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# A Newsletter on Labour Law and Emerging Trends

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**Perchstone & Graeys**  
SOLICITORS, ADVOCATES & ARBITRATORS

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## LATITUDE TO REJECT A TERMINATION OF EMPLOYMENT?

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The dream of the average Nigerian is to have a well-paying job or business that sufficiently caters to his/her domestic and financial needs. Realistically however, many employees do not earn as much as they desire, or perhaps enough to afford their dream houses or cars. This, amongst other compelling factors usually drives the employee to seek other streams of income beyond his/her 9-5 employment, commonly known as 'side hustle'. The business of the employer on the other hand largely depends on the competence and productivity of its employees. It is therefore not unusual for employers to take steps to ensure that the activities of their employees are not in conflict or competition with their business. To this end, some employers insert restrictive clauses in the employment contract to reasonably limit the



employee from engaging in activities that are detrimental to the business of the employer, a breach of which would entitle the employer to take disciplinary actions against the employee. However, in the course of these disciplinary proceedings, does the employer have the right to suspend an employee without a formal hearing? If an employer decides to terminate the employment, can the employee reject the termination? These questions were part of the issues considered by the National Industrial Court (NIC) in the case of **Yunus Adewale Adefowope v. MTN Nigerian Communications Ltd** (Suit No: NICN/LA/492/2016).

### FACTS

Yunus Adefowope ("*the claimant*") was engaged as a senior manager, solution development by MTN Nigerian Communications Ltd ("*the defendant*"). However, on January 25, 2016, he was invited to an interview on January 27, 2016. At the interview, the claimant was accused of having an interest in another company, which he denied. Subsequently, he was suspended by the defendant on February 3, 2016 and was not contacted until June 15, 2016 when he received a letter of termination of his employment. On July 21, 2016, the Human Relations (HR) Department of the defendant sent him an email notifying him of his exit computation and payment. In response, he expressed his disagreement with the termination of his employment and requested for an account number to return the terminal payments made to him. Aggrieved by the defendant's actions, he instituted an action at the National Industrial Court, claiming the following reliefs:

- a. A declaration that his suspension as contained in the defendant's letter dated February 3, 2016 is unlawful, null and void;
- b. A declaration that the termination of his appointment as contained in the defendant's letter dated June 15, 2016 is wrongful, illegal, null and void;
- c. An order setting aside his suspension and the termination of his appointment;

- d. An order to reinstate the claimant and pay his accumulated salaries. Or in the alternative;
- e. ₦200 million as damages for wrongful suspension and termination of appointment.

## FINDING/DECISION

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

- a. **Suspension of an employee during investigation:** It is within the disciplinary powers of an employer to suspend an employee for the purpose of investigating an infraction or as punishment for an infraction. Thus, it is the duty of an employee who alleges that his/her suspension is unlawful to prove the unlawfulness of the suspension. The yardstick, however, for challenging a suspension is whether it was unnecessary, unreasonable, invalid and hence unlawful. In the instant case, the Court found that the claimant was paid his full salary whilst on suspension. As such, the claimant having failed to prove the unlawfulness of the suspension, the defendant was right to suspend him, and the issue of a prior formal hearing was unsustainable.
- b. **Wrongful termination:** Failure to give the requisite termination notice stipulated in an employment contract amounts to a wrongful termination. The Court noted that the claimant's employment contract provides that the employment relationship may be terminated with thirty (30) days' written notice by either party. However, the defendant terminated the employment with immediate effect, thereby failing to give notice as required under the contract. Thus, the termination of the contract was wrongful. The point being made is that the damages for termination of employment without notice is the payment in lieu of the salary that the employee would have earned if the requisite notice had been given.
- c. **Payment in lieu of notice:** The mere statement that "adequate payment in lieu of the applicable notice shall be paid" does not meet the legal requirement of payment in lieu of notice. Relying on the case of *Chukwumah v. Shell Petroleum*<sup>1</sup>, the Court held that the legal requirement for payment in lieu of notice is that the payment must be made contemporaneously with the termination. In other words, where a termination of employment is with immediate effect, the requisite salary in lieu of notice shall be paid immediately the letter is issued. Consequently, the defendant's payment of the sum ₦1,227,850.59 described as "amount in lieu earning" one month and three days after the claimant's employment was terminated was not done contemporaneously with the termination, and therefore wrongful.
- d. **Distinction between wrongful and Illegal termination:** In addition to other reliefs, the claimant had also sought a declaration that his termination was illegal, null and void. In distinguishing between wrongful and illegal termination, the Court held that where the Court makes a finding of wrongful dismissal, a payment in lieu of notice will apply; but where the finding is that the dismissal or termination was null and void, then there is no dismissal or termination, because what the employer did was a nullity before the law. Therefore, having found that the termination of the claimant's employment was wrongful, the Court held that he was entitled to damages for wrongful termination, which by case law authorities is what is payable in lieu of notice.
- e. **Reinstatement of an employee:** An employee can only be reinstated to his previous employment by the Court in cases of statutory employment, or where, in the case of a master/servant relationship, the termination resulted from union activities. The Court held however that the claimant failed to show that his employment was statutory or

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<sup>1</sup> [1993] 4 NWLR (Pt. 289) 512

that his employment was terminated as a result of trade union activities. Furthermore, having held that the termination of the claimant's employment was merely wrongful, his claim for a re-instatement had no basis in law.

## COMMENTS

The law is certain that the termination of a private employment contract even if unlawful brings the employment relationship to an end. Consequently, the court cannot order a re-instatement of an employee unless the contract of employment has a statutory flavor. This is because an employee even though willing to work cannot be imposed on an unwilling employer.

Furthermore, the Courts have held that it is in accord with judicial decision and business practice to ask an officer being investigated to stay away from the workplace to permit unhindered investigation to be carried out, or to allow peace to reign at work. The period of suspension is therefore expected to keep the employee out of further mischief and provide his/her employer further time for reflection<sup>2</sup>. The import of the foregoing is that a suspension of an employee pending investigation does not necessarily amount to a punishment. As such, the fundamental right to fair hearing does not arise if the suspension is merely for the purpose of an investigation.



The above notwithstanding, it is the requirement of the law that a suspension, whether pending or after investigation must be necessary, reasonable, and valid. For instance, in *Temitope Oludunni Ajao V. Zenith Bank Plc. (Suit No: NICN/ABJ/182/2013)*, the NIC held that the long suspension of the claimant (employee) without pay for 32 months was wrongful, constitutes unfair labour practice and was contrary to International labour standards. Similarly, in *Lasisi Gbadegesin V. Wema Bank Plc (Suit No: NIC/57/2008)* the Court held that the employment contract did not empower the employer to suspend the employee, whether indefinitely or not. Consequently, the Court held that the indefinite suspension of the claimant (employee) for more than three years amounts to a repudiation of the contract of employment, but effective only from the date of the judgment. Thus, the employer was ordered to pay the backlog of the employee's salary and allowances together with all other entitlements that go with repudiation of the employment.

In all, it is pertinent to note that parties are bound by the terms of their contract, and that employment contracts are not for employees alone. As such, employers are advised to always ensure strict compliance with the terms of the employment contract, to avoid exposure to avoidable litigation and/or liabilities.



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<sup>2</sup> Longe v. F.B.N. Plc. (2006) 3 NWLR (Pt.967) Pg.228