journals.unizik.edu.ng/index-php/jcpl ISSN: 2736-0342
NNAMDI AZIKIWE UNIVERSITY, AWKA
JOURNAL OF COMMERCIAL AND PROPERTY LAW

Challenging the Sophistry of Common Law and Statutory Bargaining Power Paradigms in Employment Relationships in Nigeria and the United Kingdom

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Abstract

Bargaining power is intrinsic in commercial contractual relationships. Elementary law of contract suggests that in every facet of contractual relationships and in the absence of undue influence and duress, the playing field is equal between the parties to the contract. In employment relationships however, there exist the divergent interests the employer on one hand as the possessor/controller of the means of production with the supervening quest for profit and control, and the employee on the other hand as the possessor of only his labour and driven by the desire for wages, benefits and inclusion. This paper posits that these competing interests results in conflict between the primary actors in employment relationships. The study further submits that to resolve these conflicts, bargaining power has shifted from common law generalities to statutory interventions in Nigeria and the United Kingdom. Utilising the doctrinal method, this paper examines these statutory intervention with emphasis on how bargaining power is equalized in employment relationships. This paper further submits that equality of bargaining power in employment relationships remain a myth in Nigerian commercial and labour law. This study recommends statutory enactment and amendments where applicable, judicial activism on the status of collective agreements and the resorting to regional mechanisms to affect requisite change in employees' status quo.

Key words: equality of bargaining power, employment, freedom of contract, labour relations, collective bargaining.

1.1 Introduction: The Presumption of Equality of Bargaining Power in Employer/Employment Relationship.

The notion of contractual equilibrium is considered to be one of the main purposes of contract law in the sense that those contractual relationships which form the basis of judicially enforceable agreements, should be entered into by parties with equal bargaining power. This idea is inexorably tied to the principal of freedom of contract which connotes the right to contract and freely determine the provisions of contracts without arbitrary or unreasonable legal restrictions.[1]This freedom theoretically underscores both the parties' decision whether or with whom to enter into a contract and what the contents of the contract should entail.[2]Accordingly,

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[1] Merriam-Webster Dictionary https://merriam-webster.comaccessed on 22nd December 2021

[2] Commentary to Trans-Lex Principle at https://www.trans-lex.org/918000 accessed on 22 December 2021

changes in this fundamental contract law principal undoubtedly should be considered as tilting common law supposition of contractual equilibrium. This legal foundation however does not foreclose the right of parties to a contract to bargain for the most advantageous terms of contract entered into. In Nigeria, it has been held that it is the duty of labour law to be protective of workers, given the imbalance in power relations between employers and workers.[3]

The afore-stated position somersaults in employer/employee relationships, due to the reality of the inherent multidimensional inequality of these relationships. The rhetoric of inequality, though prolific in the political literature and context, is surprisingly comatose in the domain of the law of contract and contract labor law. Even though employment cases often refer to the inequality of bargaining power between employers and employees,[4]glancing lip service is however paid to this inequality as it is considered to have been properly addressed by statutory enactments. More generally, the doctrines of good faith and modifications thereto can both be understood as concerned with preventing a party from exploiting a shift in bargaining power that takes place over the course of contract; they are not concerned, however, with the preliminary allotment of bargaining power.[5]Labour law cases often espouse the objective of putting bargaining partners on an even playing field on which those with superior "weapons" are entitled to prevail.[6]

The inequality between employers/employees is frequently invoked in political rhetoric, to justify changes in the tax code or trade policy or a new legislation that ostensibly will exacerbate the cost of labour migration, or to rationalize the general disfavoring of the working class in the balance of power.[7] It is however seldom invoked to justify specific interventions in the employment relationships in and of themselves. Further these interventions are still more rarely promoted or defended as means by which to undermine the prevalence of economic and occupational status. Direct regulation of the terms of the employment relationship in Nigeria, has seen laws providing for statutory leave and notice of termination, is unsurprisingly limited in comparison to other developing democracies, perhaps arising from the Nigerian predilection and reliance on the doctrine of good faith[8] and the relics of colonial labour legislation to which the jurisdiction is unfortunately fettered.[9]

In the United Kingdom, numerous courts have observed a disparity in bargaining power between employers and employees and many have justified pro-employee defaults or interpretations on this basis.[10] Most major retailers exercise bargaining power relative to individual consumers.[11] In

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[3] See *Kurt Severinsen v Emerging Markets Telecommunication Services Limited* (2012) 27 NLLR (Pt78) 374 at 460

[4]*Circuit City Stores, Inc. v. Adams*, 279 F.3d 889, 893 (9th Cir. 2002) (finding employer "possesse[d] considerably more bargaining power than . . . its employees").

[5]*Alaska Packers' Ass'n v. Domenico,* 117 F. 99, 102 (9th Cir. 1902) (refusing to enforce modification obtained by employees after relative bargaining power had shifted in their favor).

[6] S 29 U.S.C. & 151 (2006) (stipulating that the policies of the National Labor Relations Act (NLRA) were expected to restore equality of bargaining power between employers and employees); *NLRB v. Ins. Agents' Int'l Union*, 361 U.S. 477, 489 (1960).

[7]J Calmes& E Andrews, 'Obama Asks Curb on Use of Havens to Reduce Taxes',*N.Y. Times*(New York 5 May 2009) accessed from http://www.semanticscholar.org accessed on 23rd December 2021

[8] O D Akinkugbe, "To Recognize or Not? Good Faith Under the Nigerian Law of Contract", in *I J Commonwealth L1* at https://digitalcommons.schulichlaw.dal.ca/scholarly_worksaccessed on 22 December 2021

[9] Sections 16, 17 and 18 of the Labour Act, Cap L1 Laws of the Federation of Nigeria (2004)

[10]*Jamesbury Corp v Worcester Valve Co* 443 F.2d 205, 213 (1st Cir. 1971). The court held that any doubt over the definition of a term would be resolved against the employer, because the "agreement was a standard form contract

National Westminster Bank Plc v Morgan[12], the court held that there is no general doctrine of 'inequality of bargaining power' in English law because statute was the appropriate tool to place restrictions upon freedom of contract. Since then, two major changes have unfolded. First, the number of individual rights in statutes has increased, particularly for employees and customers. Second, the need to develop the common law consistently with statutes which have been emphasized by the courts in developed jurisdictions like the United Kingdom and the United States of America, has found very limited application in Nigeria. In the United Kingdom for instance, it is believed that statutory provisions have evened the scale and there is absolute equality of bargaining power.[13]

2.1. Collective Bargaining, Employment Relationships and Equality of Bargaining Power in Nigeria

In total realization of the inequality of bargaining power in employer/employee relationships, collective bargaining was viewed from the prism of an effective tool equalization of the imbalance of power and consequential of establishment of harmonious labour relations. This is because collective bargaining has some utility as a tool for workers' participation in the bargaining process *via* their unions to influence the wages and conditions and terms of employment. Even though collective bargaining functions a mechanism of creating working conditions, wages and other aspects of employments by way of negotiation between employers and the representatives of employees organized collectively,[14] and is taken to be a weapon employed by workers to enable them participate in industries, extension of the rights of citizenship into the economic sphere and the resolution of conflict in organizations, it does not however address the initial question of inequality at the cusp of the contract of employment. Collective agreement is the result of the process of bringing workers as a body through their unions, to the bargaining table with their employees and positioning them for better wages and conditions of service.[15] It is the fundamental principle on which the trade union system rests. It does not require either side to agree to proposal to make concession but does create procedural guidelines on good faith bargaining.[16]

As one of the process of industrial relations, collective bargaining performs a number of functions in work place. It could be seen as a way of industrial jurisprudence as well as a form of industrial democracy. It brings about industrial harmony at the workplace based on mutual agreement between employees of labour union leaders and their members. It gives rise to better

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drawn up by [the employer]" who "had superior bargaining power"); *Armendariz v Found. Health PsychcareServsInc*, 6 P.3d 669, 690 (Cal. 2000) ("Given the lack of choice and the potential disadvantages that even a fair arbitration system can harbor for employees, we must be particularly attuned to claims that employers with superior bargaining power have imposed one-sided, substantively unconscionable terms as part of an arbitration agreement.")

[11]*Schwartz v. Alltel Corp*., No. 86810, 2006 WL 2243649, at *6 (Ohio Ct. App. June 29, 2006) (finding that there is an "inherent disparity of the bargaining position" between the consumer and "a multi-billion-dollar corporation").

[12](1985) UKHL 2

[13]*Ibid*

[14]E Nwadiro, (2011). Collective bargaining and Conflict resolution: the Federal Government of Nigeria and the Nigeria Labour Congress Impasse; Retrieved on 9th September, 2021 from http://moreciteseerx.ist.psu.edu

[15] See Section 91 of the Nigerian Labour Act and Section 48 of the Trade Disputes Act Cap T8 Laws of the Federation of Nigeria 2021

[16] See *Osoh v Unity Bank PLC* (2013) 1 SCM 149

understanding which in turn facilitates the process of communication. It is a mechanism for resolving conflict at workplace between management and labour as the as assessment of conditions and terms of employment.[17] Though functioning as a tool of conflict resolution, it is submitted with respect that as an equalizer of power relationships between employer and employees, collective bargaining agreements fall below par.

Indeed the courts in Nigeria have consistently held that unless reduced into writing and incorporated into the employees' contract of service, collective bargaining agreements are at best 'gentleman's agreement' totally devoid of contractual flavor and requiring political or trade union pressure for enforcement.[18] This position adopted by the Nigerian courts, further underscores the weakness of collective bargaining agreements as tools for the equalization of bargaining power between employees and the employers inter se.

2.1.1 Statutory Provisions for the Equalisation of the Bargaining Power of Employees in Nigeria

Flowing from the above and arising from the presupposition by case law that statutory provisions tilt the scale of bargaining power to a direction favourable to employees in employment relationships both upon inception and through their duration,[19] some of these statutes addressing employment dynamics are:

i. **The 1999 Constitution of the Federal Republic of Nigeria**[20]: The national policy on labour is as contained in S. 17 (3)(b) – (f)of the 1999 Constitution of the Federal Republic of Nigeria which state *inter alia*,

> (3) The State shall direct its policy towards ensuring that—
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> (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;
>
> (d) There are adequate medical and health care facilities for all persons;
>
> (e) There is equal pay for equal work without discrimination on account of sex, or on any other ground whatsoever;
>
> (f) Children, young persons, the aged are protected against any exploitation whatsoever, and against moral and material neglect;

This provision of the CFRN is explicit on non discrimination, inhuman treatment, child labour, conditions of work, health and safety of workers, *etcetera.* Any contract of employment or agreement entered into by the parties which is inconsistent to this section or any other section of the constitution, such contract or agreement shall be void.

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[17]F Anyim,EElegbede& M Gbajumo-Sheriff,'Collective Bargaining Dynamics in the Nigerian Public and Private sectors' (2011)1 *Australian Journal of Business and Management Research* 5, 63 – 70

[18]*Nigerian Arab Bank v Shuaibu* (1999) 4 NWLR (pt. 186) pg 450, 469 per Ndoma-Egba JCA, see also *Union Bank PLC v Edet*(2001) 6 NWLR (pt 708) pg 224 per Uwaifo JCA

[19]*Ibid* n3

[20] Cap C23 Laws of the Federation of Nigeria 2004

However, the non justifiability of this section as propounded in Section 12 of the CFRN defeats its utility as a constitutional tool for the regularization of power relationships between the employers and employees

ii. **The Labour Act**[21]: This is the major legislation on employer employee related matters from the inception of employment relationships. For instance, Section 7 of the Act provides that not later than three months from the beginning of the worker's contract of employment, the terms and conditions of the contract should be reduced into writing and given to the worker,[22] and that changes in such terms should be brought to the notice of the employee not later than one month such changes have been made.[23] The Section 9 of the Act provides for the privity of contract[24] and sets modalities for termination of contract between employers and employees *inter se*.[25] Section 11 itemizes modes of termination by notice, while Section 13 stipulate statutorily permitted hours of work and overtime. Section 18 of the Act makes provision for annual holidays, and Section 19 premises on calculation of leave pay and sick benefits. These sections are mostly beneficial to the employee and they function to tilt the bargaining power in favour of the employees. The wide ministerial powers however granted from Section 64 to 73 of the Act however fetter freedom of contract to the direction of the State and cause the Labour Act to lose some aroma of employee protection to state regulation. Further, the application of the Labour Act to unskilled and clerical workers limits its utility as a veritable tool for the equality of bargaining power in Nigeria.

iii. **The Wages Board and Industrial Council Act**[26]**:** Generally vests in an industrial wages board the power to "recommend Statutory minimum wages as prescribed by the Act to be paid either generally or in any particular work" or conditions of employment other than wages"[27] where such a recommendation is made, the Minister may give effect to the statutory minimum wages" or statutory minimum conditions[28] if he thinks fit to do so although no such order can authorize payment of wages less than statutory minimum wages clear of all deductions. Where a Statutory minimum wage has been embodied in an order, the employer is bound to pay a wage not less than that embodied in that order and he will be committing a criminal offence if he fails to obey the order.

To make sure that no employer toys with the provisions of the Act, the minister of labour is armed with the power[29] to appoint a labour officer or inspector to act as watch dog. Among the new powers conferred on the labour officer or inspector under section 22 of the Act is the right to examine any person whom he has reasonable cause to believe to be or to have been a worker" to whom an order of statutory minimum wages

[21]*Ibid* (n2)
[22] Section 7(1) ibid
[23] Section 7(2) ibid
[24] Section 9 (1) –(5)
[25] Section 9 (7) – (8)
[26]Cap W1 Laws of the Federation of Nigeria, 2004
[27]Section 9(1)
[28]Section 10 (4)
[29]Sections 12, 21(4)

or conditions applies "with respect to any matters under the Act and requires every such person…So examined. To sign a declaration of truth of the matter in respect of which he is examined.[30] The officer may also order any person or body of persons found to have contravened any of the provision of the Act to take, remedial action" within a reasonable period of time as may be specified[31] and may institute civil proceedings where these become appropriate. What is intended to be achieved by this legislative measure is the maintenance of fair wages in industry not on par with wages and conditions recognized in collective agreements by unions and employers" associations in the trade or industry. Hence, the employer is obliged to display a notice[32] at every place of work concerning any agreement or order regarding minimum wages.

The functions of the Board include the examination of the application to all unskilled workers of any agreed minimum wage rate in any specified area, the examination from time to time the adequacy of minimum wage rates for unskilled workers in the light of any recommendations received from area minimum wages committees, to consider any matter referred to it by the Minister with reference to the minimum wage rates of unskilled workers in any area for which an area minimum wages committee has been set up, and to report and make recommendations accordingly to the Minister. For it is where negotiations break down that the government machinery for conciliation between the parties is activated.

In general, however, the worker is entitled to sue his employer for breach of contract to recover any underpayment below the statutory minimum wages notwithstanding that the Labour Officer is also given power under section 21 (4) to sue on his behalf. The functions of the Board include; to examine the application to all unskilled workers of any agreed minimum wage rate in any specified area, to examine from time to time the adequacy of minimum wage rates for unskilled workers in the light of any recommendations received from area minimum wages committees, to consider any matter referred to it by the Minister with reference to the minimum wage rates of unskilled workers in any area for which an area minimum wages committee has been set up, and to report and make recommendations accordingly to the Minister. For it is where negotiations break down that the government machinery for conciliation between the parties comes into operations. It has been observed that "the constitution of the National Wages Board and Area Minimum Wages Committees[33] itself shows that it can be a training ground for bargaining and as the process of stimulating collective bargaining goes on, industries can reach the stage where in some parts the statutory wage regulation is still critical, while in sonic sectors autonomous collective negotiation forges ahead[34].

iv. **National Minimum Wage Act 2019:** This Act repeals the National Minimum Wage Act, Cap N61 Laws of the Federation of Nigeria, 2004. The Act is to provide a national minimum wage and make for a legal framework for a seamless review of the national

[30]S 21 (1) (3) (c)
[31] S 15 (c) sec 5.22
[32] S. 22 (3)(d)
[33] Section 16 Wages Board and Industrial Council Act, 1973, Cap W1 Laws of the Federation of Nigeria,2004.
[34]K Wedderburn, The Worker and law. (2nd Edn)(London, Penguin Books, 1963) p134

minimum wage within the period specified under the Act.[35] The period of review is at five year intervals.[36] The Act sets the minimum wage at 30,000 Naira[37] and voids any agreement for a lesser pay.[38] There are exceptions to the payment of 30,000 Naira minimum per month.[39] The intention of the legislators in drafting this Act is obviously to protect the employee but exceptions to the minimum standard of pay created by the Act makes nonsense of the intention of the draftsmen. For instance, section 4(1)(b) of the Act is to the effect that 30,000 Naira minimum wage is not applicable to an establishment employing less than 25 persons. An establishment may purposely be understaffed, even when the work load is much, just to cash into this provision and pay its workers a ridiculously low wages.

3.1. Equality of Bargaining Power in Employment Relationships in the United Kingdom

3.1.1 Statutory Provisions for Employee Protection in the United Kingdom

The United Kingdom has witnessed a steady progression from common law pronouncements to codification by statutory elucidation of employee protection paradigms to equalize the bargaining power of employment relationships. Since the early 1970s there has been a dramatic growth in the amount of UK employment protection legislation which has supplemented the common law rules. The main employment law statutes are the Trade Union and Labour Relations (Consolidation) Act 1992,[40]Employment Tribunals Act 1996,[41]Employment Rights Act 1996,[42]and the Public Interest Disclosure Act 1998.[43] Other legislations significant to power relations between employees and employers in the United Kingdom include the National Minimum Wage Act 1998,[44] the Employment Relations Act 1999,[45]and the Employment Relations Act 2004.[46]

[35] Section 1
[36] Section 3(4)
[37] Section 3(1)
[38] Section 3(3)
[39] Section 4
[40] This Act defines the role of trade unions in relation to collective bargaining and industrial actions.
[41] This Act establishes Employment Tribunals and the Employment Appeal Tribunal and sets their procedure and jurisdiction.
[42] This Act functions to consolidate enactments relating to employment rights and covers core areas like unfair dismissal, redundancy payments, protection of wages, zero hour contracts, Sunday working, suspension from work, flexible working and termination of employment.
[43] This law protects whistleblowers from negative treatment or unfair dismissal. It makes it unlawful to subject a worker to negative treatment or to dismiss them because they have raised whistleblowing concerns.
[44] This law establishes the minimum amount of pay a worker is entitled to per hour. The stipulated wages are based on the worker's age and it is a statutory requirement that workers should not be paid less than their age stipulated wages as per the prerequisites of the Act.
[45]This law sets the modalities for the recognition of trade unions by employers and provides limited protection for workers against dismissal for participation in trade union activities. It also governs collective bargaining and the recognition of collective bargaining agreements.
[46]This Act of the United Kingdom amends the law regarding trade union membership and industrial action. It also enables the government of the United Kingdom to make funds available to trade unions and federations of trade unions to modernize their operations.

In addition to the primary legislations, there is a substantial amount of secondary legislation in the form of regulations which contain further provisions which affect the employment relationship. In some cases, the legislation is supported by Codes of Practice drawn up by various government agencies.[47] Although the Codes do not have direct legal effect, they are often, and in some cases have to be, taken into account by Employment Tribunals when deciding whether an employer has complied with its statutory obligations.

4.1 The Effect of Brexit on Employee/Employer Equality of Bargaining Power in the United Kingdom

The UK as a member of the European Union (EU) enjoyed the benefits of the Union's internal market where by there are no restrictions as to movement of goods[48] and services[49] and also freedom of movements for humans. This in no small measure created more jobs for citizens and occupants of the member states. The exit of Britain from the European Union has grave consequences on so many sectors of the economy and specifically the labour force. Restriction on movement will adversely affect employers from other member states working in Britain and *vice versa* thus mass termination of employment.

Labour migration and opportunities suffered the worst hit as available work in the United Kingdom became competitive thereby giving the employer an added advantage in the bargaining process. However, to attenuate the effect of Brexit on employment relationships and bargaining power, the European Union (Withdrawal) Act (2018)[50] conserved and retained European Union sourced United Kingdom legislation as at 31st December 2020 which signified the end of the Brexit transitional period. During the transition period United Kingdom courts were bound to inject European Union stipulations into their interpretations employment relationships having European Union colourations. However, subsequent upon the lapsing of the transitional period the United Kingdom courts are no longer so bound and may apply discretion in following European Union precedents and practices.

Additionally, the UK-EU Trade and Cooperation Agreement concluded on 31st December 2020[51] includes reciprocal commitments to maintain the protection of workers as part of the 'level playing field'[52] provisions which may effectively curb any trends in the United Kingdom to fetter employee protection as a consequence of its exit from the United Kingdom.

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[47] Examples of such codes are the Corona Virus Job Retention Scheme (2020) and the Working Time Regulations (1998)

[48] Art 28-30 of the Treaty of Lisbon

[49] *ibid*

[50] This Act addresses the the shortfalls arising form the withdrawal of the United Kingdom form the European Union as well as the future interactions with the law and agencies of the United Kigdom. Available at https://www.legislation.gov.uk

[51] Eur-Lex- 22021A0430(01) [TS No.8/2021]which establishes a new framework for law enforcement and judicial co-operation in civil and criminal matters between the European Union and the United Kingdom, available at https://eur-lex.europa.eu also available at https://www.gov.uk . See also C Wynn-Evans and R Turner, Employment and Labour Law 2021, in *Global Legal Insights* available at https://www.globallegalinsights.com accessed on 22 December 2021.

[52] *Ibid*. As contained in Title XI Part Two of the UK-EU Trade and Cooperation Agreement in which the parties recognize that to prevent the distortion of trade or investment between them, conditions are required to ensure a level playing field for open and fair competition.

5.1 Conclusion and Recommendations

The assumption of equal power in labor market exchanges between employers and employees is flawed but pervasive in economics, employment law, political science, and even philosophy.[53]In Nigeria, the consequential reliance on this scantily statutorily protected common law assumptions are far reaching. The premise of equal power relations between employers and employees undermines the constitutional, statutory, and common law interventions as its protections of the employee in the workplace spurs wages and income inequality, wage stagnation, and further undercuts civic engagement and representative industrial democracy.

Fortunately, recent years have seen a shift in jurisdictions generally partial and incomplete in academic and policy realms — toward placing the imbalance of bargaining power in the workplace at the center of industrial relations' understanding of the legal status, implication and the statutory regulation of the markets. In Nigeria, the labour market provides the primary fulcrum of bargaining indicators as established by employment relationships at the point of inception. Though arguable for the purpose of the rudimentary coverage of labour legislations that the bargaining powers of employees are growing in ascendancy to be par with those of the employers, the statutory shortfalls indicate otherwise especially given a cursory examination of the United Kingdom as a 'mother' jurisdiction in light of the Nigerian colonial history.

It is therefore recommended that laws targeted at elimination of bargaining power inequalities should be the focus of Nigerian labour activists, unions and pressure groups. Such laws will ground further encroachments into employers' advantages, perceived and actual strengths in the place of contracting. Such employee protection enactments should be implemented with a view to increasing the protection paradigms available to the employee upon inception of the contract of employment.

The current international trends on equalizing bargaining power should spur Nigerian courts to judicial activism particularly with the constitutionally amplified and established role of the National Industrial Court by Section 254C of the CFRN to make definite pronouncements on the status of collective bargaining agreements and by so doing tilt bargaining power towards employees as regards the terms and conditions of work.

The generic nature of the Labour Act as the primary legislation affecting labour law and labour relations in Nigeria calls for an expansion of its applicability as narrowly construed in Section 91 to include skilled workers, executive workers, professionals and administrators. Further, the bare minimum standards set up by this principal legislation should be expanded to absorb and include international labour standards as indicated by the International Labour Organization.

[53] Lawrence Mishel, 'Centering Unequal Bargaining Power in Work Places' accessed from https://files.epi.org