ARE RETROSPECTIVE EMPLOYMENT POLICIES APPLICABLE IN NIGERIA?

In a notable decision by the National Industrial Court of Nigeria in the case of ***Ekeoma Ajah v Fidelity Bank Plc***, the court considered the propriety of an employer introducing and retrospectively applying a retirement benefits policy to an employee instead of the policy that was in place at the time of the employee's notification of retirement.

The Facts

The Claimant was employed by the Defendant on 21st January 2002 as an Executive Trainee and rose through the ranks to become an Assistant Manager in the Risk Management Department of the bank. After working in the bank for an unbroken period of 14 years and 9 months, the Claimant expressed her intention to retire from the employment of the bank and intended to take advantage of the terminal benefits contained in the bank's voluntary retirement benefits policy operating at the time. The policy was applicable to employees who attained an unbroken long service of 15 years and who were below 55 years of age and the Claimant fell into this category.

On 2nd December, 2016 the Claimant gave to the bank notice of her retirement, which was acknowledged by the Bank on 23rd December, 2016. After receiving the Claimant's notice of retirement, on the same 23rd December, 2016 the bank circulated an email cancelling the voluntary retirement benefits policy. The cancellation of the policy was retrospective and to take effect on 15th December, 2016. On the basis of this cancellation, upon the Claimant's retirement, the bank refused to pay the Claimant any entitlements under the voluntary retirement benefits policy as a result of which the Claimant sued.

The position of the bank in the suit was that, on the authority of the decision of the Court of Appeal in the case of *ECWA v Dele*[i], it was entitled to amend its employment policies or conditions of service, especially when the policy is an optional benefit, as in this case. The bank also argued that when conditions of service are amended, the relevant provision will be the one that is applicable at the time of termination of employment. Therefore, since the Claimant was short of 15 years' service at the time of her employment came to an end, she was not entitled to claim benefits under the cancelled policy.

On the other hand, the Claimant distinguished ECWA's case from hers on the ground that, in ECWA's case, the affected employee consented and agreed to be bound by the new policy introduced by his employer. The Claimant further maintained that in her case, the Claimant neither signed nor agreed to be bound by

the policy cancelling the voluntary retirement benefits policy. For this reason, the Claimant took the position that the bank's change of policy was unenforceable, done in bad faith and contrary to the Claimant's legitimate expectation.

The Court's Decision

The court identified the principal issue for determination to be whether the Claimant who had attained 14 years and 11 months in service at the time of the bank's new policy and having served notice indicating her option to retire and take benefit of the extant policy at the time of serving the notice be denied the retirement benefit under the existing policy or be switched over to the new policy which appears to be detrimental to her pecuniary interest in the service?

In giving judgment for the Claimant, the court held that although in certain circumstances an employer is, as of right, entitled to vary any part of the contract of service without seeking and obtaining the consent of its employee, the Court will discountenance variations which have the effect of taking away any accumulated benefit of an employee. The court further held that the retroactive application of a policy variation will be ineffective against an employee where it divests the employee of accrued benefits because "*the court does not protect retroactive action capable of denying accrued benefits.*"

The court held that It is part of its equitable jurisdiction to preserve earned benefits, particularly those of pecuniary nature, and the court will usually tilt towards resolving such emerging controversy in favour of the beneficiary rather than in favour of one trying to take away or expropriate the benefit. According to the court, retroactive action taken to achieve such expropriation always fail against the victim as the court will not protect retroactive action capable of denying an employee of accrued benefits, but holds both parties to their original bargain to save earned benefits at the point introduction of new policy regime. On this score, the court decided that the bank was wrong to have introduced a retrospective policy to operate as if the Claimant had not served her Notice of Retirement before the new policy came into effect.

On the question of whether the Claimant was qualified, having served for 14 years and 11 months and not 15 years as required by the voluntary retirement benefits policy, the court applied what it called the "*principle of arithmetical approximation*" and held that the Claimant must be deemed in law to have served for 15 years at the time the new policy was introduced on the 23rd December 2016.[ii]

Commentary

For employers, the consequence of this decision is that policies which are made to operate retrospectively to deprive employees of accrued benefits under existing policies are very unlikely to be enforced by the court, especially where the employees do not give their consent to be bound by the retrospective policies. As in the above case, the court is likely to construe such retrospective policies as those calculated by the employer to evade accrued obligations to employees.

For employees, this decision will necessarily provide some sort of assurance that their legitimate expectations of employers to carry out their obligations under applicable polices will readily be enforced by the court.

Finally, the court's reliance on the novel principle of "arithmetic approximation" to sustain the Claimant's claim against the bank is instructive of the fact that the court will readily invoke its equitable jurisdiction innovatively to ensure that employers do not avoid accrued obligations to employees on technical grounds.

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[i] (2004) 10 FWLR (pt.230) 297)
[ii] Since the retroactive date had been invalidated