The position of the Nigerian Courts on termination of employment
Part II

In this second part of this article, we shall examine the courts' position on reason and motive for termination, reinstatement, and suspension of employment.

Reason and motive for termination

On the issue of termination, the most prominent point of divergence among jurists is whether the employer must give the employee a reason for terminating the employment. The common law principle was settled that an employee is not mandatorily required to give notice for the termination of the employment (except the employee handbook or the letter of employment states otherwise).[1] The rationale behind this principle was that the courts would usually not foist a willing employee on an unwilling employer.[2]

However, the jurisprudence in international labour law seems to have evolved beyond this common law principle by stating that the employer must give the employee a reason for terminating the employment. Article 4 of the Termination of Employment Convention of the International Labour Organisation (the "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 or based on the operational requirements of the undertaking, establishment or service."*[3] Although Nigeria is a member of the International Labour Organisation, the Convention has not been ratified in Nigeria.

The National Industrial Court of Nigeria ("NICN"), established by the Third Alteration to the Constitution of the Federal Republic of Nigeria (the "Constitution") as the court vested with exclusive jurisdiction in respect of labour and employment matters in Nigeria in the first instance[4] has in a number of cases applied this new jurisprudential approach to state that reason must be given for the termination of a contract of employment.[5] In these cases, the courts placing reliance on the provision of Section 254 (C) (2) of the Constitution and Section 7 (6) of the National Industrial Court of Nigeria Act (the "NICNA")[6] which enables the NICN to apply international conventions and treaties to labour matters, applied the provision of Article 4 of the Convention and stated that the termination was wrongful because the employer did not give the employee a reason for terminating the employment.

However, the present position is that these decisions were reached *per incuriam* because of the clear and unambiguous position of Section 12 (1) of the Constitution which states that as a condition precedent to the application of all international conventions and treaties in Nigeria, the international convention or treaty must be ratified in Nigeria before they have the force of law in

[1] *Bankole v N.B.C (1968) 2 All NLR 37; Olaniyan v University of Lagos* (1985) 2 NWLR (Pt. 9) 599
[2] *Union Bank of Nigeria v Ogboh (1995) 2 NWLR (Pt. 380) 647 at 664; Chukwumah v. Shell Petroleum Development Company Ltd (1993) 4 NWLR (Pt. 289) 512 at 560.*
[3] Termination of Employment Convention, 1982 (No. 158)
[4] Section 254 (c) of the Constitution of the Federal Republic of Nigeria
[5] *Bello Ibrahim v. Ecobank Plc. Suit No. NICN/ABJ/144/2018; Clement Abayomi Onitiju v Lekki Concession Company Limited unreported suit No. NICN/LA/130/2011, delivered on 11 December 2018; Mr. Ebere Onyekachi Aloysius v Diamond Bank Plc. [2015] 58 N.L.L.R 92*
[6] Federal Republic of Nigeria Official Gazette (Act No. 1 of 2006) Volume 93. Government Notice No. 26

Nigeria. The courts in the decisions above placed reliance for the application of the Convention on Section 254C (2) of the Constitution –

> "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 relation or matters connected therewith."

It is noteworthy that the Supreme Court when interpreting Constitutional provisions, has held that the courts must consider the provisions of the Constitution holistically and not in isolation and where there are 2 (two) possible meanings, the court must adopt the meaning that is more reasonable and which would avoid absurdity.[7] By a community reading of the 2 (two) provisions of the Constitution[8], it can be reasonably concluded that on the specific issue of the application of international treaties by the NICN in respect of labour matters (in this instance, the Convention), as a necessary precursor to their application, such treaties must have been ratified in Nigeria, and in the absence of ratification, the treaties do not have the force of the law and the courts do not have the jurisdiction to apply them in disputes.

Section 7 (6) of the NICNA however provides that *"the Court (NICN) shall, in exercising its jurisdiction or any of the powers conferred upon it by this Act or any other enactment or law, have due regard to good or international best practice in labour or industrial relations and what amounts to good or international best practice in labour or industrial relations shall be a question of fact."* An important conflict therefore arises between this provision and that of Section 254 (C) (2) of the Constitution highlighted above because this section that does not include the condition precedence of ratification prior to application. In resolving this conflict, the position of the Constitution trumps the position of the NICNA because the Constitution is the *grundnorm* in Nigeria and always supersedes any other legislation with a contrary provision, and therefore, the NICNA to the extent of this inconsistency would be void.[9]

Interestingly, in the recently decided cases of *Attah v First Bank of Nigeria*[10] and *Abdulrazaq v First Bank of Nigeria*[11], the NICN has adopted this approach and departed from its earlier cases, stating that the treaty (the Convention) that mandates an employer to give reason for termination has not been ratified in Nigeria and as a result, it is not yet enforceable in Nigeria. Therefore, until its ratification, the age long common law position that an employee does not have to give reason for termination remains good law in Nigeria.[12] The Court of Appeal have also in the cases of *UBN Plc v Toyinbo*[13] and *Keystone Bank v Afolabi*[14] reiterated this position. We therefore make bold to state that it is the extant position that an employer is under no legal obligation to give reason for termination as long as the termination is done in accordance with the terms of the

[7] *Skye Bank v Iwu (2017) 16 NWLR (Pt. 1590) 24; Awolowo v. Shagari (1979) 6-9 SC51*
[8] Section 12 and Section 254 (C) (2) of the Constitution of the Federal Republic of Nigeria
[9]Section 1(1) and 1 (3) of the Constitution; *Obayuwana V. Governor of Bendel State (1982) LPELR-2160(SC)*
[10] Unreported (Suit No: NICN/ABJ/233/2019) delivered on 19 January 2022
[11] Unreported (Suit No: NICN/ABJ/232/2019) delivered on 19 January 2022
[12] See also *ThankGod Albert v Leisure Invest Limited; Unreported (Suit No: NICN/ABJ/382/2017)* delivered on 29 May 2020
[13] *(2008) LPELR-5056(CA)*
[14] *(2017) LPELR-42390(CA*

employment contract. The question however is whether, upon ratification, parties to an employment contract can by their agreement exempt the application of the Convention in their contract. We note that parties to a contract are allowed, to the extent that the law permits, to regulate their rights and liabilities under the contract.[15] Thus, where the terms of employment between parties state that reason need not be given for termination of employment, the terms would govern the contract between the parties.

Also, the motive of the employer in terminating the employment is irrelevant as the courts have constantly stated that ill motive or malice on the path of the employer does not in itself vitiate the termination, for a termination to be rendered invalid, the employer must have breached the provision of the contract of employment or the Labour Act (where applicable).[16] However, relevant statutes protect employees from termination due to discrimination. The constitution prohibits discrimination against Nigerian citizens based on community, ethnic group, place of origin, sex, religion, political opinion, or the circumstance of birth[17]. The HIV and Aids (Anti-discrimination) Act[18] also prohibits employers from discriminating directly or indirectly based on their HIV status or related illness. Courts have held employers liable for the act of sexual harassment against an employee when not concluding an investigation of alleged sexual harassment.[19]

Reinstatement of employment

In the event that the procedure stated in the contract of employment has not been followed and the court is of the opinion that the employer has breached the contract, the courts would regardless, as a general rule, not state that the employer should be reinstated because of the principle of not foisting a willing employee on an unwilling employer, as stated above.[20] The Courts have stated that in certain exceptional circumstances, the Court can order a reinstatement of an employee. These exceptional circumstances have been defined as 'employment that has a legal or statutory flavour thus putting it over and above the ordinary master and servant relationship. Equally so where a special legal status such as a tenure of public office is attached to the contract of employment.' and refer to contracts with statutory flavour as elucidated in Paragraph 2 above.[21] It is therefore evident that in a contract of employment *simpliciter*, the court would not order a reinstatement of the employee even if the court reaches a decision that the procedure for termination was not followed.[22]

Pro-rated salary

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[15] *Lignes Aeriennes Congolaises v Air Atlantic Nigeria Ltd (2005) LPELR 5808 (CA)*

[16] *Ajayi v. Texaco Nigeria Limited & Ors (1987) 3 NWLR (Pt.62) 577 at 593; Nwajagu V. British American Insurance Co. (Nig) Ltd (2000) LPELR-10776*

[17] Section 42 of the 1999 Constitution

[18] 2014, Act No. 7

[19] Ejike Maduka v. Microsoft & Ors NICN/LA/492/2012.

[20] Note that this is different from the approach of the court in employments with statutory flavour. See *Union Bank of Nigeria v Ogboh (1995) 2 NWLR (Pt. 380) 647 at 664; Chukwumah v. Shell Petroleum Development Company Ltd (1993) 4 NWLR (Pt. 289) 512 at 560; Odibo v First Bank of Nigeria (2018) LPELR 46628; Shitta-Bay v FCSC (1981) 12 NSC 28*

[21] *Ifeta v. S.P.D.C. Nigeria Limited (2006) LPELR-1436(SC); Isievwore v. NEPA (2002) LPELR-1555(SC)*

[22] ibid

Another question that the court is usually faced with is on the issue of whether upon termination, the employer can pro-rate the salary of the employee and pay only the fractional amount of the salary for the days that the employee was employed prior to the termination of the employment. In answering this question, the NICN in *Grant Mpanugo v. CAT Construction Nig Limited*[23] and *Abe Adewunmi Babalola v Equinox International Resources Limited*[24] distinguished employees that were paid monthly from those that were paid daily and stated that if the employer should terminate the monthly employment of the employee, the employer is liable to pay to the employee, the entire monthly salary for the month in which the employment was terminated. The courts premised their decision on the fact that the 12 (twelve) calendar months do not have equal days and as a result, the days in a month cannot as a matter of law be used as a method of calculating and prorating salary payable to an employee.

Payment of salary during suspension

Another point of divergence among the Nigerian labour law courts is whether during the period of suspension of an employee, an employer is obliged to pay the entirety of the employee's salary. Previously, the Court of Appeal in *NJC v Aladejana* stated that the employer was not obliged to pay salary during suspension because during suspension, the employee should not be entitled to enjoy the rights and privileges attached to the position.[25] However, the Court of Appeal appears to have departed from this position in a number of recently decided cases stating that the employer is obliged to pay the entirety of the employee's salary during the period of suspension.[26] The *raison d'etre* is that suspension merely operates to prevent an employee from discharging the ordinary functions of the office without any diminution of the right of the employee (salary and wages being the basic and principal right of the employee) and therefore, the employee cannot be suspended without pay or half pay except otherwise the contract of employment gives the employer the right to suspend without pay or with half pay.[27] On this issue, the extant position is therefore that in the absence of anything to the contrary, during the period of suspension, the employee must be paid the entirety of his salary.[28]

Conclusion

We have in the first and second parts of this article reviewed the extant position of the Nigerian law and courts on several labour matters as it pertains to employments with statutory flavour and private employments. As evidenced in this article, the jurisprudence on the position of several labour matters is constantly evolving, particularly in line with the mandate given to the NICN to adopt international best practices in resolving labour disputes. Notwithstanding this constantly evolving jurisprudence, generally, the enabling statute governs an employment with statutory flavour and a contract of employment and the Act (to the extent that it applies) govern private employments. Employers are advised to act in line with the governing rules and the position of the Nigerian courts in terminating the employment of their employees. They are also advised to

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[23] *Unreported (Suit No. NICN/LA/660/2015) Judgment delivered on 20 September 2019*
[24] *Unreported (Suit No. NICN/LA/166/2015) Judgment delivered on 17 June 2020 accessible at* *https://judgement.nicnadr.gov.ng/details.php?id=4770*
[25] *(2014) LPELR -24134*
[26] *Bamisile vs. NJC & Ors (2012) LPELR-8381; Globe Motors Holdings (Nig) Limited v. Oyewole (2022) LPELR-56856; Longe v.FBN PLC (2010) LPELR-1793*
[27] *City Central Group of Companies Limited v. Eze (2021) LPELR-55725; Globe Motors Holdings (Nig) Limited v. Oyewole (2022) LPELR-56856*
[28]ibid

act in conjunction with their legal advisers to limit and if possible, prevent liability when terminating contracts of employment.

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