



MY LOSS, YOUR LOSS
THE EMPLOYER'S RIGHT OF SET-OFF AGAINST AN EMPLOYEE

On a sunny Wednesday afternoon, Frank, a consignment delivery officer at Jupeta Ltd (fictional) took the company car to deliver a package to a client. While driving, he picked up his phone to reply a few messages, ignoring all traffic rules. In the twink of an eye, he smashed a brand-new vehicle of a military officer, seriously damaging the car. The military officer infuriated by the damage, threatened to sue Frank and his employer if they do not pay for the repair of the damaged vehicle. In order to forestall a court action or possible disruption of the operations of the company, Jupeta Limited fixed the damaged car, although at great expense to the company. A few days later, Frank arrived at work to meet a termination letter on his desk. In the letter, he was informed that the cost incurred by the company for the repair of the vehicle has been deducted from his accrued gratuity, and as such he should expect no other terminal benefits or payments. Dejected, Mr. Frank left the company, with no clue on what to do.



Interestingly, the above fictional scenario plays out daily in many organizations today. It has become common practice for employers to deduct financial losses occasioned by an employee's actions from his/her salaries or terminal benefits. Perhaps this trend is informed by the fact that the employer is the sole custodian of the salaries and entitlements of the employee, and as such, the easiest way to recover the loss or perceived loss of the company is to set off the value of loss from the employee's salaries or entitlement. However, in light of the recent decisions of the National Industrial Court, particularly the recent judgment in *Tunji Emmanuel Ogunlusi V. Tantalizers & Anor* it seems that the employer's power to make such deductions is in doubt.

FACTS

The facts as detailed by Tunji Ogunlusi (*"the claimant"*) was that he was the Senior Manager, Operations of Tantalizers Limited (*"Tantalizers"*) in charge of the accounts of one of Tantalizers' customers: Cadbury Nigeria Plc. Sometime in 2015, Cadbury Nigeria Plc discovered variances in the total sum of ₦6,320,700.00, representing over payments to Tantalizers. Following this discovery, Cadbury Nigeria Plc demanded for a refund of the overpayment from Tantalizers. In response, Tantalizers admitted liability to the tune of ₦6,320,700.00. As a result, the claimant was issued a query, to which he responded denying any form of negligence or liability on his part. Notwithstanding the claimant's denial, Tantalizers terminated the claimant's employment and informed him that his final entitlement had been calculated and summed up to ₦2,212,530.35, but that the sum of ₦2,528,280.18 (as his apportionment of the "Cadbury over payment") and ₦423,462.00 (as outstanding payables) had been deducted from his final entitlements; leaving him in debt to Tantalizers in the sum of ₦877,148.84. Aggrieved by this decision, the claimant instituted an action against Tantalizers, seeking amongst other reliefs:

1. A Declaration that the claimant is not liable to Tantalizers in the sum ~~₦~~2, 528,280.18 and that the deduction of the said sum from his final monetary entitlement as his apportionment of "Cadbury overpayment" is without right, claim or interest to the Defendants in general.
2. A Declaration that the claimant is not liable to Tantalizers in the sum ~~₦~~423,462.00 as "Outstanding Payables (Suppliers)" and that the deduction of the said sum from his final monetary entitlement is without right, claim or interest to the Defendants in general.
3. General damages, interest and cost of the action.

FINDING/DECISION

The Court in granting part of the reliefs sought by the claimant, determined the following issues:

- a. **Position of the law on deductions:** Article 8 of the Protection of Wages Convention, 1949, No. 95 provides that Deduction from wages shall be permitted only under certain conditions and to the extent prescribed by national laws or regulations or fixed by collective agreement or Arbitration awards. Additionally, Section 5(1) of the Labour Act provides that except where it is expressly permitted by the Act or any other law, no employer shall make any deduction or make any agreement or contract with a worker for any deduction from the wages to be paid by the employer to the worker, or for any payment to the employer by the worker for or in respect of any fines. However, with the prior consent in writing of an authorized labour officer, a reasonable deduction may be made in respect of injury or loss caused to the employer by the willful misconduct or neglect of the worker. Considering the foregoing statutory provisions, the Court held that Tantalizers had no legal justification to make any deduction from the salary and entitlements of the claimant or any other staff.
- b. **Sanctity of an employment contract:** Parties are bound by the express terms of their written contract. The Court observed that the claimant's employment contract only provides that "*in the event of insubordination, negligence, misconduct, dishonesty or breach of rules and regulations in the code of conduct made by the company, the employment may be terminated without notice or payment in lieu of notice*". The Court further noted that there is no provision in the employment contract for setting off or deduction of the claimant's terminal benefit in the case of negligence by the claimant. In light of the foregoing, the Court held that there was no justification for the deduction of the sum of ~~₦~~2,528,280.18 or any sum at all from the terminal benefits of the Claimant on the ground of negligence.
- c. **Proof of employee's indebtedness:** The Court held that in most cases, an employee accepts an offer of employment having considered the financial returns to him from the employment in terms of salary, allowances and benefits in the event of exiting such employments (in form of pension and/or gratuity). Thus, the Court generally frowns at any means of shortchanging an employee of his salary/entitlements or any part thereof. With regards to Tantalizers' deduction of the sum of ~~₦~~423,462.00 from the claimant's gratuity, the Court noted that Tantalizers had merely alleged that the Claimant owed it the sum of ~~₦~~423,462.00 being 'outstanding payables' and then went ahead to deduct same from the Claimant's final benefits. The Court found that the company never gave any particulars of debt or how it came about the sum of ~~₦~~423,462.00 as debt owed to it by the claimant, neither was any document(s) tendered in that regard. Consequently, the Court held that Tantalizers could not prove their entitlement to the sum deducted from the entitlement of the claimant, and as such, had no right to deduct same.
- d. **Law against unjust enrichment/double compensation:** The Court held that assuming that there was actually an over payment by Cadbury Nigeria Plc account, the evidence before the Court showed that such over payment would have been made to Tantalizers' account, particularly in view of the fact that all payments by Cadbury Nigeria Plc

to Tantalizers are made by way of Electronic Bank transfers to Tantalizers' account directly. Accordingly, the claimant was in no position to receive any payment on behalf of Tantalizers. As such, Tantalizers' act of taxing the claimant to refund same cannot be rationalized and amounts to unjust enrichment. To the Court, the law frowns against double compensation; thus, if any party is to make any refund to Cadbury Nigeria Plc, it was Tantalizers who was indeed the beneficiary of the overpayment.

COMMENTS

A fundamental point to note from the above case is that while the court will hardly interfere with the internal operations or activities of an employer, the Courts may in appropriate circumstances review the actions or decision of an employer to ensure that same is fair, and in accordance with the position of the law. The Court took a similar position in the case of *Omolola Shafqat Ogungbuaro v. Access Bank Plc Suit No. NICN/LA/289/2014* where the employer opted to surcharge the employee for a perceived negligence. In this case, the National Industrial Court upon reviewing the facts of the case held that an employee cannot be surcharged by an employer without first being given a hearing: (i) to establish the guilt of the employee; and (ii) to justify the surcharge and yardstick for measuring the surcharge, or the apportionment of indebtedness (where more than one person is involved). For completeness, it is important to note that Section 5 of the Labour Act sets out certain circumstances where deductions can be made from an employee's wages, as follows:



- A reasonable deduction may be made in respect of injury or loss caused to an employer by the willful misconduct or neglect of the worker, with the prior consent in writing of an authorized labour officer;
- Deductions may be made and remitted to Trade Unions that the employee has willingly subscribed to or specifically enlisted to as a member.
- Where an overpayment of wages or salaries is made to an employee, the excess sum (alone) may be deducted within three months of the overpayment.
- The above notwithstanding, the total amount that may be deducted from the wages/salaries of an employee in any one month (*save for statutory deductions*) shall not exceed one-third of the wages/salary of the employee for that month

In all, it is imperative for employers in taking disciplinary actions against an employee or making deductions from the salaries or terminal benefits of employees to ensure that all legal requirements in that regard are complied with.



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