
A Newsletter on Labour Law and Emerging Trends



Perchstone & Graeys
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‘Where does the disciplinary procedure end?’

- STATUS OF AN EMPLOYEE UNDER INDEFINITE SUSPENSION

What constitutes a completed disciplinary session? On receipt of the response to a query? On conclusion of the panel discussion? On communication of that discussion? At what point of investigation or hearing can the employer take disciplinary actions against the employee? Is it enough to simply allow the employee to be heard without more? What happens where the employee is found innocent?

The National Industrial Court (NIC) in the case of *Afolayan v. Skye Bank Plc. – Suit No. NICN/IB/08/2015* attempted to address some of these issues, to assist employer better understand the way and manner a *fairly heard* resolution process should be executed.

FACTS

Mrs. Afolayan Aderonke and Mr. Osoja Olabisi Olorunrotimi were employees of Skye Bank Plc. (“*the Bank*”). Following an allegation of having authorized payment of a cheque for five million, six hundred thousand Naira (N5,600,000), from an account without sighting the payee, Mrs. Afolayan and Mr. Osoja were, on February 1, 2012, placed on *fraud recovery suspension* without salary, pending the conclusion of investigation. Subsequently, both Mrs Afolayan and Mr. Osoja were brought before the Disciplinary Committee of the Bank.

Mr. Osoja was summarily dismissed from the Bank's employment on December 24, 2012, on the basis that his response was not satisfactory. Mrs. Afolayan remained suspended and the outcome of the Bank's investigation on her own case was never communicated to her. On January 21, 2015, Mrs Afolayan's employment was terminated without any communication on whether she was guilty or innocent. Aggrieved by the Bank's decision, Mrs. Afolayan filed an action against the bank claiming:

- A declaration that she was an employee of the Bank from February 1, 2012, when she was suspended, till January 21, 2015 when her employment was terminated (the suspension period).
- A declaration that she was entitled to all the salaries and entitlements withheld during the suspension period and an order directing the Bank to pay same to her.

The company argued that it was entitled to place an employee on suspension where necessary, and indefinite suspension. It also argued that there is no duty on the employer to communicate the outcome of its Investigating Panel to the employee; and an employer can terminate the employment of an employee for good, or bad, or no reason at all, provided the termination is in line with the terms of the employment contract.

FINDING/DECISION

In its judgment, the NIC emphasized the fact that:

- Mrs. Afolayan being placed on suspension did not mean that her employment was terminated; it simply means a temporary deprivation or stoppage of a person's privileges and rights as a result of a disciplinary procedure, during which the suspended employee retains his/her employment until same is finally determined.
- While the Bank was empowered to suspend any employee under fraud-related investigation by the bank's Human Capital Disciplinary Manual, with respect to remuneration during the period of suspension, the employee would be entitled to 50% of his/her salaries subject to a maximum period of 3 months, following which the employee would not be entitled to any payments until the conclusion of the investigation. However, where the employee is completely exonerated, such an employee would be reimbursed with respect to his/her withheld salaries for the period of suspension.



Based on the foregoing, the Court held that, by extending the suspension of Mrs. Afolayan to almost 3 years without any justification, and without letting her know the outcome of the investigation, the Bank was in breach of contract of the parties. The Court considered the fact that the refund of the salaries and entitlements of Mrs. Afolayan was dependent on the outcome of the investigation. To the Court, it was a clear case of unfair labour practice for the Bank to not communicate the outcome of the investigation to Mrs. Afolayan for three years, only to serve her with a letter of termination with no reason. On this premise, the Court held that in the absence of any evidence showing that Mrs. Afolayan was found culpable of any allegation, she was exonerated by the Investigating Panel of the allegations against her, and consequently, was entitled to her salaries and allowances for the suspension period. Accordingly, the Court awarded Mrs. Afolayan, amongst other things, a total sum of N4, 111, 225.80 as her arrears of salaries for the period she was under suspension.

COMMENTS

Understandably, employers are reluctant to have an employee accused of committing certain offences to remain in its premises during the investigation/hearing process, in which case, the common course of action is to suspend the employee. In the present dispensation of labour law jurisprudence, the NIC has numerously held severally that it is not in conformity with International Best Practice and International Labour Standard for an employer to suspend indefinitely and terminate without reason. This case therefore raises four major issues which every employer must consider in cases of this nature:

1. The need to afford an employee the opportunity to answer to allegations levied against him/her;
2. The need to comply with the disciplinary procedure contained in the employment contract/policy documents;
3. The need for the investigation/hearing to be conducted timeously (no indefinite suspension); and
4. The need to communicate the outcome of the investigation to the employee, especially where this is capable of affecting the rights of the employee.

As the Court rightly held, a suspension does not, in itself, terminate the employment; it simply temporarily suspends certain obligations of the parties, subject to the terms of the employment contract and other policy documents. Employers are also required to give, not just any reason, but a valid reason for the termination of the employment of its employees. Suspension and disciplinary terms must be reasonable in the circumstances, and in accordance with the employment contract and applicable policy documents. A fair and comprehensive employee policy, and diligent application of same will help to reduce the risk/save many employers the burden of litigation and possible liabilities.

'Have you taken advantage of the VAIDS window?

In a bid to encourage tax compliance, the Federal Government of Nigeria initiated a programme called the ***Voluntary Assets and Income Declaration Scheme in 2017 (VAIDS)***. The programme aims to achieve its objective by granting amnesty to tax defaulters who voluntarily submit themselves to tax assessment before March 31, 2018. Under VAIDS, persons who have not been declaring their full assets or income, or persons who do not remit tax at all, or persons who are under-remitting, are forgiven and/or granted amnesty from prosecution if they voluntarily declare their assets and income before ***31st March, 2018***. Additionally, for persons and companies who have declared their assets and incomes before ***31st December, 2017***, they shall be granted amnesty from interest and penalty on the accrued tax liability. In the case of persons or companies who are yet to disclose or declare their assets voluntarily as at the date of this publication, they shall, in addition to amnesty from prosecution, be entitled *only* to forgiveness as to penalty.

Ordinarily, a tax defaulter, if prosecuted and found guilty by the court of law, may be liable to a jail term, payment of the original tax liability as well as a penalty sum and interest on the outstanding liability. After March 31st, 2018, concerning those fail to disclose or declare voluntarily, the consequences would include:

- FIRS may investigate by conducting a tax audit.
- Assets and properties may be distrained.
- Persons found to have been evading tax may be prosecuted for the offence and are be liable to pay interest on the assessed outstanding tax.
- Payment of penalties.

Have you taken advantage of the VAIDS window?



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