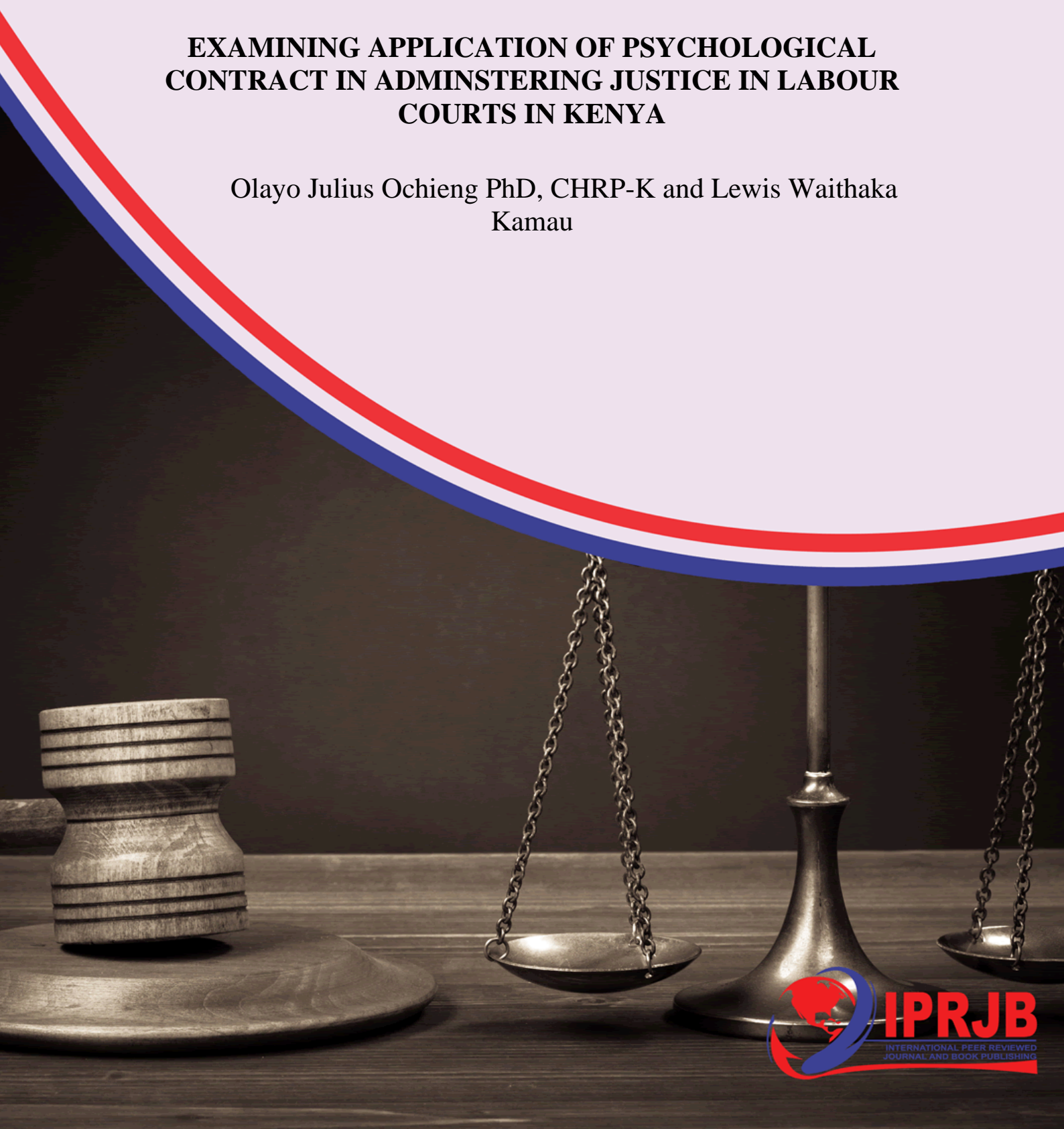


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EXAMINING APPLICATION OF PSYCHOLOGICAL CONTRACT IN ADMINISTERING JUSTICE IN LABOUR COURTS IN KENYA

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Abstract

Purpose: The main objective of this study was to establish whether psychological contract can be applied by the courts in case of unfair termination of employment.

Methodology: The study used exploratory research design to establish whether psychological contract can be applied by the courts in case of unfair termination of employment. The study analyzed psychological contract theory from a legal perspective and how human resource practitioners, advocates and judges can incorporate it in court cases. The study used exploratory research since it intends merely to explore the research questions and does not intend to offer final and conclusive solutions to existing problems. This is because the concept has not been clearly defined yet. However, the study helps us to have a better understanding of the problem. The study relied on decided court cases, journal articles and publications and books.

Results: The study found that psychological contract breaches occur when an employee perceives that an organization has failed to meet its obligation to the employee. When the breach occurs it affects the employee contribution in three forms; performance, civic virtue and intention to remain in the organization. The legal employment contract does not embrace the principles of contract law such as consideration.

Unique contribution to theory, practice and policy: The legal employment contract does not embrace the principles of contract law such as consideration. The employee does not dictate the terms of the contract. Therefore, there is need to consider psychological contract theory as an input to understanding contemporary labour practices. This is because psychological contract brings in a unique way of interpreting an employment contract, understanding employment relationship and the need for policy reforms.

Key Words: *Psychological contract, Employment, Laws, Relationship*

INTRODUCTION

Since the Declaration of Philadelphia in 1944, the international community was brought to attention that labour is not a commodity and therefore cannot be traded and negotiated as a commodity.¹ Labour in essence touches to the core aspects of our daily lives.² It is in this regard that a worker should be treated in a dignified manner. Contractual arrangement in an employment relationship seeks to strengthen this purpose. However, psychological contract concept developed by behaviorist scientist aim to change the silent perceptions in the employment relationship.

Psychological contract refers to mutual unwritten expectations that exist between an employee and the employer regarding policies and practices in the organization.³ The first person to mention the concept was Argyris. He pointed that psychological contract is the relationship between employer and employee.⁴

Levinson is recognized as the father of the theory. He defined it as;

*“Unwritten contract, the sum of the mutual expectations between the organization and employees”.*⁵

Later years saw Rousseau, an organization behavior scientist, arguing that psychological contracts are mental models or schemas that develop through an individual’s interactions and experiences. The definition given by Rousseau highlights employees’ perception of the existence of mutual obligations deposited with the employer.⁶

According to Rousseau and Greller the ideal contract in employment would detail expectations of both employee and employer.⁷ Typical employment contracts, however, are incomplete due to bounded rationality which limits individual information seeking. Both employee and employer are left to fill up the blanks thus the parties develop a psychological contract in their minds.

Guest argues that psychological contract is concerned with the perceptions of both parties to the employment relationship, organization and individual, of the reciprocal promises and obligations implied in that relationship.⁸ A psychological contract is a system of beliefs that encompasses the actions employees believe are expected of them and what response they

¹Olayo Julius Ochieng and Lewis Kinyua Waithaka, ‘Evolution of Labour Law in Kenya: Historical and Emerging Issues’ (2019) 4 International Journal of Law and Policy 1.

²ibid.

³D Rousseau and others, *Psychological Contracts in Employment: Cross-National Perspectives* (SAGE Publications 2000).

⁴Chris Argyris, *Understanding Organisational Behaviour*. (Homewood, Illinois: Dorsey Press 1960).

⁵Harold Andrew Patrick, ‘Psychological Contract and Employment Relationship’ 7.

⁶Denise M Rousseau, Guillermo E Dabos and Denise M Rousseau, ‘Mutuality and Reciprocity in the Psychological Contracts of Employees and Employers of Employees and Employers’.

⁷Denise M Rousseau, *Psychological Contracts in Organizations: Understanding Written and Unwritten Agreements*. (Sage Publication 1995).

⁸David E Guest, *HRM and the Worker: Towards a New Psychological Contract?* (Peter Boxall, John Purcell and Patrick M Wright eds, Oxford University Press 2007).

expect in return from their employer and reciprocally, the actions employers believe are expected of them and what response they expect in return from their employees.

Therefore psychological contract reinforces the employment relationship. There is a general understanding that the concept has taken the path of unwritten and unarticulated employment relationship expectations.⁹ Employees' expectations include to be treated in a dignified manner, rewarded equitably, given opportunities for personal growth and development and to be given feedback, especially positive ones on their performance.¹⁰ On the other hand employers expectation is see the employees committed to the success of the organization and adhering to the core values of the company such as loyalty.¹¹

These expectations between the two parties' remains unwritten and thus lacks the classical features of what is referred to as a formal employment contract.¹² Due to lack of this feature, psychological contract is prone to violation by either party. This breach may be as a result of the parties misunderstanding on the expectations, leading to poor performance and even termination of the employment. Mutual misunderstandings can cause friction and stress and lead to recriminations and poor performance, or to a termination of the employment relationship.¹³

As a result of this, researchers have identified that psychological contract theory may be in a good position to answer and provide solutions that would preserve the employment relationship. Employees will be able to understand what is expected of them and employers will also be able to understand the expectations of their employees. Armstrong points out that the aspects of the employment relationship covered by the psychological contract will include, from the employees' point of view: how they are treated in terms of fairness, equity and consistency; security of employment; scope to demonstrate competence; career expectations and the opportunity to develop skills; involvement and influence and trust in the management of the organization to keep their promises.¹⁴ The employer's understanding of psychological contract covers such aspects of the employment relationship as competence, effort, compliance, commitment and loyalty.

Recent studies show that the nature of the psychological contract is changing in many organizations in response to changes in their external and internal environments.¹⁵ These changes include globalization of the world economy and technological advancement which has been a boom in many ways, but have not been without a price.¹⁶ This has driven companies to downsize and opted to do more with less.¹⁷ This kind of changes have made

⁹Michael Armstrong, *Handbook of Personnel Management Practice*. (Kogan Page, London 2010).

¹⁰ibid.

¹¹ibid.

¹²David E Guest and Conway N, *Fairness at Work and the Psychological Contract*. (IPD, London).

¹³Armstrong (n 9).

¹⁴ibid.

¹⁵ibid.

¹⁶Aoife M McDermott and others, 'Promoting Effective Psychological Contracts Through Leadership: The Missing Link Between HR Strategy and Performance. *Human Resource Management*.' (2013) 52 289.

¹⁷ibid.

employees question the need to be loyal and committed when the organization may get rid of them anytime. The modern understanding of psychological contract reflects employee expectation that they will be given opportunities to grow and develop professionally. The employer on the other hand expects that loyalty and commitment so that they can guarantee the employee opportunity to advance their career. These rapid changes and development in employment relationship have increased instances of misunderstanding and thus causing breach of employment contract.¹⁸

The legal perspective of Psychological contract.

A contract is a promise that the legal system recognizes while psychological contract is the promise that the parties themselves recognize.¹⁹ Denise Rousseau, a professor and researcher of organizational behavior, first argued for the existence of psychological contracts distinct from written, enforceable contracts in the employment context;

*“The term psychological contract refers to an individual’s beliefs regarding the terms and conditions of a reciprocal exchange agreement between that focal person and another party. Key issues here include the belief that a promise has been made and a consideration offered in exchange for it, binding the parties to some set of reciprocal obligations”.*²⁰

Socially the term “contract” is a promise.²¹ The promise relates to the parties moral obligation to fulfil the terms of the contract.²² However, the concept of promise is different from the concept of “agreement” or exchange of “promises” which prostrates a negotiation whereby parties assume a responsibility to keep or else institute a remedy.

In law, a contract as a promise is a classical school of thought while a contract as an agreement is a reliance school of thought.²³ Therefore in regards to promise there is a moral obligation to keep but in case of agreement (exchange of promises) one has legal responsibility to perform.

Under the classical school of thought, a contract is unilateral and doctrine of consideration is given very little regard.²⁴ A contract as a promise from American standpoint is “unilateral” in

¹⁸Tekleab Amanuel G, Orvis A Karin and Taylor M Susan, ‘Deleterious Consequences of Change in Newcomers’ Employer-Based Psychological Contract Obligations.’ 361.

¹⁹Larry Dimatteo, Robert C Bird and Jason A Colquitt, ‘Justice , Employment , and the Psychological Contract’.

²⁰Rousseau, *Psychological Contracts in Organizations : Understanding Written and Unwritten Agreements.* (n 7).

²¹Robert Samek, ‘Performative Utterances and the Concept of Contract.’ (2015) 43 Australasian Journal of Philosophy. 196.

²²Francis Ndirangu Njenga, ‘Psychological Contracting Process Model: Towards A Unifying Theory Of Psychological Contract’ (2017) 5 5849.

²³Joseph Raz, ‘Promises in Morality and Law’ (1982) 95 Harvard Law Review 916 <<http://www.jstor.org/stable/1340782>>.

²⁴Peter Jaffey, ‘A New Version of the Reliance Theory. A Version of This Paper Was Presented at the SPTL Conference in September 1997.’

nature.²⁵ This school enables us to understand the view the supporters of Rousseau that psychological contract is a one sided concept.

In case of the reliance school, a contract is a bilateral relationship and the consideration or bargain or negotiation is its basic fabric.²⁶ In both schools of thought, the concept of “promise” is the exemplar unit of a contract. However, this does not reduce an agreement to the concept of promise since both arouse different expectations.²⁷ Indeed, whereas breach of agreement invokes remedy, breach of promise invokes validation of affection. Particularly compromising trust and loyalty, commitment and cooperative ethics.²⁸

Breach of Psychological Contract

A breach or violation of the contract occurs when an employee perceives that the organization does not deliver on its obligations.²⁹ Morrison and Robinson define a breach as an affective and emotional experience of disappointment, frustration, anger and resentment that may emanate from an employee’s interpretation of the circumstances surrounding a perceived contravention of the contract.³⁰ It is a calculative assessment of the employment relationship, whereby employees conclude that the organization did not meet their expectations.³¹ The perception of noncompliance or non-reciprocation by the other party is of crucial importance as it may adversely affect employees’ exhibition of pro-social behavior to co-workers.³² The principle of reciprocity states that fulfillment of employee obligations is conditional on the organization fulfilling what employees perceive the organization to owe them.³³ The employees’ perception that the organization has failed to fulfill its obligation is thought to lead to feelings of anger, betrayal, and resentment, which in turn, lead to decreased employee motivation, dissatisfaction, loss of loyalty, and exit from the organization.³⁴

Research Problem

The breach of psychological contracts is also known to have material effects on the relationship between the employer and employee.³⁵ As the relationship is based on the

²⁵Njenga (n 22).

²⁶ibid.

²⁷ibid.

²⁸ibid.

²⁹Elizabeth Wolfe Morrison and Sandra L Robinson, ‘When Employees Feel Betrayed: A Model of How Psychological Contract Violation Develops.’ (1997) 22 *The Academy of Management Review*. 226.

³⁰ibid.

³¹Jerry Hallier and Philip James, ‘Management Enforced Job Change and Employees Perceptions of the Psychological Contract.’ (1997) 19 *Employee Relations* 222.

³²ibid.

³³Peter Herriot, WEG Manning and M Kidd, ‘The Content of the Psychological Contract’ (2007) 8 *British Academy of Management* 151.

³⁴William H Turnley and Daniel C Feldman, ‘Re-Examining the Effects of Psychological Contract Violations : Unmet Expectations and Job Dissatisfaction as Mediators’ (2000) 42 *Journal of Organizational Behaviour* 25.

³⁵ibid.

principle of reciprocity, when an employee experiences a breach of the psychological contract, employees may withhold their contributions to the organization, and in some instances leave the organization.³⁶ According to Rousseau breaches of transactional psychological contracts lead to an exit from the organization, while breaches of relational psychological contracts can lead to a variety of reactions ranging from the withdrawal of commitment, reverting to economic (or transactional) contract, turnover, or further actions to diminish the employment relationship.³⁷ Thus, the main objective of this study is to establish whether psychological contract can be applied by the courts in case of unfair termination of employment.

Specific objectives

- a) To investigate whether psychological contract influences court decision in unfair termination of employment. And if so,
- b) To analyze how psychological contract influences court decision in unfair termination of employment.
- c) To identify whether there is a relationship between unfair termination and breach of psychological contract in an employment relationship in Kenya.
- d) To forecast the effect of psychological contract on unfair termination laws in Kenya

Methodology.

The study used exploratory research design to establish whether psychological contract can be applied by the courts in case of unfair termination of employment. The study analyzed psychological contract theory from a legal perspective and how human resource practitioners, advocates and judges can incorporate it in court cases. The study used exploratory research since it intends merely to explore the research questions and does not intend to offer final and conclusive solutions to existing problems. This is because the concept has not been clearly defined yet. However, the study helps us to have a better understanding of the problem. The study highly relied on decided common law cases, journal articles and publications and books.

The Legal view of Psychological Contract and Implied Contract Terms.

As mentioned earlier a contract from a social point of view is a promise.³⁸ And according to supporters of the classical school, breaking a promise is morally wrong. The reliance school believe that a contract is an agreement whose main feature is bargain. However, both schools recognize the importance of the element of promise.

The modern employment relationship is characterized by a contract.³⁹ In Kenya the contract can either be written or oral,⁴⁰ and the terms either express or implied. The Employment Act

³⁶ibid.

³⁷Denise M Rousseau, 'Psychological and Implied Contracts in Organizations' (1989) 2.

³⁸Samek (n 21).

³⁹Employment Act No. 11 of 2007. (n 3) part III.

⁴⁰ibid s.8.

identifies the terms that must be expressly provided for in any contract of service, and further limits the time in which the terms must be met from the begin of the contract to two months.⁴¹ The particulars include; name, age, permanent address and sex of the employee; name of the employer; job description of the employment; date of commencement of the employment; form and duration of the contract; place of work; hours of work; remuneration, scale or rate of remuneration, the method of calculating that remuneration and details of any other benefits; intervals at which remuneration is paid; and date on which the employee's period of continuous employment began, taking into account any employment with a previous employer which counts towards that period; and any other prescribed matter.⁴²

These details generally cover what is morally right.⁴³ However, express terms sometimes miss important details of an employees.⁴⁴ The effect of this is that an employer may find himself not covering a key aspect of the contract or even assist the employee.⁴⁵ Another problem is that it violates the freedom of contract which dictates that parties to contract have the right to choose the terms of the contract.⁴⁶

Such problems necessitated the need for implied terms of a contract. These terms are usually determined by a court of law. In *United Bank Ltd v Akhtar*, the employee of the Bank was given a six-day notice to transfer from Leeds to Birmingham. He was not facilitated to that effect. He sued successfully.⁴⁷ The Employment Appeal Tribunal said that implied terms are necessary. It also recognized that it was crucial especially where literal interpretation of the terms would result in damaging the trust and confidence between an employer and employee. The implied terms create duties on both the employee and employer e.g. duty to cooperate, to turn up for work, to be honest, to obey and to account. It is from these duties that psychological contract is derived. The duties develop unspoken perceptions, attitudes that each party should take note of.

There is a difference between psychological contract and legal contract of employment.⁴⁸ The later portrays a limited and uncertain representation of an employment relationship. This is based on the fact that employees contribute little to the terms and conditions of the contract. Thus the only time when the nature and content of the contact can be known, is when it is subjected to a test in an employment court.

Due to the evolution of the Labour laws, psychological contract has been agreed to be an effective way to regulate the employment relationship. Since bargaining power in an employment contract is biased, then an evaluation on how best psychological contract can be

⁴¹ibid s.10(1).

⁴²ibid s.10(2).

⁴³Hogeschool Utrecht, 'The Relationship Between Fulfilment of the Psychological Contract and Resistance to Change During Organizational Transformations.'

⁴⁴ibid.

⁴⁵ibid.

⁴⁶ibid.

⁴⁷*United Bank v Akhtar (1989) IRLR 507, EAT.*

⁴⁸Denise M Rousseau, 'Psychological Contract Inventory, Revised Version: Technical Report, Pittsburgh, PA: Carnegie Mellon University, Heinz School of Industrial Administration.'

incorporated into drafting our labour laws and policies will cure the uncertainty and limitedness of the legal employment contract.

Breach of psychological contract.

As much as Rousseau has argued that much time has been given on the violation of the psychological contract and that it's high time we put more research on how to fulfil the expectations, it is worth noting that we must first ensure that our laws and policies first reflect the theory. This is because psychological contract theory has become an important way of understanding the modern employment relations. The theory has provided ways of monitoring the employment relationship in a globalized economy that is guided by human rights principles such as human dignity, non-discrimination, fairness among others.

This being the case, the best way to understand psychological contract and its impact is by looking at the duties imposed on the employer towards the employee. The reason being that an employee has little say on the terms of a legal employment contract. The law has only set the minimum standards of the contract terms to be drafted by the employer. Much of the terms do not reflect the true picture of the relationship.

Various duties that as espoused in our laws are imposed on the employer e.g. Duty to; pay wages, indemnify employees, maintain their trust and confidence, take reasonable care for employee welfare, have a grievance structure, provide a suitable working environment and support the employee.

The constitution provides that every person has a right to fair labour practices that include fair remuneration and reasonable working conditions.⁴⁹ Remuneration means the total value of all payments in money or in kind, made or owing to an employee arising from the employment of that employee.⁵⁰ The act further provides that an employer has a duty to pay the whole amount owed to the employee.⁵¹ The Commonwealth Court of Conciliation and Arbitration in *Harvester case [Ex parte H.V McKay]* stated that the remuneration must be able to meet the normal needs of an average employee regarded as a human being in a civilized society.⁵² It further stated that that it must be able to support the employee in a rational and frugal comfort.

In Kenya, the Justice Radido Stephen Okiyo in *Isabel Wayua Musau v Copy Cat Limited* stated that an implied term to increase or review the salary of an employee could be incorporated into a contract of employment where such a practice/custom had been established either through annual salary increments/review or through staff policies or manuals and where an employer acts capriciously or arbitrarily, the Court could intervene to enforce the practice, custom or management practice.⁵³ In the case Isabel Wayua Musau (the Claimant) was employed by Copy Cat Ltd (the Respondent) sometime in 1990 as a Personnel Officer. She served the Respondent diligently and rose to the rank of Human Resources Manager before her retirement. It was the Claimant's case that in the course of her contract of

⁴⁹Constitution of Kenya 2010. National Council for Law Reporting (Nairobi, Kenya) Article 41 (1)(2)(a)(b).

⁵⁰**Employment Act No. 11 of 2007. (n 3) s.2.**

⁵¹ibid.

⁵²*Ex parte HV McKay (Harvester Case), (1907) 2 CAR 1.*

⁵³*Isabel Wayua Musau v Copy Cat Limited [2013] eKLR.*

service, she received several salary increments except for 2010, when the contract of service came to an end. And that in the course of 2008/2010 a salary harmonization was carried out after which several of her colleagues got a salary raise but not her. The court in its holding also stated that it is trite that terms can be implied into the employment relationship either through statute and examples include sections 47 and 48 of the Labour Institutions Act on minimum wages and conditions of employment, section 41 of the Employment Act on notification and hearing before termination of employment and the Employment (Medical Treatment) Rules, 1977 or terms can be implied through the common law for example on whether a management policy has become part of the contract as was held in *Taylor v Secretary of State for Scotland*⁵⁴ by the House of Lords that ‘the policy must be construed in a way which is consistent with their being still part of the contract.’ The court further noted the existence of several cases which suggest that failure to increase the salary of an employee in circumstances where it can be shown that the employee was treated unfairly in a way which lacks any rational or objective basis may amount to a repudiation of the contract. This is so because it destroys the obligation of trust and confidence between the parties. The court cited this position with authority in the case of *Pepper & Hope Ltd v Daish*.⁵⁵

When remuneration is observed through the lenses of Psychological contract, it can be seen that transactional contract does not guarantee job security. The employee view is that the relationship is temporary and is based on the returns derived from the employer. The modern economy is changing very fast thus replacing employees with technology. New policies thus need to structure ways in which firms can retain best employees. This can be achieved through the relational contract. Psychological contract hence safeguards the employment relationship by enabling the employers to remunerate in a fair and reasonable manner. Violation of fair remuneration then reflects a violation of basic human right principle of respect. As a general principle, there is no implied term in the contract of employment to the effect that an employee should receive annual salary increases.⁵⁶ However, it does appear that there is an implied term to the effect that employers should not treat an employee arbitrarily, capriciously or inequitably where pay is concerned.⁵⁷

Hard economic times may result in employees finding that the employer has not assigned them duties. However, they are entitled to payment as agreed in the contract. But there are certain jobs especially those that entail maintaining a public image, are exception to the duty to assign work. In *Clayton & Waller v Oliver*, an actor was removed from playing a leading role in a music production.⁵⁸ The actor was then given a substantially inferior role. The court held that the actor was entitled to damages due to the fact that the employer lowered the employee reputation. This can be viewed as a breach of psychological contract. The employer had a duty to honor the unspoken expectation of the actor.

⁵⁴*Taylor v Secretary of State for Scotland* (2000) IRLR 502.

⁵⁵*Pepper & Hope Ltd v Daish* (1980) IRLR 13.

⁵⁶G Anderson, D Brodie and J Riley, *The Common Law Employment Relationship: A Comparative Study* (Edward Elgar Publishing Limited 2017).

⁵⁷*ibid.*

⁵⁸*Herbert Clayton and Jack Waller Ltd v Oliver: HL 1930.*

In *Malik v Bank of Credit and Commerce International (BCCI); Mahmud v Bank of Credit and Commerce International*, the employees claimed damages, saying that the way in which their employer had behaved during their employment had led to continuing losses, ‘stigma damages’ after the termination.⁵⁹ The House of Lords held that it is an implied term of any contract of employment that the employer shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. An employer might be liable in damages to an employee stigmatized by association with employers’ improper methods of conducting business, even though he had only learned of the misdeeds after the termination. Addis was not concerned with direct economic losses, but rather with injury to feelings, and was decided before the modern idea of trust and confidence was developed.

In the case, Lord Steyn said that the employer shall not:

‘Without reasonable and proper cause, conduct itself in a manner . . . likely to destroy or serious damage the relationship of confidence and trust between employer and employee.’

Lord Nicholls said:

“The [employer’s] conduct must, of course, impinge on the relationship in the sense that, looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer”.

Thus, Mutual trust and confidence forms the base for any employment relationship.⁶⁰ It is important since it bridges the gap left by the legal contract and labour laws. It protects the employee from conducts by the employer that aim at undermining the employee and the employment relationship in general. Several common law cases have captured this principle of mutual trust and confidence.

Nevertheless, courts in Kenya have in several instances stated that the principles in Malik case are not applicable to our local situation. In *Mary Wakwabubi Wafula v British Airways PLC* Justice Waki in finding that there was no actionable “trust and Confidence” implied term of the contract stated that the Kenya **Employment, Act** which was enacted in 1976 to “*consolidate, with amendment, the law relating to employment and for matters incidental thereto and connected therewith*”, did not find it necessary then, nor has Parliament since then found it necessary, to address the ravages of the common law principles in the Addis Case.⁶¹ Further, the Judge said that the common law development in Britain had grown in tandem with its Statute. He even agreed with Justice Kiage that the Court decisions flowing from that jurisdiction are colored by their peculiar environment and are not applicable in our local circumstances.

⁵⁹*Malik v Bank of Credit and Commerce International (BCCI); Mahmud v Bank of Credit and Commerce International: HL 12 Jun 1997.*

⁶⁰Brodie D, ‘The Heart of the Matter: Mutual Trust and Confidence.’ (1996) 25 Industrial Law Journal 121.

⁶¹*Mary Wakwabubi Wafula v British Airways PLC [2006] eKLR.*

In *Robinson v Crampton Parkinson*, Justice Kilner Brown said that in an employment contract and employment condition, mutual trust and confidence must be there.⁶² Thus when an employer behaves to the contrary then it amounts to breach of contract.

In *Post Office v Roberts* a senior official of the corporation wrote a report about an employee that she was unfit for promotion.⁶³ The report was found to have been written without consideration of her records. This made her to be denied transfer. The Employment Appeal held that she was dismissed unfairly. This position was clarified in the case of *Woods v W/M Car services*, where the court said that in any employment contract there is an implied term that an employer will not behave in a way that is likely to damage the employment relationship.⁶⁴ Generally, the employee expects the employer will positively recognize their effort and allow them opportunity to grow in their career through promotion.

Another case that established the importance of trust and confidence was in the case of *TSB Bank v Harris*.⁶⁵ Here the bank had given reference to a prospective employer that complaint against Harris. She was unaware of the reference and the bank had not given her a chance. The bank held that despite the bank having a regulation allowing them to disclose, it had breached the principle by not according her a chance to make her case.

These cases illustrate that within the implied terms the courts are taking into account the elements of psychological contract. Implied terms are based on mutual obligations that are inferred in a contract. The court here applies an objective test to determining any violation. On the other hand, psychological contract based on unspoken and unwritten obligation perceived in a relationship. The test to determine breach of such a contract is subjective. The court puts itself in the shoe of the employee, and determines the expectations of the employee. An employment contract is different from other business contracts. As said earlier the bargaining power of one party is weak in a legal employment contract unlike other contracts. Lack of equal bargaining power demands from a reasonable man's point of views that, when a breach occurs the remedies should take into consideration the unspoken expectations that the aggrieved party perceived.

Discussion and Conclusion

Psychological contract breaches occurs when an employee perceives that an organization has failed to meet its obligation to the employee.⁶⁶ When the breach occurs it affects the

⁶²*Robinson v Crampton Parkinson [1978] ICR 401 EAT.*

⁶³*Post Office v Roberts [1980] ICR 347 EAT.*

⁶⁴*Woods v W/M Car Services [1981] ICR 666 EAT.*

⁶⁵*TSB Bank v Harris [2000] IRL 157.*

⁶⁶Neil Conway and Rob B Briner, *Understanding Psychological Contracts at Work: A Critical Evaluation of Theory and Research.* (Oxford University Press 2005).

employee contribution in three forms; performance, civic virtue and intention to remain in the organization.⁶⁷

Conway et al have argued that psychological contract is a legal metaphor.⁶⁸ He cites Cheshire on contract law where he identifies that the most important concept in a contract is its outward appearance.⁶⁹ Psychological contract is based on the eyes of the beholder and thus undermines the main concept of a contract.⁷⁰ However, a closer look at employment contract does not embrace the principles of contract law such as consideration. The employee does not dictate the terms of the contract.

With globalization,⁷¹ technological advancement and the development of labor relations from a human rights angle, there is need to consider psychological contract theory as an input to understanding contemporary labour practices. This is because psychological contract brings in a new way of interpreting an employment contract, understanding employment relationship and also a way of enacting our policies.⁷²

The constitution sets the guiding principle in labour as “fair labour practice”.⁷³ Since psychological contract focuses on people and not technology,⁷⁴ the only way to be fair in organizations is to incorporate the doctrine when framing the regulations. The doctrine provides a framework for addressing management issues on performance and commitment by enabling the management understand the relationship between the people and organization.⁷⁵

Labour has now taken a human rights dimension. It recognizes that humans are the bottom-line drivers of sustainable development, business growth and hence their capabilities and needs should be fully integrated in the business.⁷⁶ The state in ensuring fair labour practices should be informed by the elements of psychological contract. When the state ensures organizations take regard of employee behavior, attitudes, and expectation, they ensure that the weaker party in an employment contract (an employer) is treated in a dignified manner.

Thus when a breach occurs, the courts should therefore award primary damages. This as earlier mentioned is because labour is about human relations, and an employee in an employment contract is always in a poor bargaining power.

⁶⁷Archana Tyagi and others, ‘Emerging Employment Relationships : Issues & Concerns in Psychological Contract Published by : Shri Ram Centre for Industrial Relations and Human Resources Linked References Are Available on JSTOR for This Article : Emerging Employment Relationships : Iss’ (2019) 45 381.

⁶⁸David E Guest, ‘Is the Psychological Contract Worth Taking Seriously ? Linked References Are Available on JSTOR for This Article : Is the Psychological Contract Worth Taking Seriously ?’ (2019) 19 649.

⁶⁹ibid.

⁷⁰ibid.

⁷¹Tyagi and others (n 67).

⁷²ibid.

⁷³Constitution of Kenya 2010. National Council for Law Reporting (n 111) Article 41.

⁷⁴Tyagi and others (n 67).

⁷⁵ibid.

⁷⁶ibid.

Recommendation

The legal employment contract does not embrace the principles of contract law such as consideration. The employee does not dictate the terms of the contract. Therefore, there is need to consider psychological contract theory as an input to understanding contemporary labour practices. This is because psychological contract brings in a unique way of interpreting an employment contract, understanding employment relationship and the need for policy reforms.

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