

26 June 2024

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TEMPLARS ThoughtLab

Protecting Employees with Mental Health Conditions in Nigeria: The Mental Health Act, 2023 in Focus

Introduction

The subject of mental health and stability of an employee in a work environment is a nagging issue that frequently calls for consideration. Thus, examining the extent to which Nigerian law protects or permits the right of employees with mental health conditions in the work sphere is an inevitable discourse. Accordingly, this article seeks to address the emerging legal concerns associated with the potential risks arising from the termination of employment of employees with mental health conditions, following the enactment of the Mental Health Act, 2023 (the "Act").

Prior to 2023, the Lunacy Act¹, which has been in existence for over a century, was the overarching legislation on mental health matters. However, following its enactment in 2023, the Act repealed the Lunacy Act. The Act defines what constitute mental health conditions as impairments, activity limitations and individual and participatory restrictions arising from diagnosable mental disorders which involve significant changes in thinking, emotion or behaviour and causes distress or problems in the interaction between the individual and his environment and includes intellectual, psychosocial or cognitive disabilities. The Act also defines "Mental ill-health" to mean mental or psychiatric disorder characterized by the existence of recognizable changes in the thoughts, feelings and general behaviour of an individual brought about by neurobiological or psychosocial factors causing psychological, intellectual or social dysfunction and thus the Act seeks to protect persons with mental health conditions/ disabilities in Nigeria.

The protection provided by the Act to persons with mental health conditions/ disabilities, equally extends to employment relations and as such, employers of labor are required to apply caution in exercising their unilateral rights of termination of the employment of an employee with mental health conditions/ disabilities. This is of crucial consideration because the provisions of the Act introduce potential liability concerns for employers, where they choose to unilaterally terminate an employee's contract of employment based on issues surrounding their mental health.

In the subsequent paragraphs, we discuss the nature of the protection provided by the law to employees with mental health issues and the key legal considerations that employers should be mindful of.

¹ CAP 524, Law of Nigeria 1964.

Applicable Jurisprudence - The rights of Mentally ill employees prior to the enactment of the Act

Employment relations are intrinsically voluntary and generally, parties are bound by the contract they have freely entered, and it is the duty of the court to respect that agreement and enforce it.² The jurisprudence, supported by a rote number of cases, is that both parties must consent, and mutually agree on applicable terms that would govern the employment relations. Consequently, the requirements for termination, resignation or dismissal are ordinarily spelt out in the terms and conditions of the contract³ and either party would be liable for any breach thereof.⁴ This general principle of law is however subject to the caveat that the courts will usually, not allow the imposition of servile conditions on an employee and will not enforce such agreement.⁵

Thus, the issue of the management of employees with mental health conditions or disabilities in the workplace cannot be overemphasized. In more advanced jurisdictions⁶, applicable law provides for reasonable accommodations⁷ for employees with mental health disabilities. Global conventions such as the United Nations' Declaration on the Rights of Mentally Ill Persons (1971) (the "Declaration") provides guiding principles on workplace management of employees with mental illnesses and advocates that, the necessity of assisting mentally retarded persons to develop their abilities in various fields of activities and of promoting their integration as far as possible in normal life, must be taken into consideration by employers.

On the contrary, Nigerian employment laws have sparse provisions that can be referenced as legal accommodations for employees and no reasonable accommodations tailored to employees with mental health issues. For instance, under the Nigerian Labor Act (applicable to only blue color workers), there is no provision or guidance given for termination of the contract of employees suffering from mental health conditions which affect the performance of their duties or responsibilities in the workplace. Similarly, the List of Occupational Diseases listed in Schedule 1 of the Employee Compensation Act, 2010⁸ which provides for the compensation of employees suffering injuries occurring in the course of employment does not contemplate mental health illnesses or conditions. As such, employees who suffer mental health related illness in the course of work, had no protection or compensation until the advent of the Act. What is more, it appears that until the advent of the Act, Nigerian labour laws did not categorise mental illness as a workplace disability.

The enactment of the Act is therefore a critical development as the rights and protection conferred on employees with mental health conditions create tangent obligations that might result in liability for employers where their employment relations are made subject to judicial review and global conventions are applied at the discretion of the Nigerian Industrial Court.

² See *Gbedu & Ors. v. Itie & Ors.* [2020] 3 NWLR [Pt.1710] 104 at 129.

³ Except for employments that have a statutory flavour, or which are governed by the provisions of the Labor Act.

⁴ See *Oak Pensions Ltd v. Olayinka* [2017] LEPLR-43207(CA); [2018] 12 ACELR 85.

⁵ See *Afrab Chem Ltd v. Pharmacist Owoduenyi* [2014] LPELR-23613(CA).

⁶ **United States:** The Americans with Disabilities Act (ADA) prohibits discrimination against qualified individuals with disabilities, including mental health conditions, in all aspects of employment; **United Kingdom:** The Equality Act 2010 protects employees from discrimination based on disability, including mental health conditions. Employers are required to make reasonable adjustments to accommodate employees with disabilities; **Australia:** The Fair Work Act 2009 includes provisions related to unfair dismissal, which can include dismissal based on mental health conditions. The Disability Discrimination Act 1992 also protects individuals with disabilities, including mental health issues, from discrimination in employment.

⁷ An employment related reasonable accommodation is an adjustment detailed in employment law/regulations made to accommodate or make fair the same system for certain employees based on a proven need. It is a legal instrument that seeks to minimise discrimination in the workplace and optimise the productivity of employees with disabilities.

⁸ Schedule 1 of the Employee Compensation Act, 2010

Employee rights under the Mental Health Act

As interesting innovations, the Act provides the following rights for employees with mental health issues and further to these underlisted rights, ascribes corresponding obligations to the employers as well:

- **Equal Access and Protection from Discrimination:**
The Act provides that persons with mental health conditions must be afforded equal access to employment opportunities and remuneration for work done, in the same manner applicable to persons without mental health conditions.⁹
- **Protection from withdrawal of benefits on account of mental disorder:**
The Act prohibits employers from terminating a worker's employment or withdrawing any benefits to which they are entitled, on the basis of past or present mental health conditions or in circumstances where the employee is receiving treatment for a mental health condition.¹⁰ The Act also mandates employers to assist employees to seek medical advice or treatment where they have reasonable cause to believe that the employee is suffering from a mental health condition which is severe enough to affect their work output.¹¹
- **Protection from dismissal:** The Act provides that employers may not terminate the employment of a worker merely on the grounds of present or past mental health condition or while the worker is receiving treatment for the mental health condition.

The Employer's duties

Employers are by reason of the rights conferred on the employees with mental health issues, obligated to engage with persons experiencing mental health conditions with care, diligence and without prejudice to minimize the risk of discrimination.

- **Duty to provide medical assistance:** The Act¹² provides that where an employer has reasonable cause to believe that a worker is suffering from a mental health condition severe enough to affect the work output of the worker, the employer is to assist the worker to seek medical advice or treatment. Based on this provision, the employer is within its remit to assist its employees with Mental Health Conditions by recommending psychological counselling to help improve mental health and ultimately behaviour in the workplace. However, this may only be a recommendation, the employer may not mandate such intervention for an unwilling employee¹³.
- **Duty to protect personal data:** Medical information of any kind is regarded as sensitive personal data and there is a professional obligation both on the employer and the medical service provider to ensure the confidentiality of a patient's personal health information (this includes health status, treatment or stay in a health establishment), unless consent to release the information is provided by the employee or on any other recognized legal basis, court order, in the case of a minor, persons who are unable to grant consent upon the request of a guardian or a minor, or threat to public health¹⁴. The Act¹⁵ provides that all information concerning a person with mental health condition¹⁶, including information relating to his or her health status, treatment and stay in a health

⁹ Section 13 (1) of the Act.

¹⁰ Section 13 (2) of the Act.

¹¹ Section 13 (3) of the Act.

¹² Sec 13(3) of the Act.

¹³ Sec 26 of the Act prescribes that, no treatment shall be administered without the prior written consent of the person with the mental health condition voluntarily given.

¹⁴ Sec 26 of Act.

¹⁵ Sec 21 of the Act.

¹⁶ The National Health Act, No. 8 of 2014.

facility is confidential. However, it further provides that notwithstanding this data protection provisions of the Act in respect of a mentally ill person, nothing shall preclude health professionals for taking reasonable steps to prevent the likelihood of serious harm to the person with mental health conditions or to others.

Against the background of the above, the Act also provides for two legal bases for the disclosure of health records of a person with Mental health issues to third party, another healthcare provider or professional, namely: (1) if the disclosure is necessary for any legitimate purpose within the ordinary course and scope of his or her duties; and (2) when such access or disclosure is in the interest of the user¹⁷. While we note that an employer has a duty of care to protect its employees at the workplace, an employer also has a duty to protect the interest of its clients (where necessary) and therefore, it is important that a balance is created between protecting a person with a Mental Health Conditions and their coworkers and clients confidentially.

Relevant employment law and business considerations

The broad nature of these protections means that Employers would have to outline and include into employment agreements clear metrics that show that they are complying with these minimum requirements.

Reasonable Accommodations

Seeing as there are currently no legal provisions in this regard, prudent employers would be required to minimize the risk and damages that could arise from a successful court claim by employees with mental health conditions/ disabilities, by incorporating a framework for assisting employees with mental health conditions which enables them optimize productivity in the workplace. Some of such accommodations adopted globally include flexible working conditions, therapy support, modified workspaces (e.g. private workspaces) which enable productivity, disability leave, customized work tools and devices as well as customized organizational engagement.

Benefits and Compensation

Benefits and compensation for employees with disabilities are to be extended and customized for employees living with mental health conditions. It is also necessary that relevant regulators be engaged to ensure that the List of Occupational Diseases outlined in the Employee Compensation Act (2010) is modified to include mental health related conditions/ disabilities as part of occupational hazards that may arise in the course of the employment.

Termination & Dismissal:

Regarding the protection from dismissal, it has been argued that employers are by reason of the provisions of the Act constrained from terminating employees who are receiving treatment for mental health related conditions¹⁸. It is our view that this contradicts the contractual nature or essence of employment relations outlined above, where employees are bound by the terms of their contract. In the author's views, while the law seeks to cure situations where employees with mental health conditions are treated without prejudice and discrimination, in view of the doctrine of sanctity of contract ¹⁹, the protection offered by the Act cannot not absolute.

¹⁷ Section 27 of the Act.

¹⁸ By the provisions of Section 13 (1) of the Act, an employer shall not terminate the employment of a worker or otherwise deprive him of any benefit to which he is entitled merely on the grounds of present or past mental health condition or while the worker is receiving treatment for the mental health condition.

¹⁹ The sanctity of contract refers to the principle that contracts are legally binding agreements between parties and should be respected and upheld by all parties involved.

It is foreseeable that there would be need for the National Industrial Court and relevant regulators (via regulations) to provide clarity and measurable yardsticks to this provision as this lacuna puts the employer at risk of liability for wrongful termination of employment if a literal view of the provision of the Act in this regard is applied. Employees may also weaponize this provision and seek to take the benefit of the protection under the Act even where they are ineligible to take the benefit of the protection provided by the Act.

Such employees may be quick to file claims alleging that the termination is because of the employee's mental illness condition and is, therefore, in breach of the general protections' provisions of the Act or anti-discrimination legislation or that the termination is harsh, unjust or unreasonable and, therefore, amounts to unfair dismissal.

Our Recommendations

Employers will be in a better position to defend an unfair dismissal claim on the bases of an employee suffering from mental health conditions, if it can be established that: (a) the employee cannot perform the inherent requirements of the role; and (b) and reasonable adjustments provided by the employer are not sufficient to enable the employee to carry out the inherent requirements of the role, or the adjustments that could be made would constitute an unjustifiable hardship on the employer.

To determine whether an employee with a mental health issue can perform the inherent requirements of the employee's position, the employer can obtain medical evidence from the employee's treating medical practitioner and/or an independent medical practitioner, if the reasons fall within the two legal bases when disclosure of health record is permitted by the Act. This will help to support the employer's decision-making and mitigate against the risk of the employee later making a successful claim against the employer.

Unless it can be established that the employee is unable to perform the inherent requirements of the role (notwithstanding any reasonable adjustments), employers should be careful to ensure that mental health issues do not form part of the reason for any decision to terminate an employee's employment. This can be done by remaining focussed on the performance or conduct issue at hand.

It is imperative to note that the Act provides that where an employee with a mental health condition is required to respond to a complaint or inquiry, the employee will be entitled to representation by a legal practitioner during such complaint procedure or appeal.

In conclusion, employers may mitigate risks arising by ensuring that they adopt a framework of assistance and reasonable accommodations in their employment policy and also ensure that where an employee with mental health condition is to be terminated the procedure used for that restriction or denial of rights contains proper legal safeguards against every form of abuse. This procedure must be based on an evaluation of the social capability of the person by qualified experts and must be subject to periodic review and to the right of appeal to higher authorities. This is in line with minimum standards set by similar global conventions.