A Newsletter on Labour Law and Emerging Trends - April 2023 Edition

Perchstone & Graeys
SOLICITORS, ADVOCATES & ARBITRATORS

EMPLOYMENT TERMINATION CHECKLIST FOR EMPLOYERS AND HR PRACTITIONERS

Mr. Mayowa Olih ("*Mayowa*") was employed by Novatis Limited ("*Novatis*"/"*the company*") as a Customer Service Officer. During his employment with Novatis, Mayowa was transferred from the Maitama branch of the company to the Gwagwalada branch. Mayowa had his residence in Maitama and the transfer to Gwagwalada was quite unexpected and did not come with any relocation and transportation allowances to make the transfer easy on him. Mayowa's transportation costs tripled, and not been able to meet up with his regular private means of transportation through ride hailing apps, he resorted to public transportation. This resulted in tardiness as Mayowa, who was usually known for his punctuality, could no longer resume early to work and on some days, was unable to show up at work. Due to his numerous absence and lateness to work, Novatis placed a restriction on Mayowa's salary account for five months and subsequently disengaged him from the company for gross misconduct. Displeased with the termination of his employment, Mayowa instituted an action for wrongful termination of his employment, as well as other claims.

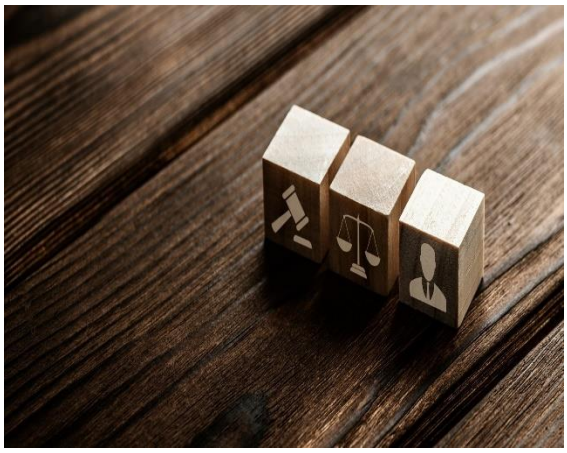
The National Industrial Court of Nigeria (NICN), Lagos Judicial Division per Hon. Justice M.N. Esowe determined a similar set of facts in ***Mr. Aruna Collins Ekpen v. Lapo Microfinance Bank Limited*, *(Unreported) Suit No: NICN/LA/145/2021 judgement of which was delivered on March 30, 2023.*** In the suit, the Court held in favour of Mr. Aruna that the termination of his employment was wrongful and that withholding his salaries for over three months constituted an unfair labour practice.

FACTS AND FINDINGS

Aruna Collins Ekpen ("*Aruna*") was employed by Lapo Microfinance Bank Limited ("*Lapo*"/"*Bank*") in December 2013 and worked in various capacities in one of the Bank's branches. He was later transferred to a different branch, quite far away from the initial branch Aruna had originally worked in. Due to the distance from his residence, Aruna had challenges with tardiness. Lapo thereafter placed restrictions on Aruna's salary account and in December 2020, disengaged him from its employment on the allegation that Aruna's performance had been below expectation.

At the trial proceedings in Court, Aruna's testimony was that he was wrongfully terminated in contravention of the terms of his employment which provided that his employment may be terminated by a written notice or payment in lieu of such notice and that the Bank failed to comply with the terms of the termination of his

employment, with the payment in lieu not being made contemporaneously with the termination of his employment. It was also Aruna's testimony that the restriction placed on his salary account by Lapo was unjustified, and done in utmost bad faith. On its part, Lapo contended that Aruna's employment was terminated owing to gross misconduct and that no notice of termination was needed for termination based on gross misconduct.



The Court upon carefully examining the evidence before it, held that no evidence was adduced by Lapo to prove that there was gross misconduct by Aruna and that the purported dismissal and/or termination of Aruna's employment was wrongful and in breach of international best practices in labour and employment relations. The court also held that the restriction placed on Aruna's salaries for three consecutive months by Lapo was unlawful and compensated him in damages for Lapo's wrongful actions.

OUR COMMENTS

When issues of wrongful termination of employment are alleged, a cardinal consideration is the terms and conditions of service contained in the contract of employment.[1] Termination or dismissal of an employee must comply strictly with the terms in the contract of employment to avoid exposures for wrongful termination.[2] Below is a quick checklist that should guide exits based on termination or dismissal:

1. Is the termination based on the employee's performance? If so, have you notified the employee of the areas where his performance has been poor and given them an opportunity to improve on the poor performance?[3]

2. Is the termination based on a disciplinary issue? If so, have you given the employee an opportunity to defend himself against the allegations levelled?[4]

3. Having decided to terminate the employee's contract, have you stated a valid reason for the termination of the employment?[5]

4. Have you complied with any contractual provision requiring the doing of certain things as part of the exit procedure?

The above list is by no means exhaustive, but is a proper guide that can hedge against the risks of wrongful termination.

[1] *Umera v. NRC* [2022] 10 NWLR (Pt. 1838) 349.
[2] *Obanye v. UBN Plc* [2018] 17 NWLR (Pt. 1648) 375 at 390.
[3] See Recommendation 8 of the ILO Termination of Employment Recommendation, No. 166.
[4] See Article 7 of the ILO Termination of Employment Convention, No. 158.
[5] See Article 4 of the ILO Termination of Employment Convention, No. 158.

No doubt, employers have the right to discipline erring employees. It is undisputable that the power of an employer to discipline its employees is inherent. However, when an employer seeks to terminate an employee's employment on the grounds of 'gross-misconduct', and same is not expressly defined in the contract of employment, such act of gross-misconduct must fit in the general definition of gross misconduct as defined by the Court.[6] It is true that what constitutes gross misconduct in the workplace is not exhaustive, however, it is advisable that employment contracts clearly define and specify conduct that will amount to gross misconduct. For instance, where an employer proceeds to dismiss an employee on an act it considers as gross misconduct which is not expressly provided in the contract, and which on the face of it does not fit in the general definition as interpreted by the Courts,[7] such determination may expose the employer to liabilities for wrongful termination.

Also, employers should endeavour to shun labour practices that may be tagged unfair. The list of what constitutes unfair labour practices are unlimited. The Industrial court is empowered to look at, ascertain same based on the facts circumstance submitted to court on a case-by-case basis. It is clear that the practice for an employer to clog the wheel of performance of an employee and accuse the employee of poor performance or misconduct is an unfair labour practice. An employer is required by law to pay the salaries of its employees as and when due and allow such employee's access to their salaries upon payment. Thus, denying an employee access to his salary whether by withholding or restricting access to same is unlawful and also amounts to an unfair labour practice.[8]

In conclusion, where an agreement sets out the grounds upon which a contract may be terminated, such must be followed accordingly, and in a case of gross misconduct, evidence of such act must be proved, especially where instances of gross misconduct are not expressly contained in the contract. To avoid liabilities in damages, provisions as to notice period should be strictly complied with. Where an employer seeks to make payment in lieu of notice, such payment is required to be made contemporaneously,[9] and in compliance with international best practices, there must be a valid reason upon which termination is based.

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[6] See *UBN v. Ogboh* [1995] 2 NWLR (Pt. 380) 647 at 669 paras F-G, per Iguh JSC.
[7] *Oyedele v. University of Ife Teaching Hospital* [1990] 6 NWLR (Pt. 155) 194.
[8] See Section 15 of the Labour Act and Article 6 of the ILO Protection of Wages Convention, 1949 (No 95).
[9] *Chukwumah v. Shell Petroleum* [1993] 4 NWLR (Pt. 289) 512.