

The Power to Transfer Employees: A Case Comment

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Introduction

The power to transfer an employee is a source of competing claims between employers and employees. The two contracting parties are not fairly matched on the issue whether transfer is a bargaining subject or is within the exclusive mandate of the employer.¹ Literally, transfer denotes the movement of an employee from one job position to another position of equivalent rank, level or salary without affecting the employment contract.² It also includes the change in workplace of an employee in case where the undertaking has branches in different localities. The total relocation of the undertaking from one to another location can also entail transfer of its employees. Generally, transfer is taken as movement of an employee from one department, section, shift, job, plant or place to another, without resulting in change as regards salary or other benefits.³

There are several reasons for effecting transfer of employees. The following may be some of the causes that trigger either the employer or employee or both of them to initiate the process of transfer.⁴ First, transfer may be necessary to meet the organizational requirement when there are changes in technology, volume of production, change in organizational structure, and fluctuation in market conditions. Second, it may also be used to reduce interpersonal conflicts, such as between employees. Third, employees may

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¹ For other sources of conflict of authority between employers and employees, see Richard A. Clapp, Management's Prerogatives vs. Labor's Rights, *Western Reserve Law Review*, 1953

² Joselito Guianan Chan, Labor Laws of The Philippines, *Pre-Week Guide on Labor Law*, 2006, p. 7 [hereinafter Joselito Guianan Chan, Labor Laws of The Philippines]

³ For comparisons between transfer, promotion and demotion, see Achan Naku & et al., The Impact of Permanent Employee Transfers on Performance Levels at United Nations Development Program South Sudan Country Office, *International journal of Innovative Research in Management*, Issue 3, vol. 9, 2014, p. 39

⁴ Kalpana R, 'Types and Reasons for Transfer of Employees in an Organization (*Business Management Ideas*)

<<http://www.businessmanagementideas.com/organisation/types-and-reasons-for-transfer-of-employees-in-an-organisation/2495>> consulted on Dec. 18, 2016

need it to satisfy their desire to work in a friendly atmosphere or native place. Finally, it may be used to punish employees for violating the disciplinary rules.⁵

Currently, there are two trends in the regulating transfer of employees in different jurisdictions. One approach is leaving the issue of transfer to the agreement of the employer and employee. In principle, what shall be the express elements of an employment contract is a matter of agreement between the employer and employee.⁶ But, statutes may designate some basic particulars or information as mandatory subjects of negotiation and express elements of the contract. Parties are supposed to have common understanding and agreement on such matters in their contract. The particulars include the name and address of the employer and employee, the date on which employment begins, the rate of wage, description about title and type of the job, the place of work and mobility requirements, if needed.⁷ Hence, a given employment contract is not valid unless it incorporates agreement on such particulars. The job description is an essential element to ensure an employee is aware of what is expected from him. The agreement on the place of work indicates where an employee is placed to work. There are circumstances where by an employee is hired by a company that has outlets in different places. The type of job and place of the work are matters that could bring transfer of the employee after the formation of the contract.

As shown above, there are a number of justified reasons for employers to change the contract after the employment has begun. Many employers draft contracts to include clauses which allow changes to be made on working places, methods, shift patterns, etc. These clauses, those which remain lawful as far as they do not conflict with labor laws, contain overriding terms which entitle the employer to act unilaterally. In relation to transfer, an employer can lawfully relocate his employees if there is “mobility

⁵ Ibid

⁶ Barry Cushway, *The Employer's Handbook, An Essential Guide to Employment Law, Personnel Policies and Procedures*, Revised 5th Edition, Cambridge University Press, 2008, pp. 47-48 [hereinafter Barry Cushway, *The Employer's Handbook*]

⁷ Ibid

clause” in the employment contract.⁸ Such clause usually purports to require the employee to work at a location other than the one where he is initially based. An example of such clause in employment contract is as follows:⁹

“The Company has the right, as a term of your employment, to change your normal place of work to any other company premises. If we do so, you may, at our discretion, be entitled to financial or other relocation benefits.”

In exercising this power, the employer has an implied duty to act reasonably and to give reasonable notice of the planned relocation.¹⁰ For instance, it is unreasonable to suggest that the worker should start working overseas in one day's notice. In the absence of mobility clause, an employer who is contemplating transferring his employee should in advance get the full consent of the employee. In other words, the employer must make an offer to vary the original terms of the employment contract concerning the type or location of the job. It is the basic principle of law of contract that an employment contract, like any other contract, is once made, can be varied with the agreement of both parties.¹¹ The unilateral modification by the employer is not allowed. If the employee is forced to move without his consent, this will be a breach of the contract of employment. The employee may oppose the move and can bring claim of constructive dismissal.¹² In one foreign case, an employee was found to have been constructively dismissed when she was required to relocate from Vancouver to San Francisco. The Court found that the employment contract did not contain an express contractual term that allowed the company to transfer the employee

⁸ Deborah J. Lockton, *Employment Law*, 4th Edition, New York: Palgrave Macmillan, 2003, p. 37 [hereinafter Deborah J. Lockton, *Employment Law*]

⁹ Barry Cushway, *The Employer's Handbook*, Supra Note 6, p. 224

¹⁰ Deborah J. Lockton, *Employment Law*, Supra Note 8

¹¹ C. Barrow and J. Duddington, *Briefcase on Employment Law*, 2nd Edition, Cavendish Publishing, 2000, p. 47

¹² Constructive dismissal occurs when the conduct of an employer causes an employee to resign. The conduct may leave the employee feeling that he has no other choice but to resign. In such case, the employee is entitled to treat himself as having been “dismissed” and the employer's conduct is often referred to as a “Repudiatory Breach”. Landau Law Solicitors, ‘Employment Law-Constructive Dismissal’ <www.landaulaw.co.uk/constructive-dismissal/> consulted on Dec. 15, 2016.

to San Francisco.¹³ When the employee refuses to accept the transfer, the employer may bring the impasse to an end by having recourse to some legally recognized way outs. In United Kingdom, the refusal could be a reason for the employer to claim the redundancy and hence dismissal of the employee. But, redundant employee shall be offered a redundancy package with benefits like, redundancy pay and time-off to find a new job.¹⁴

The second approach leaves the regulation of employees' transfer with the managerial prerogative of the employer. Management prerogatives are those rights and privileges which management (employers) believe is only for them and employees should not venture into those areas. These prerogatives are non-negotiable and are therefore not subject to individual or collective bargaining.¹⁵

The concept of management prerogative is the natural product of the employers' position. It is held that employers have property rights over their own business. They possess inherent autonomy to direct their business operations in order to pursue their own objectives.¹⁶ Issues recognized as falling within the management prerogatives include the type of goods or services rendered by the employer, entry into new markets, pricing of goods and services, defining positions and their requirements, budgeting and closure of a business. Except as provided by labor laws, employers are free to regulate all aspects of employment, such as hiring, work assignment, working methods, time, place and manner of work, tools to be used, processes to be followed, supervision of workers, transfer of employees, work supervision, suspension of workers, discipline, dismissal and recall of workers.¹⁷ Accordingly, employers are presumed to have exclusive power

¹³ Wilson v. UBS Securities Canada Inc. et al., Supreme Court of British Columbia, Judgment, 2005, at <<http://employmentlaw101.ca/07-types-of-unilateral-changes-that-may-trigger-a-constructive-dismissal/#fn-498-17>> (consulted on Dec. 15, 2016)

¹⁴ Barry Cushway, *The Employer's Handbook*, Supra Note 6, p. 249

¹⁵ Chris Obisi and et. al, Organization Effectiveness: Beyond Workers' Rights and Management Prerogatives, *International Journal of Asian Social Science*, 2013, p. 205

¹⁶ N. Patrick Crooks, Management Prerogatives No Longer Include Right To Make Unilateral Decision To Subcontract, *Notre Dame Law Review*, Vol. 38, Issue 3, 1963, p. 290

¹⁷ Bernadette M. Tomboc et. al, Management Prerogatives and Employee Participation, Working Paper Series

on transfer of employees even though mobility clause is not inserted in the employment contract. Absence of the clause does not affect the employers' unilateral power on making transfers. Employers have the right to command while employees owe the duty to obey. This relationship is an attribute of contract of employment and touchstone of managerial prerogatives.¹⁸

The privilege to transfer employees is not usually without legal limitations. When exercising their management prerogatives, employers may be required to follow some procedures or fulfill duties. Statutes or courts may develop criteria for the exercise of valid management prerogative by employers. For instance, even if it is the right of the employer either to continue or close his business, he is required to pay contract termination benefits if he chooses the closure of the business. In Philippines, employers shall exercise their managerial powers without violating the following criteria:¹⁹

- *There is nothing to the contrary in the terms of the employment;*
- *The management has acted bona fide and it is in the interests of its business;*
- *The management is not actuated by any indirect motive or any kind of mala fide;*
- *The transfer is not made for the purpose of harassing or victimizing the workman;*
- *The transfer does not involve a change in the conditions of service.*

In Endico v. Quantum Foods Distribution Center case, the Supreme Court of Philippines stated the underlying feature of managerial prerogatives in the following words.

In the pursuit of its legitimate business interests, especially during adverse business conditions, management has the prerogative to

2004-04, Unpublished, Center for Business and Economics Research and Development (CBERD), Philippines, 2004, p. 5

¹⁸ Douglas Stanley, Prerogative in Employment, *McGILL Law Journal*, Vol. 20, 1974, p. 395

¹⁹ R. Venkataraman, *Labour Law Journal Digest: Standing orders to end*, Vol. 8, Wadhwa Publishers, 1979, pp. 130-131

*transfer or assign employees from one office or area of operation to another provided there is no demotion in rank or diminution of salary, benefits and other privileges and the action is not motivated by discrimination, bad faith, or effected as a form of punishment or demotion without sufficient cause. This privilege is inherent in the right of employers to control and manage their enterprises effectively. The right of employees to security of tenure does not give them vested rights to their positions to the extent of depriving management of its prerogative to change their assignments or to transfer them.*²⁰

It is also stated in the Industrial Relations Act of Malaysia that the employer is in the best position to judge how to distribute his employees between different jobs or branches. Therefore, he should have the exclusive power to decide on the transfer of his employees. An employee who refuses transferring is guilty of insubordination. The refusal constitutes willful disobedience of a lawful order of an employer.²¹ In the light of Section 13(3) (b) of the Act, such prerogative is, however, not absolute as it must be exercised in good faith. It cannot be exercised unreasonably and arbitrarily to the detriment of the employee. The employer must ensure that the status and remuneration of the employee are not affected. The employer shall also make sure that the transfer is not *mala fide* or unfair labor practice or an act of victimization. The transfer should not take place to the prejudice of the employee, such as causing economic loss to him and his family. The onus of showing the existence of such vitiating circumstances that undermine the proper exercise of the employer's prerogatives lies with the employee. Whether a transfer is *mala fide* or not is a question of fact for the court to decide.²²

To recapitulate the discussion, the first approach emphasizes that the type of job and place of work are essential elements of employment contract. Any change to these elements, can only be made by either the mutual agreement

²⁰ *Endico v. Quantum Foods Distribution Center*, G.R. No. 161615, The Supreme Court Philippines, First Division, January 30, 2009

²¹ Joselito Guianan Chan, *Labor Laws of The Philippines*, Supra Note 2, p. 3

²² Hew Soon Kiong, 'Laws on Transfer of Employees'

<<http://www.talentwork.com/articles/files/hr/09/index.html?iframe=true&width=700&height=100%>> consulted on Dec. 15, 2016

of the two parties or mobility clause. According to the second approach, employers do not need the help of either the consent of the employee or mobility clause to make transfer. They have an inherent right over transfer and can relocate their employees by a unilateral decision.

Transfer of Employees under Ethiopian Labor Law

When one examines the Labor Proclamation,²³ there is a reasonable ground to conclude that transfer is more of a contractual matter of the two parties than the personal concern and power of the employer. The Proclamation dictates that employment contract shall include mandatory agreements of the two parties on some matters. These agreements are part of the express elements of the contract. Article 4(3) of the Proclamation explains “A contract of employment shall specify the type of employment, place of work, the rate of wages and its method of calculation, manner and interval of payment and duration of the contract”. This provision makes it clear that type of employment (job) and place of work are the essential parts or elements of employment contract. That means it is a mandatory requirement of the law that the employment relationship is not created until agreement reaches on the location and type of job. For instance, if the employee agrees to teach students in Addis Ababa City for a given salary, the contract is said to be clear on the type of employment and place of work. Any different expectation from the side of the employer, let me say teaching in Bahir Dar City, is against the contractual agreement of the two parties.

It must be borne in mind that employment contract is not subject to any special form in Ethiopia. With the exception of few cases, there are no legal requirements about the form that a contract of employment must be in writing. However, the Proclamation stipulates that the contract must be clear in terms of indicating the type of service to be rendered by the employee. It must also identify the location in which the employee is required to work.²⁴ The Proclamation further stresses that the employment contract shall be

²³ Labor Proclamation, 2003, Proc No. 377, *Federal Negarit Gazette*, Year 10, No. 12, [hereinafter Labor Proclamation]

²⁴ Regarding contents of employment contract, the Ethiopian Labor law displays similarities with the Employment Rights Act (1996) of United Kingdom. See Barry Cushway, *The Employer's Handbook*, Supra Note 6, pp. 47-48

made in such a manner that its terms are certainly defined and the two contracting parties are left with no uncertainty as to their respective rights and duties.²⁵ If the contract is silent regarding one of its essential elements like place of work, it might be subject to invalidation since its formation is defective in the eyes of the law.²⁶ The employee cannot execute his duties unless such elements are known.

Unlike the case of termination, the Labor Proclamation does not list out reasons for amendment of employment contract. The only restriction imposed by the law is change of ownership of an undertaking does not bring variation of the contract. The employment contract will continue, as it is, with the new owner of the undertaking.²⁷ Parties in the employment contract can modify their contract for any reason. Amount of salary, place of work, type of job and duration of working hours could be some of the reasons that trigger amendment of the contract. In conclusion, transfer is one of those matters which are subjects of amendment by the agreement of the employer and employee.

The Labor Proclamation allows parties to vary the conditions of a contract of employment that are not determined under the Proclamation through collective agreements, written agreement of the two parties and work rules.²⁸ The contents of employment contract are not limited to the express elements specified in Article 4(3) of the Proclamation. They also encompass other matters dealt under collective agreement and work rules. The employee is also bound by such instruments. Issues regulated under the individual employment contract, such as amount of salary and place of work, can be amended by the written agreement of the employer and employee. Those matters which are initially dealt under either the collective agreement or work rules can be modified by subsequent collective agreement or work rules respectively. Taking into consideration the absence of participation of the employee in drafting of work rules, it is not logical to

²⁵ Labor Proclamation, Supra Note 23, Art. 4(2)

²⁶ The Civil Code of Ethiopia, 1960, Art. 1714, Proc. No.165/1960, *Negarit Gazzeta*, year 19, No.2

²⁷ Labor Proclamation, Supra Note 23, Art. 16

²⁸ *Id.*, Art. 15

conclude that matters which shall be regulated under the employment contract can be varied by work rules.²⁹ For instance, the amount of salary agreed and specified in the contract cannot be altered by a work rule. The same reasoning applies to place of work and type of job. Contrary to the general rule on variation of contract,³⁰ the Labor Proclamation provides that the amending employment contract must be in writing even if the original contract was concluded orally.

In addition to the employment contract, transfer of employees may also be regulated by a collective agreement entered into between trade unions and employers.³¹ Such agreement can be used to devise transfer rules and procedures applicable on all employees of a certain undertaking. The transfer rules may be changed or repealed by subsequent agreements of the trade unions and employers. Generally, transfer could be governed either by the individual employment contract or collective agreement. In case where both instruments regulate the issue differently, we may confront with the question of which one shall prevail. The Labor Proclamation laid down a guiding rule that the one which is more favorable to the employee shall prevail.³²

Article 13 (2) of the Labor Proclamation is usually taken as a provision which gives managerial prerogatives to the employer. The provision clearly states that the employee is duty bound to obey instructions given by the employer. There is, however, a caveat to this rule: the employee is required to obey only instructions that do not contradict the employment contract. The employee should not be compelled to work at a place which is not indicated in his contract of employment. This is also supported by a reading of Article 12(1) (a) of the Proclamation that states the employer shall give work to his employee in accordance with the employment contract. As long

²⁹ Based on Art. 4(5) and 15 of the Proclamation, it may be argued that collective agreements or work rules may vary terms of employment contract as far as the amendment is beneficial to the employee. In other words, more favorable working conditions and benefits, such as increase of salary, may be brought by either the collective agreements or work rules. Since the change increases the well-being of the employee, this line of argument does not contradict our legal analysis under this section.

³⁰ The Civil Code of Ethiopia, *Supra* Note 26, Art. 1722

³¹ Labor Proclamation, *Supra* Note 23, 129 (3)

³² *Id.*, Art. 4(5), see also The Civil Code of Ethiopia, *Supra* Note 26, Art. 2518

as there is no mobility clause in the contract or a collective agreement, the employer cannot transfer the employee to a different area without the consent of the latter. If the employer does so, it amounts to violation of the contractual right of the employee. What if the employer changes the workplace unilaterally? Even if the Labor Proclamation instructs the employee to accept orders in the light of their contract, it does not tell us the effect of such change of the employer that run counter to the contract.³³ In the light of the general principle of contract law, one may say that the employer can demand performance from his employee only to the extent that is specified in the contract. In the words of Rene David, “contracts are law for the parties. What must be given [performed] by the parties is what they have agreed to give [perform].”³⁴ The Federal Supreme Court Cassation Division (hereinafter, FSCCD) has, however, held that the employee shall not refuse a transfer order by his employer even if it is contrary to the employment contract. The FSCCD noted that the employee can bring his case before the competent organ after having reported to his new workplace. In the Court’s opinion, if the employee refuses to move to the new workplace, he/she could be dismissed as per Article 27 of the Proclamation.³⁵

The Labor Proclamation provides some exceptions whereby the employee may be forced to accept the transfer offer or face the termination of his employment. This is when there is either:

- Total relocation of the undertaking/ organization/ from one locality to another or
- Cancellation of the post for which the employee is hired and he is offered work in another place.³⁶

³³ The labor law of South Africa provides that employees or trade unions can oppose unilateral change of employment contract by the employer by exercising their right to strike. (Labour Relations Act 66, Sec. 64 (4), 1995

³⁴ Rene David, 1973, *Commentary on Contracts in Ethiopia*, Haile Sellasie University, p. 42

³⁵ Addis Spare Parts Import and Distributor PLC vs Ato Kassahun Kebede, Federal Supreme Court Cassation Division, Civil File No. 37778, Vol. 8, November. 04, 2001 E.C.

³⁶ Labor Proclamation, Supra Note 23, Art. 28(1)(c)(d).

The first exception deals with the case of business relocation. Employers may choose new working environment for different reasons. Tax incentives, merger, acquisition, access to raw materials, entry to new markets and lower labor costs are among the usual driving forces for relocation of businesses. These factors would help employers to develop new competitive position.³⁷ When relocation occurs, employees have two options; either to transfer with the business or quit their job. In the second exception, there is no transfer of the business. Due to organizational restructure or other related measures, the existing post of the employee may be cancelled or replaced by a new one. This could bring either the transfer of the employee, if s/he accepts the new assignment, or the termination of the employment contract. Except for these situations, the Labor Proclamation has not recognized managerial prerogatives of the employer to assign workers as it pleases the employer. In conclusion, the Labor Proclamation of Ethiopia does not recognize management prerogative over transfer of employees.

Summary of Case ³⁸

In the case between the Ethiopian Orthodox Tewahdo Church Patriarchate Head Office and Ato Yibeltal Atnafu, the Office was an employer and Ato Yibeltal an employee.³⁹ The FSCCD transcript depicts that the employee was working as an operator of printing machine for 28 years. On July 15, 2000 E.C, a fight broke out between the employee and his two colleagues for unknown reason. The employee filed a criminal charge through the office of the public prosecutor. The immediate supervisor of the employee told the latter to drop the charge and to resolve the problem through arbitration and if not, he would be reassigned to work in furniture workshop (at a different location). But, the employee opted to pursue the charge,

³⁷ Linda K. Stroh, Does Relocation Still Benefit Corporations and Employees? An Overview of the Literature, *Human Resource Management Review*, Vol. 9, No. 3, 1999, p. 280

³⁸ There are other cases as well-disposed by the FSCCD on the issue of transfer. For instance, in the case between Muger Cement Enterprise vs. Ato Hailu Mengistu, the Cassation Division ruled that transfer is a unilateral power of the employee even if there are contrary provisions in the collective agreement. It based its decision on the concept of management prerogative, Articles 13(2) and 13(7) of the Labor Proclamation. (Muger Cement Enterprise Vs. Ato Hailu Mengistu, Federal Supreme Court Cassation Division, Civil File No. 40938, Vol. 8, March 24, 2001 E.C)

³⁹ Ethiopian Orthodox Church Patriarchate Head Office Vs. Ato Yibeltal Atnafu, Federal Supreme Court Cassation Division, Civil File No. 44033, Vol. 8, July 22, 2001 E.C

instead of the arbitration. The employer (the office) wrote a letter of transfer on September 22, 2001 E.C stating that the employee was transferred from printing office to furniture factory. The employee strongly opposed the letter issued by the Office and filed a suit to the Federal First Instance Court. He argued that the transfer was made contrary to their agreement. He claimed that he was forced to change his workplace for the sole reason that he brought legal action against those individuals who inflicted a physical injury on him. The employee requested the Federal First Instance Court to invalidate the transfer and reinstate him to his previous position and workplace. In response to this, the employer defended its action stating that employees are legally obliged to work under the direction and control of employers. Employers have the mandate to assign their employees at a position or place that serves the best interest of their undertaking, particularly for the purpose of increasing productivity, efficiency and bringing industrial peace. In order to realize such objectives, the employer contended that it has managerial prerogative to transfer his employees. The issue of “what and where to work” is the sole concern of that belongs to the employer. After hearing both parties, the Federal First Instance Court annulled the transfer made by the employer on the ground that the employer violated Article 15 of the Labor Proclamation and it shall reinstate the employee to his previous position and workplace. The Federal High Court rejected the appeal of the Office and confirmed the decision of the lower court. The case was finally brought to FSCCD by way of cassation. The applicant (the Office) pleaded that the lower courts have committed fundamental error of law while deciding the case in favor of the respondent (employee). The respondent contrarily argued that the transfer was illegal since it changed his post from printing machine operator to a carpenter and an inevitable change in his working place. The FSCCD framed the issue “whether the transfer was legal or not”. After examining the arguments put forwarded by the two parties, it smashed the lower courts’ decision and decided that the transfer did not violate the Labor Proclamation. According to it, arguments raised by the respondent do not override the management prerogative of the employer to change the workplace of its employees. It ruled that an employer can transfer his/her employee by virtue of his management prerogative. It also went on to say that as far as the current

salary of the employee is not affected, the Labor Proclamation does not prohibit the employer from making transfer if its purpose is either to bring industrial peace or to serve the interest of the undertaking. Thus, the lower courts' decision is found to contain fundamental error of law.

Case Comment

In the cases dealing with transfer of employees, the FSCCD has drawn the conclusion that the employer shall have management prerogative over transfer of employees. The writer finds the conclusion defective for the following reasons.

Firstly, many of the cassation decisions on transfer violate the commonly accepted rule of interpretation. When the law made by the legislature is clear, judges shall not deviate from the exact words of the law and search for the intention of the legislature. According to George Krzeczunowicz,⁴⁰ “Where the provisions of a law are clear, the court may not depart from them and determine by way of interpretation the intention of the legislature.” On the issue at the hand, Article 4(3) of the Labor Proclamation clearly states that both the employer and employee shall agree on type and place of the job under the employment contract. By ignoring Article 4(3) and invoking Article 13(2) of the Proclamation, the FSCCD empowered the employer to unilaterally change the type and location of the job of the employee as far as the salary and other financial benefits as stipulated in the employment contract or collective agreements are not affected. But, Article 4(3) of the Proclamation clearly specifies that the type and place of job must be indicated in the employment contract. Article 13(2) of the same Proclamation on the other hand states employee shall follow instructions of the employer that are consistent with the employment contract. Therefore, the employer cannot order his employee to work at a place which is different from the one mentioned in the contract. The Cassation Division has set the binding interpretation by violating these clear provisions of the Labor Proclamation. Interestingly, the Federal First Instance and High Courts were constantly invalidating the unilateral decision of the employers

⁴⁰ George Krzeczunowicz, Statutory Interpretation in Ethiopia, *Journal of Ethiopian Law*, Vol. I No. 2, 1964, p. 318

arguing that transfer of employees requires the mutual consent of the two parties.

The procedural history of transfer-related cassation cases revealed that many of employees argued and opposed transfer alleging that the move contradicted their employment contract and collective agreements. Unfortunately, such arguments were not well received by the FSCCD. Instead, the main references for its decisions were whether there is reduction of salary or not, whether the transfer is made for industrial peace or not and whether the transfer is made to increase productivity or not. Why not the FSCCD makes reference to employment contracts? The writer is of the opinion that the tacit rejection of the above arguments put forwarded by the employees is a clear violation of their contractual rights. If the FSCCD followed the spirit of the Labor Proclamation, it would have considered the agreements of employer and employee as one criterion for the validity of transfers.⁴¹ Even in countries where management prerogatives are given much weight, employers are not allowed to exercise management prerogatives if there is contrary agreement in the employment contract. Hence, unless the employment contract allows the employer to relocate the employee through mobility clause, the former should not be allowed to have an extended exclusive power over transfer of employees. It is also apparent from the decisions that the FSCCD is not treating elements of employment contract in similar fashion. On the one hand, it holds that salary and other financial benefits, as stipulated in employment contract, shall not be affected by the unilateral action of the employer. On the other hand, it recognizes that the employer can by himself vary the employment contract regarding the type and location of the job. Thus, it is self-contradictory to

⁴¹ In the case between Lulit Ayalew vs Ethiopian Insurance Corporation, the Cassation Division pronounced that the employer cannot have management prerogative over transfer if it does violate collective agreement. In earlier decisions, even if employees opposed the transfer made by their employers on the basis of collective agreement, their arguments were rejected by the Cassation Division. Now, this decision indicates a partial return from its previous position as it is considering transfer in the light of the terms of collective agreement. Though the move is commendable, it is still not enough in the light of the intent of the Labor Proclamation. (Lulit Ayalew vs Ethiopian Insurance Corporation, Federal Supreme Court Cassation Division, Civil File No. I05997, Vol. 18, April 26, 2007 E.C)

allow the employer to unilaterally change some terms of the contract, but not the others.

Secondly, the decision rendered by the FSCCD lacks constitutionality. The FDRE Constitution, as the supreme law of the land, assigns the power to make laws to the legislative organ of the government.⁴² This power may be delegated to the executive organ only when the legislature consents so. The judiciary is instituted for the sole purpose of interpretation of laws. The latter refers to searching for the meaning of existing laws without deviating from the intention of the legislature. Under the modern principle of separation of powers, interpretation of laws belongs to the courts.⁴³ The Constitution never allows the judiciary to bring new rules into the existing proclamations or regulations of the Country nor to change the same laws. The much debated Federal Courts Proclamation (as amended)⁴⁴ also does not allow the FSCCD to make laws. It only states “interpretation of a law by the Federal Supreme Court rendered by Cassation Division with not less than five judges shall be binding on federal as well as regional council [courts] at all levels....”⁴⁵ Various legal scholars agree that the Proclamation does not empower the Cassation Division to make laws, like the doctrine of *stare decisis* in common law legal system. The main reason d’être behind the enactment of the Proclamation are first to bring uniform interpretation and application of laws for similar issues and second to correct cases that contain fundamental error of laws.⁴⁶ If that is so, the Cassation Division cannot change the clear terms of the Labor Proclamation. It is worth discussing the question what if lower courts refuse to be bound by such precedents or rulings of the FSCCD. There are no practical cases or incidents which could be used as benchmark to answer this question. Based on the discussion made so far, it can be concluded that the decisions in focus

⁴² The Constitution of the Federal Democratic Republic of Ethiopia, 1995, Art. 55(1), 55(3), 77(13), 79, 80 *Federal Negarit Gazette*, 1st Year, No. 1

⁴³ George Krzeczunowicz, *Supra* Note 40, p. 316

⁴⁴ The Federal Courts Proclamation Re-amendment Proclamation, 2005, Proc. No. 454/2005, *Federal Negarit Gazette*, 11th Year, No. 42

⁴⁵ *Id.*, Article 10(4)

⁴⁶ ዮሴፍ አዕምሮ, በኢትዮጵያ የሰበር ስርአት የመጨረሻ ውሳኔ ምንነት፣ አሊ, መሀመድ, መሰረታዊ የሀገር ስህተት, in Muradu Abdo (ed.), *The Cassation Questions in Ethiopia*, Addis Ababa University, School of Law 2014, p. 19, 109

are inconsistent with the Constitution as well as the Proclamation. Until the legality of such precedent or cases is challenged, the FSCCD will continue to erode the constitutional mandate of the legislature.

Thirdly, the decision on transfer of employees practically creates favorable environment for constructive dismissal and creates opportunity for employers to abuse their dominant position. It is known that under the Labor Proclamation overt actions of dismissal of an employee have serious repercussions against the employer. For instance, if the employer terminates the employment contract contrary to the grounds and procedures laid down under the Labor Proclamation, he will face the obligation either to reinstate the employee to his job with back pay or to compensate the employee with up to six month salary and wage in lieu of notice period. The employer is also criminally held liable.⁴⁷ In fear of these liabilities, the employer may not directly fire the employee, but transfer the latter to an area which is very far away from his home town or family. In this regard, the practical problem is stated by one legal practitioner as follow.^{48 49}

በሥራ ላይ እያሉ ሙስናን ለበላይ አካል ለማስተላለፍ እንቅፋት የሚሆኑ፣ ከቅርብ ኃላፊዎች ጋር የግል አለመስማማት ያላቸው፣ በዘር ወይም በሃይማኖት ከበላይ ኃላፊ ጋር አንድ ያልሆኑ፣ በዕውቀታቸውና ሐሳባቸውን በገበድ በመግለጽ ከአሠሪው ጋር የማይስማሙ ሠራተኞች በግዴታ እንዲላወሩ ሲደረግ እናስተውላለን። የዝውውሩ ዋና ዓላማ ድርጅቱን ለመጥቀም ወይም ከባለሙያ ልምድ ለመጠቀም ሳይሆን ሠራተኛው በዕርምጃው ምክንያት ተበሳጭቶ ድርጅቱን እንዲለቅ ለማድረግ ነው።

Literally translated,

It is observed that employees who might be exposing corruption or who have personal disagreement or different social status (in terms of ethnicity

⁴⁷ Labor Proclamation, Supra Note 23, Art. 43, 44, 184(2)(C)

⁴⁸ ጌታሁን ወርቁ, ሥራንና ሠራተኛን የማያገናኝ ዝውውር ዕጣ ፈንታ, ሪፖርተር, የካቲት 12 2008 ዓ.ም.

⁴⁹ The writer of this comment personally observed a case of an employee working in a private bank. The employee was a married woman and mother of one child. She was working as a secretary in a branch of the Private Bank in Chiro Town of West Hararghe. According to her claim, she was repeatedly subject to sexual harassment by her immediate manager. Since she was not willing to submit to the sexual lust of the manager, she was given a transfer letter that stated she shall report to her new workplace, Humera Branch, within a week from the date when she received the letter. She reported the case to the head office of the Bank in Addis Ababa to no avail. Finally, she was forced to quit the job since it was unthinkable to leave her family and home town and move to Humera.

or religion) with their immediate managers are forcefully being transferred. The aim of the transfer is not to pursue the interest of the undertaking or to exploit the personal skill of the employee, but, to dismiss him constructively.

One may argue that bad intentioned transfers could be challenged on the ground of provisions that regulate and sanction constructive dismissal. Compensation and other benefits may be claimed just by showing that the transfer constitutes constructive dismissal. Even if it is a generally accepted notion that resignation due to unfair transfer amounts to constructive dismissal, this may not, however, work well in Ethiopia. First, the Labor Proclamation does not explicitly recognize illegal transfer as a ground for constructive dismissal.⁵⁰ Second, it is a learned experience that the FSCCD has broadly interpreted management prerogatives to encompass majority of transfer cases. Hence, employees might not be well positioned to succeed in claims of constructive dismissal.

The unilateral measure of transfer has also serious financial implications on employees. When examining and deciding cases, the FSCCD gives at most emphasis on whether the transfer affects the existing salary and other financial benefits of the employee or not. Transfer by its nature is a source of additional expenses and inconveniences to the employee. Transportation of household goods, house rent and etc. are burdens for the majority of employees in Ethiopia. In the legal systems of other countries, employers usually offer relocation benefits to employees when there is transfer. As a matter of obligations, such benefits may also be required by statutes or precedents. Even in those countries that give principal recognition to management prerogatives, transfer is not allowed if it causes high economic loss to the employee and his family. In Ethiopia, the FSCCD is not accustomed with the culture of considering such circumstances. It simply examines whether there is a reduction of the existing benefits or not. The interpretation and application of management prerogatives in Ethiopia do not follow the duty to share the financial hardships of transfer between the employer and employee. Generally, the unilateral measure of transfer (by the

⁵⁰ Labor Proclamation, Supra Note 23, Art. 32

employer) is affecting the right to employment security and financial conditions of employees.

Conclusion and Recommendation

The aim of this case comment was to examine the decisions of the FSCCD on the power to transfer employees in light of the Labor Proclamation. The Proclamation left the regulation of transfer of employee to be decided either by employment contract or collective agreement. But, the FSCCD has decided in a number of cases arguing that transfer is a managerial prerogative of the employer, hence the employee could be transferred to another workplace or position without his consent. Failure to move to a new workplace or position is fault with serious consequences, including dismissal without notice. In the light of both the FDRE Constitution and Federal Courts Proclamation (as amended), the decision of the FSCCD in the case between the Ethiopian Orthodox Tewahdo Church Patriarchate Head Office Vs. Ato Yibeltal Atnafu has the result of amending the Labor Proclamation and hence it lacks validity, as the FSCCD does not have the power either to amend or repeal existing laws of the Country. It also violated the cardinal rule of interpretation, i.e., “when the law is clear, there is no need of interpretation of such law. The law must be applied as it is”. In addition, the main objective of having the labor laws as well as involvement of the government in the relationship between the two parties is to help the weaker party, the employee, from unfair and abusive exercise of power by the stronger party, the employer. This basic objective of the law is now being compromised because of the decisions of the FSCCD. In many practical cases, transfer is used as a costless tool of dismissal of employees, without payment of termination benefits.

Finally, the writer suggests that the FSCCD should reverse and replace the existing binding interpretation on transfer by another one that is consistent with the objective and clear terms of the Proclamation. Transfer should be a bilateral concern of and decided by both parties. Employers should be allowed to have exclusive power or right on transfer only on exceptional grounds, such as by inserting mobility clause in the employment contract.

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