

Termination of Contract of Employment with statutory flavour and the remedy of Re-Instatement: Curtailing summary and unlawful dismissal.

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Abstract

Employment is a relationship between two parties, usually based on a contract where work is paid for and whose construction or determination is founded on due notice of the parties thereto. The law is well settled that if, where there is an ordinary contractual relationship of master and servant, the master terminates the contract the servant cannot obtain an order of certiorari or reinstatement. If the master rightfully ends the contract, there can be no complaint: if the master wrongfully ends the contract then the servant can pursue a claim for damages." Employment under public authorities, however, stands on a different footing from an ordinary master and servant relationship. This paper begins with the position of the Nigerian law as regards categories of contract and the implication of each category of contracts of employment .It examines the nature of contract of employment and the special nature of employments with statutory flavour, it focuses on the clarification of the definition of an employment with statutory flavor drawing on decisions at various levels of law. The paper also examines and discusses the remedies available to a wrongly dismissed employee whose employment enjoys statutory flavour via an examination of some popular cases known to the Nigerian Law.

Key words: Contract of employment, termination of employment, statutory flavour, unlawful dismissal, re-instatement

Introduction

Cases of wrongful dismissal has become so prevalent in the Nigerian economy and a source of concern to lawyers and judges to the extent that during the 2015 National Bar Association Annual Conference, the body concluded that, "injustice exists in the Nigerian labour market," and call for a review of national Labour Laws.¹ Similarly, Odeku & Animashaun², opined that cases of termination of employment are in abundance in Nigeria with court rulings in favour of both parties to the contract of employment. In several instances, the employer suspends the employee indefinitely. After endless wait, the employees applied to court for a declaration that they are still in the employer's service. Such employees are usually in precarious situations as they do not know if reinstatement will be ordered by the court or not.

Remedies however, have been found to be different with regard to cases of employees given a legal status by law other than that of the mere master servant relationships. "Where the employer terminates the employment of his employee, albeit wrongfully, the contract of employment yet remains effectively determined. The only remedy available to such employee is award of damages and nothing more"³ (Atilola, 2015). Hence, in the normal master/servant relationship under common law, the employee is entitled to only damages in the case of a wrongful termination of appointment. However, where the relationship is above that of the mere master/servant relationship i.e. an employment with statutory flavour, there exist a window of reinstatement for the employee whose appointment was wrongfully terminated.

¹ Onanuga, A., (2015, May, 19) Wrongful dismissal:Lawyers want labour laws received.The Nation, Retrieved on March 19th 2018

² Odeku, K., and Animashaun, S., (2012) Foisting a willing employee on an unwilling employer: The remedy of re-instatement revisited. *Pakistan Journal of Social Sciences*, 9(5)

³ Atilola, B., (2015), Expanding the frontiers of employment with statutory flavours: A review of the Supreme Court's decision in *Longe v First Bank.*, National Industrial Court of Nigeria available innien.gov.org/publications/expanding-the-frontier-of-employment-with-statutory-flavours1.pdf

According to Muhammed, I, T., JSC (as he then was) in the case of *Power Holding Company Plc v Mr. I. C. Offoelo*,¹ The learned Justice opined that “the mere fact that an employer is a creation of statute, that it is a statutory corporation or that the government has shares in it, does not elevate its employment to one with statutory flavour. Rather there must be a nexus between its employee’s appointment with the statute creating the employer and corporation.”

Contract of Employment

A contract of employment is defined as “any agreement, whether oral or written, express or implied whereby one person agrees to employ another as a worker and that other agrees to serve the employer as a worker.”² It is, in legal parlance, commonly referred to as master-servant relationship. A contract of employment may be in any form, and not necessarily in writing. A contract of employment may be inferred from the contract of the parties if it can be shown that such a contract was intended although not expressed. The inference may be rebutted if such service is incompatible with the employment.³ This may happen where the parties are relations or where the service was performed on the basis of a charity. Nevertheless, a contract of employment may be oral unless there is a statute requiring writing or deed.

The basis of employer-employee relationship is the contract of employment and the ordinary incidents of that relationship. The contract of employment is the pivot bedrock or foundation upon which the employee must base his case in a court of law. He succeeds or fails upon the terms of the contract of employment. In effect, where the contract of employment has been reduced into writing, the court, as well as the parties, is bound by those terms. The court has no duty to look outside the terms stipulated and agreed therein by the parties to the contract in determining the respective rights and obligations of the parties in case of disputes arising from the contract. The court in the case of *Federal Medical Centre, Ido-Ekiti & Ors v Folorunsho Kayode Michael*,⁴ emphasized the decision in *N.I.I.A. v. Ayanfalu*,⁵ Fasanmi JCA, (as he then was) enumerated the three (3) categories of employment recognized by the Nigerian court as follows:

- A pure master/servant relationship under common law.
- Employment where the office is held at pleasure or employment at will, and
- Employment protected by statute.

A pure master/servant relationship under common law

This is a contract of employment whereby one party, called the employee, agrees to perform some services for another, the employer, in return for the employer’s promise to pay him some consideration called wages. “Where the employer terminates the employment of his employee, albeit wrongfully, the contract of employment yet remains effectively determined. The only remedy available to such employee is the award of damages and nothing more”⁶ The quantum of damages recoverable by a party for wrongful termination of his employment will largely depend on whether termination of the employment was as a result of failure to give the required notice or as a result of an alleged malpractice.⁷ If the wrongful termination is as a result of the former, the quantum of damages recoverable may be the employee’s salary for the period of the required notice but if it is due to the later, then such a determination carries with it some stigma on the character of the employee for which he shall be entitled to substantial damages far beyond his salary for the period of the requisite notice.⁸

The court has no power to declare such wrongful termination null and void. This is found on the principle of law that the court will not impose a willing servant on an unwilling master even where the master’s behaviour or the adopted procedure is manifestly wrong. This was clarified in *Odin Kerimere v Impresit Bakilon (Nig) Ltd*,⁹ His lordship, Opene JCA puts the principle succinctly thus:

¹ LPELR (SC 7/2006) December 14, 2012.

² Freedland, M., et al. (2016) *The Contract of employment*, Oxford University Press

³ [2009] All FWLR 1177 at 1221

⁴ CA/AE/84/2010 (The Court of Appeal, Ekiti Judicial Division) Nigeria, December 6, 2012) LPELR 20406 (CA)

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⁶ Nwazuo, A. N..(2001) Introduction to Nigerian Law (1st Ed.) Department of Public Law and Jurisprudence Olabisi Onabanjo University, Ago Iwoye; Atilola, B., (2015) *Ibid* ; Utobo, J. O., (2017) Employee’s Contract of employment and wrongful dismissal from service, *African Journal of Politics and Administrative Studies*, 7(1).

⁷ Mobil Producing Nig. Ltd v Udo, *Ibid.* at p. 1183

⁸ *Ibid.*

⁹ *Kerimere v Impresit Bakilon (Nig.) Ltd*

it is settled that an employee cannot compel the employer to retain him no matter how desirable that may be on humanitarian or other ground. In as much the same was an employer cannot compel an employee to remain in his service no matter how indispensable his service may be to his employer.¹

Features of a master/servant relationship:

- **Parties to the contract:**

In the case of a master servant relationship there exist primarily two parties to the contract in the confines of common law (i.e. the employer and the employee).

- **Distribution of powers:**

There exists an uneven distribution of power in the master/servant relationship. The law permits the termination of employment of the employee by the employer for misconduct. "Gross misconduct has been identified as a conduct that is of a grave and weighty character as to undermine the confidence which should exist between the employer and the employee. Further, the master does not have to report the matter to the police let alone wait for prosecution to be done. He does not even have to reach a decision on an alleged crime.²

- **Remedies for unlawful termination of employment:**

In the master/servant relationship as understood by the law, the only remedy available to an employee is the award of damages as echoed in the case of *Kunle Osisanya v Afribank Plc*,³ where George Oguntade (JSC) (as he then was) ruled that the termination of appointment of the employee was wrong based on evidences presented but still ruled thus

The law is that a servant should only be paid for the period he served his master and if he is dismissed as in the case, although wrongfully, all he gets is the amount he would have earned if his appointment has been properly determined

An exception to this rule is seen in the case of *Okolo v. Helios Towers*,⁴ where the learned judge, Justice O. Obaseki-Osaghae set aside the letter of termination of appointment of the employee because the employer could not sufficiently prove the reasons stated in it, and awarded damages also because of a restricting contract entered into by the employee with the employer.

Employment where the office is held at pleasure or Employment at will

Employment at will concerns itself with an employment held strictly at the pleasure of a party, there isn't any explicit law defining their characteristics in common. At-will means that an employer can terminate an employee at any time for any reason, except an illegal one, or for no reason without incurring legal liability. Likewise, an employee is free to leave a job at any time for any or no reason with no adverse legal consequences. At-will also means that an employer can change the terms of the employment relationship with no notice and no consequences. For example, an employer can alter wages, terminate benefits, or reduce paid time off. A growing number of workers are no longer employed in 'jobs' with a long-term connection with a company but are hired for 'gigs' under 'flexible' arrangements as 'independent contractors' or 'consultants'. While the rise of this 'gig' economy is praised by some as a response to the wishes of a more entrepreneurial generation, it is more likely that it is driven by the concerns of businesses to lower wages and benefit costs during business down-turns while also reducing their vulnerability to unfair dismissal lawsuits.⁵

Exceptions to employment at will

The courts, particularly in the United States where the idea of employment at will is predominantly practised have carved out exceptions to the 'at-will' presumption to mitigate its sometimes harsh consequences. There are common law and statutory exceptions. The three major common law exceptions are public policy, implied contract, and implied covenant of good faith, while the statutory exceptions are illegal discrimination and retaliation. The at-will presumption is strong, however, and it can be difficult for an employee to prove that his circumstances fall within one of the exceptions.

¹ See Emmanuel N. Nwobosi v African Continental Bank Ltd S.C. 91/1991 (The Supreme Court of Nig. July 11th, 1995) LPELR S.C. 91/1991; Francis Arinze v First Bank of Nigeria Ltd, S.C 82/2000 LPELR-20132 C.A.); Keystone Bank Plc Kazzim Yiggon (Court of Appeal, Yola JUDICIAL Division, LPELR s.c. 82/2000

² *Mike Eze v Spring Bank Nigeria Plc*, (SC December, 9, 2011) LPELR –S.C. 69/1998

³ (2007) SC December, 9, 2007), LPELR- SC 135/2001

⁴ *Okolo v Helios Towers*

⁵ Friedman, G., (2014) Workers without employers: Shadow corporations and the rise of the gig economy, *Review of Keynesian Economics* 2(2), pp 171-188

Common law exceptions

i. Public policy

The most widely recognized common law exception to the 'at-will' presumption protects employees against adverse employment actions that violate a public interest. This common law exception is similar to, and may overlap with, the retaliation exception which prohibits employers from disengaging employees in retaliation for engaging in legally proper, necessary, or desirable activities such as whistle blowing.

ii. Individual Contracts of Employment

Some organisation may develop an individual contract of employment that will expressly state and outline the terms of employment and conditions for discharge that an employer must follow. Although employment is typically not governed by a contract, an employer may make oral or written representations to employees regarding job security or procedures that will be followed when adverse employment actions are taken. If so, these representations may create a contract for employment.

iii. Good faith and fair dealing

The exception for a covenant of good faith and fair dealing represents the most significant departure from the traditional employment-at-will doctrine. Rather than narrowly prohibiting terminations based on public policy or an implied contract, this exception reads a covenant of good faith and fair dealing into every employment relationship. It has been interpreted to mean either that employer personnel decisions are subject to a "just cause" standard or that terminations made in bad faith or motivated by malice are prohibited. The employers cannot fire a person in order to avoid their duties, such as paying for healthcare, retirement, or commission-based work.

It is difficult for a plaintiff to prove all of the promissory estoppel elements, especially in an employment context. Some courts reject outright promissory estoppel claims made by an at-will employee by contending that an employee cannot reasonably rely on a promise of employment if the employment is at-will. In any case, promissory estoppel provides only a limited remedy in comparison to a breach of contract claim. This is because damages are calculated based on the individual's previous employment, and not on the promised employment.

The statutory exceptions

In addition to the common-law exceptions, there are also statutory exception to the at-will employment doctrine, this include:

i. Illegal Discrimination

This exception prohibits employers from basing employment decisions on an employee's race, colour, religion, sex, national origin, age, disability, or sexual orientation.

It is important to recognize that discrimination statutes shield members of protected classes only from adverse employment actions made because of their membership in a protected class. In other words, an employer may fire Jane because she failed to perform the required functions of her job, but not because she is in a wheelchair.

ii. Retaliation

Retaliation is another statute-based exception to the at-will presumption. Federal and/or state laws prohibit employers from firing employees in retaliation for engaging in legally proper, necessary, or desirable activities. Example of protected activities include claiming minimum wage or overtime compensation, engaging in union activities, opposing unlawful discriminatory practices, filing for workers' compensation, and 'whistleblowing.'

Employments with Statutory Flavour/Employment Protected By Statute:

This is a special category of contract of employment and the major concern of this paper. It is special in that the employment is a creation of and regulated by statute. Such employments are said to have a statutory flavour, a special type which entitles the employee to the remedy of reinstatement in the event of unlawful dismissal. The general principle is that where the contract of service is created by a statute and the procedure for the removal of the employee is defined in the said statute, non-compliance with that statutory provision renders the determination of such contract unlawful and null and void.

According to the court in the case of *Council of the Enugu University of Science and Technology & Ors v. E. N. Ude*¹, “An employment is said to have statutory flavor when the appointment and termination of such employment is governed by statutory provision. In other words, where the contract of service is governed by the provision of statute or where the contract of service are contained in regulations derived from statute.” Hence it vests the employee with a legal status higher than the ordinary master and servant relationship.

“There is a distinction between a contract of service at common law, and a contract of service with statutory flavor. Whereas at common law, a contract of personal service is determinable by the master on reasonable notice or on the notice stipulated in the contract of the parties. However a strict compliance is required in contracts reinforced by the statute.”² Further, an employment with statutory flavour is a confirmed employment of an employee with an employer whose procedure for termination and employments are outlined in a statute, provision of law etc. It is however not defined by a probationary employment with an employer whose formation is backed by a statute.³ (*Baba v. Nigerian Civil Aviation Training Centre, 1986*).

It must however be noted that, the fact that an organisation is a statutory body does not *ipso facto* mean that the conditions of service of its employees must be of a special character ruling out ordinary master-servant relationship. To have a statutory flavour, the appointment and removal of the employee must be defined in the enabling statute so that a valid determination of such employment is predicated upon the satisfaction of the statutory provisions. His lordship, the erudite jurist, KaribiWhyte (JSC), admonished counsels on this issue as follows:

The argument, though quite misconceived, now seems to me common with counsel that any officer, employed by a statutory body enjoys an appointment with statutory flavour. Nothing is farther from the true legal position. The character of an appointment and status of the employee in respect thereof is determined by the legal character and the contract of the employee. Hence, where the contract of employment is determinable by the agreement of the parties, simpliciter, there is no question of the contract having a statutory flavour. The fact that the other contracting party is the creation of a statute did not make any difference. However, where the conditions for appointment or determination of the contract are governed by the preconditions of an enabling statute so that a valid determination of appointment is predicated on satisfying such statutory provisions, this is a contract with a statutory flavour.

Similarly and in the same case, Kutigi JSC (as he then was) opined as follows:

The fact that the respondent is a statutory body does not mean that the conditions of service if its employees must be of special character ruling out the relationship of mere master and servant relationship. The Court must confine itself to the terms of contract of service between the parties which provide for their rights and obligations.....

It is within this category that we find the cases of where the contract is not determinable by the parties, but only by statutory preconditions governing its determination”.⁴

Thus, in determining whether a plaintiff is in the category or class of employees entitled to be re-instated in the event of wrongful or unlawful dismissal, the appropriate test is whether the conditions of service, including the appointment and removal, is prescribed or defined in a statute or regulations made there under. It is not sufficient that the employer is a public or statutory body.

Procedure for termination of an employment with statutory flavor:

There isn't any laid procedure by law for the termination of an employment which enjoys statutory flavour as it isn't terminable by mere notice.⁵ Where a contract of service enjoys statutory protection, it can only be terminated in the manner prescribed by the governing statutory provisions, a breach of which renders the act *ultra vires*, void and of no effect.⁶ The only legally acceptable means of terminating a contract of employment that enjoys statutory flavour is re-echoed in *Musibau Olatidoye Adeniyi v. Ejigbo Local Government*,⁷ “where

¹ (Court of Appeal, Enugu Judicial Division April 15, 2014), LEPLR-23013 (CA)

² *Obayan v University of Ilorin*, The Supreme Court of Nigeria, February, 2018

³ *Baba v Nigerian Civil Aviation Training Centre*, (Court of Appeal, Kaduna Judicial Division, September, 25, 1986) LPELR-21095 (CA).

⁴ See *Bashir Alade Shitta-bey v Federal Civil Service Commission*, LEPLR-SC 57/1980.

⁵ Atilola, B., (2011) *Ibid*

⁶ Odeku, k., and Animashaun. S., (2012) *Ibid*

⁷ LEPLR-SC. 22017, (C.A)

an employee is sought to be removed in a contract with statutory flavour of employment wherein the procedures for employment and discipline including dismissal are spelt out, such a contract must be terminated in a way and manner prescribed by statute. Any other manner of termination is inconsistent with the relevant statute and is thus null, void and of no effect.”

Remedies for wrongful termination of employment with statutory flavour

“Where an employee’s service is protected by statute and his employment is wrongfully terminated, he would be entitled to re-instatement in his office and in addition, damages representing his salaries during the period of his purported dismissal.¹ (*Musibau Olatidoye Adeniyi v Ejigbo Local Government*, (2013); *Bashir Alade Shitta-bey v. The Federal Civil Service Commission*, 1981).

Public servant can only be validly removed from service if the procedure prescribed was followed and once the dismissal or termination of appointment is declared null and void, the effect of such a pronouncement is that the civil servant was always and still is a civil servant.²

Consequent on the foregoing there exists a salient question: what is a reinstatement?

What is a re-instatement?

According to the court in *Obayan v University of Ilorin*³, a re-instatement is to replace a man in the position from which he was dismissed and so to restore to status quo ante before dismissal. Thus, a reinstatement is an order of mandamus to an employer to return to and restore the status quo prior to dismissal as seen in *Federal Medical Centre, Ido-Ekiti & Ors v Folorunsho Kayode Michael*.⁴ Consequently, where an employee gets a reinstatement order, it means he is to return to his post like he wasn’t dismissed.

Reinstatement outside the public service

That the court would not force a willing employee on an unwilling employer and vice versa is undisputed, but recent judgment in favour of Longe (an improperly dismissed director of First Bank) and Jennifer Adighije-Okolo (a former employee of Helios Towers Nig. Ltd.), suggests the applicability of the technicality of a reinstatement order in the private sector, where an employer is unwilling to take back the employee.

In the case of Mr. Longe boarding on the statutory flavour of a director in accordance with the guidelines of the Companies and Allied Matters Act, (a former managing director of First bank Nig. Plc), the court interpreted the ruling of a reinstatement to mean; a reinstatement back into office till the day of the judgment as if proper termination of employment between the two parties would be conducted tomorrow. Hence, the plaintiff retains all benefits accrued to his office till the day of judgment at the supreme court.

In the case of the latter, although not an employment spiced with statutory flavours, the National Industrial Court gave a reinstatement order owing to the special features the contract of employment possessed. The contract of employment possessed a binding clause which forbade the employee from picking up an appointment in a telecommunications company for two years from the date of termination of appointment. Hence, the court interpreted its reinstatement order to mean the same thing as in the early discussed case of Longe.

Conclusion

Summarily, from the judgments of cases of Shitta-bey to that of Obayan, it would be noted that the remedy available to an employee whose employment is spiced with statutory flavour is reinstatement. Although the principles of these reinstatements remain ultimately the same, its definition and implication may vary across the sectors of the economy (i.e. the private and public sectors). In the public sector, the employee continues to hold the office and enjoy benefits of the office even years after the determination of the case. Elsewhere, outside the public sector (i.e. the private sector) the implication of a reinstatement order is that the employee was still in the employment of the employer till the date of dismissal and he is entitled to salary for the amount of foreseeable

¹ *Musibau Olatidoye Adeniyi v Ejigbo Local Government* (2013) LEPLR-SC 22017 (CA); *Bashir Alade Shitta-bey v The Federal Civil Service Commission*, Ibid

² *Federal Medical Centre, Ido-Ekiti & Ors v Folorunsho Kayode Michael* (2012) LPELR-20406 (CA)

³ *Ibid*.

⁴ See also *Power Holding Company Plc v Mr. I.C. Offoelo*, LPELR-sc 7/2006; *Federal Civil Service Commission v J. O Laoye* LPELR-SC 202/87; *Central Bank of Nigeria v Igwillo*, (2002) LPELR SC 116/2002

years he would have been in such employment had his case been properly determined, hence he doesn't physically return to his post.