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STAFF RESTRUCTURING IN THE FMCG INDUSTRY:

BALANCING EMPLOYERS AND EMPLOYEES INTEREST IN A MERGER, ACQUISITION AND DIVESTMENT.

Competition in the Fast-Moving Consumer Goods (FMCG) industry is intense. New products are introduced in the market everyday by both big and small players. This accounts for the industry being fast-paced and innovative, as every player wants to stay ahead. The goal of every FMCG company is to be the market leader or acquire the major market shares in the industry or attain financial growth. It is not sufficient to be a market leader in this industry, this position must be maintained. Restructuring is one of the ways players in the FMCG industry keep their competitive advantage. Intrinsic in the factor of competitive advantage that leads to a decision by FMCG companies to restructure include survival, expansion, going global, or even positioning itself for an acquisition.

Restructuring is a fundamental change in the composition of the company to achieve a particular objective. The structural change may be in terms of shareholding, business, or operational outlook of the company. Restructuring in the FMCG industry can take different forms. It can be a merger of two or more FMCG companies, an acquisition of the majority or the entire shares of an FMCG company, or a divestment.

The players in the FMCG Industry stand as one of the biggest employers of labour. The industry has varieties of employment options as it operates in foods, drinks & beverages, food & animal nutrients, tobacco, consumer electronics, toiletries, creams, cleaning products, office supplies, clothing, etc. It thus offers job opportunities in factories, safety, product design, branding & advertising, project management, engineering, finance, supply chain functions, distribution, sales, regulatory & compliance, IT, legal, etc.

From the acquisition of raw materials to production, packaging, and distribution, the employees of an FMCG company are a fundamental part of its operations. They are also one of the most affected groups in any restructuring situation as a restructuring can lead to upsizing or downsizing of staff through redundancy, role realignment, demotion, promotion, termination of employment, and termination of contract with outsourcing companies. This will lead to tension and anxiety for employees and such state of apprehension tends to affect the morale and job performance of many employees. Some employees may even begin to consider other job offers to the detriment of the business of the company.

It is therefore critical for employers in the FMCG sector to understand the impact of restructuring exercises on their employees, with a view to complying with legal requirements and balancing the employees interests with those of the company's. We shall in this piece, highlight the nature of merger, acquisition, and divestment in the FMCG industry, employee management in each model, and how employers can navigate such murky waters.

MANAGING EMPLOYEES OF FMCG COMPANIES UNDER A MERGER

A merger is an amalgamation of two or more companies under the identity of one of the combined entities, or in some cases, under the identity of a new corporate entity. For example, the merger between Dangote Sugar Refinery (DSR) and Savannah Sugar Company Ltd (SSCL) in 2020, where DSR, completely took over production of sugar from the SSCL. Also, Nigerian Breweries Plc on 31st December 2014, concluded its merger with Consolidated Breweries.

Mergers may lead to redundancy in certain positions and job roles, as the merged entities would synergise operations. In certain cases, a particular factory may no longer be required, as an existing factory of either of the merged entities may be adequate for the required production capacity.

This can also apply to a branch, zonal or regional office. In other cases, a particular department, or employees with similar job roles may amount to duplication of functions.

The above notwithstanding, the affected employees remain employees, and the company has the obligation to ensure that the consequences of the merger that affects its workforce are executed in accordance with extant law and applicable terms of the contract of employment of the employees.

It is recommended that employees be promptly informed of an imminent merger, as well as the possible implication, or some assurances provided to them (where applicable). Usually, provisions are made in the merger agreement concerning the employees of the merged entities. Communicating a possible merger to the employees is not only recommended for the purpose of easing the anxiety of the employees but it is also now a statutory requirement. The Federal Competition and Consumer Protection Commission (the Commission), Merger Review Regulations 2020 require mergers notifiable to the Commission to be communicated to the employees or their trade unions in a particular form. Interestingly, the term Merger as used in the Regulations is all encompassing, and includes an acquisition, amalgamation, and other forms of identified corporate restructuring.

Prior to the merger, it is important that the merging entities assess the various functions across factory, production, safety, distribution, finance, marketing, operations, human resource, business development, regulatory & compliance, amongst others, with a view to determining the staff strength and requirement upon conclusion of the merger. This should assist in gauging the likely consequences of the merger and to address employee fears from an informed position. Further to this, is the need to balkanize proposed employees that will be affected, to the different staff categories. This is necessary to determine the appropriate shape for the work force of the merged entity. The workforce restructuring could mean one or all the following: redundancy, termination of employment, resignation, role realignment, transfer, demotion, and promotion. The employees should be balkanized as follows, Workers under the Labour Act of Nigeria (manual labourers or clerical staff), Permanent staff, Contract or Temporary staff, Outsourced staff, Retiring staff, and Probation staff.

Where the assessment reveals no need for a workforce restructuring, then the employees should be reassured of their place in the new entity to prevent loss of morale and calm any atmosphere of uncertainty.

MANAGING EMPLOYEES OF FMCG COMPANIES UNDER AN ACQUISITION

An acquisition occurs where one company takes over or acquires the majority of shares or assets of another company, which then gives the acquiring company control over the other company. Recent examples in the FMCG industry in Nigeria are the acquisition of the 100 percent stake by Olam International Limited in the shareholding of Dangote Flour Mills Plc in 2019, and the acquisition of Chi Limited by Coca-Cola in January 2019.

An acquisition without more, does not in any way affect employees. However, as we have seen it happen in the FMCG industry, a change in the control of the company is usually necessitated by the factors intrinsic in the quest for competitive advantage. With change of control comes a change of management, innovation, introduction of new products, shutting down or selling off a business section, and sometimes, purchase of a business line of another FMCG company or a merger. So, whilst an acquisition on its own will not amount to a staff restructuring, the usual attendants of an acquisition may lead to that outcome.

An acquisition can thus lead to the different workforce restructuring as in a merger. This will include redundancy, termination of employment, resignation, role realignment, transfer, demotion, and promotion.

MANAGING EMPLOYEES OF FMCG COMPANIES UNDER A DIVESTMENT

A divestment is the elimination of a business line or division of an existing company. In a divestment, the company can either sell, or spin off a particular operation, division, or business. In FMCG companies, this is usually in the case of a product line. Most FMCG companies engage in the manufacture of different lines of products and may elect to sell off or spin off a product line. For instance, in April 2018, May & Baker divested its food arm to Dufil Nigeria Limited. This purchase gave Dufil, ownership rights to May & Baker's Mimee Noodles brand. Also, there was a divestment of the drinks bottling and distribution business of Glaxosmithkline Consumer Nigeria Plc to Suntory Beverage & Food Nigeria Limited in October 2016.

A divestment, particularly in the FMCG industry, is usually as a result of the following: where the market share is small and the business is capital intensive; where there are new regulations or changes in the existing laws that affect the profitability of the product line; where there are better alternatives usually provided by international brands at a cheaper cost; where there is a decision to focus on other profitable products line of the company to maximize returns, etc.

Divestment is a perfect reason for redundancy. However, just like in a merger, employees affected by a divestment remain employees of the company, as their employment is with the company. A sale, spin off or a shutdown of the business operations of a particular product line of the FMCG company will not automatically amount to termination or redundancy. Where such divestment will lead to redundancy or termination of employment, then the termination or redundancy procedure stipulated in the contract of employment, other employment policy documents, and where applicable, the Labour Act, must be followed for the affected staff.

REDUNDANCY UNDER A MERGER, ACQUISITION, AND DIVESTMENT

Under the Nigerian labour parlance, "redundancy" simply means an involuntary and permanent loss of employment caused by an excess of manpower. Redundancy would thus be justified where there is excess manpower by virtue of a merger, acquisition, or divestment. The reason for redundancy must be genuine. This reason is obvious under a divestment, as the sale of a business operation means that the employees in the affected divisions may no longer be required by the company. This is also the case in a merger, where there is a consolidation of offices and functions.

In an acquisition, caution needs to be exercised. A decision to change the management of a company due to a change in the control of the company or to change the workforce to meet the vision of the new directing minds of the business will not qualify as a redundancy. Also, terminating the employment of poor performers upon an acquisition is not a valid reason for redundancy. On the other hand, merging two job roles under the job functions of one and losing roles that are surplus to requirements, is a valid reason for redundancy. Where a company is suffering loss and can no longer meet its obligations to the employees, is also a valid reason for a redundancy. In these scenarios, there is an excess of manpower, leading to a permanent loss of employment. Also, the reason for redundancy should be one that can be easily established through financial records, minutes of meetings of Board & Annual General Meeting, and other records of the company.

The Nigerian labour law provides for the procedure for the conduct of a redundancy. The labour law though not applicable to all categories of staff in Nigeria, has been held by the courts to be the minimum benchmark for employee relations, particularly in the absence of any agreement or policy to the contrary. The statutory procedure for the conduct of a redundancy is as follows:

a. Inform the trade union of the affected employees (if any) of the redundancy.
b. Apply the principle of "last in, first out" subject to all factors of relative merit.
c. Negotiate and make redundancy payments to affected staff.

Some of the Trade Unions in the FMCG industry are the National Union of Food, Beverage and Tobacco Employees, National Union of Shop and Distributive Employees, and National Union of Chemical, Footwear, Rubber, Leather and Non-Metallic Products Employees. It is thus important for the company to determine whether the affected employees are unionized and comply with the collective bargaining agreement (if any) or notify the union of the affected employees.

There are three phases in any workforce restructuring. The pre-restructuring phase, the workforce restructuring phase and the post-restructuring phase. It is important for every phase to be carried out under the supervision of legal experts with broad knowledge and experience in the FMCG Industry. The pre-restructuring phase entails an audit of all employment documentation applicable to the exercise. This is done to ensure the exercise is seamless, and the company is properly prepared for the workforce restructuring. The workforce restructuring phase is the exercise itself and will include communication made to the employees or the Union on the exercise, negotiation of redundancy pay, and even the mode of termination of employment. The post-restructuring exercise involves the management of fallouts, to ensure minimal exposure.

Sequel to the above, the first step a company takes upon discovery that a redundancy is inevitable, is to examine its employment documentation in a bid to determine if a redundancy procedure is provided. Where the redundancy procedure is provided in the employment documentation of the company, it must be complied with.

Upon examination of the redundancy procedure, the company shall balkanize the affected staff and examine their contracts of employment. Not all categories of the affected staff should form part of the redundancy. In the case of outsourced staff, this should be managed properly with the outsourced entity based on the outsourcing agreement. Outsourced staff are not staff of the company. As such, the company cannot terminate their employment. Subject to the outsourcing agreement, the company may notify the outsourcing company that they no longer require the services of the outsourcing company as it pertains to the role of the outsourced staff.

For contract staff, a review of the employment contract is imperative to ascertain the expiration of the term of the contract. This is also applicable to retiring staff. Where the expiration or retirement date is fast approaching, the company, subject to its business needs may allow the contract to terminate by effluxion of time. For probationary staff, the company need not confirm the employment. Where the company is desirous of terminating earlier or disengaging the non-permanent staff, the contract of employment must be complied with.

For permanent staff, the redundancy procedure provided in the employment documentation should be followed. Where the contract documentation does not provide for any redundancy procedure, the redundancy provisions of the Labour Act should be adopted.

Another important factor in the conduct of a redundancy is the redundancy pay. Where the employment documentation does not provide for this, a reasonable redundancy pay should be negotiated and made to the affected employees. There are different metrics for the computation of redundancy pay. It could be the one-month salary for every year of service, or a fixed sum agreed for the different levels of staff. The employees are also entitled to receive any salary and benefits that remain unpaid as at the time of the redundancy.

ROLE REALIGNMENT AND TRANSFER UNDER A MERGER, ACQUISITION, AND DIVESTMENT

A merger, acquisition and divestment may necessitate role realignments, and transfer of some staff. In certain instances, role realignment and transfer are proposed or considered as alternatives to termination of employment. The company is required to genuinely consider alternative options in the event of a redundancy. Before proceeding on realigning the roles of employees or transferring employees, the employment contract must be examined.

A role realignment simply means the change of job roles. It could be an upgraded role, which could mean a promotion, or a downgraded role, that is, a demotion, or a switch from one job role to the other of the same grade. A role realignment would require the consent of the employee. In the case of a transfer, this could mean transfer to another branch, state, country, subsidiary, or an unrelated entity. Subject to the contract of employment, this would also require the consent of the affected staff. Where the affected staff agrees to a role realignment or a transfer to a subsidiary or an unrelated entity, it is safer for the terms to be negotiated and agreed on a fresh contract of employment.

CONCLUSION

The competitive nature of the FMCG industry makes it prone to restructuring, in the form of mergers, acquisitions, and divestment. In our experience, the best workforce restructuring following a merger, acquisition and divestment is one where legal experts that play in the FMCG sector provide guidance to the company for the three phases of the workforce restructuring. The pre-restructuring exercise is the most fundamental, as it paves the way for the company to have a seamless workforce restructuring exercise, and zero or minimal fallouts in the post-restructuring exercise.

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