

DISMISSAL AND TERMINATION OF CONTRACT OF EMPLOYMENT IN NIGERIA

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INTRODUCTION

The relationship between an employer and his employee is taken as regulated by the individual contract of employment. Vital aspects of that contract remain supposedly agreed by the parties without interference based on the common law rule that parties are free to enter into contracts, including contract of employment. Unfortunately, the doctrine of freedom of contract did not consider parties, who for economic, social and even political reasons are in such weak position that hardly can there be said to be any bargaining power¹. This manifests in employment situations. Besides, the common law views the relationship in contract of employment as that of master and servant relationship. This has often placed the employer at a vantage position that makes him always feel that any worker's employment can be terminated at will.

This paper will therefore, appraise the operational scope of dismissal and termination of contract of employment in Nigeria, showing the guidelines and their limits under our law. We shall proceed from here with the definitions of "dismissal" and "termination" of contract of employment.

1.2 WHAT IS DISMISSAL?

Dismissal is defined as the termination of an employee's contract of employment either by his employer or by the employee himself in circumstances in which he is entitled to terminate the contract without notice because of his employee's conduct². When the dismissal is by the employer, it comes under the purview of constructive dismissal. Thus, in

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¹ Erugo, S., Security of Employment in Nigeria: A Case for Statutory Intervention, Nigerian Journal of Labour Law and Industrial Relations (2007) Vol. 1, No. 1, P.57

² Curson, L.B., A Dictionary of Law. Medonald and Evans, Plymouth, (1979) P.104

the case of *Western Excavating Ltd. v. Sharp*³, an employee was dismissed for taking unauthorized time off work. He appealed to the Internal Disciplinary Board, which substituted a penalty of five days supervision without pay. This he accepted, but being short of money, he asked his employers if he could have an advance on his accrued holiday pay. This was refused. He asked if he could have a loan of £40, but this too was refused. Consequently he resigned and brought a claim for unfair dismissal, alleging that he was forced to resign due to his employer's conduct. His claim was upheld by the industrial tribunal, holding that the conduct of the employer was so unreasonable that employee could not fairly be expected to put up with it, which justified him leaving. On appeal, this decision was reversed with a finding of "Constructive dismissal" on the most whimsical ground, since there had been no breach of contract by the employee. Hence, if a finding of unfair dismissal were made, it would have connoted a breach of contract.

1.3 WHAT IS TERMINATION?

Termination means the act of ending something. Termination of contract of employment is therefore, the complete "severance" of an employer-employee relationship⁴. But, is there any distinction between dismissal and termination of contract of employment? This leads us to the next sub-heading.

1.4 THE DISTINCTION BETWEEN DISMISSAL AND TERMINATION

Both dismissal and termination mark the end of contract of employment, the only difference boils down to what may be the accompanying or resulting effect of the two actions. The Nigerian Supreme Court has since taken the view that dismissal is not without its stigma unlike termination. Dismissal, they have held, "Carries infamy and deprives one of benefits which termination in this case did not, the term does not apply to termination of appointment with retirement benefits"⁵.

More recently, the court held in the case of *Jombo v. Petroleum*

³ (1974) 1 All E.R., 893.

⁴ Garner, B.A.; et al (eds.) Black's Law Dictionary West Group, St. Paul. M. N. (1999) P. 1482.

⁵ J.A. Iren v. Obubra District Council and Anor (1960) F.S.C.

Equalization Fund (Management Fund⁶ that,

Termination or dismissal of an employee by the Employer translates into bringing the employment to an end. Under a termination of appointment, the employee is to receive the terminal benefits under the contract of employment. The right to terminate or bring an employment to an end is mutual in that either party may exercise it. Dismissal on the other hand, is punitive and, depending on the contract of employment, very often entails a loss of terminal benefits. It also carries an unflattering opprobrium to the employee.

It should further be noted that a person whose contract of employment has been brought to an end by way of termination cannot later be dismissed. Hence, the court stated in the foregoing case that, "It is elementary that an employee, in the instant case, the appellant, cannot be dismissed from an employment that had ceased to exist. The appellant's dismissal coming after the termination of his appointment, was a futile exercise"⁷.

It is considered important to pause here to point out that dismissal may be wrongful or unfair. "Wrongful dismissal" frequently refers to the same thing with "breach of contract". Wrongful dismissal is the name given to a breach of an employment contract by an employer, which is connected with the actual dismissal or the constructive dismissal of an employee. Breach of contract however, does not necessarily result in dismissal and covers much more than "wrongful dismissal. Nevertheless, from an employment law perspective, the two expressions are sometimes seen as interchangeable⁸.

⁶ (2005) 14 N.W.L.R., (Pt.945) 443 at 448.

⁷ Ibid.

⁸ Ibid.

On the other hand, unfair dismissal is a relative term, which developed in Britain and also, used in Nigeria. It is a statutory "invention", governed by Act of Parliament and dealt with by employment tribunals not by the courts. Unfair dismissal can, and frequently does, occur without there being any breach of contract or wrongful dismissal. It is a relatively new concept, having been in existence in Great Britain only since the passing of the Industrial Relations Act, 1971 and now under Employment Relations Act, 1996⁹.

Cases of wrongful dismissal typically occur when an employer dismisses an employee without giving the notice required by the employee's contract, and without adequate compensation in lieu. In practice, it is usually only worthwhile for the employee to sue if the contract provides a fairly long notice period. This is because damages will be assessed by reference to loss suffered which will normally be limited to the value of lost remuneration and lost "perks" for the period of notice, which the employer should have given¹⁰. It is on this note too, that the issue of mitigation of loss comes in. A dismissed employee is therefore, advised to mitigate the loss of his earnings by seeking for an alternative employment since damages do not take the form of a windfall. It is to compensate for only the loss suffered¹¹.

Termination of contract of employment may be unlawful for being contrary to the law. Section 11 of the Labour Act¹², provides for termination of contracts by notice, stipulating the various periods of notice to be given in each occasion. A party to a contract may, however, waive his right to accept a payment in lieu of notice¹³. Section 9(7) of the Labour Act provides that a contract shall be terminated:

- a) by the expiry of the period for which it was made; or
- b) by the death of the worker before the expiry of that period; or
- c) by notice in accordance with section 11 or in any other way in which a contract is legally terminable or held to be

⁹ See sections 94-134, Employment Relations, 1996 of Britain.

¹⁰ Loc. Cit., footnote 8.

¹¹ Audi, J A.M., Unfair Dismissal of Employees in Nigeria, A Journal of the Law Society, Ahmadu Bello University, Zaria (1998) vol.5, P.52

¹² Cap. LL, Laws of the Federation of Nigeria, 2004

¹³ Ibid. section 11(6)

terminated. Where an employee accepts salary in lieu of notice of termination of his employment, he may not be heard to complain later that his contract of employment was not validly and properly determined because in such a case his conduct could render the determination mutually.¹⁴

1.5 DISMISSAL/TERMINATION OF EMPLOYMENT UNDER COMMON LAW

The common law recognizes and respects the sanctity of the contract of employment. This rule is based on the principle of the confidential relationship between a master and a servant, which cannot continue in the absence of mutuality¹⁵. Consequently, a master cannot be compelled to retain the services of his servant. No court can impose an employee on the employer. The only remedy available to the servant is an action in damages. A master can terminate the employment of his servant at any time and for any reason or for no reason at all, provided the termination is in accordance with the terms of their contract. The notice, which compels a master to terminate a contract of employment with his servant, is irrelevant¹⁶.

The general rules, which the tribunals or courts have over the years established in relation to dismissal or termination of contract of employment between master and servant, are:¹⁷

1. An employer is entitled to dismiss an employee for any reason or for no reason at all; the only issue involved being whether or not the employee is entitled to a certain period of notice, or whether his conduct is such as to warrant instant (summary) dismissal without notice.
2. A servant's appointment can lawfully be terminated without first telling him and hearing his defence or explanation.
3. A servant can lawfully be dismissed without observing the principles of natural justice, as the question does not depend on

¹⁴ See *Iloabachie v. Philips* (2000) 14 N.W.L.R., (Pt.787) 264.

¹⁵ *Garuba v. Kwara Investment Coy Ltd.* (2005) 5 N. W.L.R., (Pt.917) 160 at 166

¹⁶ *L.C.R.I. v. Mohammed* (2005) 11 N.W.L.R., (Pt.935) 1

¹⁷ *Ogwuche, A. S., Compendium of Employment and Labour Law in Nigeria*, Maiyati Chambers, Lagos (2006) Pp. 54-55.

whether the master has heard the servant in his own defence but on whether the facts emerging at the trial prove breach of contract;

4. It is not necessary nor is it a requirement under section 36 of the 1999 Constitution, that before an employer summarily dismisses his employee from his employment under the common law, the employee must be tried before the court of law where the accusation is for gross misconduct which borders on criminality. Where an employee has been found guilty by a disciplinary committee to commit a gross misconduct bordering on criminality the master has a choice either to exercise his discretion in favour of prosecuting the erring servant or dismissing him summarily;
5. In a master and servant class of employment, prosecution before a court of law is not a sine quo non for summary dismissal;
6. Where an employee is alleged to have committed a crime, his criminal culpability must first be established before his employment can be terminated on the basis of the allegation; and
7. An employee whose employment is wrongfully terminated is entitled to damages calculated as the amount he would have earned under the contract for the period until the employer could have lawfully terminated it.

1.6 DISMISSAL AND TERMINATION OF EMPLOYMENT WITH STATUTORY "FLAVOUR"

An employment is said to have a statutory "flavour" where statutory provisions govern the appointment and termination. In other words, where the contract of service is governed by the provisions of statute or where the conditions of service are contained in regulations derived from statutory provisions, it invests the employee with a legal status higher than the ordinary one of master and servant¹⁸.

The rules and regulations, which are claimed by an employee to be part of the terms and condition of his employment capable of giving it statutory flavour and be of protection to the employee must have statutory

¹⁸ Auchi Poly v. Okughae (2005) 10 N.W.L.R., (Pt.933)276. See also Olanivanv. University of Lagos (1985) 2 N.W.L.R., (Pt. 9) 599

reinforcement or at any rate, be regarded as mandatory; be directly applicable to the employee or persons of his cadre; be seen to be intended for the protection of that employment; and have been breached in the course of determining the employment. This means that before an employment can have statutory flavour, the statute must expressly make it so¹⁹. However, the fact that an organization or institution is a statutory body does not mean that the conditions of service of its employees are protected by statute²⁰. For an employer to successfully justify the termination of the employment of his employee which has a statutory flavour, such employer must prove to the satisfaction of the trial court that the allegation made against the employee was disclosed to him and that he was given a fair hearing consequent upon which the disciplinary panel believed he indeed committed the offence alleged against him²¹. Where an employment protected by statute is terminated unlawfully, the remedy is to declare such termination null and void and to reinstate the employee so affected to his former position²².

1.7 DISMISS AND TERMINATION OF EMPLOYMENT UNDER THE NIGERIAN PUBLIC SERVICE RULES

The Public Service Rules of the Federal Republic of Nigeria, 2000 governs the conditions of service of Federal Public Servants and they are made pursuant to the powers conferred by the constitution. The Rules therefore, have constitutional force and they invest the public servant, over whom they prevail, a legal status, which place their employment over and above the common law relationship of master and servant. It introduces into such employment relations, the element of administrative law²³.

By virtue of Rules 04305 and 04306 of the Public Service Rules, the Federal Public Service Commission only in accordance with the

¹⁹ *Idoniboye-Obu v. N.N.P.C.* (2003) 2N.W.Lk. (Pt805) 589

²⁰ *Nigerian Gas Co. Ltd v. Dudusola* (2005) 18 N. WILR., (Pt. 957) 292

²¹ *Bamigboye v. University of Ilorin* (1999) 10 N. W.L.R. (Pt. 957) 292

²² *Iderima v. R.S.C.S.C.* (2005) 16N.W.L.R. (Pt.622) 290.

²³ Ogwuche, A.S., *Compendium of Employment and Labour Law in Nigeria*, Loc. Cit., footnote 23.

following rules may dismiss an officer in the Public Service:

1. The officer shall be notified in writing of the grounds on which it is proposed to dismiss him, and he shall be called upon to state in writing before a day to be specified (which day must allow reasonable interval for the purpose) any grounds upon which he relies to exculpate himself;
2. The matter shall be investigated by the appropriate authority with the aid of the head of the officer's department, and such other officer(s) as the appropriate authority may appoint;
3. If any witnesses are called to give evidence, the officer shall be entitled to be present and to put questions to the witnesses;
4. No documentary evidence shall be used against the officer unless he has previously been supplied with a copy thereof or given access thereto;
5. If the officer does not furnish any representations within the time fixed, the Federal Public Service Commission may take such action, as it deems appropriate against him;
6. If the officer submits his representations and the commission is not satisfied that he has exculpated himself, and considers that the officer should be dismissed, it shall take such action accordingly. The law is that a public servant can only be validly removed from service if the procedure prescribed by law was followed. Similarly, once the dismissal of a civil servant is declared null and void, the effect of such a pronouncement is that the civil servant was always and still is a civil servant²⁴.

1.8 LEGAL REMEDIES FOR WRONGFUL DISMISSAL OR TERMINATION OF EMPLOYMENT

An employee who considers that his employment has been wrongfully terminated either because he was given insufficient notice or by failure of the employer to justify his dismissal may seek for such remedies as specific performance, fair hearing or damages²⁵. The remedy of specific performance will rarely be made, except on proof of

²⁴ Op. Cit., footnote 23.

²⁵ Uvieghara, E E., Labour Law in Nigeria, Malthouse Press Limited, Lagos (2001) Pp.80 — 81

²⁶ (1985)2 NWLR (pt 9) 599 SC

special circumstances. Such special circumstances have been held to arise where the contract of employment has a legal and statutory flavour, thus, putting it over and above ordinary master and servant relationship, and a special legal status such as tenure of public office is attached to the contract of employment²⁶.

Where a contract of employment is for a fixed period and it is wrongfully terminated before the end of the fixed term, the salary or wages for the unexpired period of employment are recoverable as damages. However, this statement of the law is not absolute. The facts and circumstances of each case would determine the damages recoverable. Nevertheless, in all cases of breach of contract, the award by the court must be based on the loss naturally flowing from the breach²⁷.

The National Industrial Court may also order reinstatement of a wrongfully dismissed or terminated employee especially where the employee's contract was terminated on the ground of trade union activities. In doing this, the court always have recourse to sections 9(5) of the Labour Act and 43(1) (b) of the Trade Disputes Act²⁸.

Section 9(5)(b) provides that no employer shall,

- cause the dismissal of or otherwise prejudice, a worker by reason of trade union membership;*
- or because of trade union activities outside working hours or, with the consent of the employer within working hours, or by reason of the fact that he has lost or been deprived of membership of a trade union or has refused or been unable to become, or for any other reason is not a member of a trade union.*

Section 9(6)(a) provides that no contract shall make it a condition of employment that a worker shall or shall not join a trade union or shall not relinquish membership of a trade union. As a follow-

²⁷ (1985)2 NWLR (pt 9) 599 SC

²⁷ David Osuagwu v. Attorney General of Anambra State (1993) 4 N. W.L.R. (Pt.285) 13.

²⁸ Cap. T8, Laws of the Federation of Nigeria, 2004.

up, section 43(1)(b) provides that where any employer locks out his workers, the workers shall be entitled to wages and any other applicable remuneration for the period of lockout and the period of the lock-out shall not prejudicially affect any rights of the workers being rights dependent on the continuity of the period of employment.

Just recently, in the case of *Trans International Bank Plc. v. National Union of Banks, Insurance and Financial Institutions Employees (NUBFIE)*²⁹, the dispute centered on the complaint of the respondent that various attempts at having branch union of the respondent's union in the appellant's company were rebuffed by the appellant. In fact that, eligible members of the respondent's union in the forefront of forming the branch union within the structure of the appellant company had their services terminated by the appellant on the basis of the said union activities. The court observed that the evidence before it shows that on May 16, 1996, the day the domestic unit of the union was being inaugurated, the appellant issued queries to absenting staff that were at the inauguration ceremony. On May 17, 1996, the very following day, letters of termination were issued to all those queried the previous day without any recourse whatsoever to the provisions of the conditions of service. The court held thus:

The appellant did not abide by the process in which termination may be effected as provided by its conditions of service. We are convinced that the appellant caused the termination of, and hence prejudiced, workers in its employment by reason of the workers trade union membership and activities, thus bringing this matter squarely under the ambit of section 9(6)(b)(i) of the Labour Act. The termination is therefore, wrong, unlawful and hence null and void. For the reasons adduced... the six Executive Members of the Domestic Unit of NUBIFIE ... should be reinstated without loss of benefits and salaries.

²⁹ Unreported Suit No. NIC/17/2000, delivered on May 3, 2007

More recently, in the case of *Management of Dangote Industries Limited, Pasta Plant, Ebute Ikoro, Lagos, v. National Union of Food, Beverages and Tobacco Employees*³⁰, the court found that the appellant acted in contravention of section 9(6)(i) of the Labour Act. It therefore, ordered reinstatement of the sacked officers without loss of benefits and salaries. The court in this case, also, recognized the fact that time factor may affect the order for reinstatement, but that it is not an absolute proposition. In this respect, it held that if it dared to order for reinstatement as in its previous case of *Trans International Bank case*³¹, after eleven years had lapsed, why not also order for reinstatement in this instant case after only four years have elapsed.

In Britain, whenever a tribunal finds that an employee has been unfairly dismissed, it asks him whether or not he wishes a reinstatement or re-engagement order to be made. The tribunal however, has complete discretion as to whether or not to make such order³². The wishes of the complainant in this regard are likely to be particularly relevant if the employee was dismissed because he was (or was not) a union member or engaged in union activities³³. Or it may not be practicable to reinstate him where the vacancy has been filled since his termination. Thus the reform introduced is not effective in addressing reinstatement orders in Britain.

1.9 REMEDIES FOR WRONGFUL DISMISSAL OR TERMINATION OF EMPLOYMENT UNDER THE PUBLIC COMPLIANT COMMISSION ACT³⁴

The Public Compliant Commission in Nigeria also has jurisdiction to investigate and hear, amongst other things, cases of arbitrary dismissals and termination, since the Civil Service is one of the arms of the Government for executing its

³⁰ Unreported Suit No. NIC12/2008, delivered on January 28, 2009.

³¹ Op. cit. footnote 30.

³² Section 112, Employment Relations Act, 1999 of Britain.

³³ Section 152, Trade Unions and Labour Relations (Consolidation) Act, 1992 of Britain. "*N. N.P. C. v. Tijani* (2006) 17 N. W. L R., (Pt. 1007) 29

³⁴ Chapter p37, vol. 14, laws of the federation, 2004

missions into activities, it welds much power susceptible to committing administrative injustices against some workers. The commission's mandate under section 5 of the Act is to curb and address administrative excesses, abuse of office and violations of rules and regulations of Government Ministries, Departments, Local Government and Incorporated Companies in Nigeria.

In order to assess the contribution of the commission on the issues of dismissal and termination there is need to take a cursory examination of some of its decisions hereunder. Case No. C. 01/2009³⁵ concerned a staff of Challo Industries Ltd, Kaduna who worked for 12 years before his dismissal for alleged gross misconduct from the industries.

The matter was investigated by the Commission within the Industry and found that the complainant's appointment was wrongfully dismissed because the offence was not heard nor established. The complainant, Mallam D.I was given compensation in monetary form for his period of service as retirement benefits instead of reinstatement due to lapse of time of about a year to the date of decision by the commission. The Commission also decided the case of complaint by Oluygbobiri Tebidaba and Igbomotaru communities of Bayelsa State v. Nigeria Agip Oil Company (NAOC) in 2008.³⁶ It said that the company has corporate social responsibility to avoid "Local Content Contracts" on the pipeline project at Tebida Community, inferring that the company has social responsibilities towards the community in question.

The main draw back of the commission in deciding administrative injustices is that it is not a regular court and its decisions are not legally binding. The commission does not have powers of the court to implement its decisions. However, it had decided a wide range of cases of administrative

³⁵ See: 20th Annual Report, Public Commission, p.2

³⁶ See: 20th Annual Report, Public Complaint Commission, p. 2

injustices. For example in 2004 the Kaduna State branch received eleven complaints, and one on wrongful dismissal;³⁷ in 2008, ten complaints were made with one complaint on wrongful dismissal and termination;³⁸ and in 2009 annual report³⁹ eleven complaints out of which there is one on summary dismissal. All the complaints lodged were against ministries, Departments and other organizations. The effort of the Commission is meant to compliment the efforts of the regular courts, industrial Arbitration Panel and National Industrial Court in protecting the workers rights. The efforts of the courts and the PCC put together help in curtailing the excesses of government and organization's arbitrary powers.

1.10 CONCLUSION

In this modern time, contract can be enforced where a worker is dismissed or terminated wrongfully, as an employee in any employment may be a holder of a public office, and thereby holds a status or "property right" in his employment⁴⁰. The principle of common law in the area of contract of employment is not only an old fashioned law but, it contributes towards subordination of workers and inequality in the society. Nigeria is in dire need of dismissal or termination procedure, which works along with adequate safeguard against unfair, wrongful and unlawful dismissal or termination²⁵.

Nigeria may adopt what obtains in Britain or formulate her own procedures in the interest of social justice and industrial harmony in respect of the lower grades of public employees as damages is a poor substitute for unlawful dismissal or termination.

³⁷ Public Complaint Commission, Kaduna State Branch, 2004 Annual Report, p.7

³⁸ See 1st January, 31st Dec. 2008 Annual Report by Kaduna State Public Complaint Commission.

³⁹ See P. 21, Public Complaint Commission Annual Report.

⁴⁰ Audi, J.A.M., Unfair Dismissal of Employees in Nigeria, Loc. Cit`