
A Newsletter on Labour Law and Emerging Trends



Perchstone & Graeys
SOLICITORS, ADVOCATES & ARBITRATORS

THE EFFICACY OF CHINESE WALLS

FACTS

In **Aero Contractors Co. of Nig. Ltd V. Mr. Akintayo Akinwunmi Akingbehin**¹ Mr Akingbehin was employed in the Commercial Department of Aero Contractors Company of Nigeria Ltd (*the Company*) sometime in August 2003. In October 2012, the Company engaged the services of a consultancy firm to undertake an appraisal of its information and communication systems. The consultancy firm uncovered a massive fraud worth about N64, 000,000 (sixty four million Naira) being carried out in the Commercial Department. Investigations commenced and after a series of investigations, Mr. Akingbehin was identified as one of the perpetrators of the fraud; he was subsequently placed on indefinite suspension from November 28, 2012 following investigations by the Police.

On December 27, 2012, Mr. Akingbehin's solicitors wrote threatening to share the Company's information gotten through transactions and finances which he (Mr. Akingbehin) had been privy to if he was not reinstated to his position forthwith. The Company sued contending that Mr. Akingbehin breached the confidentiality agreement contained in the contract of employment and would expose it to further damages if the threat is carried out; the Company claimed N25,000,000 for the damage occasioned by the breach of confidentiality, amongst other things.

In Mr. Akingbehin's defense, he claimed that, as Union Chairman he had the responsibility of representing the interest of other employees and as such, frequently contended with the Management. He further claimed that the investigations were executed his being afforded fair hearing, following which he was reported to the Police and suspended. He noted that the disclosures his solicitor made were not in bad faith and not a breach of the confidentiality clause between him and the Company. He asked the court to declare his dismissal wrongful, illegal, unconstitutional and contrary to the principle and rules of natural justice and fair hearing, and that he be reinstated; he also claimed for his unpaid salary and other emoluments from the period of his suspension, including special and general damages to the tune of N100, 000,000.00 (one hundred million Naira) for inconveniences, emotional and psychological trauma and infamy he has suffered in the aviation industry.

ISSUES

1. Whether the confidentiality agreement in the contract of employment was breached by disclosure of the Company's confidential information in the solicitor's letters of December 27, 2012 and January 14, 2013.
2. Whether the dismissal of Mr. Akingbehin by the Company was wrongful.

¹ Suit No: NICN/LA/123/2013 which judgement was delivered on June 16, 2015.

FINDING/DECISION

The court considered the defendant's Letter of employment dated August 24, 2003, Letter of confirmation dated May 25, 2004, and Staff Handbook and Administrative Policy Manual. It found that Mr. Akingbehin breached the duty of confidentiality as stipulated in the Company's employee handbook by disclosing details to his counsel, who published same in the scathing letter to the Company for the sole purpose of blackmail.



On wrongful dismissal as alleged by Mr. Akingbehin, the court held that Mr. Akingbehin was wrongfully dismissed and ordered that the Company pay damages in the sum of N845,890.75. For breaching the non-disclosure clause of his contract of service however, the court ordered that Mr. Akingbehin pay the Company the sum of N2,000,000.00 as damages.

COMMENTS

A. Nature and Significance of Non-Disclosure Clauses in Employment Contracts

The relevance of the non-disclosure of information clause in employment contracts is indisputable and essential in protecting business integrity. Concerns arise however as to the extent of the requirements under such confidentiality clauses. In *Akinsanya v. Coca-Cola & Anor*,² the employer's confidentiality clause stated that non-public information shall not be revealed to family members. The employee disclosed confidential information to her spouse by email; her defence was that they are *one* — spousal unity. The court *per* B.B. Kanyip however struck down this defence holding that the disclosure to her husband was wrongful as he came within the limits of “*family members*”. The employee's disclosure thus ran contrary to the employer's Code of Business Conduct; “*Once it is noted that even under section 187 of the Evidence Act 2011 spousal unity was not used as an absolute proposition, then the claimant's argument that she did not regard her husband as coming within the definition of family cannot be sustained. In this sense, the claimant in making communication of the sort of Document 13 to her husband breached Document 23; and I so find and hold. Her letter of appointment (Exhibit CI) barred her from discussing with any person information as to the affairs of the company and enjoined her to sign a non-disclosure agreement and the Code of Business Conduct. Under cross-examination, the claimant acknowledged signing the Code of Business Conduct and knew that it was binding on her, and that she believed she signed a document on non-disclosure of information. There is no question, therefore, that the claimant breached her obligation as to non-disclosure.*”

B. Sidestepping in a Disciplinary Process

By the employee's Handbook, an erring employee was to be first invited to an investigatory panel to answer to the charge against him/her. Thereafter, the panel makes recommendations and where the employee is found liable for gross misconduct, the employee would be dismissed on the Managing Director's final approval. From the facts, the court found that, while the committee found the employee guilty of gross misconduct and recommended him for dismissal, the final approval of the Managing Director was not secured. Justice Oyewunmi Oyebiola in her judgement noted the Company's compliance until this last stage, on the back of which the process was adjudged wrongful. This decision underlines the fact that employers must follow the *entire due process* in disciplinary proceedings for same to not be regarded as wrongful.

² Suit No: NICN/LA/40/2012 which judgment was delivered on April 7, 2016.

C. Employer before the Trade Union

One of the defences Mr. Akingbehin tried to hide under was that he owed a duty as the Chairman of the Senior Staff Union to disclose the underhand dealings of the employer which he was privy to. The court faulted this point: “*the defendant became first a staff of the claimant before he became a union leader, hence his primary responsibility is to the claimant by obliging the terms of his contract before any other responsibility. He rather chose to do otherwise thereby breaching his contract of employment. The defendant must be ready to face the consequences of that breach.*”³ The court went on to add that seeing that the employee’s aim was to use the information he was privy to in arm twisting the employee to accede to his demands, the disclosure was solely and surely for his benefit. It was on facts not so dissimilar that the court rejected the defence of Section 192 of the Evidence Act; i.e. the disclosure from the defendant to his lawyer was made in bad faith to prosecute a selfish purpose i.e. his reinstatement. Thus, client/lawyer privilege with respect to communication could not be sustained.



CONCLUSION

According to my Lord, Justice B.B. Kanyip “...labour or industrial relations are almost always mirrored in the light of the conduct of the employer; the actions (or inaction) of the employee are seldom, if ever, the subject of consideration in this regard...”⁴ At any rate, the National Industrial Court is reckoning with employer’s rights and will enforce same where necessary. This was the case in this regard. The court was opportune to give verve to this statement by finding that the employee owed a duty of non-disclosure to his employer which he breached, making him liable in the sum of N2,000,000 (two million Naira). It is evident therefore that the NICN would not hesitate to accord liability/damages to a failing party, even when such party is the employee.



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³ Per Oyewunmi, p. 14.

⁴ B. B. Kanyip, “The Changing Face of Nigerian Labour Law Jurisprudence and What Employers Need to Know”, a paper delivered at the Employment Law Seminar organised by Perchstone & Graeys on April 7, 2017.