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CONTENTS:

- BUSINESS, PREGNANT WOMEN AND THE LAW:
  PROVISIONS OF THE LAW IN RESPECT OF MATERNITY PROTECTION
- EXTRATERRITORIAL IMPACT OF SECURITIES- THE LEGAL ASPECT

BUSINESS, PREGNANT WOMEN AND THE LAW
PROVISIONS OF THE LAW IN RESPECT OF MATERNITY PROTECTION

BY NEHIZENA OLUWAKEMI IBHAWOH

INTRODUCTION

Businesses are set up to maximise profits and while business owners strive to create a working environment that supports their staff through different stages of life, situations often arise which lead to a conflict between the exigencies of business and keeping employees happy.

An example of such a situation is where a business witnesses a high incidence of pregnancy among its female workforce leading to it having a large number of them leaving work at almost the same time to give birth and nurse their babies. Some times the business owners are reluctant to let the staff member go on maternity leave because she just started work.

In the course of conversation in this country, one often hears that most Nigerian banks have found a way of preventing their female employees from getting pregnant within the first year(s) of their employment and that where a pregnancy occurs in contravention of the bank's rules, the hapless female employee is sacked or rendered redundant. My investigations have shown that more often no written document stating such a rule exists in such banks. Most of the female bankers I spoke with indicated that whether or not employees are allowed to continue working if they become pregnant during their first year(s) with the bank is rather a matter of "corporate culture" or custom of some banks and instances abound where visibly pregnant employees have been employed by banks.

What should then happen? This article seeks to look at the position of the law on pregnant employees and the manner in which the rights of the pregnant employee can be protected without jeopardising business interests.

THE GENERAL PROVISIONS OF THE LAW

The relationship between employees and employers is governed primarily by contract and Labour Act. Section 54 of the Labour Act provides that a woman shall have the right to maternity leave before and after delivery (confinement) if she has been continuously employed by her then employer for a period of six months or more immediately prior to her absence.

The provision of Section 54 is in consonance with the International Labour Organisation (ILO) Maternity Protection Convention (Revised) 103 which state that member nations, of which Nigeria is one, must provide for maternity leave for their female workers after a minimum length of service.

Section 54 (1) (a) also stipulates that a female employee shall have the right to six weeks leave of

absence from work if she produces a medical certificate from a registered medical practitioner stating that she will most likely give birth within the next six weeks. In addition, it provides that she shall also not be required to work for the six weeks following her confinement in accordance with section 54(1)(b). This then means that every pregnant female employee who has worked continuously for any Company/organization or business concern for a period of six months is entitled to twelve weeks maternity leave. In Scandinavian countries, maternity leave is for eighteen months.

During this period of absence, the female employee must also be paid not less than fifty per cent of the wages she would have earned if she had not been absent - Section 54 (1)(c).

In addition, in line with the stipulations of the International Labour Organisation's Maternity Protection Convention (Revised) 103, no employer shall issue a female employee a notice of dismissal during her absence on maternity leave nor shall a notice of dismissal expire during her absence.

The marital status of a pregnant employee is irrelevant when applying these provisions, as such, all pregnant women are entitled to the same maternity benefits whether or not they are married while pregnant.

From the above it is clear then that to refuse to grant maternity leave benefits to female workers who get pregnant within the first year of employment is a violation of the clear provisions of the law, as is terminating their employment by reason of pregnancy.

THE MITIGATING EFFECT OF THE CONTRACT OF EMPLOYMENT

The law recognizes that the relationship between employee and employer is predicated on the law of contract. Accordingly, Section 7 of the Labour Act provides that employers should issue a written statement (which may apart from containing the usual terms of employment also contain special conditions) to a new employee not later than three months after the beginning of an employee's employment. This written statement is usually in the form of a letter of employment. The letter of employment may also refer the employee to some other document (usually a staff handbook or procedure manual) containing details of the terms and conditions of employment. The staff must have easy access and reasonable opportunities of reading the document in the course of their employment

The issue of pregnancy may be treated as part of the special conditions to be included in the letter of employment and or the handbook. My opinion is that businesses can only get the full services of their employees by stating the following in the employment letters or the staff handbook or procedure manual issued to their employees:

1. that all employees are eligible for any kind of leave (maternity, annual or casual) only after being confirmed and having worked for the Company for X number of years (X being the exact number of years the Company decides on. Usually it varies for one year to two years depending on the Company)

2. that female employees will be eligible for maternity benefits only after being confirmed and having worked for the Company for X number of years.

3. that female employees must also inform their immediate superiors/supervisors and the human resources department of their pregnancy X weeks or months before their confinement (i.e. date of delivery)

4. that where applicable, female employees will be required to properly hand over to their replacement, such handing over to include training, and knowledge sharing.

   As long as the employee consents to the terms and conditions set out in the contract of employment, he or she cannot be heard to complain. The law recognises the express terms and conditions of a written contract of employment as binding on the employee and the employer. The employee's consent is usually expressed by signing a declaration that he or she accepts the terms and conditions contained in the letter of employment and or the handbook.

EXSISTING EMPLOYEES

The Labour Act provides that all existing employees must be informed of the changes in the terms of employment not more than one month after the changes are made. Consequently, any decision made by any business concern in respect of the maternity rights of its female employees must be communicated to all staff within one month. The employees should either have a copy of the statement containing the change or have reasonable access and opportunities of reading the statement in the course of their employment.

CONCLUSION

In almost all societies the world over, pregnancy is viewed with joy and anticipation, it should not be a bitter experience for staff who suddenly and without warning find the axe of redundancy or dismissal dangling over their heads because they are pregnant.

Neither should it result in the employers feeling like the Grinch who stole Christmas because they cannot rejoice with their pregnant employee without worrying about the effect of this pregnancy and the resultant absence of their employee on the fortunes of their business.

By adopting the solutions proffered above the employers and the employee can both enjoy this period while keeping losses on both sides minimal or at best non-existent.

EXTRATERRITORIAL IMPACT OF SECURITIES[1] THE LEGAL ASPECT

By Jerry Okoye

Introduction

Not long ago countries traded their securities within their territories. It was a plain world where the flow of securities' transactions respected political geography. The domestic character of securities' markets made its regulation very simple. Each financial market seemed to be an island at that time, and the regulators had strong monopolies and little reason to look beyond their coasts. However, in the late 1970s, the demise of domestic securities gradually commenced; and in 1988 only, 'a staggering $10 trillion of securities' funds moved across national frontiers.[2]

This development was caused by the combination of several factors. Most remarkable are technological advances witnessed in global transportation and telecommunications. Other factors include the relative prevalence of cooperation between nations and prosperity in some countries. These led to the emergence of enormous multi-national corporations with significant long-term investment programs and large balances in various foreign currencies; Governments started dismantling local monopolies and withdrawing support from nationalized parastatals so as to introduce competition into the private sector. This was manifested by several large flotations on the stock markets, of shares of nationalized companies being privatized. The concept of private share-holding also became popular.

Recently, most domestic companies, especially the banks tend to invest in international securities. The profitability of these international companies permeates these local companies, thereby increasing their attractiveness to investors. The success or otherwise of the international securities affects the local corporations. So, a Nigerian who has shares in a Nigerian bank, which in turn has shares in another international corporation, would rely on the profitability of the international corporation to make profit on his own investment in the Nigerian bank. The current business norm is the inter-investment of companies amongst themselves, thus, what affects one,

affects all, depending on its investment. The current economic crisis is an example of this scenario, but on a much larger scale.

The Legal Aspect

Most of the laws governing the trading of securities were developed by individual nations prior to the current internationalization. Also, as a result of the different times and circumstances under which the various financial markets were born, each nation developed its own regulations to govern its markets almost in isolation from other markets, as a result, each nation regulates its securities' markets in different ways. Also, by this period the concept of private share-holding was not just popular, but investors' desires are now guided by the desire to invest in assortment of securities (notwithstanding the jurisdiction) with a view to making profit. Hence, such regulatory differences sometimes result in an irregular playing ground for companies attempting to raise capital in a foreign market and for domestic investors who wish to diversify their portfolios by investing in foreign companies. These differences were regarded as obstacles by both issuers and investors. Consequently, in a bid to attract foreign investors, most regulators became involved in either inter-regulatory competition by providing comparatively lax regulatory environment (e.g. by reducing compliance costs and disclosure requirements); or inter-regulatory harmony by accepting the requirements of other jurisdiction (reciprocity) or adopting a common set of requirements (commonality).

As cross-border transactions flourished, more parties became involved and ingenious approaches conceived, inevitably, disputes arise; the critical question now becomes: which procedure, regulation or law would govern this unwitting relationship?

The current development combined with the respect for national sovereignties makes the regulation of international securities' transaction a difficult task. As the world's regulatory agencies are increasingly unsure of the appropriate path to tow, some countries are already applying their securities' regulation extraterritorially. This application was justified by the view that any conduct by a foreign entity that took place in another country or had an effect on that country's economy should be regulated by that country. Another justification is that any issuer that conducted its activities in a country or directed efforts to sell to investors located in the country has implicitly consented to being subject to the laws of that country.

In the United States of America, in *Leasco Data Processing Equipment Corp. v. Maxwell 468 F 2d 1326, @ 1335 (2d Cir 1972),* the U.S. court employed the *conduct test* and applied the U.S. securities laws when some of its nationals were fraudulently induced to purchase securities of a British corporation. The courts saw no reason why, for the purposes of jurisdiction, telephone calls and mails to the USA should not be deemed to constitute conducts within the country. Thus, if a party could prove that a form of correspondence took place in the country, the market regulation of the country would apply. [3]

The implication of these justifications is that both countries would have concurrent jurisdiction over the regulation of securities between parties within their countries because the conduct of both parties affected their respective economies. Thus these justifications do not solve the jurisdiction problem; rather, it created a clash of legal systems. What if both parties agree only to their local jurisdiction and the laws governing securities in their countries are different? Supposing a class action dispute arises? If the procedure for offering securities are substantially different in the countries, does the issuer need to also comply with the procedures as required by the subscriber's country? The questions arising from this

implication reduces the enforceability of resolutions reached by judicial bodies in different countries.

Moreover, the extraterritorial application of a foreign regulation to another country encroaches on the sovereignty of that country.

For the International Bar Association (IBA) section on Business Law, a coordination of national regulations will solve the problem. In this regard, it suggests some measures towards the coordination of national regulations (although it seems to concentrate on the need to allow corporations to deal with securities outside their jurisdiction rather than the protection of investors). The measures include -

Convergence or Standardisation this is the development of common requirements to reduce costs of compliance with many national regulations;

Exemption this is the provision of exemptions from national rules to foreign operators where imposing the national rules would be excessively burdensome; R*ecognition* this is the acceptance of compliance of a foreign operator with its home country's standards through unilateral or mutual recognition.

But these suggestions are strictly procedural. It still does not solve the substantive problem of jurisdiction.

The imposition of foreign regulations on local entities is an encroachment of sovereignty and causes confusion amongst investors. It is advisable that countries with obsolete regulations should revise.

On the other hand, countries who perceive that their citizens tend to transact amongst themselves should enter into treaties so as to have some uniformity of legislation. The treaty should also settle the issue of jurisdiction so that the investors, upon entering into transactions would be aware of the governing laws. Also parties may, upon transacting amongst themselves, agree on which jurisdiction would govern them.[4]

Conclusion

The explosion of international securities transactions is a very positive development that will promote the free flow of capital and the efficient allocation of world resources. Whether such a trend continues smoothly depends on the attitude of individual nations with respect to the perceived benefits of globalization and the enthusiasm to share domestic resources. It will also be important for nations to re-examine the approach of their domestic courts and their regulators with respect to the international interaction of their citizens with foreign entities. In this regard, while there may be a tendency to rigidly apply laws and regulations that effectively control domestic transactions, there is need to recognise the permeability of international securities transactions by balancing the interests of other nations with the tendency to uphold sovereignty.

(1). The security referred to in this text is the commercially interchangeable and negotiable instrument representing financial value. See Section 294 -The Investments & Securities Act, Cap. I24 LFRN

(2). J. A. Grundfest; Stanford Law School Journal of Financial Services Research; (2006) p.76

(3). See also Continental Grain (Australia) Pty Lts v. Pacific Oilseeds Inc, 592 F 2d 409, 420 (8th Cir 1979)where the court held that it has jurisdiction because the defendant sent mails from the USA.

(4). But the parties cannot oust the jurisdiction, when the law is unambigious on where jurisdiction lies.

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