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PERSPECTIVE**

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LEGITIMATE EXPECTATION IN TERMINATION OF EMPLOYMENT: AN ECONOMIC PERSPECTIVE

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ABSTRACT

The concept of legitimate expectation or expectation interest has gained status in East African labour law jurisprudence. Knowing that an employer may terminate a contract of Employment by merely giving the requisite notice, Labour courts have adopted the public law concept of legitimate expectation as an exception to the at-will employment. Termination, usually when initiated by the employer, does not meet the reasonable expectations of the employee thus the need to revisit reasonable expectations in termination of employment through economics. This paper concludes that the public law concept of legitimate expectation as the glimmer of hope in contentious unfair terminations can increase resource (income) redistribution among the working class.

1.0 INTRODUCTION¹

The conundrum is that terminations without reason or fair hearing leave out reasonable expectations of employees.² The importance of incorporating legitimate expectation in the legislative text of East African labour laws cannot be overstated. The courts have already imported from public law into the employment relationship the concept of a legitimate expectation.³

This legal note is necessitated to enable legal practitioners know the legal challenges of legitimate expectation for the client and judges to determine the extent of expectation interests of employees in decision-making involving unfair terminations of the contract of employment. The legal position in Uganda is

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¹ This comparative labour law investigation is focused on Kenya, Tanzania and Uganda which form part of East Africa.

² The concept or principle or doctrine of legitimate expectation has been accepted as part of our law.

³ See *French v Barclays Bank plc* [1998] IRLR 646; see also *R v British Coal, ex p. Vardy* [1993] ICR 720 concerning a legitimate expectation of consultation.

that termination is unfair if it goes against the legitimate expectation of the employee.⁴

Using an economic approach, this paper attempts to fill the scholarship gap on the considerations for applying legitimate expectation in employment law. Thus, Part 2 is an account of the applicability of legitimate expectation and the necessary prerequisites to invoke the doctrine in employment.

Part 3 details, through an economic approach, a review of case laws from Uganda, Nigeria and other African jurisdictions applying the legitimate expectation doctrine in employment law and this is based on a cost-benefit analysis. This section also seeks to highlight the need for income distribution among the working class through the prism of legitimate expectation. It concludes that private law of employment requires the doctrine of legitimate expectation as an exception to employment-at-will.

2.0 LEGITIMATE EXPECTATION IN EMPLOYMENT LAW

The doctrine of legitimate expectation, a subsidiary component of the fair and equitable treatment standard,⁵ originates from administrative law.⁶ There are reliance and expectations interests.⁷ The concept of legitimate expectation is most widely understood as a ‘basic principle of fairness.’⁸ The protection of

⁴ In Uganda, the Court of Appeal in *Bank of Uganda versus Joseph Kibuuka & Ors*, the position has been adopted in in the sense that a termination decision contrary to the legitimate expectation of an employee is deemed unfair termination

⁵ Trevor Zeyl, Charting The Wrong Course: The Doctrine Of Legitimate Expectations In Investment Treaty Law- *Legitimate expectation in Investment Treaty Law*

⁶ See. Chester Brown, “The Protection of Legitimate expectation as a ‘General Principle of Law’: Some Preliminary Thoughts” (2009) 6:1 Transnational Dispute Management 1 at 4, citing Jürgen Schwarze, *European Administrative Law*, revised 1st ed (London: Sweet & Maxwell, 2006).

⁷ Reliance interest relates to the financial loss resulting from actions performed and costs incurred due to reliance on the contract, whereas the expectation interest relates to the financial loss incurred due to frustration of the expectation to profit from the contract. *See generally* Daphne Barak-Erez, ‘The Doctrine of Legitimate expectation and the Distinction between the Reliance and Expectation Interests’ *European Public Law*, Volume 11, Issue 4 583 © Kluwer Law International, 2005

⁸ H. Woolf, J. Jowell, A. Le Sueur, C. Donnelly and I. Hare, *de Smith’s Judicial Review* (London: 7th edn Sweet and Maxwell, 2013), p.662.

legitimate expectation is derived from the principle of *vertrauensschutz*, which seeks to ensure that ‘everyone who trusts the legality of a public administrative decision should be protected.’⁹

In Administrative law, it is argued that legitimate expectation ought to be protected as to do otherwise would be to allow the state to abuse its powers which it ought to exercise in the public interest.¹⁰ John Cartwright asserts that, the protection of ‘legitimate expectation’ is not a doctrine of English private law.¹¹ This position begs the question why legitimate expectation must be extended to private law of employment.

The doctrine was highlighted by Lord Diplock in *Council of Civil Service Unions v. Minister for the Civil Service*¹² that:

"To qualify as a subject for judicial review the decision must have consequences which affect some person (or body of persons) other than the decision-maker, although it may affect him too. It must affect such other person either: (a) by altering rights or obligations of that person which are enforceable by or against him in private law; or (b) by depriving him of some benefit or advantage which either (i) he had in the past been permitted by the decision-maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational grounds for withdrawing it on which he has been given an opportunity to

⁹ See M. Schroeder, “Administrative Law in Germany” in R. Seerden and F. Stroink (eds), *Administrative Law of the European Union, Its Member States and the United States - A Comparative Analysis* (Antwerp: Intersentia Uitgevers Antwerpen, 2005), p.119. cited by Tomlinson, Joe (2020)

¹⁰ Coughlan [2001] Q.B. 213 [57]; *R v Inland Revenue Commissioners ex p Preston* [1985] AC 835 [71]; *R v Secretary of State for Education ex p Begbie* [2000] 1 WLR 1115, 1129; *Nadarajah* [2005] EWCA Civ 1363 [52].

¹¹ Protecting Legitimate expectation and Estoppel in English Law-Report to the XVIIth International Congress of Comparative Law, July 2006 *Electronic Journal of Comparative Law*, vol. 10.3 (December 2006), <https://www.ejcl.org> [accessed 20 August 2021]

¹² [1985] A.C. 374

comment; or (ii) he has received assurance from the decision-maker will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn."¹³

2.1 The Law on Termination and Legitimate Expectation

Professor John-Jean Barya notes that case law has developed a number of grounds constituting good or legitimate cause for termination:

1. Redundancy and abolition of office especially as a result of organizational or operational requirements of the undertaking¹⁴
2. Expiry of a fixed term contract or fixed task (all countries)
3. Mutual agreement (all countries)
4. Death of the employee (Uganda, Tanzania)
5. Frustration (Uganda, Tanzania)

Termination of employment in most cases becomes contentious when initiated by the employer. Therefore, legitimate expectation may have been disappointed as justiciable ground for challenging termination of the contract of employment. Thus, reasonable expectations¹⁵ need to be clarified.

An outstanding 2021 labour decision in Uganda that applied legitimate expectation was the decision of *Bank of Uganda versus Joseph Kibuuka and 4 Others*¹⁶ where the Court of Appeal adopted the doctrine of legitimate expectation to the effect that there is need to provide a reason for termination of employment that goes against the legitimate expectation of an employee.

¹³ See generally *Schmidt v. Secretary of State for Home Affairs* [1969] 2 Ch. 149; *Ridge v. Baldwin* [1964] A.C. 40, *Breen v. Amalgamated Engineering Union* [1971] 2Q.B. 175 on the requirement of a duty to hear based on a legitimate expectation rather than an enforceable legal right was re-iterated in a number of subsequent decisions

¹⁴ Kenya s. 2 Trade Disputes Act Uganda (Industrial Court Awards), Tanzania (s.3 Security of Employment Act) cited by John-Jean Barya (2004) *Termination of Employment: A Comparative Study of recent developments in some African jurisdictions*. Uganda Living Law journal. Vol. 2: 2 pg. 205

¹⁵ Section 78 (2) (b) of the Employment Act of Uganda recognizes reasonable expectations in compensatory orders

¹⁶ Civil Appeal No. 281/2016

In this case, the appellant terminated the employees before they reached retirement age. In the letters of termination, the appellant indicated that “it was an early retirement” without a reason. The employer argued that it was a valid termination on the basis that they were not required to give a reason. The Court of Appeal held that the respondents had a legitimate expectation of a retirement package upon their retirement (voluntary or otherwise), something which the appellant did not honour by terminating them prematurely, which was unlawful. This decision reaffirms the position that an employer is required to give reasons before termination.¹⁷

It is to be noted that the burden of proof in legitimate expectation lies on the employee. This was confirmed in the Tanzanian labour decision of *National Oil (T) Limited v Jaffery Dotto Msensemi & Others*,¹⁸ where the applicant challenged the award to the respondent on the finding that a Human Resource Manager had represented to him (respondent) or created a legitimate expectation of renewal of fixed term contract. However, the alleged promise by the Human Resource manager was not proved hence the burden of proof not discharged.

2.2 SCOPE OF LEGITIMATE EXPECTATION

In the decision of *Ahmed Ishola Akande v. Lilygate Nigeria Ltd (The Lilygate)*¹⁹, the judges pointed out that Legitimate expectation are in these categories:

1. Benefit based (unjust enrichment)
2. Reliance-based (detriment)
3. Executory (not paid or relied on) -risk allocation

¹⁷ See *Bank of Uganda v Betty Tinkamanyire* available at <http://www.ulii.org/node/15338> accessed 10th July 2021 in this case, ‘Betty who has been working with the bank for ten years and had four years until retirement was given a letter of retirement’. This ‘untimely retirement letter given to her came with no explanations as to why she was being dismissed from work; she filed a suit against her employer at the High Court to be reinstated plus cost of damages’. Her employer “denied liability asserting that it was within its rights to terminate the respondent’s employment and claimed that the action was done lawfully”.

¹⁸ Revision No. 558 of 2016

¹⁹ Unreported Suit No NICN/LA/209/2016

They cover pre-employment rights (for example the right to privacy of the prospective employee), employment rights (like the right to maternity leave, sick leave and salary) and post-employment rights accruing at the end of the employment such as pension rights and a letter of recommendation to another employer. Suffice to say, this exposition appraises post-employment rights involving the legitimate expectation.

In *Attorney General of Hong Kong v. Ng Yuen Shiu*,²⁰ Lord Fraser observed that Legitimate expectation were capable of including expectations which went beyond enforceable legal rights provided that they had some reasonable basis and he stated that the word "legitimate" fell to be read as meaning "reasonable".²¹ Therefore, it does not matter whether reasonable expectations are based on legal right or not; and rightly so, in the employment context, legal rights to pension, salary, maternity leave and so forth are not the only guaranteed substantive expectations.

Finally, an employee can enforce an expectation based on conduct or promises which are not purely legal in right. This is illustrated in the Nigerian decision of *Ahmed Ishola Akande v. Lilygate Nigeria Ltd (The Lilygate)* where court awarded compensation to a prospective employee who was terminated before he performed the job. In this case, the employer had not benefitted from a prospective employee's work and the job offer was recalled before he started the work.

The Court welcomed the claimant's legitimate expectation on the basis that he had resigned his previous employment. In this line, there was no legal right to compensate a prospective employee for no work done but compensation for the reliance. This will lead us to factors that exactly determine the application of legitimate expectation.

²⁰ [1983] 2 A.C. 629.

²¹ See Hilary Delany, *The Doctrine of Legitimate Expectation in Irish Law*, 12 DUBLIN U. L.J. 1 (1990). Available at <https://heinonline.org/HOL/Page?handle=hein.journals/dubulj12&collection=journals&id=5&startid=&enddid=29> [accessed 17 July 2021]

2.3 PREREQUISITES FOR LEGITIMATE EXPECTATION

a. Some of the Considerations

i. Objective Commitment:

In the English employment context, the doctrine of legitimate expectation rests on whether the relevant authorities have made objective commitments.²² These commitments can be established through express or implied promises, past or regular conduct.²³ To characterize legitimate expectation, it must be objective rather than subjective. Consider the decision of *Devitt v. Minister for Education*,²⁴ where an expectation of an appointment to a specific position was at issue. The court rejected this claim as it was subjective.

In a Kenya decision of *Fatuma Abdi v Kenya School of Monetary Studies*, the court dismissed the claim of an employee who expected her contract to be renewed because she had recently been promoted. Reasonable expectations must be kept separate from conative inclinations such as desire, hope, want and wish.²⁵ In making such determinations, courts have considered the language used by these authorities as well as the manner in which representations were made.²⁶ Further, where an employee has relied on an employer's objective commitment and suffered detriment as a result of that reliance, courts will be more inclined to find a legitimate expectation and protect it.²⁷

ii. Is it necessary to show detrimental reliance?

²² Council of Civil Service Unions v Minister for the Civil Service, [1985] AC 374, 408-09; see also Muayad Kamal Hattab, "The Doctrine of Legitimate Expectation & Proportionality: A Public Law Principle Adopted into the Private Law of Employment" (2018) 39 Liverpool Law Review 239, 246

²³ Ibid

²⁴ [1989] I.L.R.M. 639.

²⁵ Bailey H. Kuklin, The Plausibility of Legally Protecting Reasonable Expectations, 32 Val. U. L. Rev. 19 (1997). Available at: <https://scholar.valpo.edu/vulr/vol32/iss1/2> [accessed 3 September 2021]

²⁶ See National Farmers' Union and another v Secretary of State for the Environment, Food and Rural Affairs and another, [2003] All ER (D)

²⁷ Daphne Barak-Erez, "The Doctrine of Legitimate expectation and the Distinction between Reliance and the Expectation Interests" (2005) 11 European Public Law 583, 595;

An important distinction between jurisdictions is whether *subjective awareness or reliance* are needed for legitimate expectation to be protected. In the Ugandan context, expectations of an employee are not protected without reliance. This was discussed in the decision of *Doreen Rugundu v International Law Institute*.²⁸

In this case, Doreen who was offered a contract to work at the International Law Institute had her contract cancelled even before she could commence work. There was no explanation given as to why the contract was cancelled and she filed a case of wrongful termination of contract against her employer-to-be at the High Court and was successful.’ However, the employer appealed in the Court of Appeal and the decision of the High Court was overturned; reason being that there was no contract between the two parties in the first place.’

There was a second appeal to the Supreme Court which was ruled in favor of the employer.²⁹ Stating that “under the provisions of Section 24(1) of the Employment Act to terminate the contract by giving the appellant seven days' notice or pay her seven days' wages in lieu of notice; the respondent gave the appellant a notice of over 4 months.”³⁰ Therefore, the courts refused any form of compensations to Doreen without taking into consideration the fact that she had suffered general damages for disappointment, embarrassment and inconvenience, costs of the suit³¹and so on.

In contrast, in the Nigerian decision of *Ahmed Ishola Akande v. Lilygate Nigeria Ltd (The Lilygate)*, court awarded compensation to a prospective employee who was terminated before he commenced the job reason being that termination of this employment came after the employee had terminated his previous

²⁸ Doreen Rugundu v International law institute available at <http://www.ulii.org/ug/judgment/supremecourt/2006/18/supreme-court-2006-18.rtf> [accessed 3 September 2021]

²⁹ *ibid*

³⁰ *ibid*

³¹ Acknowledgment of the case summary to Vera Hayibor in thesis : HAS POVERTY A FEMININE FACE? AN ANALYSIS OF THE IMPACT OF LABOUR LAW ON THE ECONOMIC RIGHTS OF UGANDAN WOMEN (SUSTAINABLE DEVELOPMENT GOAL 1) Strathclyde University

employment (reliance was demonstrated). In Doreen's case, reliance was not demonstrated to warrant legitimate expectation.

iii. Is it necessary to have knowledge of the expectation?

At a general level, for instance, in the Australian immigration case of *Ministry for Immigration and Ethnic Affairs v Teoh*, McHugh J indicates that a "person cannot lose an expectation that he or she does not hold,"³² suggesting subjective knowledge of the expectation is required. However, case law from other jurisdictions indicates that legitimate expectation require neither knowledge nor reliance.³³ Indeed, termination is unfair with or without knowledge of loss of expectation.

In the earlier decision, the doctrine of legitimate expectation was applied thought not explicitly. In the decision of *Charles Abola & Others vs Attorney General*³⁴ over six thousand government civil servants had been retrenched in the early 1990s and paid retrenchment packages which IMF and World Bank had agreed on with government. A few years later, they went to court to demand for their pension rights.

The High Court ruled, after some correspondence written by government officials were deemed to be admissions, that the plaintiffs were entitled to their pension. They were paid their gratuity and should currently be receiving monthly pension as per the Pension Act.

In the context of legitimate expectation, it can be argued that the government correspondence with the retrenched civil servants amounted to a reasonable expectation to the employees for post-employment rights. In general, an employee who has been retrenched has a reasonable expectation of pension regardless of retrenchment package.

³² Minister of State for Immigration and Ethnic Affairs v Teoh, [1995] 3 LRC 1, 37 (HCA

³³ Paul Daly, "A Pluralistic Account of Deference and Legitimate expectation: Pluralism in Action" (October 23, 2015), Administrative Law Matters, 12 prerequisite.

³⁴ HCCS No. 1029/1998 CASE SUMMARY acknowledged to Prof. John-jean Barya of Makerere University School of Law in his comparative review on Termination in African jurisdictions

iv. Loss or Detriment:

There is a view that expectation interest can only be compensated where there is a loss. This position is illustrated in the Ugandan case of *Emily Mbabazi v Rural Electrification Agency & 2 Others*³⁵ though a judicial review application which concerned non-renewal of the employment contract of the applicant. The Court observed, and this is critical, that:

“The employees expected to be treated fairly before any decision is taken not to renew their contracts of employment. Legitimate expectation envisages that, if the administration- by a representation- has created an expectation in some person, then it will be unfair on the part of the administration to whittle down or take away such legitimate expectation.”

The applicant was faced with loss of employment by the respondent arguing that ‘her performance was wanting.’ The renewal of the employment contract was conditioned that the applicant be reappraised every 6 months in order to determine whether to renew the contract. In this case, the performance appraisals were not done per the contract. Thus, the respondent’s decision to not renew the contract went against the legitimate expectation created in the employee’s mind that her contract will be renewed.

In general, the doctrine exists in order to protect losses created by public authorities when expectations that have been relied upon are disappointed. The court is involved in protecting claimants’ reliance interests³⁶ that have been either lost or affected by the disappointment of expectations for example the loss of pension rights in retrenchment. In the employment context, a loss suffered by an employee must be atoned for where a legitimate expectation is involved.

³⁵ HCMC No 165/2019

³⁶ It could be said that there are two main forms of detriment: concrete detrimental reliance, such as the expenditure of money pursuant to a representation, and moral detriment, where the harm may be, for instance, emotional suffering.

v. *Existing and enforceable by law*

Reasonable expectations in the relevant sense refer to those expectations aroused by society's legal culture and not solely by the law narrowly conceived, that is, statutes and case law alone.³⁷ This requirement does not imply that expectations are legal rights. It simply holds that they must be enforceable in law.³⁸ An expectation by an employee who condones sexual harassment in the 'hope' of promotion at work is one such bargain contrary to public policy.

To illustrate the enforceable by law aspect, consideration should be given to the decision of *V. Bagamuhunda & Ors vs UEB (Uganda Electricity Board)*, where UEB had negotiated a retrenchment package for its employees. The plaintiffs were paid the said package on retrenchment but denied pension under the Staff regulations. When they filed a suit against UEB, the High Court held that: The plaintiff's pension had not been included in the severance or retrenchment packages earlier paid. In relation to legitimate expectation, it begs the question whether payment of retrenchment packages did not take away the reasonable expectation of pension rights for the UEB employees.

vi. *Obligation of Good faith*³⁹

³⁷ In stemming from the "expectations" part of the equation, they refer to the acquisition of one's legal due. There are other expectations which are clearly reasonable in some sense even though they fall outside the domain of the law. For example, at one extreme, a person reasonably expects the sun to rise each morning, but this is based on regularity and the laws of nature See Bailey H. Kuklin, *The Plausibility of Legally Protecting Reasonable Expectations*, 32 Val. U. L. Rev. 19 (1997). Available at: <https://scholar.valpo.edu/vulr/vol32/iss1/2> [accessed 2 September 2021]

³⁸ See *Sylvester C. Nwoye V. Federal Airports Authority of Nigeria*, it was held that promotion from one level or position in an organization to another is not a right but a privilege, which is earned. Hence, an employer cannot be compelled to promote its employee no matter the good opinion the employee might have of himself.

³⁹ See *Toussaint v. Blue Cross & Blue Shield of Mich.*, 292 N.W.2d 880 (Mich. 1980) (applying a legitimate expectation analysis); *Pine River State Bank v. Mettelle*, 333 N.W.2d 622 (Minn. 1983) (referring to *Toussaint* and applying a similar approach); *Hammond v. North Dakota State Pers. Bd.*, 345 N.W.2d 359, 361 (N.D. 1984) (applying the doctrine of promissory estoppel); *Woolley v. Hoffmann-La Roche, Inc.*, 491 A.2d 1257 (N.J. 1985) (applying a unilateral contract analysis).

Some courts have held that Good Faith only applies in relation to the express provisions of a contract and the parties' reasonable expectations flowing from those provisions.⁴⁰ An individual must prove in order to make a claim for legitimate expectation that he or she has relied on a legitimate interest in 'good faith'.⁴¹ However, the U.K. courts rarely use the terms interchangeably. This seems to be due to several misconceptions about the principle of good faith.

First, it suggests that judicial reluctance is due to the ease of confusing "good faith" with contracts "*uberrimae fidei*."⁴² This duty of good faith compels the employer to take into account relevant factors before reaching a decision affecting the employee such as (the performance rather than religion or tribe of the employee) or (the actual prohibited misconduct at work place rather than merely any police investigation about the employee unrelated to work). In this wise, the doctrine of legitimate expectation envisages a duty of good faith by an Employer toward the employee.⁴³

Failure to give notice can amount to bad faith.⁴⁴ The principle is that although an employer can terminate at will the contract of employment, he or she must act in good faith and at a reasonable notice to the employee.⁴⁵ If the employer acts in secret and conceals what is being done from the employee, he or she may expose himself/herself to some suspicion of not having acted in good faith.

⁴⁰ James J. Brudney, Reluctance and Remorse: The Covenant of Good Faith and Fair Dealing with American Employment Law Good Faith and Fair Dealing in the Individual Employment Relationship, 32 Comp. Lab. L. & Pol'y J. 773 (2010-2011) Available at: http://ir.lawnet.fordham.edu/faculty_scholarship/127 [accessed 1 September 2021]

⁴¹ ELAINE DEWHURST AND DAFNI DILIGKA, INCREASING PENSION AGES IN GREECE AND IRELAND: *THE CASE OF LEGITIMATE EXPECTATION*

⁴² Justice Lindsay, a former President of the EAT

⁴³ *Cresswell v Board of the Inland Revenue* [1984] ICR 508. In the context of unfair dismissal, if the employer fails to provide instruction and training where the employee is required to perform new duties any dismissal for incompetence would normally be unfair

⁴⁴ *Johnstone Luvisia v Allpack Industries Limited* (Kenyan decision), failure to notify the employee of nonrenewal until after expiry amounts to bad faith.

⁴⁵ The obligation to give notice before termination is common to the Labour laws of all East African countries, thus failure to adhere to this standard invites a remedy in breach of good faith resulting in unfair termination

This can be illustrated in variations to the employee handbook or contract of employment.⁴⁶

Good faith is one of the exceptions to employment-at-will.⁴⁷ For instance, employers may not terminate employees for exercising a lawful right or privilege, for refusing to perform or participate in an unlawful activity. The most comprehensive contract-based example is the employee handbook limitation: when employers promulgate personnel manuals or similarly regularized written practices, such express provisions may establish reasonable contractual expectations or entitlements for their employees.

In *Petrie v. Mac Fisheries, Ltd.*,⁴⁸ the court held that displaying a notice about sick pay entitlements on the factory notice board was insufficient. The English courts consider the relationship to be distinctly bilateral.⁴⁹ Consider, for example, the unilateral variation to the employee handbook which erodes an employee's expectation.

In East Africa, the decision of *John Ogutu Raga v Bandari Sacco Society Limited* is apt to demonstrate bad faith. The claimant was employed as Chief Executive Officer under a fixed term contract. After his second contract expired, Ragama applied for a third. Bandari Sacco's board approved his application and subsequently offered him a third contract. Later, he was sent on compulsory leave and was informed the SACCO had decided not to renew his contract. The court held that it was too late in the day for the SACCO to communicate its decision not to renew what had already been renewed.

vii. The Operation of The Handbook Provisions and Variation of Terms

⁴⁶ Katherine M. Apps, 'GOOD FAITH PERFORMANCE IN EMPLOYMENT CONTRACTS: A "COMPARATIVE CONVERSATION" BETWEEN THE U.S. AND ENGLAND' U. PA. JOURNAL OF LABOR AND EMPLOYMENT LAW [Vol. 8:4 2006 at pg 884

⁴⁷ See generally Clyde W. Summers, Labor Law as the Century Turns: A Changing of the Guard, 67 NEBR. L. REV. 7, 12-14 (1988) cited by James J. Brudney, Reluctance and Remorse: The Covenant of Good Faith and Fair Dealing with American Employment Law Good Faith and Fair Dealing in the Individual Employment Relationship, 32 Comp. Lab. L. & Pol'y J. 773 (2010-2011) Available at:

http://ir.lawnet.fordham.edu/faculty_scholarship/127 [accessed 1 September 2021]
[1940] 1 K.B. 258

⁴⁹ Katherine M. Apps, *Supra*

The general rule is that an employer cannot alter the contract by unilateral denunciation of the collective agreement where the relevant terms have become part of the contract of employment. Likewise, the employer cannot unilaterally recoil from the terms by mere disagreement with the union, although two cases suggest that, if the employee leaves the union membership, they may cease to be bound by the collectively bargained TERMS.⁵⁰

In the *Zambian* decision of *Richard Musenyesa v. INDO Zambia Bank Limited*,⁵¹ the Supreme Court dealt with an employee whose conditions of service were altered by their employer. The entitlement to gratuity at the end of the employment relationship was not mentioned in the new conditions of employment despite being in the previous conditions that regulated his employment.

Holding; the Supreme Court provided that where acquiescence is intended to be assumed from conduct, credible evidence will have to be led, showing that the employee was by clear notice given by the employer, aware of the variation, understood the implications and its full extent, before it can be said that they acquiesced or consented by conduct.⁵² *From this case, it seems that variation into the terms and conditions of employment if not accepted by the employee can result in legitimate protection of the worker.*

By virtue of the *Richard Musenyesa* case, employees do not have to resign and risk losing their livelihoods or being victimized for protesting but rather must produce evidence that they did not consent. Therefore, even if they continue in employment or do not protest, if there is evidence they did not agree or would not have agreed to a change to their detriment, the courts will hold that their

⁵⁰ [1972] 2 Q.B. 455.

⁵¹ Appeal No. 214/2016 (2020)

⁵² E.g. In a trilogy of cases, prior to *Richard Musenyesa*, namely, *Zambia National Commercial Bank v. Misheck Chanda*,⁴ *Zambian Breweries Plc v. Stanley K Musa*,⁵ and *Charles Nyambe & 82 Others v. Buks Haulage*,⁶ the Supreme Court was emphatic that when an employee does not complain about a variation, they accepted it by acquiescence or conduct and therefore abandoned the rights held prior to the change.

previous, unaltered contract will govern their relationship with the employer rather than the adversely, unilaterally altered contract.⁵³

In Tanzania, rule 4 (5) of the *Employment and Labour Relations* (Code of Good practice) GN 42/2007 provides as:

“Previous renewals, employer’s undertakings to renew and failure to renew the employment contract on similar terms.”

This guideline seems to limit the employer’s power to vary the terms and conditions of employment in renewal of fixed-term contracts.

viii. Other examples

It would amount to bad faith for an employer to discharge a sales employee who is paid on commission after the employee has obtained an extraordinarily large order but before completion of all the formalities required to make the commission come due. Similarly, it would be bad faith for an employer to fire an employee just before the employee meets a performance quota that triggers a substantial bonus.

In each case, the employee has expended effort that the employment contract contemplated and indeed was designed to induce and, by rendering this effort a sunk cost, eliminated her power to bargain for a share of the return to the effort. In refusing to pay the commission or the bonus, the employer has deprived the employee of the share of the return to her effort that the contract had allocated to her ex ante and exploited the employee’s weakened bargaining position ex post. This is bad faith.⁵⁴

Consider *Clark v BET plc*.⁵⁵ In this case, the relevant term stated that the employee's salary "shall be reviewed annually and be increased by such

⁵³ Chungu, Chanda (2020) "Richard Musenyesa v. INDO Zambia Bank Limited Appeal No. 214/2016 (2020)," SAIPAR Case Review:Vol.3: Iss.1, Article 12. Available at: <https://scholarship.law.cornell.edu/scr/vol3/iss1/12> [accessed 1 September 2021]

⁵⁴ Daniel Markovits, 'Good Faith as Contract's Core Value' *Philosophical Foundations of Contract Law*. Gregory Klass, George Letsas, and Prince Saprai. © Oxford University Press 2014. Published 2014 by Oxford University Press at pg 274

⁵⁵ [1997] IRLR 348

amount, if any, as the board shall in its absolute discretion decide." The amount was to be calculated by a pay comparability exercise. This was held to confer a duty on the employer to make an increase and only the amount of the payment was discretionary. This payment was to be determined by taking into account factors that ought to have been considered had the employer acted in good faith.

In the English case of *Mallone v. BPB Industries*,⁵⁶ Mallone was an executive of BPB's Italian subsidiary until 1995. His contract contained an executive share option scheme. However, when he was dismissed in 1995, BPB informed him that his share option was zero. At trial, the court held that the contractual discretion under the employment contract did not entitle them to cancel the option scheme once it had been held for three years.

In the Court of Appeal, Mr. Mallone's counsel argued that the directors' discretion was not exercised in "good faith." *Lord Justice Rik held for the court that the contractual language could "in theory embrace an exercise of the directors' discretion.* This case normatively highlights the need for legitimate expectation in circumstances of constructive dismissal. To that end, an employee will be compensated for their legitimate expectation at termination if the reason of their quitting employment is the unfair conduct of the employer.

In the insurance context, an employee will expect that driving the company vehicle covers family members as passengers. In case the employee suffers injury with his spouse or family on board, without explicit exclusion of such classes of person, it is a duty of good faith to indemnify the employee for the defects and harm caused to his family as passengers onboard. It might be unfair to reject insuring the family members as passengers for the employee using the organization's vehicle on permission.

Advocating for this approach to insurance demands that an employee has a legitimate expectation for protection of his family on board unless the

⁵⁶ CA 19 Feb 2002

insurance policy excludes family members as unauthorized passengers. Furthermore, in *Reid v Rush & Tomkins Group plc*⁷⁹, an employee who was injured abroad in a road traffic accident whilst on the employer's business found himself in a precarious position. He had not been able to make a claim against the tortfeasor's policy because, in that country, third party insurance was not compulsory.

An action for damages against his employer failed because the failure to warn the employee of the local risks was held not to be a breach of contract. The rationale for this decision was the need to avoid imposing an expensive burden on employers who would otherwise be required to forewarn their employees of the complexities of foreign legal and social systems.

By extension, Professor Barry Hough and Ann Spowart-Taylor argue that it might arguably be within the contractual contemplation of the parties that the employer should be under a duty to communicate such information as is in its possession and not to deny disclosure without good reason where the consequences of such a refusal would place the employee at unreasonable risk.

Such a duty could be framed within the existing duty to maintain trust and confidence since the denial of already acquired information without good cause would suggest conduct capable of destroying mutual trust and confidence.

ix. Established practice

In employment law, Hilary Delany argues that it has been established that the adoption of a consistent practice if over a sufficiently long period of time may justify a legitimate expectation that this practice will continue. What will constitute such a consistent practice has not been expressly defined by the courts and the question falls rather to be decided according to the individual facts of a particular case.⁵⁷

The National Industrial Court (NIC) recently applied the principle in the case of *Medical and Health Workers Union of Nigeria & Ors v Federal Ministry of*

⁵⁷ HILARY DELANY *ibid*

Health.⁵⁸ The Court acknowledged that the practice of skipping salary grade levels by Government can create an expectation interest, which in turn was capable of creating an entitlement or vested right in favour of the complainants who had all the while been beneficiaries of the practice.⁵⁹

x. Unilateral Modification to the Contract of Employment

In assessing whether a legitimate expectation has been taken away, it is necessary to consider the unilateral nature of the transaction. For instance, a variation to the contract of employment where there is a need for consultation may automatically give rise to protection of a legitimate expectation.⁶⁰

In the case of *Toussaint v Blue Cross and Blue Shield*,⁶¹ which came up in the State of Michigan, the issue before the Supreme Court was whether a voluntary promise including a discharge-for-cause policy, made by the employer to his employee in a handbook constituted a binding obligation upon the employer.

The Court held that such a policy could bind an employer if the ‘employer’s written policy statements set forth in the manual of personnel gave rise to legitimate expectation.’ That when a promise acquires legitimate expectation, the employer’s unlawful breach or departure constitutes a breach of contract.

The Kenyan decision of *John Nduba v AMREF Health Africa* illustrates the consequences of unilateral variation of terms of a fixed term contract. Here, the employment contract was renewable subject to satisfactory performance. John’s performance had been exemplary. Under the employer’s Human resources policy manual, the contract period for regular staff was not less than 2 years.

⁵⁸ Medical and Health Union Workers of Nigeria & Ors v. Federal Ministry of Health unreported Suit No. NICN/ABJ/238/2012, the judgment of which was delivered on July 22, 2013.

⁵⁹ See also Patrick Obiora Modilim v. UBA Plc unreported Suit No. NICN/LA/353/2012,

⁶⁰ French v Barclays Bank plc [1998] IRLR 646; see also R v British Coal, ex p. Vardy [1993] ICR 720 concerning a legitimate expectation of consultation.

⁶¹ 579, 292 N.W.2d 880 (Mich. 1980) case summary with acknowledgement to Sefton Fross, THE IMPACT OF THE COVID-19 PANDEMIC ON EMPLOYMENT CONTRACTS - ARTICLE | 12 MAY 2020

However, when John's contract expired, it was renewed for 3 months rather than the expected 2 years. He successfully brought an action against his employer and was awarded 15,000,000 Kenya shillings. Professor Barry Hough and Ann Spowart-Taylor argue that there is need to strike a fairer compromise in the unilateral modification of the contract of employment.

The common law notoriously failed to develop a model of the contract of employment that could accommodate the need for unilateral change. Its insistence that the employee has the right to insist on performance of entitlements created by the contract is commercially unsound in a long-term contract where parameters are bound to change. The employee's rights are essentially process rights for example; the right to be warned that dismissal will occur if a change is not accepted.⁶²

2.4 SUBSTANTIVE VERSUS PROCEDURAL EXCEPTIONS

There is an ongoing debate on whether the doctrine applies exclusively to procedural rights or whether it also extends to substantive rights.⁶³ Substantive legitimate expectation protect those interests in a substantive right (for instance the right of an employee to retirement benefit outlined in an employee retirement benefits policy or National Social Security Fund Act).⁶⁴

Procedural legitimate expectation can ensure fair procedures for the continuance or acquisition of a benefit where there is an interest in that benefit (such as giving reasons for promotion decisions) or the adherence to past or promised procedures. The courts have grappled and are still grappling with the notion of protecting substantive expectations thus the fairness conception has

⁶² Professor Barry Hough and Ann Spowart-Taylor, 'REALISING "PARTNERSHIP" IN EMPLOYMENT RELATIONS: SOME LEGAL OBSTACLES (unpublished)

⁶³ THE PROTECTION OF LEGITIMATE EXPECTATION IN GLOBAL ADMINISTRATIVE LAW Louise Otis and Jérémy Boulanger-Bonnely

⁶⁴ Age benefit, Withdrawal benefit, Invalidity benefit, Emigration grant, survivor's benefit. See generally John-Jean Barya, Interrogating the right to social security and social protection, HURIPEC Working paper No. 23 January, 2009

progressively extended beyond its initial procedural form in order to accommodate the protection of substantive expectations.⁶⁵

In general, the Labour Courts of Uganda, Kenya and Tanzania recognize the protection of procedural rights in employment law. In general, substantive protections are not explicitly recognized. However, a good example for the protection substantive rights was highlighted in the decision of *French v Barclays Bank*.⁶⁶

Mr. French, an employee of Barclays, was due to relocate cities. An applicable staff handbook offered an interest-free bridging loan but following a collapse in the housing market, the employer sought to re-adjust the loan arrangement. While the case fell outside of traditional contract rules, the court decided to protect Mr. French's substantive legitimate expectation, holding that the bank had made a clear commitment through its prior conduct towards other employees and the applicability of the handbook provision at the time of the loan. The judgment focused on the substantive loan itself.

3.0 COST-BENEFIT ANALYSIS OF THE LEGITIMATE EXPECTATION

- I. *The lack of Legislative Text on Legitimate expectation in Labour costs employers in uncertainty and employee's economic loss of valid expectations.*

There is no statutory backing for it. Thus, courts are left with a wide discretion to determine what can be a legitimate expectation to the employment relationship. The Employment Act of Uganda, like in the Acts of Kenya and Tanzania do not have provision for expectations in employment. It seems therefore that the doctrine of legitimate expectation does not have a statutory establishment.

⁶⁵ See Tomlinson, Joe (2020) Do we need a theory of legitimate expectation? Legal Studies. pp. 286-300. ISSN 1748-121X
<https://doi.org/10.1017/lst.2019.29> [accessed 2 September 2021]

⁶⁶ *French v Barclays Bank plc*, [1998] IRLR 646 (CA).

In Botswana, the legitimate expectation to procedure in termination of an army officer are not protected. *The legitimate expectation doctrine has been limited to matters of the Defence Forces.* In *Mokokonyane v Commander Of Botswana Defence Force and Another*,⁶⁷ the Appellant was in terms of Regulation 4(5)(b) of the Defence Force (Regular Force) (Officers) (Amendment) Regulations 1996, given three months' notice in writing that he was being compulsorily retired on the ground that there were no future prospects for his promotion in the force.

Regulation 4(4) of the said Regulations gives the Commander of BDF discretion to require any officer below the rank of Lieutenant – Colonel who has attained the age of 45 years to retire from the force. The compulsory retirement age in the BDF is 55 years. When the Appellant was given notice, he was 47 years and was not given prior notice of the decision to retire him nor was he given the opportunity to contest the decision.

The Appellant applied to the High Court for an order to set aside the decision of the Commander of the BDF to retire him but the application was dismissed. He appealed to the Court of Appeal where it was argued on his behalf that he had a legitimate expectation that he would not be compulsorily retired until he reached 55 years and that if his retirement at an early age was being considered he would be advised of this and be given the right to be heard before the decision to compulsorily retire him could be made.

It was further contended on his behalf that as he was not afforded such right, the decision to retire him was invalid and had to be set aside. It was held by Zietsman, J.A., dismissing the appeal, that: *“the claim of legitimate expectation and the claim of a right to be heard fall to be considered in relation to each other as the claim of legitimate expectation is the basis which gives standing to the claim of the right to be heard.* His judgment introduces the legitimate expectation principle which has also been accepted as being part of the law of East Africa (Kenya, Tanzania and Uganda).

⁶⁷ [2000] 2BLR 102

The benefit of incorporating legitimate expectation in the labour laws of East Africa will bring certainty and efficiency in termination of employment.

II. Legitimate expectation apply on a case-by-case basis.

The cost of leaving legitimate expectation to judicial control is that they may be misinterpreted and construed as mere hope and invasions to the doctrine of at-will employment.

There can hardly be any precedential growth for legitimate expectation in employment law which creates legal uncertainty. Broadly stated, legal certainty requires that the law must provide those subjects to it with the ability to regulate their own conduct in accordance with the law.

The suggestion that promoting legal certainty is the purpose of legitimate expectation is powerfully stated in Schwarze's leading treatise on European Administrative Law, in which it is argued that that the principle of legitimate expectation has emerged 'as a corollary of the principle of legal certainty.'⁶⁸ Fordham states that 'what is in play [in legal certainty issues] is the idea that people deserve to know where, in law, they stand.'⁶⁹

However, the benefit of judicial control is to regulate distribution of income among the working class only for such conduct which demonstrates unfair results⁷⁰ in the unequal bargaining power.

III. The case of probationers and fixed-term workers.

⁶⁸ J. Schwarze, *European Administrative Law* (London: 1st (English) edn, Sweet & Maxwell, 1992), p.872

⁶⁹ M. Fordham, "Legitimate Expectation II: Comparison and Prediction" [2001] J.R. 262, 263 (emphasis added). P. Popelier, "Legitimate expectation and the Law Maker in the Case Law of the European Court of Human Rights" (2006) E.H.R.L.R. 10. There are clear links between the concept of legal certainty and the concept of the Rule of Law here, see for example the role of legal certainty in J. Raz, *The Authority of Law: Essays on Law and Morality* (Oxford: OUP, 2009), Ch.11. On the general concept of legal certainty, see further H.W.R. Wade, "The Concept of Legal Certainty: A Preliminary Skirmish" (1941) 4(3) M.L.R. 183; Lord Mance, "Should the law be certain?" (The Oxford Shrieval Lecture, 11 October 2011).

⁷⁰ *Attorney General of Hong-Kong v Ng Yuen Shiu* [1983] 2 AC 629; *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 415 (Lord Roskill), 412 (Lord Diplock).

Some of the factors deemed relevant to the reasonable expectation include the terms of the contract, any past practices of renewal and so on.⁷¹ A mere renewal clause does not suffice to create legitimate expectation.⁷² Also, meeting the conditions of renewal of contract create an expectation interest in the mind of the employee.⁷³

It is important to note that legitimate expectation may not apply to probationary employees as opposed to confirmed ones. They may also not apply where a fixed term employee is terminated upon the expiry of the fixed term contract if there is no option-of-renewal clause. This is the position in Uganda, Kenya and East Africa.

In the Tanzanian decision of *Dar-es Salaam Baptist School v. Enock Ogala*⁷⁴, the court held:

“Where the contract is affixed term contract, the contract shall terminate automatically when the agreed period expires, unless the contract provided or there was no expectation of renewal the contract would have expired automatically with no need to write a termination letter.”

However, a fixed term contract with an option of renewal invokes application of legitimate expectation.⁷⁵ In the Republic of Tanzania, rule 4(3) of the

⁷¹ Section 186 (1) (b) of the Labour Relations Act of South Africa is a model law for legitimate expectation in unfair dismissal in fixed term contracts. See Stephen Lesiba (2015) Thesis -Insufficiency and lack of clarity of statutory regulation of fixed term contracts in South Africa. LLM (university of Johannesburg).

⁷² *Cleopatra Kama Mugenyi v. Aidsplan*, the claimants sued seeking damages for non-renewal of their employment contracts. They alleged that they had a legitimate expectation of renewal because the contract documents contained a renewal clause

⁷³ See Teresa Carlo Omondi v Transparency International (Kenyan decision)

⁷⁴ Revision No. 53 of 2009 HC Labour Division at Dar Es Salaam (unreported) Rweyemamu J

⁷⁵ An employee reasonably expected the employer to renew a fixed term contract of employment on the same or similar terms but the employer offered to renew it on less favourable terms or did not renew it. See Stephen Lesiba (2015) Thesis -Insufficiency and lack of clarity of statutory regulation of fixed term contracts in South Africa. LLM (university of Johannesburg).

Employment and Labour Relations (Code of Good practice) GN 42 of 2007 provides that; “...a fixed term contract may be renewed by default if an employee continues to work after the expiry of the fixed term contract and circumstances warrant it.”

It is noteworthy that where a probationer at the expiration of the probationary period continues in the employ of the employer who takes the benefits of his service, the law presumes that there is a contract of some sort between them.

Also, the reasonable legitimate expectation of the probationer would be given effect by the court where the employer fails or neglects to notify him or her of the outcome of the probationary period but allowed him to continue to work thereafter.

Similarly, termination of a probationer calls for a fair hearing. In the case of *Huble v Nigerian Maritime Services Ltd*,⁷⁶ a German was employed by the Respondent on a probationary period of six months. Upon the expiration of the probationary period, the employer was not informed that his services are no more needed but rather was left to continue rendering the services he was rendering during the currency of his probationary employment. His employment was abruptly terminated wherein he instituted an action challenging his termination.

Taylor CJ stated that, having failed to notify him of the outcome of his performance as a probationer while retaining him in the Respondent’s employ, the act of retention tantamount to confirmation by conduct of his appointment and was therefore subject to reasonable notice and not terminable at the pleasure of the Respondent.

This reasoning of the Supreme Court is on the principle of estoppel by conduct as the law will not allow a party who has made a representation to another which the other person on the strength of the representation have acted to

⁷⁶ (1971) UILR 231 cited by EYONGNDI: The Nigerian Employee and the Quest for Confirmation: Examining the Quagmire of Probationary Status, NAUJILJ VOL 8(2) 2017

renege from the representation after it has been acted upon. If the court allows such a person to renege from his representation which have been acted upon it will not only be inequitable but unsolicited hardship could be inflicted on unsuspecting members of the public.

4.0 CONCLUSION.

The doctrine of legitimate expectation is firmly established in the law of contract, although under different names and using different language of description.⁷⁷ Since the doctrine of reasonable expectation is not yet neatly defined, Micheal Dugeri asserts that the doctrine of expectation interest may become an unruly horse like public policy unless handled carefully.

The doctrine of legitimate expectation is designed to protect the rights of persons in general and applicants in particular to procedurally unfair administrative action where any of their rights or legitimate expectation is affected or threatened.⁷⁸

Unsurprisingly, the doctrine of legitimate expectation or expectation interest has been invoked in labour disputes involving termination of fixed-term contracts by employers in East Africa. So far, there is limited jurisprudence in Uganda, Kenya and Tanzania for its application in other areas of labour law disputes other than fixed-term contracts.

This article therefore calls for the incorporation of the principle of legitimate expectation into the labour laws of countries in East Africa to facilitate justice while resolving labour disputes.

⁷⁷ Protecting Legitimate expectation and Estoppel in English Law-Report to the XVIIth International Congress of Comparative Law, July 2006 Electronic Journal of Comparative Law, vol. 10.3 (December 2006), <https://www.ejcl.org> [accessed 2 September 2021]

⁷⁸ Micheal Dugeri 'The Doctrine of Legitimate Expectation in Employment Law available at <https://ssrn.com/abstract=3545135> [accessed 2 September 2021]

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