justice delayed is justice denied'. In other words, speed is a major guiding principle in the resolution of labour disputes even if this is at the risk of an unfair decision.

23. Prior to the passing of the NIC Act, the general thinking especially within the world of employment is that the TDA 2004 envisaged three main forms of disputes: trade disputes, intra-union disputes and inter-union disputes. See Part I of the TDA, which is headed, "Procedure for Settling Trade Disputes" and which consists of sections 1 — 19. Section 7(1)(a) of the NIC Act and section 254C(1) of the 1999 Constitution now give the NIC wide and exclusive jurisdiction over all labour and employment matters. Section 7(3) of the NIC must however not be lost sight of. It provides thus: "Notwithstanding anything to the contrary in this Act or any other enactment or law, the National Assembly may by an Act prescribe that any matter under subsection (1) (a) of this section may go through the process of conciliation or arbitration before such matter is heard by the Court".

24. Where the dispute in issue is s trade dispute, a litigant must first go through the processes of Part I of the TDA before approaching the NIC in its appellate jurisdiction. In other words, the NIC does not have original jurisdiction when the dispute is a trade dispute.

25. Under Part I of the TDA, the first step towards activating the said dispute resolution processes is the formal declaration of the existence of a trade dispute except where the Minister of Labour apprehends it under section 5 of the TDA 2004, in which case he is permitted to apply any of the fast track measures allowed by the TDA. For instance, where the Minister apprehends a trade dispute under section 5 of the TDA 2004, he may appoint a conciliator to look into it or refer the dispute to the IAP or refer to it to a board of inquiry. And under section 17 of the TDA 2004, the Minister may by-pass all other processes and refer the dispute directly to the NIC, that is, if the dispute involves workers in any essential service or the circumstances of the case make reference of the dispute to an arbitration tribunal inappropriate.

26. As to who can declare a trade dispute, the TDA permits an employer(s), or a union, or a group of workers, or the Minister under his power to apprehend a trade dispute, to so declare the dispute when one exists. By declaration of a dispute is meant a formal notification in writing to an opposing party of the existence of a trade dispute between the parties. In the case of the Minister, it is a formal notification to the disputants of his fear (apprehension) that a trade dispute exists between them, although the Minister reserves the right not to do this and simply apprehend the dispute and refer it to an appropriate body.

27. In resolving the dispute in question, section 4 of the TDA 2004 enjoins the disputants to first explore agreed methods of resolving the dispute among themselves, and if this fails or there is no prior agreement as to how disputes are to be resolved, then within 7 days, to involve a mediator. When this fails to settle the dispute, the dispute shall be reported to the Minister under section 6 of the TDA 2004 by or on behalf of either of the parties within 3 days of the end of the 7 days. The Minister is here permitted to refer the matter to a conciliator under section 8 or to the IAP under section 9 or to the NIC under section 17 or to a board of inquiry under section 33, of the TDA 2004. Where the matter is referred to a conciliator under section 8, the conciliator is expected to inquire into the causes and circumstances of the dispute and by negotiation with the parties endeavour to bring about a settlement. All this must be done within 7 days of the conciliator′ s appointment. Where a settlement is reached, the conciliator shall report that fact to the Minister and forward to the Minister the memorandum of the terms of settlement signed by the representatives of the parties. Where no settlement is reached, the conciliator shall report that fact to the Minister.

28. The Minister is then expected under section 9 and within 14 days to refer the matter to the IAP whose Chairman must then constitute an arbitration tribunal consisting of either a single arbitrator (with or without assessors) or more than one arbitrator to hear and determine the matter. The arbitration tribunal under section 13 has 21 days, or such longer days as the Minister may allow, to make its award. This award is, however, not communicated directly to the disputants, but sent to the

Minister. The Minister may then communicate the award to the parties with a stipulation that within not more than 7 days, either party to the dispute may object to the award. If there is no objection within the 7 days given, the Minister may then confirm the award by publishing in the Federal gazette a notice to that effect. It should be noted that only when the award is confirmed by the Minister is it binding on the parties. And the power of the NIC to interpret IAP awards under sections 15 of the TDA 2004 and 7(1)(c)(ii) of the NIC Act applies only to confirmed IAP awards.

29. The Minister is permitted under section 13(3) if he thinks it desirable not to notify the parties of an IAP award but to refer it back to the IAP for reconsideration.

30. Where any of the parties objects to the IAP award, the Minister, under section 14 of the TDA 2004 is expected to refer the dispute to the NIC, whose decision shall be binding except, by section 9 of the NIC Act, on questions of fundamental rights as contained in Chapter IV of the Constitution where appeals lie as of right to the Court of Appeal. Only the parties to an IAP award should have the right to object to it in order to activate the power of the Minister of Labour to exercise his duty of referral of the matter to the NIC under section 14 of the TDA 2004. It is, therefore, wrong for the Minister of Labour to refer a matter to the NIC when it is objected to by a person or body that was not a party to the matter.

31. The Minister of Labour has no power to refer a dispute to the NIC where he has not received any objection to the award of the IAP from either party.

32. Given the continued centrality of the Minister in the dispute resolution processes of Part I of the TDA 2004, the Minister (or any of the parties involved) is permitted under sections 15 and 16 respectively to apply to the NIC for the interpretation of an IAP or NIC award or a collective agreement. In exercising its power of interpretation, the NIC may either hear the parties or, with their prior consent, not hear them in determining the question(s) as to interpretation.

33. So long as the processes under sections 4, 6, 9, 14 or 17, or the IAP award is binding or the NIC has issued an award, strikes and lockouts are prohibited under

pains of criminal sanctions. And by section 18(3) of the TDA 2004, where a dispute is settled either by agreement or acceptance of the IAP award, that dispute is deemed to have ended. Any further dispute involving the same matters (including questions as to the interpretation of an award made by which the original dispute was settled) is, for purposes of the said section 18 of the TDA, to be treated as a different trade dispute.

34. Another mechanism for resolving trade disputes is the power of the Minister to constitute a board of inquiry under sections 33 and 34 of the TDA 2004. This mechanism is rarely used most probably because of the statutory limitation implicit in its constitution. For instance, under section 33(1) of the TDA 2004, the board of inquiry set up by the Minister is statutorily expected to only inquire into the causes and circumstances of the trade dispute in question and report thereon to the Minister. The statute is silent as to what should be made of the report by either the Minister or any other authority. If such a report is simply filed away, this will be perfectly lawful and valid. A point needs to be noted at here.

35. Section 254C(3) of the 1999 Constitution employers the NIC to establish an ADR Centre within the premises of the Court on matters in which it has jurisdiction. In consequence, the Honorable President of the Court promulgated the ADR Centre Instrument 2015 with a commencement date of 6th April 2015 as well as the ADR Centre Rules 2015 also with a comment date of 6th April 2015. By Article 2(4)(a) of the Instrument, the ADR Centre has responsibility for resolving disputes by applying only mediation and conciliation mechanisms. Arbitration os not covered.

36. In the resolution of labour/employment disputes, the Arbitration and Conciliation Act Cap. A18 LFN 2004 is in applicable. See section 12 of the TDA and *Giuseppe Francesco E. Ravelli v. Digitsteel Integrated Services Limited* unreported Suit No. NICN/LA/599/2016, the judgment of which was delivered on 16th February 2018.