
A Newsletter on Labour Law and Emerging Trends



Perchstone & Graeys
SOLICITORS, ADVOCATES & ARBITRATORS

“PUNISH ME ONCE, MY FAULT...PUNISH ME TWICE, YOUR FAULT”

DOUBLE JEOPARDY IN THE WORK PLACE

It is common knowledge that employers have, for a long time, retained the right to dictate the conduct of employees in the work place, such as what constitutes misconduct or gross misconduct, and the applicable sanctions in that regard. In the same vein, employers are empowered by law to act in a quasi-judicial capacity over erring employees and take the relevant disciplinary actions. That said, where an employer has taken a disciplinary action against an employee, can the employer take a further disciplinary action against the same employee, for the same act of misconduct? This includes where, in the view of the employer, the earlier punishment was insufficient?

The National Industrial Court (*“the Court”*) had an opinion on this in the recent case of *Mr. Emeka Onyema v. Diamond Bank Plc.*

FACTS

Mr. Onyema was employed by the defendant in 2007 and promoted over the years, up to Assistant Manager. In October 2013, he was invited to appear before a Personnel Management Committee in relation to an alleged diversion of funds to an account other than the one instructed. Sequel to the investigation by the Committee, Mr. Onyema was purportedly found guilty of initiating and directing the diversion of the funds. On November 6, 2013, Mr. Onyema was placed on one month’s suspension without pay as punishment for his alleged misconduct. Upon completion of the one-month suspension, on December 6, 2013, Mr. Onyema resumed work but was denied access; instead, a few days later, he was placed on another suspension, for one more month. The reason given by the Bank was that the earlier suspension was to enable it resolve the allegation before it.



Mr. Onyema eventually resumed on December 6, 2013, on completing the second suspension; however, the Bank refused to pay his salaries for his subsequent services. Furthermore, about six months later, Mr. Onyema was dismissed as punishment for the same misconduct. Aggrieved, he instituted an action at the NIC against the Bank, stating that he was not given any fair hearing by the Bank before he was punished by means of a suspension without pay. He also contended that the allegations over which he was tried were criminal offences over which the Bank

had no jurisdiction to determine, and for which he ought to have been first tried by a court of law before any disciplinary action could be taken. Consequently, he claimed, amongst other reliefs:

- a. A declaration that the letter of dismissal issued by the Bank and dated the June 27, 2014, is in violation of his right to fair hearing and/or his right against double jeopardy, and is accordingly, invalid, unconstitutional, null and void.
- b. A declaration that the Bank was estopped from issuing the letter of dismissal dated the June 27, 2014, to Mr. Onyema, having obtained from him the full performance of all his obligations to secure the forfeiture/ withdrawal of the claims against the Bank by Sarner PFM Resorts Ltd, in consideration for the full resumption of employment by Mr. Onyema.

FINDING/DECISION

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

1. **Fair hearing:** An employee who seeks to rely on lack of fair hearing must have raised it timeously, especially during the process of the disciplinary hearing. Therefore, having accepted the suspension without pay and served it out, it was too late in the day for Mr. Onyema to raise the issue of lack of fair hearing.
2. **Misconduct of a criminal nature:** An employer can dismiss an employee where the accusation against such an employee is gross misconduct involving dishonesty bordering on criminality. In such a case it is not necessary nor required that the employee must first be tried in a court of law.
3. **Suspension:** Whilst an employer has the right to suspend an employee when necessary, with or without pay or at half pay, employers cannot suspend without pay where there is no express or contractual right to do so. Thus, in suspending Mr. Onyema without pay, the Bank had taken it up upon itself (outside of the Court) to assess its own damages for the employee's misconduct at the sum which would be represented by the wages of the days the employee remains suspended.
4. **Punishment:** The suspension of November 6, 2013, was punishment on Mr. Onyema for the allegation of diversion of funds with complicity of the Bank's Business manager. Therefore, it was not open to the Bank to punish Mr. Onyema a second time, either through a subsequent suspension, or later, a dismissal. Thus, the Bank's act of suspending Mr. Onyema and later dismissing him amounts to double jeopardy.



A further point the court noted was that, though an employer has the discretion to give a lesser punishment to an employee, it has no discretion to give a higher punishment than that prescribed.

5. **Contract:** A suspended employee remains an employee of the employer for as long as the suspension lasts. As such, other than the initial period in which Mr. Onyema was suspended without pay (November 6,

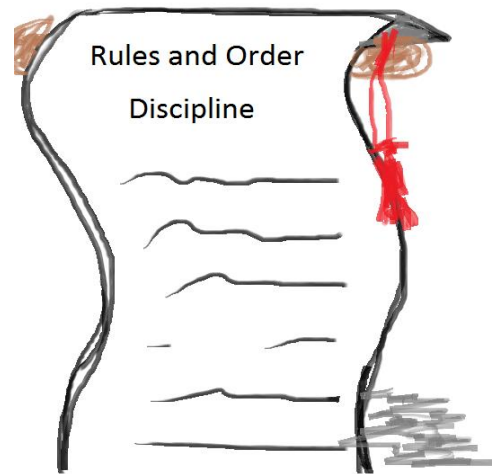
2013 to December 5, 2013), he was entitled to be paid the total sum of N23,999,119.41., being his salaries for the period, from December 6, 2013, till the date judgment was delivered.

COMMENTS

The NIC has shown, in the above judgment, that the rule against double jeopardy applies to employment relationships as well. In simple terms, double jeopardy entails the trial or punishment of a person for the same offence or misconduct, in respect of which he has already been tried and/or punished. In a decided case, the Court found that the employee was first made to level a vast expanse of grassland as his punishment for misconduct. However, the employer, not being satisfied with that punishment subsequently dismissed the employee. To the Court, the subsequent dismissal was malicious and amounted to double jeopardy.

As regards the act of suspension and discipline in general, the courts have once again conditions of service/terms of employment. In reiterating the importance of abiding with the company's written policies and rules, it is once again noted that these policies, rules and contract of employment remain the laws that guide the employment relationship and as such, must be religiously observed at all times by both parties, even in carrying out disciplinary acts for wrong done.

Finally, it is imperative to mention that the courts have held suspension to be, at best, a restraint of an employee from the performance of the ordinary duties assigned to him by virtue of his office, and not a demotion, nor a diminish of his/her rights under law. Where suspension is vindictive or malafide, it may amount to unfair labour practice and thus, be actionable against the employer. It is also against fair hearing and the rule of natural justice to take the punitive measure of a suspension with half salary, without first giving the employee an opportunity to be heard with respect to the allegations against him/her. Thus, whilst the law permits employer to suspend an employee, the suspension must be in accordance with conditions of service and provisions of law. An employer cannot therefore suspend without pay, as in the present case, where there is no express or contractual right to do so.



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