REVISITING THE PENALTY OF SUMMARY DISMISSAL VIS-A-VIS THE REMEDY OF REINSTATEMENT UNDER NIGERIAN LABOUR LAW

BY

OGUCHE SAMUEL*

> After a refusal on the part of the servant to perform his work, the master is not bound to keep him as a burdensome and useless servant to the end of the year.[1]

ABSTRACT

Recently, the law reports become loaded with cases on wrongful termination of employment as well as summary dismissal. When these issues arise, the inevitable accompanying issues are remedies of reinstatement and damages. This paper is an examination of the right of employers to visit the sanction of summary dismissal on their employees where occasion demands in the context of the terms and conditions of employment as well as the ultimate interest of the employer. The paper examines the meaning of summary dismissal as well as termination, bringing out their differences. Similarly, the nature of employments with statutory flavour is also examined in this work, thereby analysing situations where the remedy of reinstatement is available to a dismissed employee or not. This paper addresses the meaning of misconduct as well as justification for summary dismissal, taking a voyage into a plethora of judicial authorities, labour statues in Nigeria as well as international instruments on labour. Again, the issue of prosecution and conviction in a court of law before an employee accused of criminal misconduct is dismissed is also addressed in this work. Finally, conclusions and recommendations are made for better labour and industrial relations.

PREAMBLE

Master and servant or employer and employee relationship is never intended to last ad infinitum. Depending on the terms of employment, the relationship is bound to end someday. However, there are certain instances where employers may choose to bring the employment to an untimely end as a result of certain reasons or for no reason disclosed. Such determination of appointment may take the form of termination of appointment or summary dismissal. Within the context of the frequency of its occurrence in recent times, it is not out of place to observe that the expression "summary dismissal" is beginning to take on a conceptual character. Although there are no specific acts set out as justifying the sanction of summary dismissal, like the proverbial elephant, they would be easy to identify. Concepts have their ways of emerging in people's consciousness and, taken as one, the penalty of summary dismissal in contemporary Nigeria has, no doubt, been conditioned by the vagaries and vicissitudes of our labour relations. The fact that employers have resorted to the penalty of summary dismissal, which is on the increase in

* Oguche Samuel, LL.B (Hons), B.L., LL.M, is a Lecturer in Department of Public Law, Faculty of Law, University of Jos, Nigeria. Phone: 08036236419, Email: ogucheсamlaw@yahoo.com

[1] Lord Ellenborough in Spain v. Arnott (1817) 2 Starke 256.

the industrial sector shall be examined in this work with a view of achieving industrial discipline and harmony in Nigeria. Some people have often advocated that the sanction of summary dismissal should not be made easy for employers in view of the fact that many employers have recourse to it maliciously. In some cases, employers are being accused of summarily dismissing their employees on other hidden grounds than the one disclosed. This work shall address this issue from the legal perspective.

Most law students and young practitioners have always fallen into a pit when it comes to forming opinions on when to advocate the remedy of reinstatement or not. Most of the time, some practitioners embark on the metaphorical wild goose chase, asking for remedy of reinstatement where particular circumstances do not justify such. The dilemma in which they find themselves in such a situation is very agonizing because the advice they may have to give may run contrary to their personal convictions of what is wrong or right.

MEANING OF SUMMARY DISMISSAL

Summary dismissal is said to arise in a situation where an employer dismisses an employee without giving the requisite notice provided for in the contract of employment. It is sudden and operative with immediate effect and, where it is rightly exercised, leaves the dismissed employee without benefit or remedy. It should be noted that acts and conducts which may justify summary dismissal cannot be clearly delineated. A lot of conducts may earn an employee summary dismissal and whether a particular conduct justifies summary dismissal or not depends on the circumstances of each case.

DISTINCTION BETWEEN SUMMARY DISMISSAL AND TERMINATION

Many people in the field of law use the terms "dismissal" and "termination" interchangeably. In the context of labour law, this practice is a lamentable misconception. On the distinction between the two terms, the Court of Appeal stated in Abomeli v. N.R.C[2] that:

> Dismissal carries with it infamy and deprives the dismissed employee of benefits while termination does not. The term (dismissal)[3] does not apply to termination of appointment with retirement benefits.[4]

From the above, it becomes obvious that the basic distinction between dismissal and termination is that the former deprives the employee of benefit that he is ordinarily entitled to, while the latter does not.[5] Summary dismissal is a stronger measure than termination in view of the fact that termination still leaves the employee with benefits. No wonder, in the case of Jupiter General Co. Ltd. v. S. Kroft[6], the Privy Council stated that summary dismissal is a strong measure only to be justified in exceptional circumstances. As has been noted, the circumstances of each case determine the justification or otherwise of summary dismissal. In the case of N.O.M. v. Daura,[7] it was observed thus:

> It is a well established principle of the common law and of Nigerian law that, ordinarily, a master is entitled to terminate his servant's employment for

[2] (1995) 1 N.W.L.R. (Pt.372) p. 451

[3] Emphasis is mine

[4] Supra, at p. 471, paras E-C

[5] ibid

[6] (1937) 3 All E.R. 25

[7] (1996) 8 N.W.L.R. (Pt. 468) p. 512

> good or bad reasons or for no reason at all. However, where the parties have reduced the terms and conditions of service into agreement, the agreement must be observed.[8]

It becomes clear from the above that the employer reserves the right to impose the sanction of summary dismissal or termination on his employee(s) at any time, depending on the circumstances of each case. In terms of termination, the accuracy of the emloyer's reason, if any, cannot even be questioned. He can wake up from his blissful slumber one day and say to his employee(s), "you are fired; your services are no longer required, so good bye". When he rightly exercises the imposition of the sanction of summary dismissal, such employee cannot challenge his dismissal but can only channel his appeal to God in prayers, if he believes in God at all. It should be noted here that the time of dismissal cannot be made subject of emphasis. In the case of Harmer v. Cornelius[9], the plaintiff was employed as a scene-painter after his response to a newspaper advertisement for "two first-rate panorama and scene-painters". He was thereafter dismissed on the ground of incompetence on the second day of his employment. The court had no hesitation in holding his dismissal justified on the ground that it would be unreasonable to compel an employer to go on employing a person who, having presented himself as competent, turns out to be incompetent. In the same way, Parker J. observed in Callo v. Brouncher[10] that if there was any moral misconduct, either pecuniary or otherwise, wilful disobedience, or habitual neglect, the defendant should be at liberty to part with the plaintiff.

JUSTIFICATION

For summary dismissal to be justified, it must have resulted from a conduct that touches on the foundation of the contract of employment. It has to be borne in mind that the general law of contract also applies to contract of employment. Lord Coleridge CJ, in Freeth v. Burr[11], a case which was a contract of sale of iron to be delivered in instalments, said that "in cases of this sort, where the question is whether the one party is free by the action of the other, the real matter for consideration is whether the acts or conducts of the one do or do not amount to an intimation on an intention to abandon and altogether to refuse performance of the contract."[12] He further observed that "the true question is whether the acts or conducts of the party evince an intention no longer to be bound by the contract."[13] In General Billposting Co. Ltd. v. Atkinson,[14] Lord Collins termed this a test. Similarly, in Laws v. London Chronicle Ltd[15], Lord Evershed had this to say:

> Since a contract of service is but an example of contracts in general, so that the general law of contract will be applicable, it follows that if summary dismissal is claimed to be justifiable, the question must be whether the conduct complained of is such as to show the servant to have disregarded the essential conditions of the contract of service.[16]

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[8] Ibid, at p. 560
[9] (1858) 141 ER 94
[10] (1831) ER 807
[11] (1874)LR 9 CP 208
[12] Ibid, at 213
[13] Ibid
[14] (1909) AC, 118 at 122
[15] (1959) 2 All ER, 285
[16] Ibid, at 287

On this note, the present writer is in total agreement with Professor Uvieghara when he said that the test needs to be modified in the light of the decision in Laws v. London Chronicle Ltd.[17] According to Uvieghara, the test is not whether conduct evinces an intention to longer be bound by the contract or that it shows a complete disregard of all the essential conditions of the contract but rather, whether it demonstrates a disregard of "one of its essential conditions."[18] As observed above, when an employee breaches his duty of obedience to lawful and proper order of his employer or to exercise reasonable skill or care in the discharge of his duties, that would be sufficient justification for sanction of summary dismissal. Hence, in Laws v. London Chronicle Ltd[19], Lord Evershed MR commented in the following words:

> It is no doubt therefore, generally true that wilful disobedience of an order will justify summary dismissal, since wilful disobedience of a lawful and reasonable order shows a complete disregard of a condition essential to the contract of service, namely, the condition that the servant must obey the proper order of the master and that, unless he so does, the relationship is, so to speak, struck at fundamentally.[20]

MISCONDUCT THAT JUSTIFIES SUMMARY DISMISSAL

It should be noted at this juncture that despite the fact that there is no fixed rule of law which defines the degree of misconduct that amounts to repudiation, not every misconduct amounts to a repudiatory misconduct. In Okoye v. Nigeria Airways[21], Desalu J. opined that "misconduct inconsistent with the due and faithful discharge by the servant of the duties for which he was engaged is good cause for the dismissal but there is no fixed rule of law defining the degree of misconduct which will justify dismissal."[22] It should be well understood that the question of definition of misconduct is entirely different from the issue of degree of misconduct justifying a dismissal. On this note again, the present writer aligns himself with Professor Uvieghara, disagreeing with the Court of Appeal when, in Oyedele v. Ife University Teaching Hospital Complex Management Board[23], when it stated that "under our law there is no definition of what is misconduct anywhere. Misconduct is what the employer considers to be misconduct. In the instant case, the employer of the appellant considered the two allegations made against him to amount to misconduct and so they retired him."[24] This statement, with respect, is not only out of place but also misleading and not to the point.

Having taken such a position, what is left to be decided is whether misconduct is sufficient to justify a dismissal, and in so deciding, the courts are to be the final arbiters.

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[17] supra

[18] Uvieghara E.E. Labour Law in Nigeria (Lagos: Malthouse Law Books, 2001) p. 64

[19] supra

[20] Loc cit

[21] (1979) 3 LRN 82

[22] Ibid, at p. 96

[23] (1990) 6 NWLR (Pt.) 194

[24] Ibid, at p. 199

JUDICIAL INTERPRETATION OF MISCONDUCT

In C.B.N. v. Jidda,[25] the respondent was at all times material to the suit an employee of the appellant and was Acting Senior Manager (Banking Officer), Abuja. Sometime in March 1998, he was served with a letter of suspension from duty without pay and still in 1998 he was arraigned along with nine others before the Miscellaneous Offences Tribunal, Abuja where they were tried and he was later discharged and acquitted. He was later dismissed from the service of the Appellant. Being dissatisfied with his dismissal, he filed a suit challenging his dismissal and the trial court found in his favour. On appeal to the Court of Appeal, the decision of the trial court was completely overturned. It was held that a master can terminate the contract of his servant at any time and for any reason or for none. Also in British-America Insurance Company (Nig) Ltd. v. Omolaya[26], the Court of Appeal held that absence from work was gross misconduct which entitled the employer to dismiss summarily. Similarly, in Anaja v. U.B.A. Plc,[27] gross misconduct was defined as a conduct of a grave and weighty character as to undermine the confidence which should exist between the employee and his employer or working against the deep interest of the employer.[28]

In the popular case of Sule v. Nigerian Cotton Board[29], the plaintiff/appellant maintained an action in the High Court, claiming the sum of N180, 731.00 as damages for wrongful retirement. He was retired on the ground that he refused to move his family from the defendant/respondent's quarters in Lagos after being transferred to Funtua, thereby depriving the officer who was transferred to replace him the use of the premises. The Supreme Court held that this was sufficient to attract the sanction of summary dismissal, and that the fact that the plaintiff/appellant was given six (6) months notice was an unnecessary benevolence on the part of his employers. The Supreme Court held that the appellant could not be heard to complain having been retired on full benefits instead of summary dismissal which he deserved.

In Chama v. Five Star Industries Ltd[30], the dismissal of the plaintiff was based on the ground that he called the Managing Director "a thief, cheat and rogue". In an action for wrongful dismissal, Adesanya J. was of the view that it was not enough to allege gross insubordination and rudeness but that the particulars as to the precise form of misconduct must be given. According to him, "insubordination, insolence, rudeness, derogating language, these are vague terms which in my view can disguise a multitude of types of misconduct. Some of them may properly justify such a drastic step as summary dismissal. Many of them may not justify summary action."[31]

It has been held that disobedience includes insubordination. In University of Calabar v. Essien[32], the Supreme Court had this to say:

> The word insubordination connotes disobedience. And wilful disobedience to a lawful order or command of a superior officer has been

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[25] (2001) FWLR (Pt.47) 1065
[26] (1991) 2 NWLR 721
[27] (2011) 15 NWLR (Pt. 1270)377
[28] See pp. 398-399, paras. G.A
[29] (1985) 2 NWLR (Pt.5) at p. 17
[30] (1975) NCLR 138
[31] Ibid, at 142
[32] (1996) 10 NWLR (Pt.477) p. 225

judicially interpreted quite rightly to mean insubordination. Disobedience of an employer's lawful order and/or command is misconduct, which may justifiably attract the penalty of summary dismissal, compulsory retirement of the employee concerned.[33]

It should be noted that the status of the employee in question is a relevant consideration in dismissing him. In the same vein, the fact that the employee has an isolated history of misconduct as opposed to an isolated incident is also important in dismissing him.

DISMISSAL BASED ON ALLEGATION OF CRIMINAL MISCONDUCT

It is now established that an employee can be lawfully dismissed for misconduct which also constitutes a criminal offence. It is however, settled that before an employee is dismissed for a criminal offence, he must have been tried and convicted by a court of law. This principle has its origin in the decisions of the Supreme Court. In Denloye v. Medical and Dental Practitioners Disciplinary Committee,[34] a decision was actually reached on a finding of professional negligence. Here the appellant appealed against the decision of the Medical and Dental Practitioners' Disciplinary Tribunal which found him guilty on five counts of infamous conduct in a professional respect has ordered the removal of his name from the medical register. The first count charged the appellant with neglect of a patient for almost a fortnight. The second count charged him with extortion of the sum of 30 guineas from the parent's father in order to induce him to examine and treat the treat the patient. The 3rd, 4th and 5th counts relate to different transactions namely, the receipt of the amount of the £2.2s in each of counts 3 and 4 and £2 in count 5 by the appellant for false pre-employment certification of fitness. The court gave judgement in his favour on the ground that the withholding of the evidence by the tribunal when the appellant demanded for it constituted a denial of justice to the appellant. For the above reasons, the court set aside the order of the tribunal and restored the appellant's name to the medical register.

Similarly, in Sofekun v. Akinyemi[35], the plaintiff was purportedly dismissed under regulations which had provisions to the effect that dismissal was to be effective once where "an offence against any enactment (being a criminal offence as defined for the purposes of these regulations) may have been committed by a public officer." Being a medical doctor and an employee in the public service, the plaintiff was accused of, inter alia, attempting to have carnal knowledge of and unlawful and indecent assault of a female patient, both being within the definition of a criminal offence in the regulations and the Criminal Code. The Supreme Court held that the plaintiff should have first, been found guilty of committing the offences. The Constitution makes a presumption of innocence in favour of an accused person until his guilt is proved, and this must be done by giving him a fair hearing by a court or tribunal. Fatai-Williams, CJN (as he then was) had this to say:

> It seems to me that once a person is accused of a criminal offence, he must be tried in a court of law where the complaints of his accusers can be ventilated in public and where he would be sure of getting a fair hearing as set out in subsection (4) to (10) of section 22 of the Constitution of the Federal Republic of Nigeria.[36]

[33] Ibid, at 262

[34] (1968) NSCC 260

[35] (1980) 5-7 SC 1

[36] Scc (1980) NSCC 175 at 184

He commented further on the nature of fundamental right of an employee accused of a criminal offence in the context of termination of employment:

> I take the view that because it is so fundamental to the life, liberty and well being of the individual, any person who complains about an alleged infringement of any of his Fundamental Rights as entrenched in our constitution, to convey the issue of such infringement at any stage of any court proceedings whether in the trial court or Court of Appeal, to say that the procedure specified in section 42 (the 1979 Constitution) is an exclusive procedure may indeed lead to strange and undesirable consequence in certain circumstance. If, for instance, a person engaged say in a statutory corporation or the Civil Service, alleges as basis of his employment that the termination was wrongful because it was based on the result of an enquiry which was (1) conducted unfairly in breach of the provision of section 36 of the Constitution and/or (2) in the alternative, in breach of the statutory procedure for conducting such enquiry as laid down by the particular statute relating to his employment, it will be preposterous to suggest that by the mere fact that he alleges a contravention as one of his grounds for redress, he would have to proceed under the Fundamental Rights (Enforcement Procedure) Rules 1979 even though the said Rules do not cover his 2nd ground or, that he should pursue his two grounds by means of separate proceeding, one in the normal way and one other by special procedure. It does appear to me that for recourse to the procedure laid down in the Rule to be appropriate, the question of contravention of the provisions of Chapter IV must not be a mere preliminary or incidental question in the case. It must be the sole issue in the case and the whole purpose of the proceedings must be to free the application from the burdens of the contravention.[37]

Looking at this very case, question that readily comes to mind is, what happens in the absence of a provision such as was contained in the regulations? In such a case, no doubt, an allegation of a misconduct which also amounts to a crime is not necessarily an accusation of such crime. It should be noted that some misconduct may give rise to both a breach of contract and a criminal offence just as it can be tortuous and also criminal. At this juncture, it should be remarked that it does not follow that to allege a contractual misconduct also means a charge of crime. Consequently, in such cases, the constitutional provision on the issue of fair hearing cannot be relied on. This can be explained on the ground that to charge is generally understood mean "charged for the purpose of prosecution of a crime." The decision of the House of Lords in Stirland v. DPP[38] buttresses this point. In this case, the accused was on trial for forgery, on the basis of which he asserted during examination-in-chief that he had never been "charged" with any offence. He was then asked questions suggesting that he had been "questioned about a suggested forgery" sometime by his former employer. In construing the word "charge" in a section of statute which reads in part "every person charged with an offence...." Viscount Simon L.C. pronounced as follows:

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[37] See (1980) 5-7 SC 1 at 20-21

[38] (1944) AC 315

> It is necessary however, to guard against a possible confusion in the use of the word "charged"... it is plain that its meaning in the section is "accused before a court" and not merely suspected or accused without prosecution. When the appellant denied that he had ever been "charged", he might fairly be understood to use the word in the sense it bears in the statute, and to men that he had never previously been brought before a criminal court.[39]

The reality here is that employers are unwilling to report criminal misconduct to the police but prefer to dismiss. However, it should be noted that the application of the constitutional provision regarding fair hearing has put employers in a quandary. For example, what becomes the fate of an employer where there seems to be no conclusion to police investigation as a result of tardiness, or where investigation is abandoned?

In Imonikhe v. Unity Bank Plc[40], the appellant, an indigene of Edo State, who was an employee of the respondent, was issued a query in which he was accused of fraud. The Kernel of the allegation was that he benefited from the sum of N3, 000 drawn from the account of a customer when a cheque of N3, 000 he paid into the customer's account had not been cleared, and that the alleged act was contrary to Article 4(iii)(a) of the Collective Agreement (Exhibit P18) governing his employment. Subsequently, the respondent issued another query to the appellant. The respondent accused the appellant of aiding and abetting the forgery of his brother's credentials to facilitate his brother's employment by the respondent as an indigene of Benue State, and that the acts allegedly done by the appellant were in breach of Article 4(iv) and (ix) of exhibit P18. The appellant separately replied the queries issued to him and he denied the allegations in both queries.

The respondent's queries and the appellant's replies were referred to the respondent's disciplinary committee, which found the appellant's replies unsatisfactory and also found the appellant guilty of the allegations against him. Consequently, the appellant was dismissed from the employ of the respondent. After hearing the respective cases of the parties, the trial court entered judgment in favour of the appellant. The respondent was aggrieved by the decision of the trial court and appealed to the Court of Appeal which allowed the appeal and set aside the judgment of the trial court. The appellant was dissatisfied with the judgment of the Court of Appeal and he appealed to the Supreme Court. Unanimously dismissing the appeal, the Supreme Court had this to say:

> An accusation of crime must be proved beyond reasonable doubt in a court of competent jurisdiction before an employer can rely on it to dismiss an employee. In the instant case, it was not necessary for the respondent to prove the allegations against the appellant before a court of law.[41]

The Supreme Court further pronounced as follows:

> What the appellant is really saying is that since the allegations are on the commission of crime, there ought to have been a trial and conviction by a court properly constituted before he can be dismissed. Audi alteram partem is a maxim denoting basic fairness. It is a canon of natural justice that has its roots in the Old Testament. The Good Lord heard Adam before he passed sentence. It simply means hear the other side... Accusing an employee of

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[39] Ibid, at 323-324

[40] (2011) 12 N.W.L.R. (Pt.1262) 624

[41] Ibid, at p. 648, paragraph H.

misconduct, etc by way of a query and allowing the employee to answer the query, and the employee answers it before a decision is taken satisfies the requirements of fair hearing or natural justice. The appellant was given a fair hearing since he answered the queries before he was dismissed.[42]

On whether or not it is mandatory to secure a conviction for a criminal misconduct before an employer can dismiss an employee based on such misconduct, the Supreme Court had this to say:

> As regards irregular practice, the respondent sent queries to the appellant for the appellant to explain:
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> (a) His role in irregular practices in respect of a customer's account.
>
> (b) How he made his brother claim Benue State instead of Edo State (where he comes from) so that he can be employed by the bank.
>
> The appellant answered the queries on the above, but the respondent did not find the answers satisfactory, and so he was dismissed. Can it be said that the above also has to be proved in court of law? I do not think so. By the conditions of service of any organisation properly so called, an employer ought to be able to discipline erring employees and that was precisely what the respondent did.[43]

It is the view of the present writer that where allegation of crime, especially that bordering on fraud and dishonesty is made against an employee, there is no need prosecuting and securing a conviction before the sanction of summary dismissal can be meted out on such an employee. The proponents of conviction for crime before dismissal fail to understand that the processes leading to conviction are cumbersome, ranging from investigation to filing of formal charges in court, with all the attendant delays and intrigues. What happens where, due to some procedural blunders, the prosecution is unable to prove the charge against such employee beyond reasonable doubt as required by law, and the employee is consequently discharged and possibly acquitted? Does it mean that in such a case, the employer must continue with the services of the employee since there is no conviction? This certainly is an affront to justice.

In U.B.N. v. Chinyere[44], the Court of Appeal remarked thus:

> It is not necessary and not a requirement under the Constitution that before an employer summarily dismisses his employee from his services under the common law, the employee must be tried before a court of law where the accusation against the employee is for gross misconduct involving dishonesty bothering on criminality.[45]

Where summary dismissal is challenged, the onus is on the employee who was summarily dismissed to prove that his dismissal was wrongful.[46] When the dismissed employee shows that his dismissal was wrongful, the said employee would be seen to have discharged the burden of proof placed on him by law. In University of Calabar v. Essien[47], it was established that where a contract of employment enjoys statutory flavour,

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[42] Ibid, paras. D-F

[43] Ibid, p. 649, paras. A-C, per Rhodes-Vivour, J.S.C

[44] (2010) 10 N.W.L.R. (Pt. 1203) 453

[45] Ibid, at 474, paras. E-G, per Gumel J.C.A

[46] Nigerian Romanian Wood Industries Ltd. v. Akingbulugbe (2011) 11 N.W.L.R. (Pt. 1257) 131

[47] (1996) 10 NWLR (Pt.177) p.225

an employer who dismisses an employee on grounds of misconduct needs to establish the following to justify summary dismissal:

a. That the allegation was disclosed to the employee;
b. That he was given fair hearing. This means that the rules of natural justice were not violated.[48]
c. That the disciplinary panel followed the laid down procedure, if any, and accepted that he committed the act after its investigation.[49]

Worthy of note is the fact that where a contract of employment is not governed by statute, an employee can be summarily dismissed without availing him fair hearing. In Anaja v. U.B.A. Plc,[50] it was remarked that:

> A master has full powers to terminate the employment of his servant at any time, for any reason or indeed, for no reason at all; provided, that the termination of such an employment follows the procedure spelt out in the contract of service, otherwise the master will be liable in damages for breach of the contractual agreement. In the class of cases of master and servant, an officer's appointment can lawfully be terminated without first telling him what is alleged against him and hearing his defence or explanation. Similarly, an officer in this class can lawfully be dismissed without observing the principles of natural justice. In the instant case, the appellant's employment was not governed by statute and did not have any statutory flavour. It was therefore a master and servant relationship. The respondent was well within its right as a master to end the relationship by summary dismissal without giving any reason at all.[51]

EMPLOYMENTS WITH STATUTORY FLAVOUR AND REMEDY OF REINSTATEMENT

When it comes to addressing the question of remedy of reinstatement, a vital question that comes to mind is, "can there be specific performance of a contract of employment?" Like the proverbial snake in a clay pot that must be killed with utmost caution, this question deserves caution and patience while answering it as the grant of specific performance or reinstatement depends on the circumstances of each case. Ordinarily, specific performance of contracts of employment is not ordered by the courts except in special circumstances which shall be discussed hereunder. In Momoh v. C.B.N.[52], the Court of Appeal remarked that:

> Ordinarily at common law, a master is entitled to dismiss his servant from his employment for good or bad reason or for no reason at all. In consonance with this principle, the courts rarely order specific performance of contract of employment so as not to create a situation whereby an employee will be foisted upon an unwilling employer, just as on the other hand no employer could be allowed to prevent an employee from seeking for greener pastures

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[48] The two notorious pillars of natural justice are *audi alteram partem* and *nemo judex incausa sua,* meaning you must hear the other side and no one should be a judge in his own cause respectively.

[49] See also Momoh v. C.B.N. (2007) All F.W.L.R. (Pt.395) 420

[50] supra

[51] Pp. 393-394, paras. G-C, per Yahaya, J.C.A

[52] supra

elsewhere.[53]

There is a sole factor that determines whether or not a court can order specific performance after finding that dismissal was wrongful. In U.B.N. v. Chinyere[54], it was held that an employment can only be said to have been wrongfully terminated if it was done contrary to the conditions governing the particular contract of service in a manner not contemplated by the stipulations in the conditions of service.[55] Similarly, in Nigerian Romanian Wood Industries Ltd. v. Akingbulugbe[56], it was held that a plaintiff who seeks a declaration that termination of his employment was wrongful must prove the following material facts:

(a) That he is an employee of the defendant;
(b) The terms and conditions of his employment;
(c) The way and manner and by whom he can be removed;
(d) The way and manner the terms and conditions of his employment was breached by his employer.[57]

Similarly, in W.A.E.C. v. Oshionebo[58], it was held thus:

> An employee who complains that his appointment was wrongly terminated has the onus to place before the court the terms and conditions of the contract of employment and to prove the way and manner those terms were breached by the employer. It is not the duty of the employer who is a defendant to an action brought by the employee to prove any such breach.[59]

The sole determinant is whether the contract of employment enjoys statutory flavour or not. As a matter of fact, it is only in employments with statutory flavour that the courts can make a decree of specific performance. This being the case, it is a futile exercise to pray for specific performance of a contract of employment that does not enjoy statutory flavour.

When is a contract of employment said to enjoy statutory flavour? This question was rightly answered by the Supreme Court in Idoniboye-Obu v. NNPC.[60] In this case, the respondent appointed the appellant as Senior Accounts Supervisor with effect from September 1, 1980. The appellant rose to the rank of Chief Accounts Officer. On the 24th day of June 1985, the appellant received a letter from the respondent, suspending the annual leave as well as suspending him from duty. The letter alleged that fraud was uncovered in his section and that he was involved in the alleged fraud. By a letter dated September 13 1985, the appellant's appointment was terminated. The appellant, as plaintiff, filed an action in the High Court sitting in Port Harcourt, challenging the termination of his appointment, praying for a declaratory relief and an injunction. The learned trial judge gave judgment in his favour and ordered reinstatement, consequent upon which the respondent appealed. The Court of Appeal

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[53] See p. 442, paras. B-C, per Omoleye J.C.A. See also Obo v. Commissioner of Education, Bendel State (2001) FWLR (Pt. 38) 1226 and Araromi Rubber Estates Ltd. v. Orogun (1999) 1 NWLR (Pt. 586) 302

[54] supra

[55] See p. 472, paras. F-G

[56] supra

[57] See p. 148. Paras. C-G

[58] (2007)All FWLR (Pt.370) 1501

[59] See p. 1512, paras. F-H. See also Iwuchukwu v. Nwizu (1994) 7 NWLR (Pt. 357) 379; Katto v. C.B.N. (1999) 6 NWLR (Pt. 607) 390 and Ibama v. S.P.D.C. (2005) All FWLR (Pt. 287) 832, all referred to by the court.

[60] (2003) 4 M.J.S.C 131

overturned the decision of the learned trial judge on the issue of specific performance in a master and servant relationship. Dissatisfied with the decision of the Court of Appeal, the appellant appealed to the Supreme Court. Unanimously dismissing the appeal, the Supreme Court had this to say:

> Two of the vital ingredients that must co-exist before a contract of employment can be said to import statutory flavour include the following:
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> 1. The employer must be a body set up by statute
> 2. The establishing statute must make express provisions regulating the employment of the staff of the category of the employee concerned, especially in matters of discipline.[61]

The apex court further held as follows:

> An employment is said to have statutory flavour if the employment is directly governed or regulated by a statute or sections of the statute delegate power to an authority or body to make the regulations or conditions of service as the case may be. In the case of the latter, the section or sections of the statute must clearly and unequivocally govern or regulate the employment of the plaintiff and must be unmistakably clear in the provision of the delegated legislation. The regulation and or the conditions of service must be implicitly borne out from the section or section or sections and the regulations or conditions of service conveying a legal instrument or a document which is of similar context.[62]

In Alhassan v. A.B.U., Zaria[63], the appellant was a senior staff of the respondent. He was originally engaged by the 1st respondent as an administrative officer. He was subsequently posted to the security office where he remained till 2nd July, 1999 when an anonymous letter was sent to the 1st respondent as a result of which he was given a query and then posted to the 2nd respondent. At the request of the 3rd respondent he was again posted there and rose to the position of the college secretary. While in that capacity, he applied for leave to enable him contest for the chairmanship of the Senior Staff Association of Nigerian Universities (SSANU), but was advised against it by the 3rd respondent. He went ahead to contest and lost. Subsequently, a query and letter of last and strong warning were issued to him. His appointment was eventually terminated and he was paid 3 months' salary in lieu of notice of his termination. He thereafter challenged the termination as wrongful and sought order of reinstatement with payment of all his accrued salaries and other emoluments in arrears. The respondents joined issues with the appellant vide pleading but did not adduce any evidence. At the conclusion of trial, the trial court dismissed the appellant's case for want of proof on the balance of probability. Dissatisfied, the appellant appealed to the Court of Appeal, which unanimously allowed the appeal.

It should be mentioned at this juncture that the fact that an employee is a Federal Public Servant and the employer is created by statute does not confer statutory flavour on the said contract of employment. Whether or not a contract of employment enjoys statutory flavour depends on the provisions of the terms of the contract of employment, in the sense that statutory provisions must be incorporated as governing the contract of employment. On

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[61] Ibid, p. 152, paras. F-G

[62] Ibid, p. 164-165, paras. G-B

[63] (2011) 11 N.W.L.R (Pt. 1259) p. 417

determination of whether an employment has statutory flavour, the Court had this to say:

> The fact that an employer is a creation of statute or statutory body does not, without more, raise the legal status of its employees over and above the normal common law master and servant relationship. The facts that an employee is a Federal Public servant and the employer is created by statute do not on their own elevate the employee's contract of employment to a contract with statutory flavour. Also, the fact that a person is pensionable Federal Public Servant does not mean that his contract of employment is protected by statute. Whether a contract of employment is governed by statute or not depends on the interpretation of the contractual document or the applicable statute. In the instant case, before a contractual relationship between the appellant and the 1st respondent with regard to the removal of the appellant by the 1st respondent could enjoy statutory flavour, statute 8.5 of the Firs Schedule to the Ahmadu Bello University (Transitional Provisions) Act, other laws, and the Regulations made pursuant to the said Act must be expressly incorporated into the contract of the employment existing between the parties. It is such incorporation that gives rise to special treatment by way of statutory or legal flavour in the event of master deciding unilaterally to terminate the appointment of servant.[64]

The point must be made here that once a contract of employment enjoys statutory flavour, an employer cannot terminate the employment of an employee at will. In this case, the employer must follow statutory procedure in terminating/dismissing the employee. On this note, the Court of Appeal commented as follows:

> When an office or employment has a statutory flavour in the sense that its conditions of service are provided for and protected by statute or regulations made thereunder, any person holding that office or in that employment enjoys a special status over and above the ordinary master and servant relationship. In the matter of the discipline of such a person, the procedure laid down by the applicable statute or regulations must be fully complied with. If materially contravened, any decision affecting the right or reputation or tenure of office of that person may be declared null and void in appropriate proceedings.[65]

Bearing the above in mind, it becomes obvious that the principle that a willing

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[64] Ibid, at pp. 454-455 paras, H-B; 457, paras. G-H per Orji-Abadua, J.C.A.

[65] Ibid, at. 464, paras. E-G, per Orji-Abadua, J.C.A. In Raji v. University of Ilorin (2007) All FWLR (Pt. 345) 325, a case bothering on termination of appointment of Senior Lecturer in the Faculty of Arts in University of Ilorin, the court held p. 337, paras. E-F&H that "where the terms of employment are governed by laws, rules and regulations, that is having statutory flavour, the employee's employment cannot be terminated except in accordance with such rules and regulations. In the instant case, section 15 of the University of Ilorin Act confers on the university staff a special status over and above the normal contractual relationship of master and servant. Consequently, the only way to terminate such a contract of service with statutory flavour is to adhere strictly to the procedure laid down in the statute in the University of Ilorin Act."

servant cannot be forced on an unwilling master is inapplicable in employments with statutory flavour. In Busari v. Osun State Water Corporation[66], the plaintiff/appellant was employed in 1978 by the Oyo State Water Corporation as a motorcycle mechanic and later deployed to Osun State Water Corporation when Osun State was created from Oyo State. He rose to the post of senior technical assistant. He was suspended in 1998 based on an allegation of theft of pipes with one other staff pending conclusion of police investigation. The plaintiff was charged before a Magistrates' Court for conspiracy to commit a felony and stealing, tried and discharged and acquitted. His solicitors subsequently wrote the General Manager of Osun State Water Corporation about the outcome of the case and appealed for reinstatement of the plaintiff but in reply to the said letter, a letter of termination of appointment with one month's salary in lieu of notice was sent. All efforts by the plaintiff to get him reinstated proved abortive and in consequence, he instituted an action in the High Court of Justice, Osun State praying for a declaration that the termination of his appointment was malicious and invalid and in the alternative, an order directing the 1st defendant to pay him all arrears of his salaries and his retirement benefits. The trial court dismissed the plaintiff's claim, holding that the termination of his appointment was in order. On appeal to the Court of Appeal, the Court of Appeal had this to say:

> There is no running away from the fact that what triggered off this case was the allegation of conspiracy to commit a felony levelled against the plaintiff and one Friday Okpe which led to their suspension and prosecution in the Chief Magistrates' Court, Oshogbo from which they eventually discharged and acquitted. In an effort to get reinstated back to his job, the plaintiff, through his solicitors, first notified his employers about the outcome of the case and appealed for his prompt reinstatement. On receipt of the letter (exhibit 7A), the Osun State Water Corporation wrote to the Ministry of Justice on 21st June, 2000. The Ministry of Justice in its reply dated 18th December, 2000 (exhibit D1) advised that the appointment of the plaintiff be terminated while Friday Okpe was to be retired. This advice came after the plaintiff's appointment had been terminated on 27th November, 2000. The defendants were the ones that first invoked the Civil Service Commission Regulations to suspend the plaintiff and they cannot resile from that position by treating the contract as a mere servant and master relationship. If the defendants were convinced right from the start that the contract lacked any statutory flavour, they should have relieved him of his appointment without first subjecting him to any disciplinary measures. Since the plaintiff's appointment was confirmed and he was subsequently suspended from his employment in accordance with the Civil Service Regulations, the logical conclusion which can be drawn on the nature of his employment is that it was not an ordinary contract which could be terminated at will but must follow the laid down procedure as stipulated in the Civil Service Rules... The principle of law which states that you cannot force a willing servant on an unwilling master is not applicable in this instance as the plaintiff's employment is not at the pleasure of the government or any of its parastatals.[67]

It should be noted at this juncture that where a contract of employment does not enjoy statutory flavour, an employer who terminates the services of his employee need not adduce reasons for so doing as opposed to contracts with statutory flavour. In Nigerian Romanian Wood Industries Ltd. v. Akingbulugbe[68], the Court of Appeal made the following

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[66] (2008) All FWLR (Pt. 414) 1583

[67] Per Akaahs JCA, at pp. 1598-1599, paras. G-C & E

[68] supra

useful pronouncement in this direction:

> At common law, a master is entitled to dismiss his servant form his employment for good or bad reason or for no reason at all. In the instant case, the letter of employment gave the employer, the appellant and employee, the respondent the right to terminate the employment by giving three months notice or paying three months salary in lieu. Neither was bound to give any reason for terminating the employment. In the circumstance, the respondent's employment was lawfully terminated.[69]

On the nature of contract of employment without statutory flavour, the case of Bashiru Atanda v. H. Saffeiddine Transport Ltd[70] is instructive. Here, the appellant who was a tanker driver with the respondent company had his employment terminated by a letter dated 5th January, 1998. When all efforts to persuade the respondent to rescind its decision failed, the appellant engaged the services of a counsel who wrote a number of letters to the respondent on the issue, also without any positive result. The appellant finally instituted an action against the respondents before the High Court of Oyo State, Ibadan claiming damages in the sum of fourteen million, seven hundred and seventy-seven naira for wrongful termination of his employment. He sought the damages in the amount accruing as salary and gratuity to him. His action was dismissed on the ground that employer of labour cannot be saddled with an employee as he can terminate his employee's employment without reason. On appeal to the Court of Appeal, the appeal was dismissed with the following pronouncement on the nature of contract of employment without statutory flavour:

> In a contract of service between an employer and an employee, where the service terms do not contain a statutory flavour, the contract between the parties is one of a master and servant, and in a master and servant employment, as in the instant case, the master is under no obligation to give reasons for terminating the appointment of his servant. The master can terminate the contract with his servant at any time and for any reason or for no reason. In the instant case, the appellant's employment was terminated because his services were no longer required and this is reason enough for any employer to terminate the appointment of his employee since a court cannot force an employee on his roll if his services are no longer required.[71]

However, where a master or employer elects to give reasons for dismissing his servant or employee, he must prove that such reasons justify the dismissal. In Institute of Health Ahmadu Bello University Hospital Management Board v. Anyip[72], the respondent was an employee of the appellant and by the applicable conditions of service, that is the Institute of Health Staff Regulations, it was provided that "the Institute may at any time for good cause terminate your engagement by two months notice in writing or by payment of two months' salary in lieu on notice." Following an allegation of theft of expired drugs, the

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[69] See p. 153, paras. A-B

[70] (2008) All FWLR (Pt. 401) 985

[71] P. 996, paras. E-F; p. 997, paras. E-F, per Augie, JCA

[72] (2011) 12 NWLR (P1260) 1

respondent was interdicted by the appellant. It was clearly stated in the letter of interdiction that the respondent's fate would be determined by the outcome of the report of an Administrative Disciplinary Committee set up to investigate the allegations against the respondent. After investigation and hearing, the Committee exonerated the respondent and recommended her reinstatement. Notwithstanding the recommendation, the appellant dismissed the respondent from its employment. Consequent upon which the respondent instituted an action at the High Court, which eventually dismissed the case. The appellant gave reasons for dismissing the respondent. The respondent appealed to the Court of Appeal which allowed the appeal but declined to reinstate her, but awarded damages instead. Being dissatisfied, the appellant appealed to the Supreme Court. Dismissing the appeal, the Supreme Court had this to say:

> Although an employer is not obliged to give any reason for firing his servant, where he has proffered any reason at all, he is obliged to satisfactorily prove the same as the onus is on him in that regard, otherwise the termination/dismissal may constitute a wrongful dismissal without more. In the instant case, the appellant failed to justify the dismissal of the respondent; hence it was wrongful[73].

Where a contract of employment does not enjoy statutory flavour, termination can only be wrongful if it contravenes the terms and conditions of the contract of employment. Giving judicial blessing to this point, it has been held as follows:

> The law is on firma terra that in a master and servant relationship, which is devoid of statutory flavour, as in the instant case going by the reliefs sought, and which is purely contractual, as in this case, the termination of the employment of an employee by the employer cannot be wrongful unless it is in breach of the terms and conditions of the contract of employment.[74]

On the remedy of reinstatement, it should be quickly remarked that it is only available in contracts with statutory flavour. On this note, where an employee whose contract of employment is governed by statute is dismissed wrongfully, such an employee is entitled to the remedy of reinstatement but when the termination is done in accordance with the contract of employment or relevant statute, reinstatement becomes unavailable. The basis for remedy of reinstatement is wrongful termination of employment with statutory flavour. This fact received judicial blessing in the case of Agbu v. Civil Service Commission Nasarawa State & 2 Others.[75] In this case, the appellant was an employee of the 3rd respondent and was deployed to the Ministry of Finance and Economic Planning Nasarawa State as at when his employment was terminated on the 21st day of November, 2002, consequent upon which he commenced an action at the High Court of Nasarawa State. He claimed, inter alia, a declaration that the 1st respondent's termination of his appointment conveyed in the letter with reference No. NCSC/PS/158/VOL.1/139 dated 21st November, 2002 was retrospective, malafide, improper, unconstitutional, null and void; an order of the court directing the respondents to reinstate him to his supposed position; N487,131.76k special damages being his accrued salary from May, 1999 to March, 2003 at his last grade level before his suspension ; and N150,000.00 general damages. In their pleading, the

[73] P. 19, paras. E-F, per Chukwuma-Eneh JSC.

[74] W.A.E.C. v. Oshionebo (supra), p. 1512, paras. D-E,

[75] (2011) 1 N.W.L.R. (Pt. 1229) 544

respondents pleaded that by a letter dated 19th May 2003, they reinstated the appellant to his employment and paid him all accrued arrears of salaries and entitlement due to him. In response, the appellant filed a reply in which he pleaded that he was reinstated to his employment after he commenced his suit and that by a letter dated 21st August 2003, his employment was again terminated by the respondents. In its judgment, the trial court found that the termination of the appellant's employment vide the first letter of termination which was admitted as Exhibit 13 was null and void as claimed, but the court refused to order the respondents to reinstate the appellant to his employment because it found that the second letter of termination (Exhibit 15) was in accordance with the appellant's letter of employment. Dissatisfied with the judgment, the appellant approached the Court of Appeal, which had this to say:

> Where an employment governed by statute is wrongly or unlawfully determined, the employee is entitled to re-instatement. In the instant, letter of termination of appointment dated 21st November, 2002 with retrospective effect from 1st May, 1999 exhibit 13, was the letter declared null and void and unconstitutional by the trial court. However, a new factor was introduced into the suit by the introduction of exhibit 15- the letter reinstating the appellant to his former position. By his testimony, the appellant told the court that he accepted the re-instatement and in fact assumed duty and paid a part of the accrued arrears of his salaries and entitlements. In the circumstance, exhibit 13 was rendered null and void by the issuance and acceptance by the appellant of exhibit 15 and his assumption of duty even without a court order. The employment of the appellant then became determinable in accordance with the contents of exhibit 2 (his letter of appointment) and was determined by exhibit 16- the second letter of termination of his appointment. And there was no claim by the appellant against the legality of exhibit 16. The finding by the trial court that it was in compliance with exhibit 2 and therefore legal cannot be faulted. The trial court was thus right in refusing to reinstate the appellant.[76]

DAMAGES

Damages is a common law remedy available mostly in employments without statutory flavour. In this case, employees whose employments are wrongly determined are only entitled to damages. Where employment does not have statutory flavour, being an ordinary master and servant relationship, remedy of reinstatement is unavailable. In this case, the measure of damages for wrongful determination of employment is the amount the dismissed employee could have earned under the contract. In Institute of Health Ahmadu Bello University Hospital Management Board v. Anyip[77], the Supreme Court remarked thus:

[73] P. 19, paras. E-F, per Chukwuma-Eneh JSC.

[74] W.A.E.C. v. Oshionebo (supra), p. 1512, paras. D-E,

[75] (2011) 1 N.W.L.R. (Pt. 1229) 544

[76] See Pp. 560-561, paras. H-F, per Bulkachuwa, J.C.A

[77] supra

> In an action for wrongful dismissal, the normal measure of damages is the amount the employee could have earned under the contract for the period until the employer could lawfully have terminated it less the amount the employee could reasonably be expected to earn in other suitable employment because the dismissed employee, like any innocent person following a breach of contract by the other party, must take reasonable steps to minimize the loss. It is therefore not unreasonable for the measure of damages to be liquidated where the parties by mutual agreement, as in the instant case, have set out the measure of damages payable in the event of terminating the contract of employment.[78]

Similarly, in U.B.N. v. Chinyere[79], it was equally noted that:

> Where the termination of a contract of service is wrongful, the measure of damages the plaintiff would be entitled to would be salaries for the length of time during which notice of the termination would have been given in accordance with the contract of employment. Also, the plaintiff would be paid other legitimate entitlements due to him at the time the employment was brought to an end.[80]

In the absence of statutory flavour upon contract of employment, an employee whose employment is terminated or summarily dismissed cannot pray for reinstatement. In other words, only contracts with statutory or legal flavour attract remedy of reinstatement upon wrongful termination.

INTERNATIONAL INSTRUMENTS

According to Emeka Chianu, procedural fairness can be extended to employees of all categories if Nigerian judges were willing to apply international instruments to attenuate the common law.[81] One of such international instruments of import is the ILO Philadelphia Declaration of 1944 which proclaims: All human beings, irrespective of race, creed or sex, have the right to both their material well-being and their spiritual development in conditions of freedom, dignity, of economic security and equal opportunity.[82]

It should be quickly mentioned here that Nigeria has been an active member of the International Labour Organization (ILO). On equity and fairness, many common law countries have embraced termination with justification, thereby discarding the concept of termination at will.[83] In this case, such countries no longer approve of unfair dismissal. The ILO in its efforts to set global standards and direct labour developments amongst member countries, had realised since 1963 that the English common law perspective of the rights of labour and employers of labour do not suite current awareness in the workplace. The

[78] Supra, p. 20 paras. E-G, per Chukwuma-Eneh, JSC

[79] supra

[80] P. 457, paras. A-C

[81] Chianu E, "*Towards Fair Hearing for all Nigerian Employees*", CALS Review of Nigerian Law and Practice, Vol. 1(1) 2007, p. 58

[82] See Article 2 (a). Chianu E, ibid, contended that on the strength of this provision it may be argued that if directors are entitled to a full-dress hearing prior to removal (s. 262 CAMA 1990) why should employees under them not enjoy same right?

[83] See Abugu, J, *"ILO Standards and the Nigerian Law of Unfair Dismissal"* 17 RADIC (2009) p. 186. The learned author cited the United Kingdom, Australia, Canada, Ghana, Lesotho and Gabon as examples.

first step was taken in its formulation of a set of recommendations,[84] aptly called ILO Recommendation on Termination of Employment or Recommendation 111.[85]

On the strength of the Recommendation, the common law position that an employer can terminate the services of his employee for any reason whether good or bad or for no reason at all no longer stand. Consequently, Recommendation 111 provides that 'Termination of employment should not take place unless there is a "valid reason for such termination" connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service.'[86] The above provision is a guarantee of justice for employees. This however, does not mean that the employer's right to terminate employment has been eroded. He still reserves the right to terminate but such termination must have some elements of reasonableness in that it should not be arbitrary or capricious. The phrase "valid reasons for such termination" is capable of breeding interpretation problems. To avoid this, several reasons that member nations should not accept as a valid basis for termination.[87] Among these were dismissal based on union activity or filing complaints against the employers with governmental bodies, or grounds of a worker's race, colour, sex, national origin, or religion.[88]

The ILO Termination of Employment Convention 1982 provides that "the employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker."[89] It is also provided that "the employment of a worker shall not be terminated for reasons related to the worker's conduct or performance before he is provided an opportunity to defend himself against the allegations made, unless the employer cannot reasonably be expected to provide this opportunity."[90] This, surely, is a provision for fair hearing. This provision

[84] A recommendation is drafted in much more specific language than a convention. In effect, the recommendation suggests in detail how the worker protections should be interpreted and applied. When the 1963 Recommendation on Termination of Employment was adopted in 1963, it was thought that two-thirds of the delegates would not support a convention on this topic. The 1963 Recommendation is a direct forerunner of the 1982 Convention and much of the Convention's language is taken from the earlier Recommendation. The text of the 1963 Recommendation is reprinted in International Labour Conference, 67th Session, 1982: Report VIII(1) Termination of Employment at the Initiative of the Employer [Eighth Item on the Agenda] 10205 (1980).

[85] Abugu, J, *loc cit.* It was adopted by the International Labour Organization on June 26, 1963, by a vote of 196 to 74 and 10 abstentions. It has currently been superceded by Recommendation No. 166 of 1982.

[86] Article 2. See also 'Employer Discipline: I.L.O. Report', 18 *Rutgers Law Review* (1964): 44653., cited by Abagu J., *ibid*

[87] See Article 3

[88] The following, inter alia, shall not constitute valid reasons for termination:
(a) union membership or participation in union activities outside working hours or, with the consent of the employer, within working hours;
(b) seeking office as, or acting or having acted in the capacity of, a workers' representative;
(c) the filing of a complaint or the participation in proceedings against an employer involving alleged violation of laws or regulations or recourse to competent administrative authorities;
(d) race, colour, sex, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin;
(e) absence from work during maternity leave.

[89] See Article 4

[90] See Article 7

embodies the common law concept of summary dismissal which is discussed above.[91] It has been argued that this Recommendation has not been adopted in Nigeria either by law, custom or executive action.[92]

The Recommendation further states that a worker who feels that his employment has been unjustifiably terminated should be entitled to appeal the termination to 'a body established under a collective agreement or to a neutral body such as a court, an arbitrator, an arbitration committee or a similar body.'[93] Remedy of reinstatement is made available to employees whose employment are unjustifiably terminated and the tribunal is entitled to so order or an alternative order for 'adequate compensation' or other appropriate relief. With regard to a dismissal on grounds which are related to the worker's conduct or performance, he must be given an opportunity to defend himself against the allegations made, unless the employer cannot reasonably be expected to provide this opportunity.[94]

Developments in national law and changes in national practice over the next twenty years post ratification, prompted the International Labour Conference to re-examine the 1963 Recommendation. It was felt that the advancement of workers' rights in countries throughout the world made it an appropriate time to consider a Convention on the subject.[95] On June 22, 1982, the Sixty-eighth Conference approved both a Recommendation (No. 166) and a Convention (No. 158) on termination of employment. The latter had its genesis in the former. The Convention supports the notion that discharged workers should have a right to defend themselves before punishment is imposed. Article 7 states that a dismissal based on the employee's conduct or performance should not take effect until the employee has had an opportunity to respond to the allegations, 'unless the employer cannot reasonably be expected to provide this opportunity'.[96] This can be seen as merely good personnel management practice. Yet, at present, there is no right to a pre-discharge disciplinary interview in Nigeria. Besides preventing baseless discharges, Article 7 has another attraction: it alerts the employee to the reason for discharge, thereby permitting a defence to be prepared more easily.[97]

A significant provision is made for workers who feel that their discharge is unfair. In that situation, such workers should be able to challenge their discharge before an 'impartial body' such as a court, tribunal, or arbitrator.[98] Although Article 8 does not expressly mandate a hearing, the requirement that employees have a right to challenge their dismissal before an impartial body strongly implies that some type of hearing is

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[91] *Posssard v Spiers*, (1876) 1 QBD PG 410; *Condor v Barron Knights*, [1966]

[92] Abugu J, *loc cit.* Article 1 of the Recommendation provides that effect may be given to the Recommendation through national laws or regulations, collective agreements, works rules, arbitration awards, or court decisions or in such other manner consistent with national practice as may be appropriate under national conditions.

[93] Abugu J, *op cit,* at p. 187

[94] Art. 7

[95] At its November 1979 session, the Governing Body of the International Labour Organisation decided to place an item on the agenda of the Sixty-seventh Session of the International Labour Conference entitled, 'Termination of employment at the initiative of the employer'. On June 22, 1981, the Conference resolved that this item would be placed on the agenda of the 1982 Conference with a view towards adoption of a convention or a recommendation. International Labour Conference, 68th Session, 1982: Report V(1) Termination of Employment at the Initiative of the Employer [Fifth Item on the Agenda] 1 (1981). Employers favoured the flexibility of a recommendation while worker representatives preferred a more binding convention.

[96] Convention, Art. 7.

[97] Abugu J, *op cit*, at p. 188

[98] See Article 8

contemplated. The Convention recognised the difficult position in which the dismissed worker is placed at a hearing by modifying the burden of proof. By Article 9, the worker may not bear the burden of proof that his termination was not justified.[99] The ratifying nation may either place the burden on the employer to come forward with a valid reason for the discharge, or require that the impartial body reach a conclusion based on the evidence, thereby placing the burden of proof on neither party. Far from being a matter of mere procedure, this requirement amounts to an important substantive protection in itself: employees are no longer placed in the difficult position of proving that the employer's reason for discharge was invalid, a task usually requiring employees to prove that their work record was spotless.[100]

Article 9 thus creates further support for the fundamental guarantee. Employers should have a valid reason for dismissal; therefore, it is not unduly onerous to require employers to specify that reason. In contrast, the onus of proof in Nigeria lies on the employee who complains that his employment has been wrongfully terminated. He has the onus to (a) place before the court the terms of the contract of employment and (b) to prove in what manner the said terms where breached by the employer.[101] It is not in principle for the employer who is a defendant to an action brought by the employee to prove any of those. It is clear that the provisions of the Convention represent some advancement in the rights protected in the Recommendation of 1963. It is, therefore, deplorable that Nigerian law has not even attained the level of protection envisaged under the Recommendation. As we have seen, the common law courts are vested with jurisdiction to entertain employment cases as part of the unlimited jurisdiction of the courts.[102] There is no statute establishing an arbitral tribunal for labour or employment matters. In the same vein, the relief of reinstatement is not available to employees in the private sector.[103] Even in the public sector, its availability cannot always be guaranteed.[104] Furthermore, the Convention provides that except for cases of 'serious misconduct', a terminated worker should be entitled to 'a reasonable period of notice or compensation in lieu thereof.' Dismissal for serious misconduct should be limited to cases 'where the employer cannot in good faith be expected to take any other course.' A worker accused of serious misconduct should be given an opportunity to state his case promptly, with the assistance of a representative where appropriate.[105]

The term 'serious misconduct' is not defined in the Convention and its definition or interpretation is left to each country. This approximates to the common law principles on summary dismissal and to that extent can be said to be part of Nigerian law on the subject. However, in the absence of specific statutory protection, employers have been found to subvert the rules on summary dismissal by resorting to the right to terminate with notice or payment in lieu of notice. When recourse is made to the latter

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[99] Article 9(2).
[100] Abugu J, *loc cit*
[101] Emmanuel Iwuchukwu v Eng. David Nwizu & Ors, [1994] 7 NWLR (Pt. 357) 379
[102] See s.234 of the 1999 Constitution which confers unlimited jurisdiction on State High Courts.
[103] *N.N.P.C. v Idonibove Obu* [1996] 1 N.W.L.R Pt 427, 955.
[104] See *N.S. I.T.F. M.B v Adebiyi*, [1999] 13 NWLR (Pt. 633) 16 C.A.; *Osuagwu v A.G. Anambra State*, [1993] 4 NWLR (Pt. 285) 13; *Iyase v. U.B.T.H.M.B.*, [2000] 2 NWLR (Pt. 643) 45. C.A.; *Faponle v U.I.T.H.B.M*, [1991] 4 NWLR (Pt. 183) 43.
[105] Abugu J, *op cit* at 189. The argument of learned Abugu J.E.O. is conclusive on this and we adopt it strictly here.

principles, the rules of natural justice, a demand for summary dismissal, are no longer observed and the employer need not state reasons for the termination. In other words, in practice, this injunction of the Convention is commonly observed in breach.[106]

APPLICABILITY OF ILO STANDARDS IN NIGERIA

Nigeria has been a member of the International Labour Organisation (ILO) since 1960. It has ratified thirty-eight ILO conventions, out of which thirty-four are currently in force. The Nigerian approach to the enforcement of treaties and other international instruments is dualist. Treaties are not enforceable directly as part of the domestic law until they are ratified by an Act of the National Assembly, which is the federal legislature. By section 12 of the 1999 Constitution, 'no treaty between the Federation and any other country shall have the force of law except to the extent to which any such treaty has been enacted into law by the National Assembly'.[107] The Constitution gives the Federal Government exclusive competence in treaty making. The component states of the Nigerian federation are not regarded as States in International law. Notwithstanding, it is contended that the Constitution cannot be pleaded in breach of international obligations. The primary presumption in international relations is that nation states will observe provisions of international treaties and agreements voluntarily entered into. ILO Conventions and Recommendations constitute a major source of international labour law for member countries.[108] Whilst Conventions are designed to create legal obligations for the States which ratify them, Recommendations have no mandatory force but are essentially guides to national action.[109] The obligations of member states to give effect to the provisions of Conventions and Recommendations of the General conference of the ILO are explicit. By Article 19 (5), (6) and (7) of the ILO Constitution, each of the Members undertakes that, it will, within the period of one year at most, from the closing of the session of the Conference, or if it is impossible owing to exceptional circumstances to do so within the period of one year, then at the earliest practicable moment and in no case later than 18 months from the closing of the session of the Conference, bring the Convention before the authority or authorities within whose competence the matter lies, for the enactment of legislation or other action.[110] Member nations are thus obligated to ratify or otherwise domesticate provisions of Conventions into domestic law for effective enforcement. However it is clear from the above article that non-ratification or domestication does not entitle a member state of the ILO to completely ignore developments of standards in a particular subject.

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[106] *Ibid.*

[107] *Abacha v Fawehinmi* [2000] 6 NWLR (Pt. 660) 228 at 288; *Medical & Health Workers Union of Nigeria v Minister of Labour & Productivity*, [2003] 25 WRN 127.

[108] See N. Valticos and G. von Potobsky, *The Sources of International Labour Law: ILO Sources*, (1995) pp. 4951.

[109] This distinction is not absolute as Conventions produce a substantial part of their practical effect as standard defining as well as obligation creating instruments. See W. Jenks, 'Some Characteristics of International Labour Conventions', XIII *Canadian Bar Review* (1935): 448; Cordova, 'Some Reflections on the Overproduction of International Labour Standards', 14(2) *Comparative Labor Law Journal* (1993).

[110] See also Art. 26 of the Vienna Convention on the Law of Treaties, which states that every treaty in force is binding upon the parties to it and it must be performed by them in good faith.

Article 9 of the ILO Constitution states further that provision of Conventions may be applied by laws or regulations, collective agreements, work rules, arbitration awards, court decision or a combination of these methods. Convention 158 has not been ratified by Nigeria and as such has not become part of domestic law.[111] However reference is made to the Convention in this Article to highlight the development in other member nations of the ILO who have ratified this Convention for the protection of their work force. Some thirty-four countries have ratified the Convention and several others have drawn inspiration from it in reforming their labour laws.

THE ROLE OF THE NATIONAL INDUSTRIAL COURT

Lately, the capacity of the National Industrial Court (hereinafter referred to as NIC) to deal with labour or trade disputes in the context of the court's jurisdiction and status as superior court of record has been subject of concern and intense debate among all stakeholders in the judiciary, the legal profession, academics, labour/industrial relations practitioners, employers of labour and employees. On the 24th day of February 2010, the Supreme Court held in the case of National Union of Electricity Employees & 1 Other v. Bureau of Public Enterprises[112] that the NIC does not have exclusive jurisdiction in trade dispute matters. The apex court also held that the NIC is not a superior court of record as it is not listed in section 6(5) of the Constitution of the Federal Republic of Nigeria, 1999.

The passing of the National Industrial Court Act on June 14, 2006 marked a watershed in labour relations. The said Act designated the National Industrial Court as a superior court of record and conferred exclusive jurisdiction on the court with respect to labour and industrial relations matters. As mentioned above, a contentious issue under the National Industrial Court Act, 2006 is the word "exclusive jurisdiction" as contained in section 7 of National Industrial Court Act, 2006 which precludes other Courts from hearing labour/industrial relations matters. The National Industrial Court had existed as a superior court of record prior to the decision of the Supreme Court in the case under consideration which stripped the court (NIC) of superior status and also removed its exclusive jurisdiction in trade disputes. The apex court reasoned that in the absence of the NIC being specifically mentioned among the superior courts in section 6 of the Constitution, the National Industrial Court Act, 2006 was incapable of conferring superior status on the NIC. The present author has already disagreed with the Supreme Court on this issue.[113] The controversy surrounding the jurisdiction and status of the NIC has been laid to rest with the amendment to the Constitution.[114] By virtue of alteration, section 6 of the Constitution has now accommodated the NIC as a superior court of record.[115] Consequential alterations have also been made to relevant sections of the

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[111] S.12 of the 1999 Constitutions. See also *Abacha v Fawhinmi*, [2000] 6 NWLR Pt. 660, 228; and *Medical & Health Workers Union of Nigeria v Minister of Labour & Productivity*, [2003] 25 WRN 127.

[112] (2010) 7 N.W.L.R. (PT. 1194) 538

[113] Oguche S., "*Status and Jurisdiction of the National Industrial Court: Unveiling the Error of the Supreme Court in National Union of Electricity Employees & 1 Other v. Bureau of Public Enterprises (2010) 7 NWLR (Pt. 1194) 538,* The Appellate Review, Vol. 1 No. 4, February 2011, pp. 17-39

[114] The relevant amendment was done through The Constitution of the Federal Republic of Nigeria (Third Alteration) Act, 2010.

[115] See section 2 of the Act

Constitution to properly house the NIC.

It is clear from statutory provisions that the National Industrial Court has both original and appellate jurisdiction[116] in civil matters but it has no criminal jurisdiction except on matters of enforcement of its judgments in which the Act provides that the Court may commit for contempt any person who commits an act that constitutes contempt of the court.[117] The National Industrial Court Act provides the jurisdiction of the Court as follows:

> The Court shall have and exercise exclusive jurisdiction in civil causes and matters-
>
> (a) relating to:
>
> i. labour, including trade unions and industrial relations; and
>
> ii. environment and conditions of work, health, safety and welfare of labour and matters incidental thereto; and
>
> (b) The grant of any order to restrain any person or body from taking part in any strike, lock-out or any industrial action, or any conduct in contemplation or in furtherance of a strike, lock-out or any industrial action;
>
> (c) relating to the determination of any question as to the interpretation of
>
> i. any collective agreement,
>
> ii. any award made by an arbitral tribunal in respect of a labour dispute or an organizational dispute,
>
> iii. the terms of settlement of any labour dispute, organizational disputes as may be recorded in any Memorandum of Settlement,
>
> iv. any trade union Constitution, and
>
> v. any award or judgement of the Court[118].

The Act gives the National Assembly power to confer additional jurisdiction on the Court in respect of such other causes or matters incidental, supplementary or related to those set out or itemised above.[119]

The Constitution of the Federal Republic of Nigeria (Third Alteration) Act, 2010 seems to have given wider jurisdiction to the NIC than the NIC Act, 2006. Section 6 of the Alteration Act amends section 254 of the Constitution to house the NIC, its composition, mode of appointment, jurisdiction and operation. The amended Constitution now provides as follows:

> Notwithstanding the provisions of sections 251, 257, 272 and anything contained in this Constitution and in addition to such other jurisdiction as may be conferred upon it by an Act of the National Assembly, the National Industrial Court shall have and exercise jurisdiction to the exclusion of any other court in civil causes and matters-
>
> (a) relating to or connected with any labour, employment, trade unions, industrial relations and matters arising from workplace, the conditions

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[116] See generally section 7 of the National Industrial Court Act, 2006. In terms of appellate jurisdiction of the court, it is provided under section 7(4) of the Act that an appeal shall lie from the decisions of an arbitral tribunal to the Court as of right in matters of disputes specified in section 7(1)(a).

[117] See section 10 of the Act

[118] See section 7 (1) of the National Industrial Court Act, 2006

[119] See section 7(2), ibid

of service, including health, safety, welfare of labour, employee, worker and matters incidental thereto or connected therewith;

(b) relating to, connected with or arising from Factories Act, Trade Disputes Act, Trade Unions Act, Labour Act, Employees' Compensation Act or any other Act or Law relating to labour, employment, industrial relations, workplace or any other enactment replacing the Acts or Laws;

(c) relating to or connected with the grant of any order restraining any person or body from taking part in any strike, lock-out or any industrial action, or any conduct in contemplation or in furtherance of a strike, lock-out or any industrial action and matters Connected therewith or related thereto;

(d) relating to or connected with any dispute over the interpretation and application of the provisions of Chapter IV of this Constitution as it relates to any employment, labour, industrial relations, trade unionism, employer's association or any other matter which the Court has jurisdiction to hear and determine;

(e) relating to or connected with any dispute arising from national minimum wage for the Federation or any part thereof and matters connected therewith or arising there from;

(1) relating to or connected with unfair labour practice or international best practices in labour, employment and industrial relation matters;

(g) relating to or connected with any dispute arising from discrimination or sexual harassment at workplace;

(h) relating to, connected with or pertaining to the application or interpretation of international labour standards;

(i) connected with or related to child labour, child abuse, human trafficking or any matter connected therewith or related thereto;

(j) relating to the determination of any question as to the interpretation and application of any-

(i) collective agreement;

(ii) award or order made by an arbitral tribunal in respect of a trade dispute or a trade union dispute;

(iii) award or judgment of the Court;

(iv) term of settlement of any trade dispute;

(v) trade union dispute or employment dispute as may be recorded in a memorandum of settlement;

(vi) trade union constitution, the constitution of an association of employers or any association relating to employment, labour, industrial relations or work place;

(vii) dispute relating to or connected with any personnel matter arising from any free trade zone in the Federation or any part thereof;

(k) relating to or connected with disputes arising from payment or nonpayment of salaries, wages, pensions, gratuities, allowances, benefits and any other entitlement of any employee, worker, political

or public office holder, judicial officer or any civil or public servant in any part of the Federation and matters incidental thereto;

(l) relating to-

(i) appeals from the decisions of the Registrar of Trade Unions, or matters relating thereto or connected therewith;

(ii) appeals from the decisions or recommendations of any administrative body or commission of enquiry, arising from or connected with employment, labour, trade unions or industrial relations; and

(iii) such other jurisdiction, civil or criminal and whether to the exclusion of any other court or not, as may be conferred upon it by an Act of the National Assembly;

(m) relating to or connected with the registration of collective agreements.[120]

A crucial issue to be addressed at this juncture is whether or not the NIC has exclusive jurisdiction in labour matters. In other words, does it share jurisdiction in labour matters with the State High Court or Federal High Court? The Supreme Court refused to approve of exclusive jurisdiction of the NIC in labour matters in the case of N.U.E.E. v. B.P.E,[121] but the case was decided based on the absence of the NIC as a superior court in the Constitution. This has been cured by the Constitution of the Federal Republic of Nigeria (Third Alteration) Act, 2011. The present writer has not seen any judicial authority on this issue after the third alteration to the Constitution. It is hereby submitted that vesting exclusive jurisdiction on the NIC in labour matters is desirable because of the central nature of labour in Nigeria. The powers of the High Court are limited by virtue of the fact that each High Court has a limited territorial jurisdiction. In labour matter which is a general matter, High Court decisions in a State can only be registered in another jurisdiction before it will be binding and enforceable under the Sheriff and Civil process Act Vol. 14 Cap S6 Laws of Federation of Nigeria 2004.[122]

Another reason for giving the National Industrial Court exclusive jurisdiction is that industrial matters or trade disputes should not be allowed to be left for forum shopping. It has been contended that one of the mischiefs the National Assembly took into consideration was the enforcement of the judgment of the High Courts. The High Court in State X cannot enforce its decision on labour matters in State Y without first registering same there.[123] This is not without its attendant problems. Processes like stay of execution or application to set aside the judgment obtained in State X will commence in state Y which did not participate in the hearing and determination of the case between the parties. The ruling on such a matter in State Y could negate the entire judgment of State X that heard the matter, took evidence and gave its decision. At the end of the day a worse case scenario of having 36 or more different/conflicting decisions from the various High Courts of the States on the same set of facts cannot be ruled out. This does not give room to the obedience to the rule of law as litigants from different parts of the country will be at liberty to pick and choose which judgment to obey and which not to obey based on some set of facts.[124]

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[120] Section 254C (1) of the amended Constitution

[121] *supra*

[122] See Adejumo B.A., op cit, at p 22

[123] *Ibid*

[124] *Ibid* at p. 24

Adejumo contended that the National Assembly was seized of the above facts and scenario and this knowledge was the brain behind its decision to vest the National Industrial Court with exclusive jurisdiction nationwide to deal with labour/industrial relations matters to avoid forum shopping and make judgments of the Court reliable, dependable, ascertainable, consistent and easy to comply with and engender the observance of the rule of law.[125]

The case of FGN v. Oshiomhole[126] presents a good example of the scenario explained above. In this case, the High Court of the Federal Capital Territory, Abuja held that Nigeria Labour Congress has the power to call workers out on strike. The Court of Appeal in its judgment, ruled that the High Court of the Federal Capital Territory, Abuja lacked jurisdiction to entertain the matter being matters under item 34 of the Exclusive List of the Constitution i.e. labour/trade disputes. The Court of Appeal referred the matter to the Federal High Court for determination. The Federal High Court relying on Section 251 of 1999 Constitution ruled that even though its jurisdiction excluded trade dispute/labour matters it would hear the matter based on other grounds.

Taking a look at the jurisdiction of the NIC on application of international instruments, It is also provided that "notwithstanding anything to the contrary in this Constitution, the National Industrial Court shall have the jurisdiction and power to deal with any matter connected with or pertaining to the application of any international convention, treaty or protocol of which Nigeria has ratified relating to labour, employment, workplace, industrial relations or matters connected therewith."[127] It is clear from the above that more jurisdiction is conferred on the NIC by the amended Constitution that the NIC Act 2006. Going by the provisions of the provisions of section 254C (2), application of international conventions, treaties or protocols relating to labour, employment, workplace, industrial relations or matters is now vested in the NIC. It is however, a fundamental precondition for application that Nigeria must have ratified such conventions, treaties or protocols.

Whilst Nigeria has not ratified Convention 158, its provisions are not devoid of some legal effect. Certainly the judiciary represents an arm of the governments whose obligation it is to enforce the provisions of treaties in force. In the absence of explicit legislative guidance, some judicial activism may be a ready way of dispensing justice according to international standards where such standards have evolved into some concept of universally guaranteed rights. Inspiration may be drawn from the decision of the South African Labour Appeal Court in Modise & Ors v Steve's Spar.[128] The court had to decide whether in the event of an illegal strike, the employer was nevertheless required to comply with the rule of hearing the workers or their representatives before terminating their employment contracts. Zondo J., relied on the provisions of ILO Convention 158 on termination of Employment in the majority decision despite the fact that South Africa had not ratified that Convention:

Similarly,[129] the Industrial Court of Botswana in Gaborone, Joel Sebonego v

[125] *Ibid*

[126] (*2004*) 3 NWLR (Pt. 860) 305

[127] Section 254C (2) of the amended Constitution

[128] Case No. J.A. 29/99 decided on 15th March 2000.

[129] See also two decisions of the Labour Court of Lesotho in *Matete and Bosiu v Lesotho Highlands Development Authority & Anr* No. LC 131/95 decided 9th February 1996; and *Serame Khampepe v Muela hydropower Project Contractors & 4 Ors* No. LC 29/97 where the court in each case relied on ILO Convention 158 as a guide for interpreting national law even though Lesotho had not ratified the Convention

News paper Editorial & Management Services Ltd,[130] had to consider whether the dismissal of a newspaper editor on medical grounds was unfair. The Industrial Court found that Botswana legislation did not contain any provision on dismissal for medical reasons. It therefore considered that it should rely on other sources, including international law, to determine the guidelines applicable to the dispute. In the words of the court:

> The court must therefore look elsewhere for guidance in this report. As dismissals because of ill-health are so closely related to dismissal for incapacity to perform, the court will now set out the international principles of equity regarding dismissals for incapacity to perform.... As the Industrial court is not only a court of law but also a court of equity, it applies rules of natural justice or rules of equity as they are sometime called, when determining trade disputes. These rules of equity are derived from the common law as well as from Conventions and Recommendations of International labour Organisation (ILO). The basic requirements for a substantially fair dismissal, which will include dismissal because of incapacity due to ill health are succinctly stated in article 4 of ILO convention No. 158 of 1982, which provides as follows: 'The employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service.

In these two decisions, the concepts of 'fair hearing' and 'justifiable termination' were employed as precepts of internationally guaranteed rights that should underline national legislations. The international judicial community seems poised to do this. In 1988, judges from thirty-seven countries including India, Australia, Zimbabwe, South Africa, Mauritius, Canada, Pakistan and Sri Lanka and the United States, met at Bangalore in India to discuss the 'Role of the domestic judge in encouraging and using international human rights law to shape domestic legal rules' and how judges can utilise treaties that have not been legislatively incorporated into the domestic legal system. The common conclusions are known as the 'Bangalore Principles'. At the Commonwealth Judicial Colloquium in 1998 at Bangalore, the principles of the Colloquium of 1988 were re-formulated to include the following statements:

> It is the duty of an independent, impartial and well-qualified judiciary, assisted by an independent, well trained legal profession, to interpret and apply national constitutions and ordinary legislation in harmony with international human rights codes and customary international law, and to develop the common law in the light of the values and principles enshrined in international human rights law.
>
> Fundamental human rights form part of the public law of every nation, protecting individuals and minorities against the misuse of power by every public authority and any person discharging public functions. It is the special province of judges to see to it that the law's undertakings are realised in the daily life of the people.
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> Both civil and political rights and economic, social and cultural rights

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[130] No. IC 64/98 decided April 1999.

> are integral, indivisible and complementary parts of one coherent system of global human rights. The implementation of economic, social and cultural rights is a primary duty for the legislature and executive branches of government. However, even those economic, social and cultural rights which are not justiciable can serve as vital points of reference for judges as they interpret their constitutions and ordinary legislation and develop the common law.
>
> Likewise, even where human rights treaties have not been ratified or incorporated into domestic law, they provide important guidance to lawmakers, public officials and the courts.

These are, no doubt, very persuasive precedents for Nigerian courts in the application of ILO standards in matters of termination of employment. The Nigerian Federal High Court in Punch Nig Ltd v Attorney-General & Ors.[131] relied on the Bangalore Principles in a case dealing with the rights of journalist during state of emergency, noting that 'it at such times that fundamental human rights are most at risk and that courts must be should be especially vigilant in their protection'. Justice Aguda, a Nigerian jurist serving in the Botswana judiciary, in the case of Dow v Attorney General,[132] quoted passages of statements made at the Bangalore colloquium that call for the greater domestic use of international norms and commented 'I am prepared to accept and embrace the views of these great judges and hold them as the light to guide my feet through the dark path to the ultimate construction of the provisions of our constitution now in dispute'.

Judges have opportunity of being brought up-to-date on emerging and ever-widening human rights jurisprudence as developed by international institutions and as embodied in international instruments.

Where these international instruments are brought to the attention of judges, new Vistas open in the human rights sphere. Municipal judges who feel shackled by precedent can be emboldened as they perceive a new vision of law to assure litigants not merely freedom, liberty and equality but also a better life founded on the ideals of the concept of human rights.[133] Municipal law should respond to the humanizing and reforming provisions of international documents using them as a formative element in the liberalizing of national systems of law.[134] A tragic truth of Nigerian employment law is that it is inextricably imbued with decisions which serve the interests of only capitalist employers. An even greater tragedy is that it still continues to be so, with little or no hope for radical improvements so necessary for a changing society and a developing economy. The masses are not aware of its grave pitfalls and dysfunctions; the absence of employers' willingness to adopt the norm of fairness co-exists with the lack of judicial will to enforce the same.

CONCLUSION/RECOMMENDATIONS

The sanction of summary dismissal is a strong measure which is justified only in exceptional circumstances. The dilemma of employees whose employments do not have statutory flavour is a matter of concern in the context of unprovoked termination.

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[131] [1998] FHLR 75.

[132] (1992) 103 ILR 128 (Bot. Ct of Appeal).

[133] Justice Ayoola, "Fundamental Human Rights and the Judiciary,' (1990) 1 (No 8) Justice, 119, 120

[134] Lloyd, D, "Law and Public Policy," (1955) Current Legal Problems,42.

An ordinary master and servant relationship is akin to slavery in some respects, going by the muzzle voices of employers who have varying factors inducing termination of employment since no reason need be given.

Most of the time, a lot of injustice is meted out on employees who, without any reason known to them, suddenly find themselves victims of termination despite their readiness to work, bearing in mind that a willing servant cannot be foisted on an unwilling master. Most of the time, employers simply use expression "your services are no longer required" to fire their employees. In many cases, employees who have put many years in the service of their employers suddenly find their appointments terminated, not having enough strength to commence searching for other jobs after spending their youthful vigour in the services of their employers. Even when the courts find that termination is wrongful, damages awarded are too meagre compared to hardship that such dismissed employees pass through.

In contracts with statutory flavour, remedy of reinstatement is a song of victory but does not do justice in some cases. Employees who have committed obvious grave and gross misconduct find their ways back into the services of their employers simply because proper procedure was not followed in dismissing them. Judicial authorities are legion to buttress this issue as seen in this work.

Employers are thrown into much difficulty when there is allegation of criminal misconduct against their employees. The requirement of prosecution and conviction upon an allegation of crime before the employee concerned can be summarily dismissed based on the said criminal misconduct, puts employers into tight corners even in the face of obvious commission of crime. In some cases, the Police may be unwilling to continue with investigation. In some other cases, the employee concerned may be discharged based on some procedural defects in prosecuting him. In these situations, the dilemma of employers in continuing with the services of those employees until conviction is had is pitiable and needs urgent redress.

The following palliative measures are hereby recommended:

a. Our courts, especially the National Industrial Court, should take a radical step in addressing the plight of employees whose appointments are determined without reasons where their contracts of employment do not have statutory flavour. The courts should insist that employers give reasons for terminating the services of their employees and as well put the onus on an employer who terminates or summarily dismisses an employee to justify the termination or dismissal.

b. Where it is found that an employer wrongly dismisses or terminates the appointment of his employee, exemplary and punitive damages should be awarded against such employer, and in doing so, the court should take into account what the employee concerned has lost and ought to have earned as well. This will alleviate the agony of dismissed employees and reduce bitterness.

c. Consequent upon the prevalence of wrongful dismissal or termination of appointments in Nigeria, especially where there is no statutory flavour, it is recommended that the recent practice in Hong Kong whereby contracts of employment set out express contractual provisions setting out the circumstances in which an employee may be summarily dismissed. This will constantly make employees to watch their conducts more carefully.

d. Where an employee has engaged in conduct which appears to fall within a

circumstance set out in their contract allowing for their summary dismissal, the employer should consider if, in all the circumstances of the case, the employee's conduct amounts to a repudiation of the contract or one of its fundamental terms.

e. In light of recent legal developments regarding the implied obligation of mutual trust and confidence between employers and employees, it is suggested that one useful test could be whether the employee's conduct so undermines the relationship of mutual trust and confidence between employer and employer that the employer should no longer be required to employ the employee. It should be borne in mind that although contractual provisions do not give an employer an absolute right to summarily dismiss an employee, such provisions may nevertheless be very useful in putting the employee on notice as to the types of conduct which the employer regards as being fundamentally inconsistent with the employee's continuing employment, the potential deterrent effect of which may be quite beneficial to the employer.

f. Employers should be at liberty to part with employees who are manifestly involved in criminal acts without the necessity of prosecution and conviction in the law courts as condition precedent to dismissal. Granting fair hearing to an employee accused of crime based on internal investigation and disciplinary mechanisms should suffice to warrant dismissal on allegation of crime. This avoids a situation where employers and employees continue to live in perpetual hatred, bitterness and mutual suspicion with the attendant low output.

g. Employers who are ordered to reinstate dismissed employees, where there is statutory flavour, based on wrongful dismissal or termination should, if convinced that the concerned employee has committed gross misconduct that is inimical to the interest of the employer, commence fresh processes of termination or dismissal so as to right the earlier wrong in the process of dismissal or termination that led to the reinstatement. Many employers fail to understand that an order of reinstatement does not mean end of summary dismissal or termination. A reinstated employee can be subjected to fresh disciplinary measures so as to re-dismiss him.

h. The NIC should take the radical step of applying ILO Convention 158 in Nigeria. This judicial radicalism will go a long way in strengthening labour and industrial relations in Nigeria.