

**Unfair Labour Practice (2): Payment of 13<sup>th</sup> month Salary — Navigating Employee's expectations amidst the harsh business realities faced by Employers.**



**Perchstone & Graeys**  
SOLICITORS, ADVOCATES & ARBITRATORS

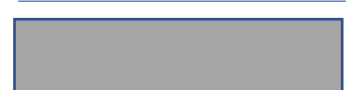
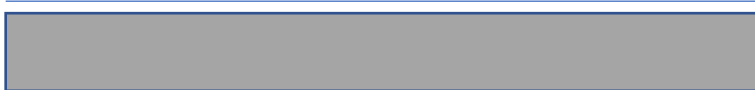


Dunder Mifflin (*the company*) is a renowned paper production company. The company made a name for itself supplying paper to numerous businesses across the city of Lagos. In 2022, due to rapidly evolving Environmental, Social and Corporate Governance (ESG) concerns, most businesses evolved to become environmentally responsible and resource-efficient, especially by reducing their paper consumption. This decision

impacted Dunder Mifflin's business negatively, causing the company to cut its expenses, and re-evaluate its employee benefits.

One of the provisions in the employment contract at Dunder Mifflin stipulates that employees are entitled to receive an additional month's salary as a year-end bonus—a gesture to acknowledge and appreciate the hard work and dedication of the workforce. Dunder Mifflin employees eagerly awaited the disbursement of their 13<sup>th</sup> month salary as December 2022 approached. The management, faced with the harsh realities of cost-cutting, dropped the bombshell—no more 13<sup>th</sup> month salary.

Dissatisfied with this decision, the employees chose to take legal action against the company for the non-payment of their 13<sup>th</sup> month's salary. A good number of employees asserted the right to the said payment based on their employment contracts, while others contended that the payment of their 13<sup>th</sup> month salary is a customary practice and a reasonable expectation, given their full year of employment with the company. The above facts are analogous to one of the claims of the claimant in **Pius Ohimai Ovbioise v. Mr. Aderibigbe Adedeji SAN [Trading under the name and style of Adedeji, Owotomo & Associates] (Unreported) Suit No. NICN/LA/484/2020** determined by the National Industrial Court of Nigeria per Honourable Justice Elizabeth A. Oji on February 22, 2023. In this case, the claimant, amongst other claims, sought against the defendant, the payment of his outstanding and unsettled arrears of his 13<sup>th</sup> month salary which remained unpaid for over four years.



## FACTS AND FINDINGS

Mr. Pius Ohimai Ovbioise (*Mr. Pius/the claimant*) was employed as counsel in the law firm of Adedeji, Owotomo & Associates (*the firm/the defendant*) vide a letter of employment dated February 11, 2016. According to his contract of employment, he was entitled to statutory contributory pension, 13<sup>th</sup> month salary being one month's gross salary without deductions, bonuses amongst other entitlements.

Mr. Pius resigned from the employment of the firm on August 18, 2020, and subsequently instituted an action against the firm, seeking, amongst others, an order for immediate payment of his outstanding arrears of 13<sup>th</sup> month salaries from 2016 to 2019; an order for the settlement of his September 2020 unpaid salary; and an order for the payment of the deducted but unremitted statutory pension contributions.

The claims were contested by the defendant, asserting that the claimant never made any request, nor complaint while he was in the firm's employment. Nevertheless, the firm claimed in its defence that the claimant's monthly salaries, his 13<sup>th</sup> month salaries from 2016 to 2019 as claimed, together with other allowances and bonuses were duly paid.

The firm also argued that they had been financially magnanimous to the claimant while he was in employment. They claimed to have disbursed several funds to the claimant at different intervals during his employment as counsel, which was yet to be fully utilized, amortized, and accounted for. To substantiate their defence, the firm also stated that they had annulled the payment of 13<sup>th</sup> month salary to its employees since 2015, and as evidence of the fulfilment of its contractual responsibilities and magnanimity to the claimant, the firm referenced the



disbursement of several sums to the claimant. According to the defendant, the sum of ₦1,500,000 (One million, five hundred thousand Naira) was disbursed to the claimant on December 18, 2017, to cover his 2018 accommodation allowance and bonus, and was inclusive of a car loan which had remained unpaid by the claimant. A sum of \$7,500 (Seven thousand,



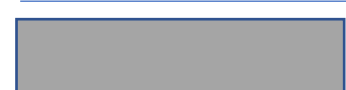
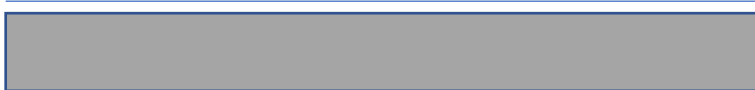
five hundred Dollars) was incurred by the defendant to sponsor the claimant to the International Bar Conference in 2018 which held in Rome. The defendant also referenced the disbursement of ₦528,000 (Five hundred and twenty-eight thousand Naira) to the claimant in 2020, including a payment of ₦500,000 (Five hundred thousand Naira) to cover the claimant accommodation allowance from May 2020 to April 2021. The defendant

counterclaimed for the recovery of unutilized and unamortized funds disbursed to the claimant, and an account of sums remitted to the claimant for official purposes while he was in the firm's employment.

The claimant, in its reply to the defendant's statement of defence and counterclaim, clarified that contrary to the averments of the defendant, he had always demanded the payment of his contractual 13<sup>th</sup> month salary. He also clarified that the ₦1,500,000 (One million, five hundred thousand Naira) disbursement of December 18, 2017, to him was an outright gift with no condition attached in recognition of his exemplary performance in one of the cases he personally handled for the firm. He explained further that, it was the defendant's reaction to his demand for his contractual 13<sup>th</sup> months' salary for 2016 and 2017 and the payment of his unremitted compulsory pension contribution that prompted the internal memo of January 29, 2018, where the defendant made representations to recharacterize the purpose of the ₦1,500,000 (One million, five hundred thousand naira) disbursement to cater for his demands and other contractual entitlements.

The claimant denied the counterclaim of the defendant, affirming that he gave account of all sums remitted into his account for official purposes, and every penny paid to him during his employment was well earned and more than deserved. He concluded that the terms of his contractual engagement with the defendant in 2016 was discussed, agreed to by parties, reduced into writing by the defendant in February 2016, and signed by both parties. The said contract of employment provided for the payment of 13<sup>th</sup> month salary to the claimant and the defendant had failed to meet that obligation since the onset of his employment.

In the determination of the dispute between the parties, the Court found that though the defendant has record of payment of salaries and other disbursements made to the claimant,





the defendant failed to adduce any evidence or record that shows the payment of the claimant's thirteenth month salary from 2016 to 2019. The defendant was unable to discharge the burden of proof that they had complied with the contract of employment by paying the claimant the 13<sup>th</sup> month salaries for the period claimed. The Court further held that although the defendant tried to make a unilateral amendment to the claimant's contract of employment, the defendant could not make such unilateral changes as it relates to benefits, or any other payments already earned by the claimant.

In summary, the Court found that the claimant established his entitlement to his claim for the payment of his unpaid 13<sup>th</sup> month salaries from 2016 to 2019.

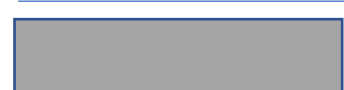
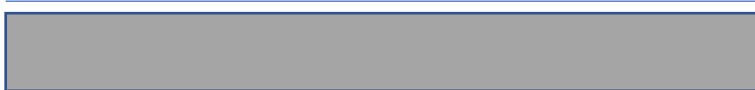
## COMMENTARY



Thirteenth-month salary is a form of additional compensation or benefit given to employees in addition to their annual base salary. It is typically paid at the end of the year and equates to a full month's pay, made in addition to the regular 12-month salary. Under Nigerian law, there are no statutory requirements for a 13<sup>th</sup> month salary payment, but it is a common practice in employment that may arise from collective bargaining, a contract between employees, and as now well-developed by the emergent labour jurisprudence of the National Industrial Court of Nigeria, it may also arise as a form of legitimate

expectation.

In *W.C.C. Ltd. v. Batalha* (2006) 9 NWLR (Pt.986) 595, the Nigerian Supreme Court affirmed the well-established right of parties to freely enter into contractual agreements. This position remains unchanged signifying that parties in an employment contract retain the liberty to agree to the payment of 13<sup>th</sup> month's salary and an employee's eligibility to same. Where an employee is entitled to 13<sup>th</sup> month's salary by virtue of an express provision of the employment contract, it becomes a mandatory and contractual obligation to be fulfilled by the





employer, and failure to fulfill this obligation constitutes a breach of the contract. *See Ajuma Okpe v. EMGE Resources Limited and Anor*<sup>1</sup>

In a situation where the employment contract does not explicitly specify the payment of a 13th-month salary, but the employer has consistently made such payments over time, legitimate expectation for payment of same is likely to arise and employees may assert a claim to it as an expectation interest that can be compelled by the National Industrial Court. See *Imuwahen Egbe v.*

*Gokada Rides Limited*<sup>2</sup> and *Mr. Patrick Obiora Modilim v. United Bank for Africa Plc*<sup>3</sup> where the NICN recognized expectation interests and awarded damages to employees to the degree of the loss of the employee's expectation.

Whether explicitly stated or implied through an employer's consistent practices, the 13th-month salary, where established, can be considered a component of employees' benefits and ought to be paid by the employer. This obligation cannot be unilaterally altered by the employer, even when the payment of the 13<sup>th</sup> month salary was established by an employer's consistent practices. In *Haruna Ishola Salau v. Sterling Bank Plc*<sup>4</sup> the NICN, conceding that unilateral alterations of contract(s) of employment made be carried out by employers in relation to changes within its managerial prerogative due to operational concerns, emphatically held that such an employer's right to alter conditions of service without the employee's consent is never extended to employee's accrued benefits or basic conditions of service. As an established benefit, employers cannot arbitrarily cease fulfilling their obligation to pay the 13<sup>th</sup> month salary and must engage in negotiations with employees and involved parties if changes are to be implemented. See *PAN Bisbilder (Nig) Ltd v. FBN Ltd [2000] LPELR-2900; Umera v. NRC [2022]10 NWLR (Pt. 1838) 349.*

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<sup>1</sup> Unreported) Suit No NICN/ABJ/173/2021 judgement of which was delivered on March 14, 2023, per Late Hon. Justice E. N. N. Agbakoba.

<sup>2</sup> (Unreported) Suit No. NICN/LA/561/2019 judgment delivered by Honourable Justice I. G Nweneka on July 27, 2022

<sup>3</sup> (Unreported) Suit No. NICN/LA/355/2012, judgement delivered by Honourable Justice B. B Kanyip on June 19, 2014.

<sup>4</sup> (Unreported) Suit No. NICN/ABJ/36/2022, judgement of which was delivered by Honourable Justice O. O. Oyewumi on October 4, 2023,

Even when business circumstances necessitate changes to employee benefits packages, employers should prioritize clear and timely communication with their employees to avoid potential liabilities. This means holding open discussions well in advance of any modifications, ensuring employees understand the rationale and implications, and more importantly, ensuring that the employees agree to them. Furthermore, employers must be mindful of any customs or practices they foster, as they may inadvertently set expectations that could lead to unforeseen obligations.

In summary, parties involved in an employment contract are obligated to adhere to the stipulated terms and conditions explicitly outlined in the contract, as well as those that become established customs and practices such as payment of 13<sup>th</sup> month salary. Failure to comply with these terms may lead to potential damages for breach of contract and unfair labour practices. Employers should also remain mindful of the fact that their right to independently alter the terms of employment is restricted, particularly when such modifications detrimentally impact the interests of the employees.

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