



The right to strike and the freedom to embark on strike action under the Nigerian labour law

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Abstract

The term 'strike action' means so many things to so many people. To some, it means the protest by workers over alleged grievances, to others; it means the struggle by workers for the attainment of their rights. Whatever the meaning of strike is to people, it always suggests that there is conflict or dispute relating to work by workers. In Nigeria, strike is an incessant occurrence. The nation is always being engulfed by numerous strike actions by workers in different industries. In 2013, the Academic Staff Union of Nigerian Universities embarked on a 6 months long strike. In 2014, Doctors Union of Nigeria also embarked on strike. Strike has undoubtedly become the most effective weapon at the disposal of workers in industrial relations in Nigeria. For the vast majority of workers, strike action is a right that goes along with their position as employees and they view the question of the legality of strike as absurd. There have been numerous attempts to regulate the ability of workers to embark on strike action through statutory laws in Nigeria. It is therefore prudent to appraise the position of strike action under Nigeria's Labour Laws, especially the Trade Dispute Act and the Trade Unions (Amendment) Act.

Keywords: labour law, freedom, the right to strike, strike action

Introduction

Strike action involves the collective withdrawal of work in the workplace as a method of exerting pressure by workers on their employers. Primarily the workers act in 'concert' with other fellow workers under the same employer with a view to protect the terms and condition of their employment and similar interests. The ultimate purpose of strike action has always been to compel the employer to negotiate with workers or their union over work related interests. Sir employment and similar interests. The ultimate purpose of strike action has always been to compel the employer to negotiate with workers or their union over work related interests. Sir Otto Kahn Freud referred to these as "platitudinal confrontation of expectations and interest"^[1]. The collective action of workers is usually done through Trade Unions. A Trade Union without the power to withdraw their labour (or embark on strike) would become impotent"^[2].

This paper examines two problems on strike action in Nigeria. The first is the legality of strike action, that is to say whether strike is legal or illegal under Nigerian Law. This is a problem because workers always embark on strike in Nigeria. Thus, is it because workers have a right to strike under the law or not? The second problem is the factor leading workers to embark on strike and the negative effect of strike action on the Nation. The aim of this paper is to study the law on labour relations with regards to strike action in Nigeria. Adequate findings with will be made and suggestions will be offered accordingly. The scope of this paper is limited to the laws concerning strike action in Nigeria, including international law applicable to Nigeria.

Meaning of strike action

Chioma Kanu Agomo stated that in strike action, workmen withdraw their labour in protest against some real or perceived grievance against their employer^[3]. According to Lord Denning

[4]

Strike is;

"a concerted stoppage of-work by men done... with a view to improving their wages or conditions of employment, or giving vent to a grievance or making a protest about something or other or supporting or sympathizing with other workmen in such endeavor. It is distinct from a stoppage, which is brought about by an external event such as a bomb scare or by apprehension of danger".

Similarly, Section 48 of Nigeria Trade Dispute Act^[5] provides that strike means;

"The cessation of work by a body of persons employed acting in combination, or a concerted refusal or a refusal under a common understanding of any number of persons employed to continue to work for an employer in consequence of a dispute, done as a means of compelling their employer or any person or body of persons employed, or to aid other workers in compelling their employer or any persons or body of persons employed, to accept or not to accept terms of employment and physical conditions of work"

By this definition, a strike includes a sympathetic strike and the so called work to rule, go slow as "cessation of work" is defined to include deliberately working at less than usual speed or with less than usual efficiency and 'refusal to continue to work'^[6]. Strike entails an action by a group of persons, whether unionized or not, acting in concert. All it seemed to require is that the strikers should organize themselves in one form or the other, including an informal grouping coordinated by *proteïn* leader, calling a mass meeting at which resolutions containing a number of contingency actions are taken. If the unit is not unionized, the mass meeting could resolve to join a trade union^[7]. In other words, a strike action by an individual worker is not a strike. Also,

the striking workers must be employees and not otherwise, thereby suggesting that the relationship of employer-employee must exist between the parties. The Trade Dispute Act does not define “employee” or “employer” but rather defined “worker” as “any employee”^[8] that is to say any public officer or any individual (other than a public officer) who has entered into or works under a contract with an employer, whether the contract is for manual labour, clerical work or otherwise, express or implied, oral or in writing and whether it is a contract of service or of apprenticeship^[9]. Strike must be about terms of employment and physical conditions of work^[10]. In *N. U.R.T.W v. Ogbodo*^[11] the court of Appeal held that for a dispute to come within the purview of the Trade Disputes Act, it must involve a trade as distinct from a political dispute, for example, boycott of goods and services of a foreign country. The general sources of industrial conflict are problems arising out of wages, hours of work, terms and conditions of work. Others include retrenchment of workers following the closing down of a factory, lay-off, discharge or dismissal, reinstatement of dismissed employees and compensation for them, non- payment of personal allowance, etc^[12]. There are various forms or classification of strike. The classification of strike depends on the criteria of differentiation, for instance, reason, target, duration, form and extent of work stoppage. The forms of strike that exist in Nigeria include the following:^[13]

Work-to-Rule^[14]

This occurs when the workers decide to apply the work rules to the letter. Job descriptions are followed rigidly so that a typist for example, would refuse to dispatch letters.

Go-slow^[15]

Here, workers do not stop work but observe a slow pace in the discharge of their duty. Section 48 of the Trade Dispute Act puts it succinctly thus^[16] “deliberately working at less than usual speed.” or “refusal to work at usual speed”.

Work Stoppage^[17]

This involves workers sitting at home or not coming to work howsoever. It is the commonest form of strike.

Work in^[18]

Here, workers not only lay down their tools but also remain at their place of work. They may also take steps to interfere with the employer’s business by seizing control of either a whole or a part of the premises in order to put pressure on the employer to concede to the request(s).

Overtime Ban^[19]

Overtime ban involves the refusal of workers to work overtime. The ban remains in force even if overtime is compulsory. This action has the tendency to increase the proportion of overhead cost of production in relation to the total cost. Invariably, this may reduce not only the output but the profit of the employer^[20].

Picketing^[20]

This action is employed by workers on strike to persuade non-striking workers to join the strike. Simply put, picketing involves a situation where workers or a group of workers, stationed at the

gate(s) of a factory or any other place of work during a strike, tries to persuade others not to go to work.

The difference between the right to strike and freedom to strike in Nigeria?

Chioma observed that according to the International Labour Organization (I.L.O.), the right to strike is the most valuable form of collective industrial action that workers employ to force employers to express their grievance and to force their employers to the bargaining table. This is just a declaration by the organization and nothing in the I.L.O constitution permits strike as a right. Strike has acquired such notoriety, that it is interchangeable with industrial actions^[21]. But how far does the law in Nigeria allow the use of strike action in pursuit of the terms of employment and physical conditions of work in industrial relations? The important question to determine now is whether or not there is a right (or is it a freedom) of workers in Nigeria to embark on a strike action. This would necessitate a consideration of the relevant pieces of legislation.

According to Amadi, the right to strike refers to a situation where the worker has a just claim to strike in his relation with his employer. What this means is that neither statute nor case law nor the contract of employment can legitimately deny worker this right^[22]. The right to strike in this regard is an intrinsic and integral part of the contract of employment.

On the other hand, where the worker has freedom to go on strike, the law will neither restrain nor protect him from so doing. This means that the worker is free to choose whenever the need arises to go on strike^[23]. But he must do so within the ambits of the law. By this freedom, he has no right, claim or title to strike, but he merely has a privilege^[24].

Quite apart from the foregoing, section 42(1) of the Trade Dispute Act stipulates that any employee who takes part in a strike is not entitled to any wages or other remuneration for the period of the strike and any such period does not count for the purpose of reckoning the period of continuous employment and all rights dependent on continuity are prejudicially affected accordingly^[25].

The legality of strike action under Nigerian law.

The law on strike action can be found in the Trade Dispute Act, the Trade Dispute (Essential Services) Act, and the Trade Unions Act. Section 18 of the Trade Dispute Act provides that-

1. An employer shall not declare or take part in a lock-out and a worker shall not take part in a strike in connection with ant trade dispute where-

- a. The procedure specified in section 4 or 6 of this Act has not been complied with in relation to the dispute,*
- b. A Conciliator has been appointed under section 8 of this Act,*
- c. The dispute has been referred for settlement to the Industrial Arbitration Panel under section 9,*
- d. An Award by an arbitral tribunal has become binding under section 13 of this Act,*
- e. The dispute has subsequently been referred to the National Industrial Court under section 14 or section 17 of this Act,*
- f. The National Industrial Court has issued an award on the reference.*

From the following sections, it can be said that the freedom to strike action under Nigerian law actually exist, however the

freedom is severely limited. A closer look at the section above with a critical mind will lead to the conclusion that there is actually no right to strike action under Nigerian law. The reason for this is because the section states that only by exhausting the provisions of the section can a legitimate and lawful strike exist, and since the section aims at resolving the dispute in question, then it follows that once the provisions of the section has been complied with, the dispute would have been resolved and thus there will be no cause for strike afterwards. In the case of *Oshiomhole v. FGN* ^[26] the court stated that a strike action is a breach of contract by the employee which entitles the employer to dismiss him and all those who take part in the strike. This decision goes to prove that although the freedom to exist, there is no right to strike under Nigerian Law. According to Chioma, the apparent ploy to further dissuade Trade Unions as the rallying point of workers for industrial actions and strike actions, curious amendments were made to some provisions of the Trade unions Act ^[27] relevant to the issue of strike by the workers. Under the Trade Union (amendment) Act, there is no system of automatic check-off dues payable to the union, in the absence of a No strike clause. This amendment was made to clip the wings of the expanding role of the Nigerian Labour Congress (NLC) being the most formidable Trade Union in the country ^[28].

Looking carefully at the Trade Union (amendment) Act, we can detect a double barreled subterfuge on the part of the lawmakers ^[29]. One, the prerogative to make necessary remittance to the Central Labour Organization had been ceded to the Union. Furthermore, as a result of the Trade Union (amendment) Act, there can hardly be any strike that would be deemed legal.

In *FGIV & Anor v. Adams Oshiomhole & Anor* ^[30], the court gave judicial recognition for workers to embark on a strike or mass protest in consideration of Section 40 of the 1999 Nigerian Constitution ^[31]. Even though the above judgment was given in support of a strike by workers it was subsequently set aside.

Also, in *FGN v. Adams Oshiomole & Anor* ^[32], the court held that though it was held in 2004 by the Federal High Court that the respective trade unions can call a strike against their respective employer, but that the NLC, cannot in pursuant to section 34 (1) (4) of the Trade Unions Act ^[33]. The judgment in *FGN V. Adams Oshimole & Anor* went ahead to lay down the principle that although the NLC has fundamental right guaranteed under section 40 of the 1999 constitution of the Federal Republic of Nigeria, that right is not at large. It must relate or flow from an employment ^[34]. Neither the Common Law ^[35] nor the Constitution of the United Kingdom from where we inherited our legal system categorically recognizes the right to strike. Section 62 (1) (b) of the English Employment (Consolidation) Act of 1978 prohibits workers or their Union from embarking on strike action. In *Edwards v. Cardiff City Council* ^[36], the court rule that an employee or worker who takes part in a strike action can be summarily dismissed by his employer because strike action constitute a breach of contract of employment under the English law. It is therefore, not surprising that the non-recognition of this right is one of the legal legacies bequeathed to Nigeria in the wake of British colonialism ^[37]. However, it is interesting to note that strike action is a universally recognize phenomenon of industrial relations ^[38]. Interestingly enough, if a striker escapes tortuous litigation as well as criminal prosecution, he cannot avoid his contractual obligation which he freely and personally entered into with his employer. The duty to render services is

fundamental to the contract of employment. The refusal to work because of a strike, therefore hits at the root of the contract ^[39]. The employer, as a consequence, is entitled to determine the contract by a summary dismissal of the striking worker ^[40]. The employer is able to exercise this right of dismissal during strike because the worker has no right to strike. In *Chigbo v. Local Government Service Commission* ^[41], the court held that a strike in any circumstances that does not conform to the conditions stipulated under the Trade Dispute Act would be an illegal strike. The predicament of the workers on the right to strike is aptly summarized by Otto Kahn-Freud as follows: “Does a strike or a lock out put an end to the (workers) contracts (of employment)? Does it suspend them? Do those taking part in a strike break their contracts so that the employer may dismiss them without notice? Or does he, by doing so, in his turn break the contract? And whether he does or not, can he be liable for wrongful dismissal if he has dismissed a worker who has gone on strike or been locked out?”

At this point the difference between a ‘right’ and a mere freedom to strike becomes decisive. If as in France and Italy the workers have a “right” to strike then they cannot by exercising it, break their contracts. Moreover, if the contract was terminated by a strike or if the mere fact that there was a strike allowed the employer to terminate it, the right to strike would be prostrated, because the workers could exercise it only at the risk of sacrificing their jobs. Hence and this position was taken in Italy as well as in France the contract of employment is only suspended by the strike, and after its end, the employee is entitled to reinstatement with full security ^[42],

This position is tacitly recognized today in Nigeria, not on the basis of the current Trade Union (amendment) Act but on the grounds of cordial industrial relations. “Employers and Trade Unions at the end of a strike normally agree that nobody should be victimized” for the part he played during the strike. It is necessary to understand that strike is an important issue and it would be absurd to think of industrial relations in terms of strike ^[43]. It is as though one is thinking of commerce in terms of insolvency and bankruptcy or international relations in terms of war ^[44].

For emphasis, Section 18 of the Trade Disputes Act has prohibited strikes or lock outs, if connected with trade dispute in which no attempt is made to settle it through conciliation and mediation ^[45]. The law provides for settlement processes up to arbitral stage, which ought to be reported to the minister at the outset of a dispute. Similarly, section 40 and 41 require notice by workers while those in ‘Essential services’ are prohibited from embarking on strike ^[46].

Industrial relations and strike action in nigeria

Having considered some of the incidents and dimensions of strike action in Nigeria, it is necessary to put within perspective, the necessity for both the employer and the employees OR workers to exhibit a disposition towards taking responsibility for the multiplier effects of their actions. It is expected that such a consideration would have a moderating effect on the decision of both parties whether or not to have a strike ^[47]. It is submitted here that to some degree the employer can anticipate a strike action by his workers and take cogent and reasonable steps to prevent it altogether or at least, curtail it, within reasonable limits.

In a strike situation, primarily, the workers are not entitled to their pay^[48]. In addition, there could also be a loss of tenure arising from the provision of section 42 (1) (b) of the Trade Disputes Act^[49]. Arising from the loss of pay to the employees, it also results in the loss of much needed revenue to the union. This is because, there would be no more check-off dues coming to the union. In the event that the strike fails, union leaders also face threats from two sources: if a vengeful management does not victimize them, they may fail re-election at the next union election^[50]. However, the Unionists have often managed to escape indictment and failure because the workers are stimulated to expect the payment of their arrears of salaries in full at the cessation of hostilities. This largely, has often proved so, in the Nigerian situation, especially in the public sector, with government as the employer. As a matter of fact, employers seldom invoke the no-work no pay rule, possibly because the employers themselves are usually at fault over the strike incidence^[51] by their failure to nip a looming strike in the bud, either by acceding to the workers request, or at least entering into negotiation with them with a view to resolving the emerging conflict. The effect is to create in the unionists, a less of care in their assessment of a conflict situation leading to a calling out of the workers on strike.

In relation to the employers, particularly the government, one is made to wonder why the festering situation should be left un-arrested until it snowballs into a full blown strike^[52]. This is often in the face of a series of ultimatum and warning strikes by the workers, lasting a couple of days.

Surprisingly, the morality in all of this is that both the employee's unions and the employers, inclusive of the government need to exhibit more sensitivity and honesty of purpose in dealing with emerging situations as it affects industrial relations in Nigeria.

There is an increasing surge in the frequency of strikes by the unions as a result of employer's inability to fulfill agreements reached during negotiations^[53]. Sometimes, we see the solution of an industrial crisis in one sector becoming the grouse of another union in that same sub-sector or another.

The question arises as to degree of adaptability of the government in creating or fostering the present industrial environment. This is because the government in Nigeria is the largest employer of labour in the country and also of the apparent or outright reluctance or refusal to apply the relevant provisions of the law in most strike situations. What then is the essence of a law that will neither be obeyed nor enforced?^[54]

Conclusion

In the course of this paper, a critical study of the position of strike action under Nigeria Labour Law with emphasis on the freedom and right of workers to embark on strike has been made.

From the provisions of section 18 of the Trade Dispute and the case laws cited, it can be said that there is a freedom to strike by workers in Nigeria. But this freedom is basically one that has not been permitted by law. This means that while workers can go on strike as they deem fit, the law will apply against the workers in instances like breach of contract, violation of the Trade Dispute Act etc. On the question of the right to strike, there is no legal provision granting such right in Nigeria. When workers go on strike, the most common liability on the workers is dismissal from work. In Nigeria, workers go on strike because withdrawing their labour collectively is the only means available to them to force

their employers to negotiate with them on the terms and condition of employment at work. And it is always practically impossible to dismiss all striking workers as that will affect the work flow. Moreover, some types of work require experience and expertise and the ability of the employer to re-employ people with the level of experience and expertise to fill up the gap is very lean. This very phenomenon is the major reason why workers continue to embark on strike in Nigeria. It is therefore suggested that the laws in Nigeria be amended to enable workers embark on strike as of Right. This will conform to the declaration of the United Nations International Labour Organization and the laws in other jurisdictions such as Italy and Spain where workers have a right to go on strike. This right will make employers more willing to respond to the legitimate demands of their workers.

The law in Nigeria, by restricting the right to strike has shown its concern for industrial peace by using legislations as a panacea for strike actions, but how effective would that be?^[55] The freedom to go on strike is necessary under the principle of collective bargaining as ultimate sanction. It has been observed that countries that have bias for compulsory methods of settlement of disputes as the provisions of section 18 of the TDA, like India, Australia, New Zealand, Nigeria etc have witnessed greater number of strikes than countries where bargaining system operates like in the USA, France, Finland etc^[56]. Strikes should not be encouraged due to their deleterious effects on all concerned. However, they should not be prohibited in absolute terms, as they are the final resort to trade disputes when no other alternatives can be found^[57].

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