

# THE REALITIES OF MANAGING EMPLOYMENT CONTRACTS

The Dynamics of the International Labour Organization  
(ILO) Conventions And Nigerian Employment Disputes



Streamsowers & Köhn

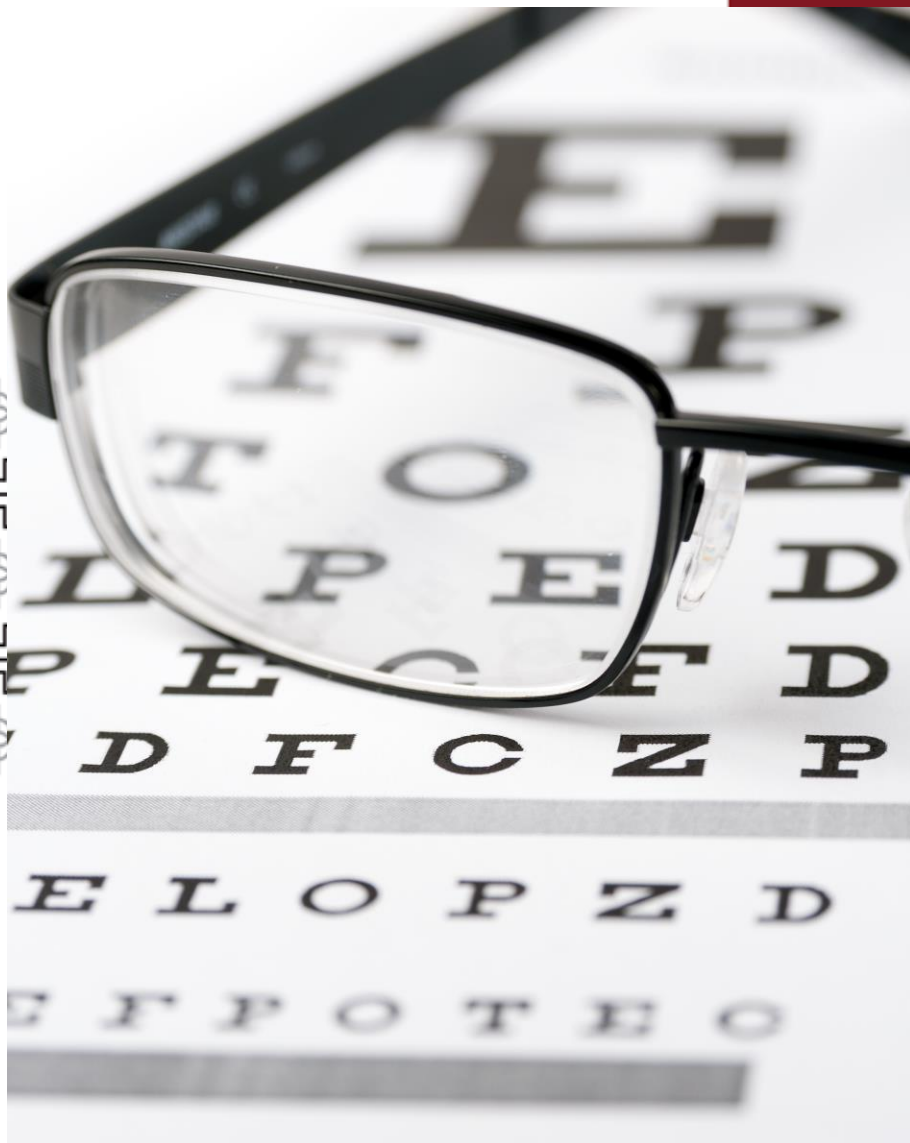
## CHAPTERS

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## CHAPTER 1

# AN ANALYSIS OF EMPLOYMENT CONTRACTS IN NIGERIA



# Introduction

Contract of Employment is an agreement whereby one person agrees to employ another as a worker and that person agrees to serve the employer as a worker.

## **Section 91 Labour Act.**

In simple terms, Contract of Employment is the terms and conditions that regulates the employment relationship between two persons.

The employment contract once entered freely and voluntarily by the parties, governs and regulates their relationship.

Any dispute that arises from or in relation to the employment would be settled on the terms and conditions embodied in the Contract. The Court or Tribunal can only interpret the terms and give effect to same.

# DEFINITION OF EMPLOYER AND WORKER

**Section 91 of the Labour Act defined Employer and a Worker thus:**

**Employer** is *"any person who has entered into a contract of employment to employ any other person as a worker either for himself or for the service of any other person and includes the agent, manager or factory of the first mentioned person and the personnel representative of a deceased employer"*.

**Worker** is *"any person who has entered into or work under a contract with an employer, whether is for manual labour or clerical work or is expressed or implied or oral or written and whether it is a contract or service or a contract personally to execute any work or labour..."*



## NATURE OF EMPLOYMENT CONTRACT

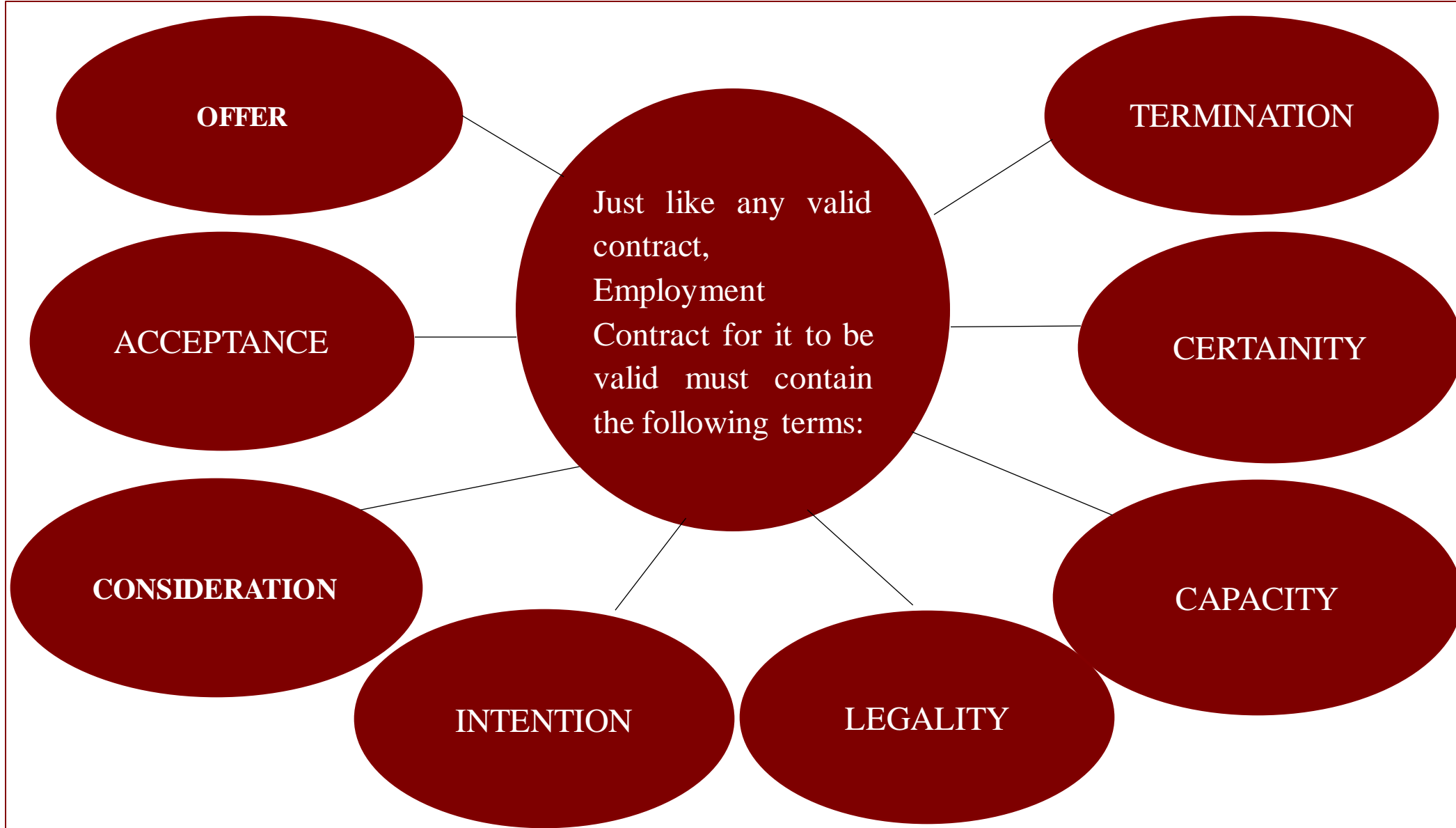
- A legally binding agreement between employer and employee.
- It could be oral or written, or partially oral and written, express or implied.
- It must define the rights, duties and responsibilities of each of the parties.
- It must have the three basic elements of a valid contract- **Offer, Acceptance and Consideration (O.A.C).**



# NATURE OF CONTRACT OF EMPLOYEMENT

- **Section 3 Labour Act:** Employer must give an Employee a written contract within 3 months of the commencement of the employment.
- The freedom and autonomy of contract is the fundamental principle of contract law. Parties to a contract have the freedom to determine the terms of their contract. Parties would be held to observe the terms of their agreement once executed.[However, this freedom is not really there]
- The Employment Contract must have certain key terms namely; name of employer and employee, nature of employment, duration, wages, termination etc.

# SCOPE OF CONTRACT OF EMPLOYMENT





# STATUTES THAT REGULATE EMPLOYMENT CONTRACTS AND LABOUR MATTERS

The Constitution of the  
Federal Republic of  
Nigeria, 1999

The Labour Act,  
Cap L1, Laws of the  
Federation of  
Nigeria, 2004

The National  
Industrial Court Act,  
2006

The Trade Unions  
Act, 2004

Act 2004The Trade  
Dispute

The Factory Act

Employees  
Compensation Act

Pension Act

# TYPES OF EMPLOYMENT CONTRACT

**Employment by written contract** of employment.

**Employment at will** or servant holding an office at pleasure of employer also known as Master and servant relationship.

**Employment which is governed by statute** i.e employment with statutory flavour.

**Section 318 (1) CFRN 1999** created the Public Service. These are staff of the President, Vice President, a ministry or department of government of the federation assigned with responsibility for any business of government of the Federation is a public servant. A civil servant thus implies someone who works in the civil service of the country or of a state. Civil servant simply means a public servant within the employment of the civil service of the federation or of a state government.

**NOTE:** The fact that an employee is employed by a statutory body does not mean that the condition of service of the employee is covered by a statute. See **AVRE V. NIPOST NWLR Pt. 1727.**

## DUTIES OF EMPLOYER AND EMPLOYEE

### Employer's duties:

Duty to pay wages or salary

Duty to provide work

Duty to recognize Trade Union

Duty to ensure safe workplace

Duty to keep workers attendance

Duty to provide character testimonial or reference

### Employee's Duties

Serve with good faith and fidelity- committed to work.

Must act in the interest of employer. Personal interest must not conflict with duties

Not to disclose trade secret.

Must cooperate with safety measure in workplace.

Obedience to lawful instruction.



QUOTES!!!!!!!!!!

The contract of employment creates a relationship between one who has power and another who has no power and that “in its inception it is an act of submission, in its operation it is a condition of subordination” and that the aim of labour law is to use law to control the employment relationship.

**Kahn-Freund (1972)**

The employment relationship projects a structure of power or authority and that from the employment contract the employer is given legal authority to suggest, and the employee is obliged to obey lawful instructions concerning the work.

**Collins, Ewing and Mccolgan, (2012)**

## CHAPTER 2

# THE REALITIES OF MANAGING EMPLOYMENT CONTRACTS FROM A SOUTH AFRICAN PERSPECTIVE



# THE LAW OF CONTRACT

## Contractual freedom

- Freedom to enter (or not to enter) into a contract

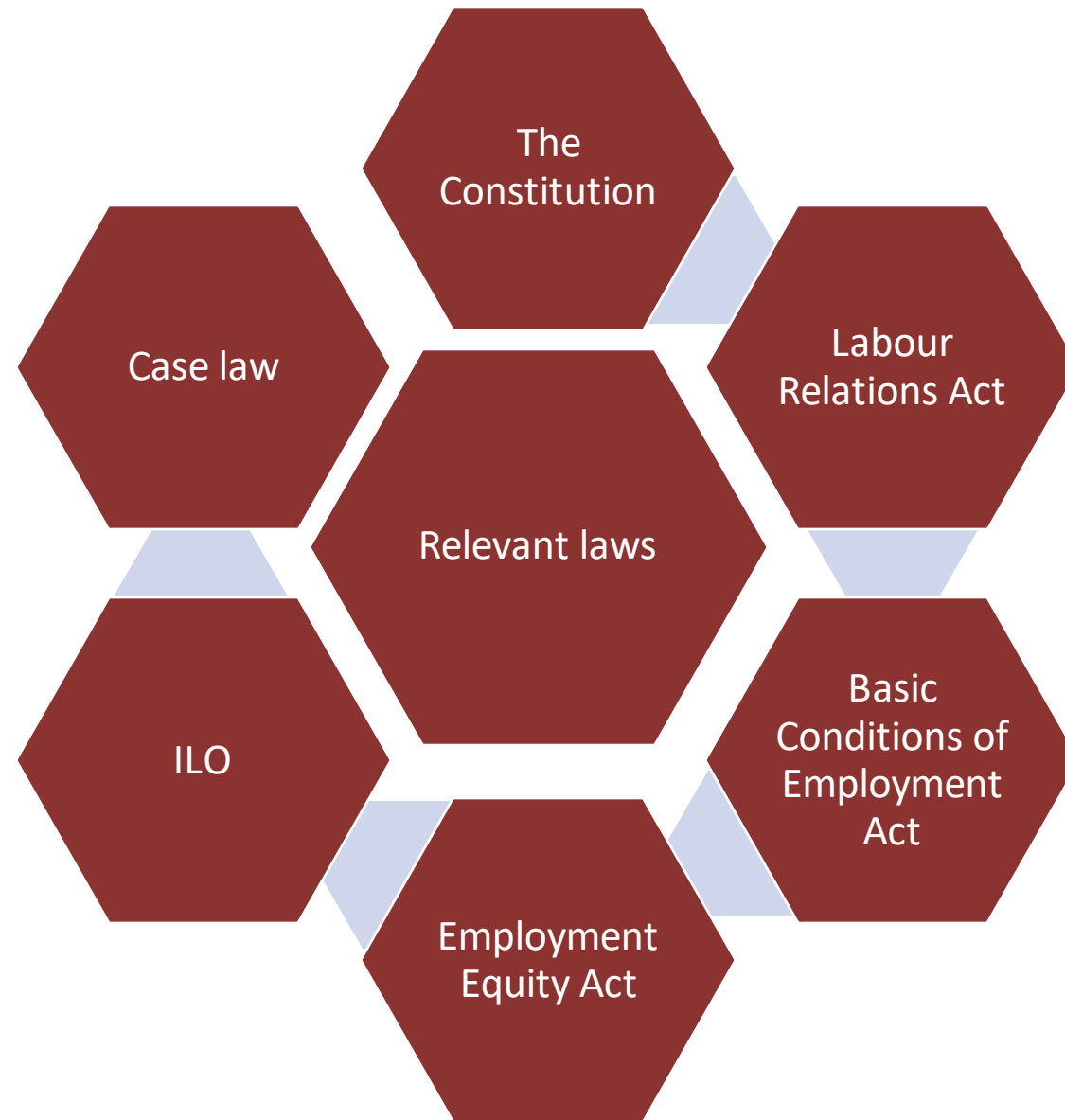
## Freedom to choose terms of a contract

## Sanctity of contract

- A contract freely entered into must be kept

## Enforceability of contract





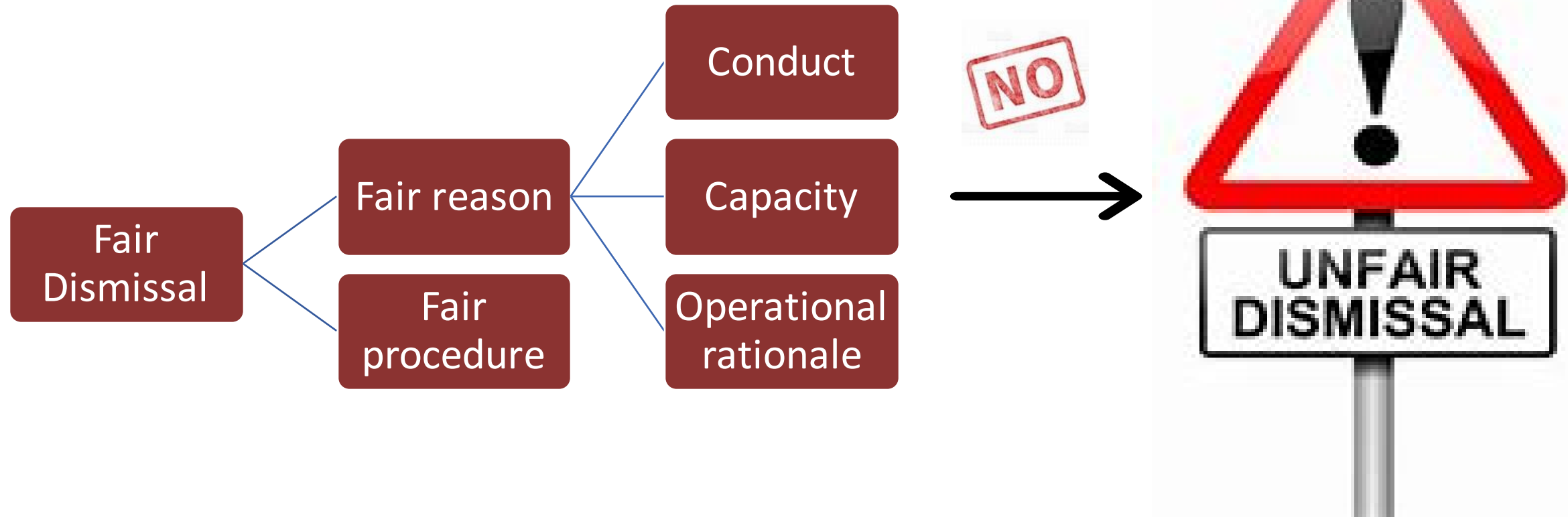
# THE CONSTITUTION: THE BILL OF RIGHTS

Equality before the law

Access to courts

Fair Labour Practices

# THE LABOUR RELATIONS ACT: Termination of employment



**AUTOMATIC  
UNFAIR  
DISMISSAL**



Can't terminate for discriminatory ground: pregnancy, race, age, gender, sexual orientation etc.

# THE BASIC CONDITIONS OF EMPLOYMENT ACT



Payment in lieu of notice

If employee is forced to resign: claim  
constructive dismissal

Resignation

Unilateral act

Same notice  
as employer

Failure to  
give notice:  
damages  
claim





International  
Labour  
Organization





South Africa is a member state

Convention 158 not ratified

LRA to be interpreted in  
compliance with public  
international law

# CONCLUSION: FAIRNESS IS KEY

## EMPLOYEES

Right to Equality before the law

Right to fair labour practices

Right not to be unfairly dismissed

Right to receive notice of termination

## EMPLOYER

Right to Equality before the law

Right to fair labour practices

Right to dismiss an employee for a fair reason

Right to receive notice on resignation

The Con Court

There is nothing in the constitutional or statutory scheme that suggests that, in determining fairness of a dismissal, a commissioner must approach the matter from the perspective of the employer. All the indications are to the contrary.

Article 8 of the International Labour Organisation Convention on Termination of Employment 158 of 1982 requires the same.



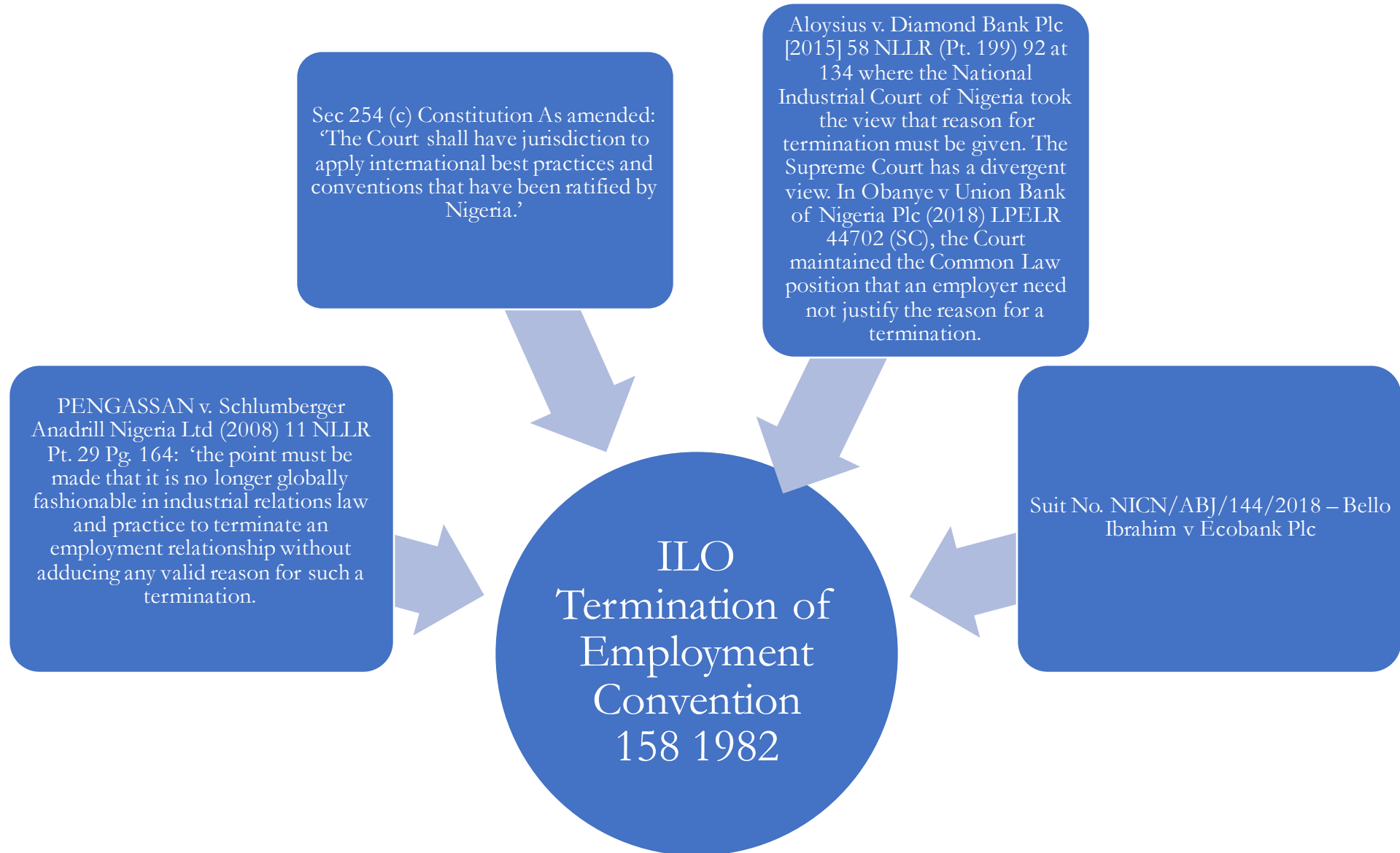
## CHAPTER 3

# **TERMINATION OF CONTRACTS OF EMPLOYMENT: THE NEW PRACTICAL AND JURISPRUDENTIAL GUIDE**

# Termination at Common Law

- Termination of employment refers to the cessation of the employment relationship between employer and worker/employee.
- Termination of a contract of employment may be at the instance of either party to the contract. While an employer may terminate with or without notice or by summary dismissal, in the case of the employee, a written letter of resignation given to the employer with or without notice effectively brings the employment to an end.
- At common law, a master can terminate the employment of his servant at any time and for any reason or for no reason at all provided the termination is in accordance with the terms of the contract of employment the motive for such termination is irrelevant. *Osisanya v. Afribank Nig Plc. (2007) 6 NWLR (Pt.1031) 565 (SC)*
- Where provision is not made in the contract of employment as to the notice to be given on either side, then it would be required that the notice given is a “reasonable” one. Where an employee is paid on a monthly basis, then a month’s notice or a month’s salary in lieu of notice should be reasonable.
- The employer must ensure that at the time of presenting the employee with the letter of termination, all payments due to him must be attached to the letter of termination, including any and all salaries, allowances, benefits and/or reimbursable expenses. See *Chukwumah v Shell Petroleum Development Co. Nig. Ltd. (1993) 4 NWLR (PT 289) 512.*
- Where the employee is given the due notice of the specific duration of termination of his appointment without the offer of the equivalent amount of money in lieu of notice, the employee must continue to work throughout the notice period stipulated in the contract. If he refuses to carry out his duties for the duration of that notice, the employee terminates his own employment.

# Transition from Common Law to Contemporary Law





# What Constitutes valid Termination today?

- A contract of employment may also be terminated by the employer with or without notice, and by summary dismissal. Where employer terminates, **it is required to give reasons for the termination which must be based on the capacity or conduct of the worker or operational requirements of the business.**
- The reasons that cannot justify termination include termination on the basis of:
  - (a) union membership or participation in union activities outside working hours or, with the consent of the employer, within working hours;
  - (b) seeking office as, or acting or having acted in the capacity of, a workers' representative;
  - (c) the filing of a complaint or the participation in proceedings against an employer involving alleged violation of laws or regulations or recourse to competent administrative authorities;
  - (d) race, colour, sex, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin;
  - (e) absence from work during maternity leave.
- Where reason is related to conduct or performance, worker must be provided an opportunity to defend himself against the allegations made, unless the employer cannot reasonably be expected to provide this opportunity.

# What Constitutes valid Termination today?

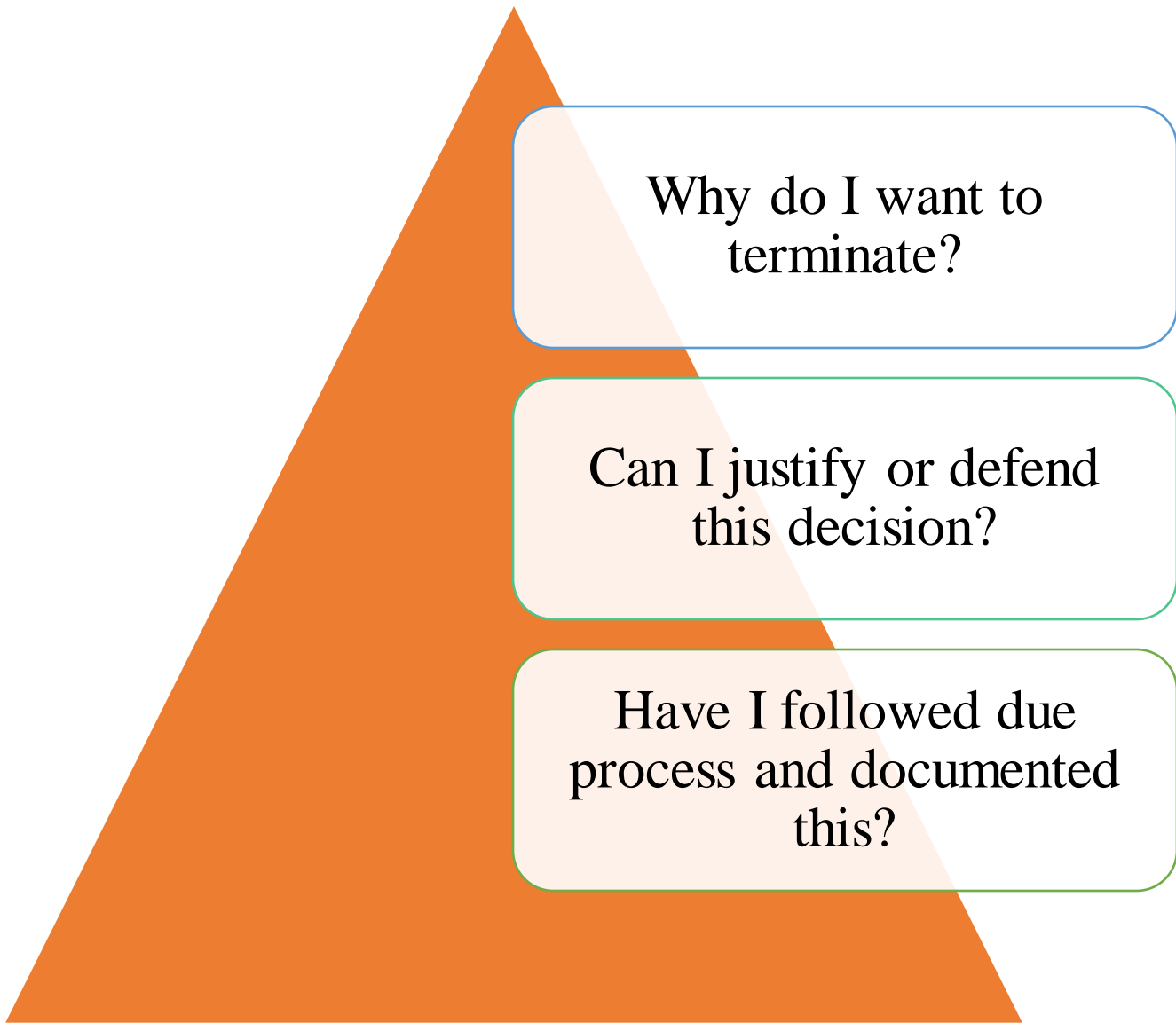
## Cont'd

- A worker whose employment is to be terminated is entitled to a reasonable period of notice or compensation in lieu thereof, unless he is guilty of serious misconduct, that is, misconduct of such a nature that it would be unreasonable to require the employer to continue his employment during the notice period.
- A worker whose employment has been terminated is entitled to-
  - (a) **a severance allowance or other separation benefits, the amount of which shall be based inter alia on length of service and the level of wages,** and paid directly by the employer or by a fund constituted by employers' contributions; or
  - (b) benefits from unemployment insurance or assistance or other forms of social security, such as old-age or invalidity benefits, under the normal conditions to which such benefits are subject; or
  - (c) a combination of such allowance and benefits.

# Termination of Employment – Emerging Issues

- **Constructive Dismissal:** A claim of constructive dismissal may occur in circumstances where the employer unilaterally and without the consent of the employee, changes the terms and conditions of the contract of employment to such a degree that it has a materially adverse effect on the employee, thereby forcing the employee to resign from the employment. **Miss Ebere Ukoji v. Standard Alliance Life Assurance Co. Ltd (2014) 47 NLLR (Pt. 154) 531**
- **Unfair Labour Practices:** The courts are now aggressive in declaring many actions of employers that were previously acceptable as now constituting unfair labor practices. These include prolonged or indefinite suspension, suspension without pay, suspension for whistle blowing, rejection of resignation pending investigation, termination after resignation, termination for rejection of sexual advances, on basis of maternity leave or family responsibilities, etc. In summary, any actions that fetter the right of the worker to freely leave employment or punish the worker for reasons not related to this conduct, performance or operational requirements are likely to constitute unfair labour practices. **Adigwe v FBN Mortgages (Unreported) Suit No. NICN /LA/526/2016; Ejike Maduka v Microsoft Suit no: NICN/LA/492/2012; Mrs. Dayo Buluro v. Nigerian Institute of Public Relations Unreported Suit No. NIC/LA/23/2009.**
- **New Measure of Damages for Termination:** The law has moved away from the One Month Mantra measure of damages. The Courts now adopt the recommendation of the ILO Termination of Employment Convention and Section 19 (d) of the National Industrial Court Act: **Sahara Energy Resources Limited v Mrs. Olawunmi Oyebola Appeal No. CA/L/1091/2016; Olasewere v MTN, Suit No: NICN/LA/90/2014**
- **Possibility of order of reinstatement of workers:** In deserving and appropriate cases, the court may order reinstatement: **Ibrahim Bello v Ecobank Suit No. NICN/ABJ/144/2018**
- **Validity of Post - Termination Restrictions:** Where a contract of employment contains restrictive covenants which prevent a departing employee from either engaging in a similar business with employer or working with another competitor, the validity of such a clause depends on its reasonableness in terms of the level of the worker and the length of the restriction. **See Iroko TV v Micheal Ugwu**
- **Effect of resignation with immediate effect:** Where an employee resigns by giving the appropriate period of notice under his contract of employment, he is entitled to be paid his salaries and accrued benefits during the period of the notice. However, where he resigns with immediate effect, he forfeits his entitlements. **WAEC v. Oshionebo [2006] 12 NWLR (Pt. 994) 258**

# 3 Question Decision Pyramid



Why do I want to terminate?

Can I justify or defend this decision?

Have I followed due process and documented this?

## CHAPTER 4

# THE DYNAMICS OF THE INTERNATIONAL LABOUR ORGANIZATION (ILO) CONVENTIONS AND NIGERIAN EMPLOYMENT DISPUTES

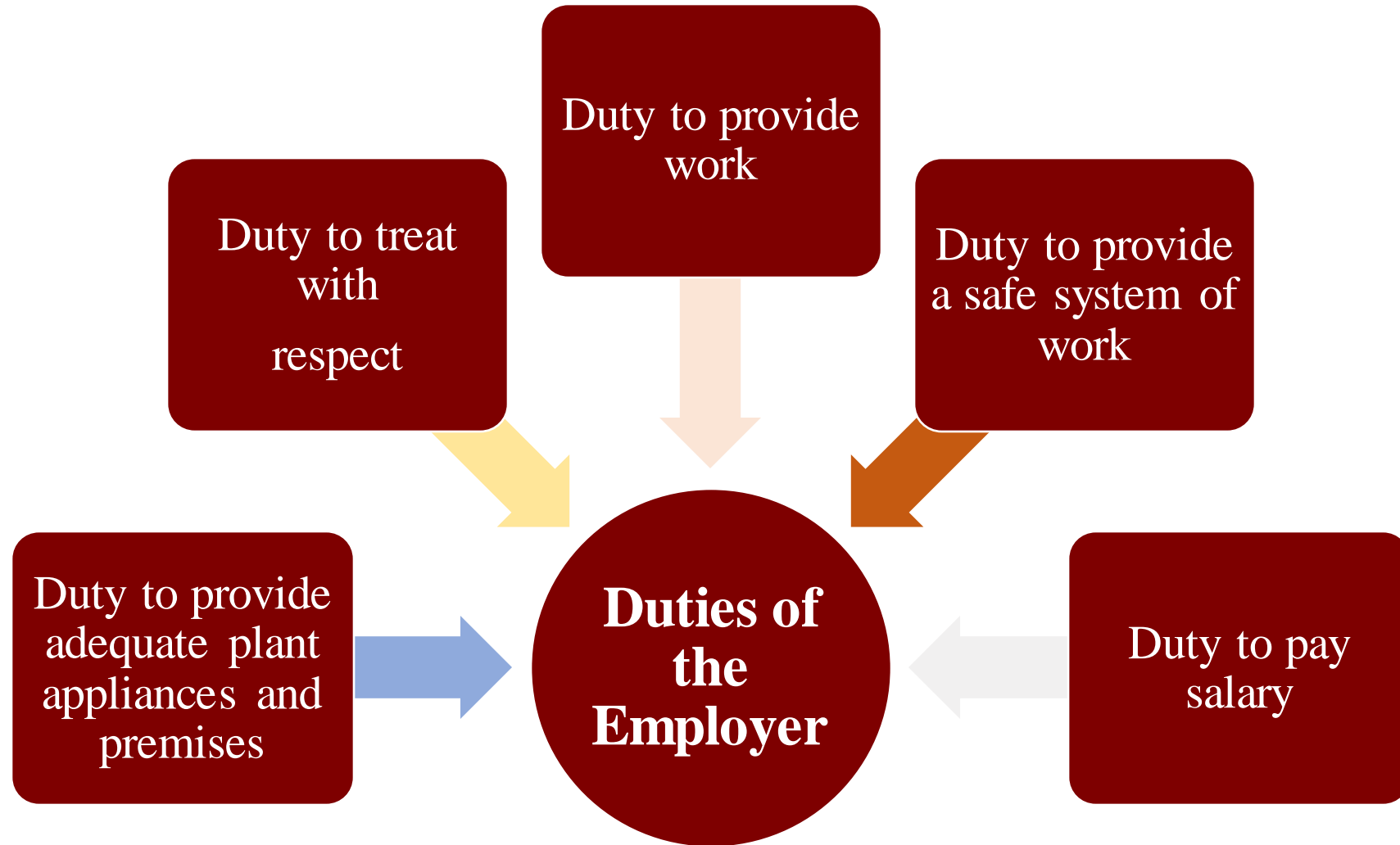
# What is a contract of employment?

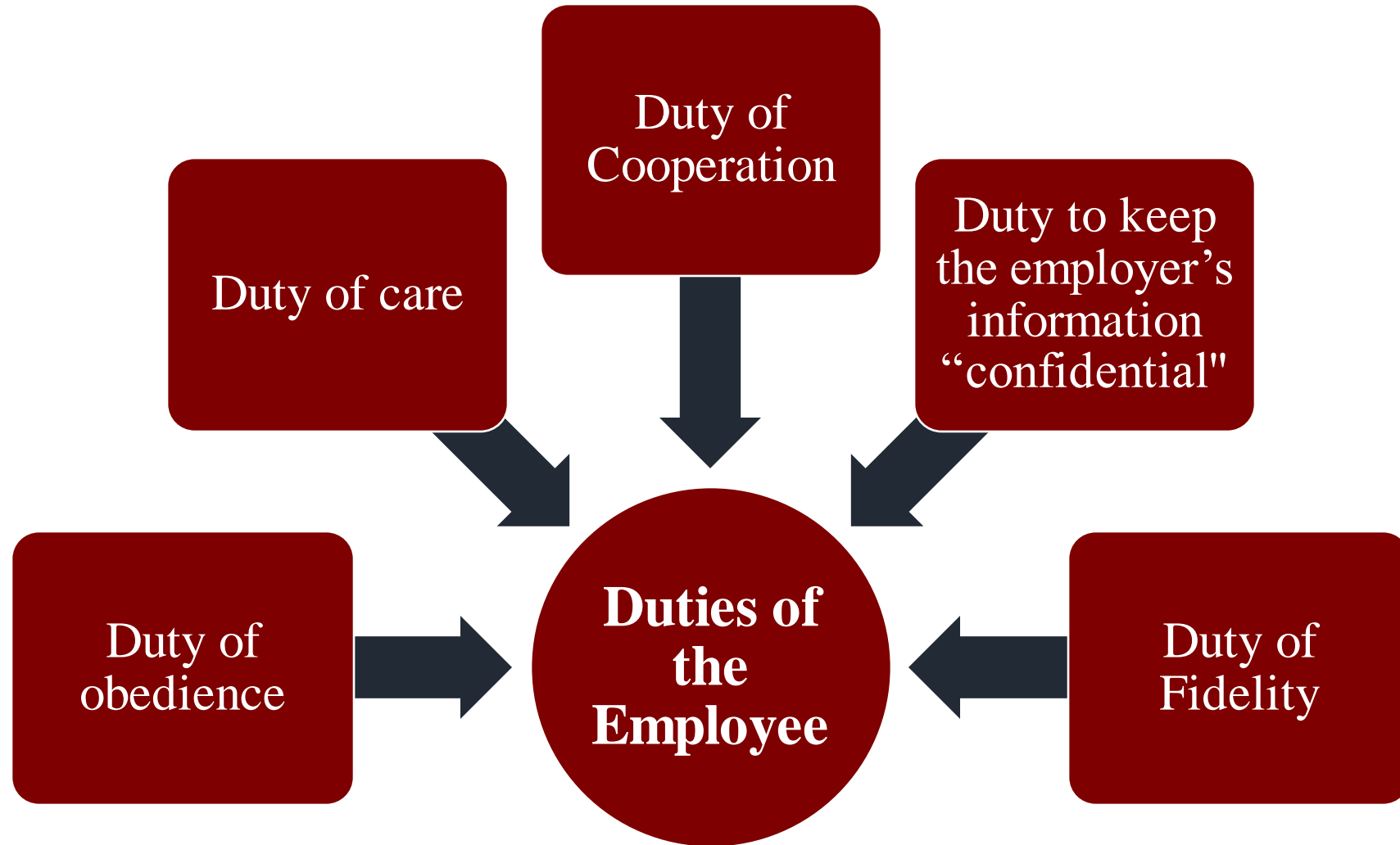
A contract of employment is an agreement between an employer and an employee, for employment that is not coated with statutory flavor, it is the basis of that relationship between an employer and an employee. The contract of employment states the terms of the contractual relationship, benefits, and responsibilities between the employer and employee. Some of such terms may include salary, retirement, benefits, company policies, and termination. **Longe v. F.B.N. PLC (2010) 6 NWLR (Pt.1189)1 S.C.** Amongst the listed terms, one term that has evolved with such significance is the termination clause.

Under a contract of employment both the employer and the employee deserved to be protected, the contract is binding between both parties, and they are both expected to adhere to the terms of the contract.

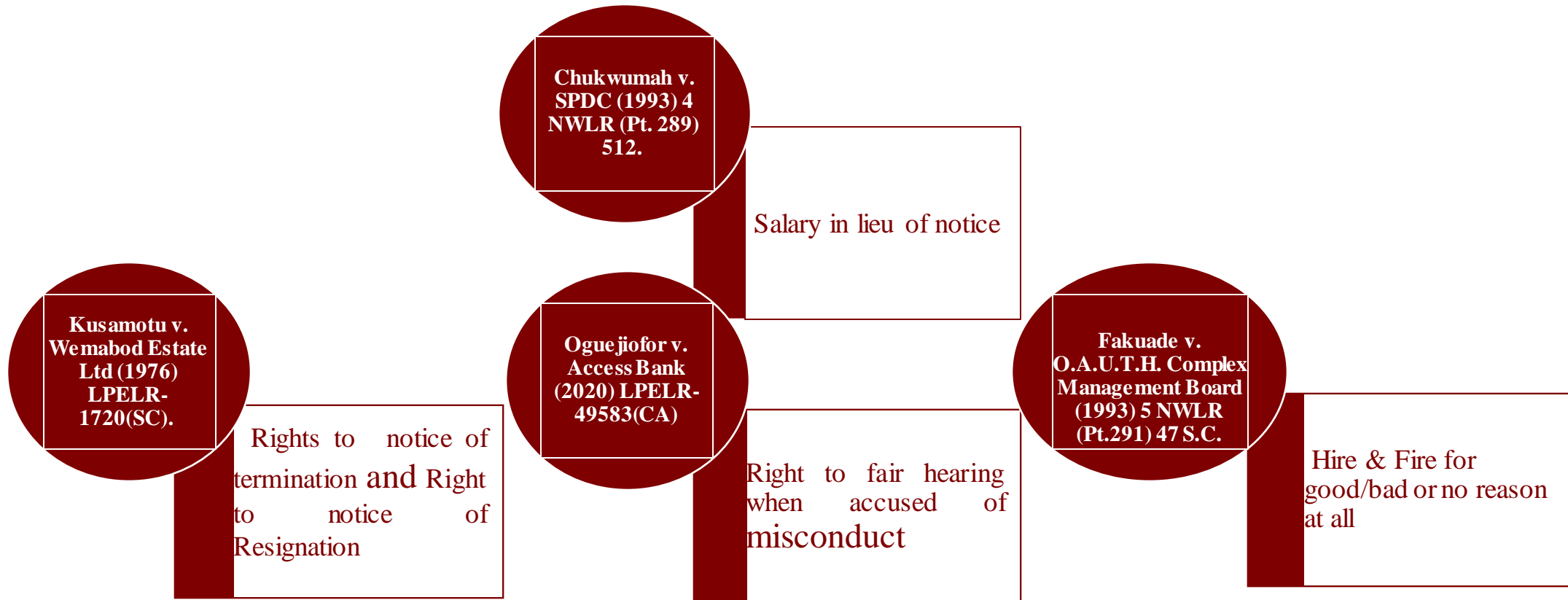








# Rights and Duties as it relates to Termination of Employment



# The ILO - Termination of Employment Convention 1982 (No. 158) and Recommendation 166



International  
Labour  
Organization



Nigeria is a signatory to the ILO and has ratified only 40 Conventions of the ILO.

Has not ratify ILO Convention 158 on termination of employment.

Article 9 of the ILO Constitution

# The ILO - Termination of Employment Convention 1982 (No. 158) and Recommendation 166



Section 12 of the 1999 Constitution -  
**Abacha v. Fawehinmi (2006) 6**  
**NWLR (Pt. 660) 228.SC.**



Section 254 (1) f and Section 254 1 (h) of the 1999 Constitution mandate and constitutionally empowers the National Industrial Court (NIC) to apply or interpret international labour standards and matters relating to or connected with unfair labour practice.



Section 254(c)(2) of the Constitution, and Section 7(6) National Industrial Court Act empower the court to apply International Best Practice.

The NIC rely on the ILO convention 158 on termination of employment.



Article 4 of the Convention provides for termination on the valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment, or service. It is now old fashion for the employer to state that *“your services are no longer required”*.



# Should Convention 158 on Termination of Employment regulate **Private** Contracts of Employment?



Contract is binding  
between parties.

Larmie v. D.P.M.S Ltd  
[2005] 18 NWLR (Pt.  
958) Pg. 438; (2005)  
LPELR-1756

Article 10 of  
the Convention C158-  
Termination of  
Employment  
Convention, 1982 (No.  
158)

International best practice  
should only be referred to  
where the contract of  
employment is silent on  
termination of  
employment. (Not  
repugnant to public  
policy or tainted with  
fraud).

# Who deserves to be protected?



Is there a need for courts to rewrite the contract?

Will it not amount to judicial nullification of contracts when the court orders the reinstatement of an employee in private employment?

Reinstatement is an aberration for employees in private employment.

An order for reinstatement will foist an employee on an unwilling employer. When reinstatement is ordered, it will amount to enslaving the employer who is compelled to retain an employee he does not want to see.

**Ibrahim Bello v Ecobank Suit No. NICN/ABJ/144/2018.**

**Obanye v. Union Bank (2018) LPELP-44702(SC).**

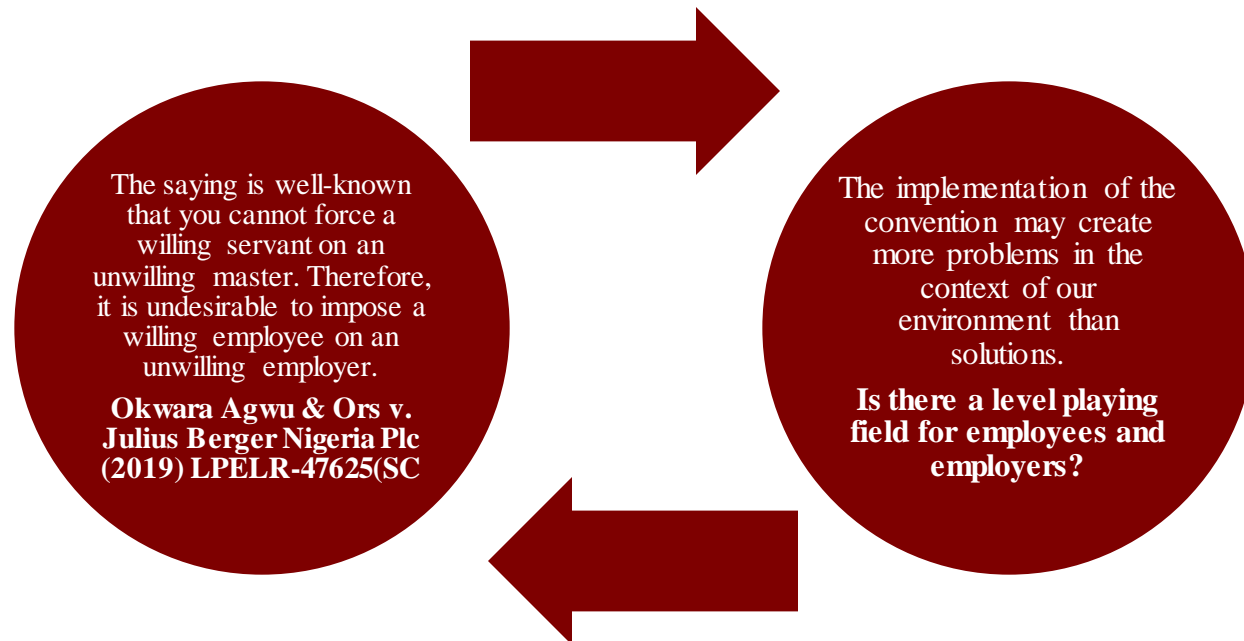
# Who deserves to be protected?



Can this order for specific performance also apply to the employer?  
What is the yardstick or parameter in the Convention to determine what constitutes a valid reason on grounds of operational requirement?  
Can an employer refuse to accept the resignation of an employee?  
Should an employee give justification for resignation?



# Conclusion



# Streamsowers & Köhn

Barristers, Solicitors & Arbitrators

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