
A Newsletter on Labour Law and Emerging Trends



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FROM FRYING PAN TO FIRE - DISMISSAL IN RETROSPECT

In the course of disciplinary proceedings, it is common practice for an employer to suspend an accused employee pending the conclusion of investigations and disciplinary hearings. If the employee is found guilty of the alleged misconduct, the employer may either issue a warning, terminate the employment or dismiss the employee. Where the employer decides to terminate the employment, can the employer backdate the effective date of termination to the date the employee was suspended? In the same vein, if after the termination, the employer makes a certain discovery which may have altered the decision of the employer to terminate, can the employer reverse its decision to a dismissal? The National Industrial Court (*“the Court”*) recently answered these questions in the case of **Olumide Seye Otusote v. National Union of Hotels and Personal Services Workers**.

FACTS

Mr. Olumide Seye Otusote was employed by the National Union of Hotels and Personal Services Workers (*“the Union”*) on March 1, 1988 as an Assistant Accountant, and subsequently elevated. While heading the Ogun/Oyo Council of the Union, between 2007 and 2008, the Council’s finance significantly dwindled, making it unable to attend to its several obligations. Following the advice/support of the Ogun State Council, Mr. Otusote used part of the funds due to the Union Headquarters to settle the Council’s financial obligations, with the expectation that the funds would be recovered from alternative sources before the due date for remittance of the funds. Unfortunately, by the time the remittance was due, the Ogun State Council was unable to raise sufficient funds to replace the used funds. Consequently, the Union issued Mr. Otusote a query, to which he responded, and following which he was suspended on August 13, 2010. Despite the explanation of the Ogun State Council that the use of the funds was the decision of the Council, the Union terminated the employment of Mr. Otusote by a letter dated December 22, 2010, backdating the effective date to August 13, 2010, when Mr. Otusote was suspended.


Despite Mr. Otusote’s repeated demands, the Union failed to pay his entitlements, which, according to him, stood at the sum of N20,835,564.65 (twenty million eight hundred and thirty-five thousand, five hundred and sixty-four Naira, sixty-five Kobo). In a surprising turn of events, by a letter dated November 7, 2011, the Union claimed that there were some fresh allegations against Mr. Otusote, and therefore reversed the termination of August 13, 2010, to a dismissal. Aggrieved by this development, Mr. Otusote sued the Union, claiming the following reliefs:

- (1) A declaration that the purported “reverse” of termination of appointment of the claimant’s employment into dismissal of the claimant from the employment of the defendant as borne by the defendant’s letter dated 7th November 2011 is strange, wrongful, unlawful, null and void.

- (2) A declaration that the termination of the appointment of the claimant from the employment of the defendant as borne by the defendant's letter dated December 22, 2010, remains valid and the claimant is entitled to all his benefits from the services of the defendant.
- (3) A declaration that the purported "reverse" of termination of appointment of the claimant's employment into dismissal of the claimant from the employment of the defendant as borne by the defendant's letter dated 7th November 2011 amounts to breach of contract and tort of conversion and detainue resulting in the embarrassment, dehumanization, and foreclosure of job prospect for the claimant.
- (4) The sum of N20,835,564.65 (twenty million eight hundred and thirty-five thousand, five hundred and sixty-four Naira, sixty-five Kobo) as his entitlements; interest; damages and cost of the action.

FINDING/DECISION

After a careful review of the submissions of both parties, the Court approached the issues under the following subheads:

- a) **Proof of a right or entitlement:** It is the duty of a litigant to refer the Court to the specific provisions of an instrument it is relying on to prove an entitlement; *'he who asserts must prove'*. Accordingly, merely frontloading a document and claiming that a right inures from it without indicating the exact clause or section that grants the right or empowers the performance of an act is insufficient. The Court therefore held that since the Union failed to indicate the provision of the conditions of service/constitution that grants it the power to dismiss Mr. Otusote after terminating his employment, the Union's submission in that regard was unsubstantiated.
- b) **Termination of employment with retrospective effect:** While a termination can be with immediate effect, an employer cannot terminate an employee's employment retrospectively. Thus, any letter of termination which purports to backdate an employee's termination is wrong and invalid. The implication of the foregoing is that the letter of termination dated December 22, 2010, backdating the termination of Mr. Olusote's employment to August 13, 2010, would be invalid. However, the Court noted that from Mr. Olusote's reliefs, he is not contesting his termination, but his dismissal. Hence, since the claimant is not contesting the termination of his employment or claiming for a relief in that regard, the Court cannot make any order as to the invalidity of the termination on the ground that it was backdated.
- c) **Dismissal of an employee after the employment had been terminated:** Upon the termination of an employment, such employment ceases to exist, and the law is that an employee cannot be dismissed from an employment that had ceased to exist. Consequently, the attempt by the Union to dismiss Mr. Otusote after the termination of his employment was futile and invalid. In the same vein, considering that there was no employment in existence at the time of the dismissal, Mr. Olusote's claim that he was not given an opportunity to defend the alleged charges that led to the conversion of his termination to dismissal is irrelevant.
- d) **On whether the conversion of a termination to dismissal amounts to breach of contract and tort of conversion and detainue:** With regards to Mr. Otusote's third relief (*detailed in Number. 3 above*), the Court held that after

the termination, there was no existing contract of employment upon which Mr. Otusote could have been dismissed. Thus, it was logically impossible to hold that the purported reversal of the termination of employment into a dismissal amounts to a breach of contract. On the issue of 'conversion and detainue', the court held that the reversion of the termination of employment to a dismissal cannot amount to a conversion and detainue. Conversion and detainue entails dealing with another's 'corporeal' or 'moveable' property in a way which amounts to denial of his right over it. A mere denial or omission to fulfil a contractual right cannot suffice.

COMMENTS

From the above, it is clear that the order of disengaging an employee is just as important as the order of engaging. With the case in point, the Court explained that while a termination gives the parties the right to determine the contract at any time by giving the prescribed period of notice, a dismissal on the other hand, is a disciplinary measure which carries no benefits. In this case, the Union, in the first termination letter, informed Mr. Otusote that his entitlements would be calculated and paid to him. However, instead of paying over his entitlements, the Union attempted to 'reverse' the termination, and changing same to a dismissal; affecting its post-employment obligations to pay certain benefits to Mr. Otusote.



Another crucial point which the Court addressed is the issue of retrospective termination of employment. The position of the NIC in this regard has been supported in a plethora of cases. In *Underwater Eng. Co. Ltd. v. Dubefon (1995) 6 NWLR (Pt.400)156*, the Supreme Court held that the right of the employer to terminate the employment by reason of a misconduct which was known to the employer all along, and for which the employee had been tried and acquitted, did not entitle the employer to treat the contract of employment as having been determined retrospectively. Flowing from the foregoing, assuming Mr. Otusote had claimed for an order invalidating the initial termination, it is likely that he may have succeeded, in which case, he would have continued to be entitled to his salaries. However, the Court cannot make any order where it has not been requested to do so.



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