
A Newsletter on Labour Law and Emerging Trends



Perchstone & Graeys
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THE DUTY OF CONFIDENTIALITY IN EMPLOYER/EMPLOYEE RELATIONSHIPS; ARE THERE ANY LIMITS?



Employment relationships often times involve the exchange of sensitive information and disclosure of company trade secrets and facts important to the business interests. It therefore becomes imperative to achieve a balance of employer and employee interests and due protection of pertinent disclosures.

The National Industrial Court of Nigeria (NIC) has recognised this fact and as such, in certain decisions, worked to protect such interests. Two of such decisions in which an aspect of this was addressed are reviewed below.

I. AERO CONTRACTORS CO. OF NIG. LTD V. MR. AKINTAYO AKINWUNMI AKINGBEHIN¹

Mr. Akingbehin was employed by Aero Contractors Company of Nigeria Ltd 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 of about N64, 000,000 in the Commercial Department. Further to investigations, Mr. Akingbehin was identified as one of the perpetrators of the fraud. He was suspended indefinitely from November 28, 2012, following more 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 Mr. Akingbehin had been privy to if he was not reinstated to his position. The company sued contending that Mr. Akingbehin breached the confidentiality agreement contained in the contract of employment and would expose it to further damage if the threat was carried out; the company claimed N25, 000,000 for the damage occasioned by the breach of confidentiality, amongst other reliefs. Mr. Akingbehin 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 stated that the investigations were executed without his being afforded fair hearing and the disclosures his solicitor made were not in bad faith nor a breach of confidentiality. Mr. Akingbehin 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 his unpaid salary and other emoluments from the time of his suspension, and special and general damages of N100, 000,000 for inconveniences, emotional and psychological trauma and infamy suffered in the aviation industry.

Following a review of the facts and documents before it, the court found that Mr. Akingbehin did in fact breach the duty of confidentiality by disclosing details to his counsel, who published same in the scathing letter to the

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

company for the sole purpose of blackmail. For this breach of the non-disclosure clause of his contract, the court ordered that Mr. Akingbehin pay the company the sum of N2, 000,000 as damages. It however held that Mr. Akingbehin was wrongfully dismissed and ordered that the company pay him damages of N845, 890.75.

2. TITILAYO AKINSANYA V. COCA-COLA²

Mrs Akinsanya was employed by Coca Cola in December 2001 as Region/Division Human Resources Manager. She also doubled as Manager of Coca Cola's plant at Otta. In 2007, she was appointed Acting Head of Total Rewards, Coca-Cola Africa, Strategic Business Unit (SBU) and was responsible for the role of Human Resources Director, Commercial Product Supply (CPS), Pan Africa and Human Resources Manager, CPS Nigeria.

On December 6, 2010, Mrs Akinsanya received a letter on the company's letter head, signed by a non official of the company, summarily dismissing her from employment. The letter alleged that she violated the company's Code of Business Conduct by "*submitting non-business related expenses for reimbursement from the company*" and disclosing confidential information to a third party. Mrs Akinsanya claimed that while she had been undergoing investigation by the Audit panel and subsequently the Ethics and Compliance Committee prior to that time, she had no knowledge of any specific allegations against her until the letter of Summary dismissal was received.

The company claimed that records of Mrs Akinsanya's official emails revealed she was in breach of an express prohibition in the code of business ethics by disclosing official confidential information to her husband. The information disclosed involved records of an internal report by a whistleblower whose report and identity must be specially protected and handed subject to stringent regulation known to Mrs Akinsanya. Having been alerted by these revelations, an Audit Panel was set up to investigate the claims and resolve matters raised during the investigation. On concluding the investigation, the Audit Panel forwarded its report to the Ethics & Compliance Committee, which upheld its findings and recommended Mrs Akinsanya's summary dismissal.



The company's Code of Business Conduct required employees to, amongst others, *not disclose non-public information to anyone outside the company, including to family and friends, except when disclosure is required for business purpose*. Mrs Akinsanya's defence was that her husband did not come within the definition of family as she and her husband were one — *the doctrine of spousal unity*. The court did not agree; it stated that spousal unity does not exclude a spouse from the definition of "family". The court did however find that Mrs Akinsanya was not given fair hearing before being summarily dismissed; *Document 21 which invited Mrs Akinsanya to a meeting to discuss audit did not mention anything about a breach of the obligation of non-disclosure*. The court discountenanced the report of the audit panel indicting Mrs Akinsanya for a breach of non-disclosure and declared the summary dismissal wrongful. It awarded Mrs Akinsanya damages of N17, 368,486.00, being her annual salary.

COMMENTS

These two cases showcase the extent the NIC would go to protect an employer in matters relating to its business interests. In the first case, the NIC awarded damages in favour of the employer for breaching the confidentiality clause in the contract of employment. The employee admitted to the dissemination of financial information

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

pertaining to the employer which he was under a duty not to disclose to his lawyer. The court did not hesitate to hold that, by the facts at hand, he was not protected by the plea of client/lawyer privileged communication.

In the second case, the former employee tried to hide under Section 187 of the Evidence Act 2011 which recognises the spousal unity between husband and wife and does not compel the disclosure of any communication made between the two in marriage; in the instant case, the email detailing the communication between Mrs Akinsanya and her husband was 'disclosed' by the company. Mrs Akinsanya's rationale for disclosing information to her husband (spousal unity) was discarded; she acknowledged signing the Code of Business Conduct and knowing that it was binding on her and did not object to the document's admissibility or evidential value.

In both cases, the court noted that the duty of confidentiality/non-disclosure existed between the parties. It further upheld that duty above two canons of law; lawyer/client privilege and spousal privilege. Even with respect to trade union obligations in the first case, it stated that; *"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 cases would have been a complete win were due process followed in dismissing the employees. In the first case an erring employee was to be first invited to an investigatory panel to answer to the charge against him. Thereafter, the panel would make recommendations and where the employee is found liable for gross misconduct, the employee would be dismissed on the Managing Director's final approval. While the committee found the employee guilty and recommended him for dismissal, the final approval of the Managing Director was not secured. In the second case an Audit Panel was set up to investigate the claims. On concluding the investigation, the panel forwarded its report to the Ethics & Compliance Committee, which upheld its findings and recommended Mrs Akinsanya's summary dismissal. The document inviting Mrs Akinsanya to a meeting however did not mention the issue of the breach of non-disclosure. She was unaware of the allegations against her and as such, could not have been fairly heard on same.

In all, while the NIC is reckoning with employer's rights, it is imperative that employers follow the entire process in disciplinary proceedings. This is especially as the NIC will not hesitate to accord liability/damages to a failing party, once same is due.



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³ Per Oyewunmi, p. 14.