

EMPLOYMENT BOND CONTRACT IN NO MANNER A LICENSE WITHOUT LIMITATIONS: ENSURING THE ELIMINATION OF OPPRESSIVE BOND TERMS INCORPORATED BY EMPLOYERS

Oluwakemi Odeyinde*

Abstract

It is trite law that employment bonds are now enforceable under the Nigerian Labour Law. However employers are in the habit of incorporating oppressive terms in their employment bond. The purpose of this study is to show that although the courts have upheld the validity of employment bond, it is however contingent upon certain conditions. An Employment bond can thus be defined as an agreement between an employer and its employee requiring the employee to remain in service for a specified period of time in consideration of the employer paying the cost of training the employee. The landmark case of *Overland Airways Ltd v Captain Joseph Gamra & Anor* saw the court nullifying the validity of an employment bond that required the employee to remain in employment for sixty days after the cost of training had being sponsored by his employers. The terms of the bond were regarded by the court as unreasonable. Judicial authorities have shown that in ensuring the enforceability of employment bonds the terms must be reasonable and consistent with the applicable laws. On this basis, employers are to ensure that they consult their lawyers and ensure that the terms of the employment bond are fair and reasonable.

Keywords: Employment bond, training bond, bond contract, employer, employee

1. Introduction

In recent years much debates have surrounded the legality or enforceability of Employment bond under the Nigerian labour law. Employees have condemned out rightly the introduction of bonds in their contract of employment. Some are of the view that it constitutes unfair labour practice. However organisations now protect their business interest through the use of employment bonds. Every organisation desires to achieve customer satisfaction and therefore seek to provide quality goods and services. One of the ways organisations ensure this satisfaction is through continuous training and education of their employees. Sometimes, employers sponsor the training of their¹ employees, at other times they may allow them acquire new skills and qualifications while in employment. For example lecturers in the universities are usually given study leave. The expectation of every employer is that skills and knowledge acquired by the employee in the course of employment will be applied while in service. It is expected that such investments would come with a lifelong commitment and dedication by

* **Oluwakemi Odeyinde**, LLM (UNILAG) BL (UI), Law Lecturer II, Institution: Centre for Foundation Education, Bells University of Technology Ota, Nigeria, E-Mail: kemiodeyinde@gmail.com, Contact Numbers: 08178312706; 08056682060

employees. But this is not always the case. It has often been the case that employees leave for greener pastures after being trained by their employers. This is where the conflict usually begin. The issue for contention normally arises where an employee terminates his contract of employment after acquiring new skills and qualifications while in the service of the employer. The cost of training may have been borne by the employer. He therefore expects a return on his investment which should come in the form of long active service. It hampers the growth of any business when employees leave an organisation after a while. Employers have devised a means to regain back the proceeds of their investments which may be lost if the employee terminates his employment. Thus employees now have to sign an undertaking to remain in the service of their employers for a duration of time after their training. Employment bond also sometimes called 'training bond' is a device currently used by companies, industries, institutions to protect their business interest. The recent development is that the National Industrial Court of Nigeria has held employment bonds to be legal and enforceable. Today employers of labour now make use of employment bonds. However employers sometimes incorporate terms in the bonds that are often difficult to achieve by their workers. The legal consequences of this are that incorporating onerous terms in bonds may be termed as forced labour. This paper therefore considers whether all employment bonds are enforceable. In addition what will the courts look at to determine the enforceability of a bond? This is necessary in other to guide lawyers in drafting effective and enforceable bonds.

2. The Concept of Employment Bond

The concept of employment bond is to secure the business interest of the employer. Employment bonds are used by companies, institutions etc. to protect their investments in the development of their staff. Employers do not want to invest in workers and loose them too quickly. When employees leave organisation too often, it slows down the pace at which business grow. Furthermore it is not always easy to find skilled and qualified workers in any field of employment. Employees are the building block of any organisation and that is why companies or institutions decide to invest in them. However no one likes to lose his or her investment. Every investor expects to have returns on their investments. The return on investment can take various forms. Employees may be required to give back the years of being trained by the organisation through the training and developing of other staff. In addition they may be expected to use their training towards the development of the organisation or business. Employers of labour always want staffs or workers who will stay longer in the service of the company. Therefore employment bond is a device adopted by 'employers to secure their investments on staff training and development.'² This has been said by some writers to be a legitimate expectation which the law recognises. Whether or not employment bonds are legal and

² Bimbola Atilola *Recent Developments in Nigerian Labour and Employment Law* (Hybrid Consult Publication 2017), 7

therefore backed by the law will depend on the circumstances of each case. Employment bond serves as a preventive mechanism towards the abrupt termination of a contract of employment after a period of training.

2.1 Definition of Employment Bond

The Labour Act defines a contract of employment as ‘any agreement, whether oral or written, express or implied, whereby one person agrees to employ another as a worker and that other person agrees to serve the employer as a worker.’³ On the other hand, a bond in the legal parlance is a formal written agreement by which an individual undertakes to perform certain act (e.g to fulfill certain commitments of an agreement). Failure to perform the act makes the individual liable to pay certain amount of money as compensation. In *Overland Airways Ltd v Captain Joseph Gamra &Anor*⁴ the National Industrial Court of Nigeria (NICN) adopted the Black’s Law definition of a bond as: ‘A written promise to pay money or to do some act if certain circumstances occur or a certain time elapses; a promise that is defeasible upon a condition subsequent...’⁵ In the same vein the Supreme Court in *BFI Group Corporation v. BPE*⁶ used the definition of a bond in the 4th Edition of the Halsbury’s Laws of England as follows: ‘a bond is an instrument under seal, usually a deed poll, whereby one person binds himself to another for the payment of a specified sum of money either immediately or at a fixed future date.’ An employment bond therefore is an agreement whereby an employee agrees to remain in the service of the employer for a specified period in consideration of the cost of training. In the case of breach of such agreement, the employee will be liable to refund a specific amount which will be determined by the employer. Usually what will be refunded is the cost of training which is referred to as the bond value. The employment bond takes different forms, it could also be an agreement between the employer and employee which provides that the employee shall work for a particular period of years upon joining the organisation or business. In the event that the employee quits his/her job before completing that number of years, he will be held liable to pay a certain sum of money as compensation. Employers usually make use of training bond to make their staff whose training has been sponsored remain in service for an agreed term with the main aim that the employer could gain the benefits of its investment on the employee.⁷

2.2 ‘Bond’ distinguished from ‘Penalty’ and ‘Contract in Restraint of Trade’

An instrument may be called a bond and yet does not possess the characteristics of a bond. The courts have noted the distinguishing feature of a bond as possessing,
an obligation to pay a fixed sum of money, at a definite time, with
a stated interest, and it makes no difference whether a bond is

³ Nigeria Labour Act LFN 1990, S 91

⁴ Unreported Suit No. NICN/LA/141/2011, 8

⁵ *Black’s Law Dictionary (8th Edition)*, 187

⁶ *Overland Airways Ltd v Captain Joseph Gamra &Anor* (2012) LPELR – 9339 (SC), 8

⁷ *Supra* note1,

designated by that name or by some other, if it possesses the characteristics of a bond. There is no distinction between bond and certificates of indebtedness which conform to all characteristics of bonds.⁸

In determining the enforceability of bonds the courts distinguish between a bond and a penalty bond. According to the Black's Law Dictionary, a penalty refers to 'excessive stipulated damages that a contract purports to impose on a party that breaches. If the damages are excessive enough to be considered a penalty, a court will usually not enforce that particular provision of the contract.'⁹ Also, the court defined a penalty as follows;

a penalty is a sum which a party...agrees to pay or forfeit in the event of a breach, but which is fixed, not as pre-estimate of probable actual damages, but as a punishment, the threat of which is designed to prevent the breach, or as security, where the sum is deposited or the covenant to pay is joined in by one or more sureties, to insure that the person injured shall collect his actual damages. Penalties...are not recoverable or retainable as such by the person in whose favor they are framed...¹⁰

From the above definition by the court we see that when penalty clauses are incorporated into contract of employments, they are generally unenforceable. To determine whether a clause is a penalty or bond depends on a close examination of the intent of both.¹¹ In fact the courts have stated that a penalty is a type of bond.¹² However what distinguishes a penalty from a bond is that in the case of a penalty the amount to be paid as a result of the breach is fixed as a punishment, in which case it is not enforceable. While in the case of a bond the amount to be paid is pre-estimated of the damage suffered and therefore enforceable.¹³ Penalty clauses in a contract are like a form of punishment meant to threaten the other party not to commit a breach. Such clauses are unenforceable by law. Thus the law will not enforce contracts that contains 'unfair and unconscionable clauses which are designed to terrorize'¹⁴

In the same way 'contract in restraints of trade' are not bonds. The opposing counsel in the *Overland* case argued that the terms of the bonds were contract in restraint of trade. So what are contract in restraint of trade? The court in considering whether the terms of

⁸ *Overland Airways Ltd v Captain Joseph Gamra & Anor* Unreported SUIT NO. NICN/LA/141/2011, 8

⁹ *Supra* note 4, at p.1168

¹⁰ *Supra* note 6, 8

¹¹ *Ibid*, 9

¹² *Supra* note 3,9

¹³ *Ibid*

¹⁴ *The Supreme Court in Oyenehin & Anor. v. Akinkugbe & Anor*, (2010) LPELR – 2875 (SC), 25 paras F – G

the contract could be regarded as ‘contract in restraint of trade’ adopted the definition by the Black’s Law Dictionary¹⁵ as follows;

a limitation on business dealings or professional or gainful occupations. An agreement between or combination of businesses intended to eliminate competition, create a monopoly, artificially raise prices, or otherwise adversely affect the free market. Restraints of trade are usually illegal, but may be declared reasonable if they are in the best interests of both the parties and the public.

Simply put, a contract in restraint of trade is an agreement between an employer and employee stating that the employee will not carry on similar business or work with his competitor to carry on similar business within a particular geographical location or time. Therefore the purpose of restraint of trade is to protect trade secrets of the business. Such trade secrets are confidential information which should not be exposed or get into the hands of other competitors. However the general rule is that contract in restraint of trade are generally unenforceable, however there are circumstances under which the court will enforce them. For example the Supreme Court of Nigeria in considering the enforceability of contract in restraint of trade held in the case of *Koumoulis v. Leventis Motors Ltd* thus: ‘generally, all covenants in restraint of trade are prima facie unenforceable in common law. They are enforceable only if they are reasonable with reference to the interest of the parties concerned and of the public.’¹⁶ Similarly, the Supreme Court further held that:‘depending on how the covenant is framed, an employer can lawfully prohibit the employee from setting up his own, or accepting a position with one of the employer’s competitors, so as to be likely to destroy the employer’s trade connection by a misuse of his acquaintance with the employer’s customers or clients.’¹⁷ Therefore for contract in restraint of trade to be enforceable, it must be reasonable. It is clear from the explanation of the Supreme Court in the *Overland* case that contract in restraints of trade are different from bonds. The former are to protect the trade secrets of the employer while the latter seek to recover back the costs of training the employee.

3. The Principle of Law as regards Enforceability of Employment Bonds

The case of *Overland Airways Limited v Captain Raymond Jam* brought the issue of validity and enforceability of training bonds to the lime light. Here the court had to consider the enforceability of training bonds in the aviation industry. It is the usual practice in the aviation industry for airline companies to sponsor their pilots for training overseas. The pilots are however made to execute training bonds. Over the years the

¹⁵ Supra note 3,1340

¹⁶ (1973) LPELR-1710(SC), 11; *Esso Petroleum Company limited v Harper’s Garage (Stockport Ltd)*, (1967) 2 WLR 871

¹⁷ *Ibid*, 13 paras E – G; *Commercial Plastics Limited v. Vincent* (1965) 1 QB 623, 640

validity of these bonds have raised much controversy under the Nigeria labour law.¹⁸ It has been declared by some as unfair labour practice. The court therefore had to consider the validity and enforceability of training bonds in the case of *Overland Airways Limited v Captain Raymond Jam*.

Overland Airways Limited is an airline company in Nigeria. The Company sponsored one of its pilot by the name Captain Raymond Jam to undertake a training in the United States of America. Raymond signed two training bonds, which was to remain in the employment of the company for 36 months and 12 months respectively. Raymond gained new qualifications from his trip to the USA, which included obtaining new licenses. Raymond however resigned from Overland while the bond still subsisted. Aggrieved by this, Overland instituted an action against Raymond for the enforcement of the training bonds. Raymond argued in his case that the training bonds were void and unenforceable as they were restraints of trade and constituted unfair labour practices and were contrary to public policy. Overland however contended that the training bonds were a way of protecting their business interests and were voluntarily entered into by the pilots. The court held that the training bonds were enforceable and does not constitute unfair labour practice. In arriving at this decision, the court applied international best practices. It declared the bond valid as 36 months and 12 months were reasonable and fair. The court ordered Raymond to pay the cost of the training pro-rated for the remainder of the bond period.

From the above we see that a training bond is a contract and like in all other contracts the courts will consider the terms of the contract to determine whether there was a breach. In the absence of fraud, duress or unfair practices the court will enforce the validity of a training bond.¹⁹ Accordingly, in determining the enforceability of a training bond, the court will consider the following:

- i. whether the length of time the employee is expected to remain in the service of the employer is reasonable
- ii. whether the bond value is overly high as to make it so difficult or impossible for the employer to pay.

¹⁸‘National Industrial Court Upholds Validity of Training Bonds in Aviation Industry’, *ACAS-LAW* <https://www.lexology.com/library/detail.aspx?g=b7022baf-000a-40d0-95c7-85dd55b2c6c7> accessed 20 February 2021

¹⁹ [Abdulmajeed Abolaji](https://www.mondaq.com/nigeria/contract-of-employment/993890/training-bonds-how-enforceable-are-they-against-employees-in-nigeria), ‘Nigeria: Training Bonds – How Enforceable Are They Against Employees In Nigeria?’ <<https://www.mondaq.com/nigeria/contract-of-employment/993890/training-bonds-how-enforceable-are-they-against-employees-in-nigeria>>

ii. whether the employer has offered something extra other than the employment as consideration for the employee to remain in the service of the employer for a specific time²⁰

This decision of the National Industrial Court has created a legacy for employers to protect their business without fear of losing their investments. Furthermore organisations will readily sponsor their employees as they know they have some incentives to hold on to.²¹ The *Overland v Raymond* case was affirmed in *Dr. Victor F. Balogun & 2 Ors. v Federal University of Technology Akure & Anor.*,²² when his lordship Hon. Justice O. O. Oyewumi stated as follows:

It is trite that a training bond is an agreement that seeks to compel an employee who has been sponsored for a training by the employer to work for an agreed number of years for the benefit of the employer's investment on the staff. Alternatively put, it is the service compulsorily rendered by an employee for training sponsored by his employer. The law is now settled that training bonds are enforceable once it is ascertained to be reasonable. Reasonability or otherwise of a training bond is dependent on the bonding period and the amount required to be paid in the event of breach. By *Overland Airways Ltd v. Jam [2015] 62 NLLR (Pt.219)525*; training bonds are not enforceable between the parties being in restraint of trade unless they are shown to be reasonable. The only issue to consider in cases of this nature is to consider whether the bonding term is reasonable.

It is now established law that training bonds are enforceable, however where it is couched in such a way as to prove that they are penalty bonds, the court may declare them as unenforceable. Therefore in the case of *Overland Airways Ltd v Captain Joseph Gamra & Anor*, the court had to determine whether the training bonds in issue are penalties or not. In the instant case two sum of money were expended in the training of the employee by the company. They included the sum of N7, 500, 000.00 (Seven Million, Five Hundred Thousand Naira in particular) and N1, 575, 969.00 (One Million Five Hundred and Seventy Five Thousand Nine hundred and Sixty Nine Naira). In a written agreement between both parties the two training bond required the said employee to remain in the employment of the company for a minimum period of SIXTY months and TWELVE months respectively upon completing the program. The court held that the two bonds were penalties and therefore void and unenforceable.

²⁰ *Ibid*

²¹ *Ibid*

²² NICN/AK/49/2015

Therefore we see from *Overland v Joseph Gamra* case that employment bonds are generally legal and enforceable, however dependent upon certain conditions which must be satisfied. The conditions are as follows:

- i. the terms must be reasonable particularly as regards the duration of the bond
- ii. the duration of the bond must be fair and proportionate with the cost of training.

The court will not validate a bond where the span or length of the bond is unreasonable or where the bond arrangement contains difficult or unfair terms. Moreover, the court will not in any way condone unfair labour practices.

Similarly, in the case of *Iscare Nig. Ltd v Victoria Omotayo Akinsanya & Anor*,²³ the defendant was under the employment of the claimant on a salary of N540,000 per annum. The claimant agreed to send the defendant on 7 day training in India. The cost of the training was N569,108,00. In consideration of the 7 day training, the defendant was compelled to sign a bond. The terms of the bond included the following; i. that the defendant must remain in the employment of the company for three years after the training and; ii. If in any way the defendant leaves the company by way of resignation or dismissal before the bond expires she was to pay the sum of N5,000,000 (Five Million Naira) as compensation in addition to paying the total cost of the training. The court held the terms of the bond agreement to amount to unfair labour practices. According to the court a clause requiring the defendant to pay the sum of N5,000,000 (Five Million Naira) was rather 'inhumane, unconscionable and amounts to unfair labour practices.'²⁴ Furthermore such a clause was contrary to public policy and international best practices under the international labour organisation (ILO) Decent Work Agenda²⁵.

In contract of employment the 'employers have more bargaining power than the employees'²⁶ It is the usual practice of some employers to hurriedly give employees bond to sign. Most times they do not usually have the time to read them and consider the legal implication of what they are signing. Some employees are aware of the legal implications yet prefer to sign than lose their jobs. As stated by the Hon. Justice B.A Adejumo in the *Overland case v Joseph Gamra*;

While the practice of bonds is recognised as international best practice, it is not a licence without limitation, just as with all rules of law. To hold otherwise is to grant blank cheques to the employers of labour to take away the gains achieved by the

²³ Suit No. NICN/LA/484/2012

²⁴ *Ibid*

²⁵ *Supra* note 1, 9

²⁶ *Supra* note 1

innovation of unfair labour practice as moderating force in employment and labour relations²⁷

3.1 Labour Standards Practices in ensuring the Enforceability of Employment Bond.

It is the duty of every employer to ensure compliance with the relevant provisions of the law in drafting employment bond contracts. Therefore companies and organisations need to employ the services of a legal practitioner to be able to do this. Often times the fear of losing workers have made some employers to draft onerous bond contracts. Consequently, the standard practice for employment bond agreement is to include provisions for guarantors. A guarantor is someone who agrees to pay someone else's debt where he/she is unable to pay. Therefore under a bond contract the guarantor takes responsibility for re-payment of the bond value where the employee in any way defaults. The duty of the guarantor is to ensure that the employee complies with the terms of the bond agreement. As failure of the employee to do so imposes a joint liability on both parties to pay the bond value to the employer.

Furthermore for employment bonds to be enforceable in law, employers must ensure that such bonds are not oppressive and are consistent with the applicable laws. In the first instance Section 34(1) (c) of the 1999 Constitution of the Federal Republic of Nigeria (as amended) provides that *'every individual is entitled to respect for the dignity of his person, and accordingly, no person shall be required to perform forced or compulsory labour.'* The International Labour Organisation (ILO) define forced labour as "all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily"²⁸ In accordance with section 73 of the Labour Act the punishment for forced labour is stated as follows: 'Any person who requires any other person, or permits any other person to be required, to perform forced labour contrary to section 34 (1) (c) of the Constitution of the Federal Republic of Nigeria 1999, shall be guilty of an offence and on conviction shall be liable to a fine not exceeding N1, 000 or to imprisonment for a term not exceeding two years, or to both.'²⁹ Finally employment bonds are generally enforceable as long as they do not violate section 34(1) (c) of the 1999 Constitution.

4. Conclusion

From the discussion in this research paper we see that the courts will consider certain situations before it can uphold the validity of employment bonds. The court will take a cursory look at the terms of the bond to determine its validity. Basically the court will

²⁷ Supra note 6

²⁸ *ILO Forced Labour Convention 29*, (1930) Art 2(1)

²⁹ Cap L1 LFN 2004

consider the reasonability and duration of the bond among other things. Furthermore the courts have had to distinguish bonds from penalty and contract in restraint of trade. Where bond contracts are proven to be penalties or contract in restraint of trade then the court will not enforce it. Bond contract should not be employed as a means of punishment to employees for leaving their employer. Everyone has a right to choose whether or not to keep a job as the court will not impose an unwilling employee on an employer. Employment bonds are meant to have regards for the respect of dignity of an individual. When employers are made to sign bonds that are unreasonable and difficult to attain for an average person, then the law comes in to mitigate the harshness of the bond. Consequently the function of the National Industrial court is to curb unfair labour practices. It is a court meant to place employers in check. The case of *Overland Airways Ltd v Captain Joseph Gamra & Anor* shows the extent employers will go to protect their business interest. Employers may have the right to protect their business through the use of employment bond, however the court will not allow any employee to be subjected to forced labour. The duration of time at which the employees expected to remain in service should not be unduly high. Mandating an employer to remain in employment for sixty months after a training sponsored by the employers seems to be too lengthy. This no longer becomes a case of trying to recoup back investment for the expenses incurred in training the employees but rather a way to exert undue control over them. However with the pronouncement by the court on the enforceability of employment bond, employers can freely engage in the personal development of their employees. As they now have something to hold down their investment. Employment bond if done appropriately is a legal device to solve the problem of attrition in any company.