

THE NIGERIAN EMPLOYEE AND THE QUEST FOR CONFIRMATION: EXAMINING THE QUAGMIRE OF PROBATIONARY STATUS*

Abstract

Nigeria today, in both private and public establishments, probation is a common employment practice used to ascertain the competence and suitability of employees for confirmation of employment. Hence, this paper through desk base research methodology examines the concept of probationary employment in the light of employees' quest for security of employment in Nigeria. It argues that probation is a period used to ascertain the suitability or otherwise of an employee but employers have used it to enslave workers. The paper discusses the philosophical basis, procedure for determination of probationary employment and implication of promotion on probationary employment. The remedies available to a dismissed probationer are also highlighted. The legal status of a probationer and the suitable length of time of probationary employment are also discussed. An analysis of case law shows that there is no procedure for termination of probationary employment. The paper recommends that the Labour Act be amended to peck the period of probation in Nigeria and define its incidences.

Key words: Probationary employment, Employee, Employer, Promotion, Dismissal

1. Introduction

In employment relationship today in Nigeria like in some other parts of the world, employers being desirous to understudy an employee with the intention of ascertaining his or her skills, suitability, comportment, dedication to work, fidelity and other qualities a prospective employee should possess, usually employ on probationary basis.¹ This period of probation unlike in the francophone African countries where their colonial French labour code is in existence with the effect that probationary employment cannot exceed six (6) months², in Nigeria the period is at the discretion of the employer. This notwithstanding, it is not uncommon to see employers adopting a uniform system of probation period.³ During the probation period, the employer retains the prerogative whether or not to confirm the employment or determine it. It naturally places the employee at the mercy of the employer as to the continuity of the employer-employee relationship. The fact that the conditions for confirmation which are to be met by the employee remains within the exclusive knowledge of the employer further puts the employee in a precarious situation. While the employee works with the hope that his or her employment will be confirmed, the decision is solely that of the employer to make. The emergence of this employment practice raises certain issues as to the very nature of this relationship. Hence, probationary employment is a topical issue in Nigerian labour law. This labour practice have generated serious question. At times, during the probation period the employer promotes the probationer. This act of promotion by the employer raises a *prima facie* case of competence or suitability in favour of the probationer which may cause one to ask, does promotion during the currency of probation translate the probationer's employment to a confirmed employment or can a promoted probationer be justifiably kept on probation? According to the control test, a person who works under the control of another as to how, when, where and what to do is said to be an employee of that person.⁴ A probationer usually works

* By David Tarh-Akong EYONGNDI, LLB (Hons) (UNICAL), LLM (IBADAN), BL, Lecturer, Department of Private and Commercial Law, Faculty of Law, Bowen University, Iwo, Osun State, Nigeria. Email: eyongndidavid@gmail.com Phone No. +2347033252212

¹ The purpose of the probationary period is to provide orientation, guidance, on-the-job training, and coaching to the new employee, allowing them the opportunity to learn and fulfill the requirements of their new position. This period is also the final and critical phase of the selection process that will provide the hiring supervisor/manager the opportunity to evaluate the hiring decision. To do this effectively, the supervisor/manager will be required to regularly monitor measure and review the new employee's level of performance during the probationary period. During this time, the new employee will be evaluating and adjusting to his/her new position and work environment to determine if expectations are being met and assessing his/her overall fit to the organization and its mission, Fundamental Principles and values. Available at <http://hrcouncil.ca/docs/POL_Probation2.pdf>. Accessed on the 10th December, 2016.

² E. Chianu, *Employment Law*, Akure, Bemico Publishers (Nigeria) Ltd, 2006 (Reprint) page 116 – 167.

³ The expertise, skill and knowledge required by an account is not the same as that of a cleaner, hence, it will not be ideal to place them on the same probation period to ascertain their suitability.

⁴ *Cassidy v. Minister of Health* (1951) 1 All E.R. 574, *Gold v. Essex County Council* (1942) 2 All. E.R. 237, *Collins v. Hertfordshire County Council* (1947) 1 All E.R. 633, *Agent v. Minister of Social security* (1968) 3 All E.R. 208.

under the control of the employer, who evaluates his performance with the view of confirming, terminating or extending the probation period. Where an employer is dissatisfied with the performance of a probationer, can such a dissatisfied employer without more dispense with the employees like disposable waste? In the light of massive unemployment and underemployment in Nigeria and the need for decent and secured employment, what should be a fair period of probation?

This paper examines the meaning of probationary employment and its philosophical basis. It discusses the themes of promotion during the period of probation, comparison between the procedure for termination of probation employment and standard employment, the legal effect of failure to terminate or confirm a probationary employment at the expiration of the probation period as well as the ideal length of time of a probationary employment. The study suggests the way forward through recommendations and conclusion.

2. Probationary Employment Defined

The Court of Appeal in *Baba v. C.A.T.C*⁵ defined probation employment as the initial period of employment, during which a newly transferred or promoted employee must prove or show that he is capable of performing the required duties of the job or position before he will be considered as permanently employed in such positions. In other words, it is a period of 'trial' or 'test' so to say⁶ This is a period of employment or a type of employment which could either end in confirmation or termination of the employer's desire to fully employ the employee; it is a period where an employer 'employs' an employee with the understanding that the employment is subject to either confirmation or termination or further extension with the aim of ascertaining the employee's ability, capacity, skills, knowledge, fidelity and any other criteria which are usually known to the employer but unknown to the employee as a pre-condition for permanent or confirmed employment. It is a period of test running the employee with the hope for a confirmed employment subject, however, to either an expressed or implied right of termination of the employment either before the expiration of the probation period or at its end. The probationer is entitled to remuneration like a confirmed employee but his name in the employer's list of employees can be described as 'written on sand or with pencil which can be erased or blown off by the wind of incompetence.' The probationer does not enjoy the benefit of employment security like an employee in a confirmed employment. The National Industrial Court of Nigeria (NICN) affirmed this in *Bishak v. National Productivity Centre & Anor*⁷ when in determining the nature of probationary employment it held that 'an officer on probation does not enjoy the same condition of service with an officer whose appointment has been confirmed. His status in the establishment is more or less temporal during the period of probation hence the process of his removal is not subject to strict adherence to Rules as is the case with a confirmed officer'.⁸ However, the fact that the probationer's employment is regarded as temporal during the currency of probation and his removal thereof needs not be through the usual rigorous procedure as that of a confirmed staff, with regards to rendering an employer vicariously liable, his actions or omissions can render his employer liable just as much as that of a confirmed staff. Thus, an employer cannot exculpate himself from liability by taking shade under the shadow of probation.⁹

3. Philosophical Basis of Probationary Employment

The question which this section seeks to answer is, why do employers employ workers on probationary basis when they could employ them permanently? Chianu is of the opinion that employment of persons

⁵ [1985] 5 NWLR (Pt. 42) 514 at 527.

⁶E. S Loh., 'Employment Probation as a Sorting Mechanism', 47 *Indus. & Lab. Rel. Rev.* 471 (1993-1994) Available at <<http://heinonline.org/HOL/LandingPage?handle=hein.journals/ialrr47&div=38&id=&page=>> Accessed on 14th December, 2016. See also Awolowo, O., *Termination of Employment during Probation- Case of Wayo v Benue State Judicial Service Commission*, (2008) Vol. 4, No. 2, NJLIL, 1.

⁷ [2015] 57 NLLR (Pt. 194) 1.

⁸ *Alhassan v. Ahmadu Bello University, Zaria* [2011] 11 NWLR (Pt. 1259) 417.

⁹ Section 73 of Employee Compensation Act, 2010 defined an employee to include a personal employed on temporal basis. See also D. T Eyongndi., 'An Analysis of Casualization of Labour under Nigerian Law' Vol. 7, No. 4 (December) *The Gravitas Review of Business and Property Law*, 2016, P. 109.

on probation for a short period of time is a feature of almost all contracts of service.¹⁰ This is usually a period of trial for the new employee during which the employer understudies his skill, comportment, suitability, fidelity and dedication to work.¹¹ Probationary periods, also referred to as trial periods, allow employers to evaluate a new employee's job performance before offering him a permanent position. If the employee is not doing well or is determined to be unfit for the job, the employer can terminate his employment without legal ramifications. The purpose of a probationary period is to afford a company the opportunity to evaluate the employee's work performance over a reasonable, mutually agreed upon period of time whereby the employer can determine the employee's suitability for the position that he/she was appointed to be based on the employee's work performance. The employee is therefore appointed on the basis of a conditional employment contract, meaning that the continuation of his/her employment contract is conditional on whether the employee has demonstrated that he/she is able to carry out the responsibilities defined under the job description. The probationary period, which typically lasts 60 to 90 days, also grants employees the right to decide if they want to continue in the employment.¹² Such periods are intended to provide employers time to evaluate employees before making the job permanent.¹³ Probationary periods are defined periods of time that employees are exempt from certain contractual items, most importantly the notice period required for termination. The probationary period allows both employee and employer to see if they are a 'good fit' and to make things easier if they need to terminate the contract. Once the probationary period is over, if both parties are satisfied with the employment arrangements, the employee is typically removed from probation. This may involve a raise or promotion but will also enable certain contractual obligations as defined in the employment contract, such as a longer notice period or access to certain benefits including pension schemes. Companies may also place employees on a probationary period if their performance has been unsatisfactory or if they have been guilty of misconduct. This probationary period is typically a time for the employee to improve their performance, in the case of misconduct, for an investigation to take place.¹⁴ The Supreme Court in the case of *Ihezukwu v UNIJOS*¹⁵ held that, the essence of a probationary appointment is that the employer retains the right not to confirm the appointment until after a specified period. Where the contract of employment provides that the appointment is subject to a probationary period of a certain length of time, this does not give the employee a legal right to be employed for that length of time and the employer may lawfully dismiss him before the expiry of that period. It can be safely concluded that, the rationale for probationary employment is that, the employer desires a period of time to ascertain the skill, knowledge and potentials of an employee in order to determine whether such an employee is suitable for his employ and the only way to achieve this, is to put the employee under a trial period.

4. Nature of Probationary Employment

What is the nature of probationary employment? Worthy of note is the fact that probationary periods are of no legal significance. There is no express statutory requirement for its inclusion in an employment contract. It is purely a matter of freedom of contract which has become an employment custom. Therefore, in order to attach legal significance to probationary period, it must be stated in the contract of employment of the employee and must not be a violation of the statutory rights of that employee and a probation time will therefore not be implied into an employment contract.¹⁶ Some writers classify probationary employment as temporal employment¹⁷ while some consider it as a form of permanent

¹⁰ E. Chianu., op. cit. page 116.

¹¹ Ibid.

¹² J. Mancini, *The Purpose of Probationary Period*. Available at <<http://work.chron.com/purpose-probationary-period-7641.html>> Accessed on 14th November, 2016.

¹³ <<http://www.inc.com/encyclopedia/probationary-employment-periods.html>> Accessed on 14th November, 2016. See also Bruce, S., *Probationary Periods — Dangerous Device or Necessary Tool?* Available at <<http://hrdailyadvisor.blr.com/2011/03/27/probationary-periods-dangerous-device-or-necessary-tool/>>. Accessed on 23 December, 2016.

¹⁴ <<http://www.hrzone.com/hr-glossary/what-is-a-probationary-period>> Accessed on 14 November, 2016.

¹⁵ [1990] 4 NWLR (Pt. 146) 598 at 609 Para. H.

¹⁶ E. Chianu, op. cit. page 116. See also Atebata, D. O., *The Legal Status of Employees on Probation*, Vol. 1, No. 1, Journal of Commercial Law, March, 2015, Page 78 – 79.

¹⁷ O. O. Sholanke, 'The Status of University Employee on Probation', Vol. 2, No. 10, *Justice Journal*, 1991, Page 35.

appointment but subject to satisfactory performance.¹⁸ Chianu has argued that the classification of probationary employment as temporary employment is neither fair nor apt.¹⁹ He is of the view that a temporary employment is usually periodic from month-to-month or year-to-year for a short term certain such as where the employee stands in for a permanent staff that is away on maternity or sick leave. Persons are also employed for a short term when there is an increased demand for the service the employer provides such as during harvest time or at holiday seasons as in the case with fashion designers or printers when hard pressed with work.²⁰

5. Effect of Promotion on Probationary Employment

Promotion of an employee signifies that he or she has performed meritoriously. Thus, promotion is a reward for display of necessary skills or knowledge which the employer considers to be profitable to his venture. Where an employer promotes an employee whether confirmed or probationer, it is a tacit acknowledgement of the contributions of such an employee to the business of the employer. The employer is taken to have found the employee meritorious, hardworking and an asset to his establishment and the most profound way to acknowledge this is through promotion. The question here is, where an employer in recognition of the ability, merit, skill, contribution and or knowledge of a probationer promote him or her, what will be the effect of such promotion on the probationary employment or will there still be a justification for the continuity of the probationary employment? The law is that, promotion of an employee who is on probationary employment does not translate such a probationary employment to confirmed employment.²¹ This is despite the fact that promotion is an acknowledgement of skill, knowledge, suitability or contribution of the employee. The above postulation has been given judicial consideration in the case of *Baba v. N.C.A.T.C.*²² The court held that where the employment contract stipulates a means for confirmation of a probationary employment unless an employer varies it subsequently, notwithstanding that the employee has been promoted, confirmation can only be through the stipulated means and not implied. Though this may not be the case where from the totality of the fact it is conclusive that the Employer has confirmed the employment though it is yet to formally communicate the confirmation to the employee particularly where it will work unnecessary hardship or injustice to insist that an employment is unconfirmed such as where the probationary period has lapsed and the employee has enjoyed promotion with an impressive work record and the probation period is almost being made *ad infinitum*.²³ Under this circumstance it will be inequitable for the court to allow the employer to render an employee perpetually probationer as equity considers what ought to have been done as done.²⁴

6. Termination of Employment during Probation Period

The law is that an employer can terminate the employment of an employee for any reason or no reason at all.²⁵ This is however applicable only to an employment relationship of master and servant²⁶ and not an employment with statutory flavor.²⁷ It is necessary to state that there is a difference between reason for termination of employment and procedure for termination of employment. While the former deals with the cause of termination in terms of fault on the part of the employee, the latter deals with the way

¹⁸N. A. Inegbedion, 'Contending Legal Issues in the Determination of Public Employment', (1999) Vol. 4, *Edo State University Law Journal*, 69, 81.

¹⁹E. Chianu., op. cit. page 116.

²⁰ Ibid.

²¹ Ibid; see also the case of *Ihezuekwu v. University of Jos* [1990] 4 NWLR (Pt. 146) 598 at 609 Para. H.

²² [1991] 5 NWLR (Pt. 192) 388, [1991] 7 S.C. (Pt. 1) 58

²³ *O.A.U. v. Onabanjo* [1991] 5 NWLR (Pt. 193) 549.

²⁴ J.C. Nwobike, 'The Legal Status of an Unconfirmed Employee' Vol. 4, NO. 1, *Modern Practice Journal of Finance and Investment Law*, 2000, Page 98.

²⁵*NITEL Plc. v. Akwa* [2006] 2 NWLR (Pt. 964) 391 at 417, Paras. E – F, *I.D.C v. Ajibola* (1976) 2 S.C. 115 at 199 – 120. See also the cases of *Imoloame v. WAEC* [1992] 9 NWLR (Pt. 265) 303 at 305, *John Holt Ventures Ltd. v. Oputa* [1996] 9 NWLR (Pt. 470) 101 at 119, *Ekhaton v. Alliance Autos Nigeria Limited & Ors.* [2015] 59 N.L.L.R. (Pt. 205) 416, *Atere v. Steam Broadcasting Communications Limited* [2015] 59 N.L.L.R. (Pt. 206) 534

²⁶ *Agbo v. Central Bank of Nigeria* [1996] 10 NWLR (Pt. 478) 360, *Igwilo v Central Bank of Nigeria* [2000] 9 NWLR (Pt.) , *Chukwurah v. Shell Petroleum* [1993] 4 NWLR (Pt. 289) 512

²⁷ *Aigoro v. University of Lagos* [1979] 10 – 12 CCHCJ 9; *Olaniyan v. University of Lagos* [1985] 2 NWLR (Pt. 9) 599.

and manner through which as a reason of the fault, the employment contract is brought to an end between the parties thereto. It is a cardinal labour law principle that an employer cannot be compelled to retain in his employ an employee he is dissatisfied with just as an employee cannot be compelled to remain in the employ of an employer he is no longer willing and ready to work for.²⁸ The mere fact that an employee is placed on a probationary appointment does not mean nor could it be implied that, his appointment cannot be fully terminated within the probationary period on reasonable notice as the purpose of putting the employee on probation is to give the employer an assurance that the employee is a fit and proper person to be placed on permanent/confirmed employment.²⁹ In *Ihezuekwu v. UNIJOS*³⁰ the Supreme Court held that, the essence of probationary appointment is that, the employer retains the right not to confirm the appointment after a specified period while the contract of employment provides that the appointment is subject to a probationary period of a certain length of time, this does not give the employee a legal right to be employed for that length of time and the employer may lawfully dismiss him before the expiry of that date. Thus, a probationary employee has a legitimate expectation of confirmation at the end of the probation but this expectation is not laden with a right to complete the probation period as he who has the power to hire also has the power to fire whenever the situation arises.

Procedure for Termination of Probationary Employment

Basically, there are two types of employment relationship. These are simple master-servant employment and employment with statutory flavour.³¹ In relation to employment with statutory flavor, for it to be validly terminated, the employer or employee must have regards to the procedure provided in the statute regulating the employment contract.³² For an employment relationship of master-servant, based on the contract, the parties are free to provide a procedure for termination of the employment and are bound to follow such a procedure in order for the employment contract to be validly determined free of liability.³³ However, this is subject to the employer's power of summary dismissal in the event of a gross misconduct by the employee.³⁴ Under the master servant employment relationship, an employer is not bound to give reasons for the termination of the employment of an employee but where he gives any, he is duty bound to substantiate it to the satisfaction of the court and an affected employee is allowed to contest the reason so given.³⁵ Thus, the question is, whether statutory or not, is an employer under a duty to subject a probationer to procedural fairness in the event of termination of his employment or he can treat him as disposable waste?

There is no iron cast answer to the issue. Generally, whether an employment is confirmed or probationary, the employer is under a duty to ensure that there is compliance with the implied or express term of the contract with regards to termination. Thus, there is no laid down procedure for termination of probationary employment in any of the labour legislation save as such contained in the letter of employment or other regulations pursuant to which the employee was employed. Where the contract of employment stipulates that the employment could be terminated by either of the parties by giving a month notice or salary in lieu of notice (as is usually the case), either of the parties could validly terminate the contract by complying with this provision. However, just as the employment of a confirmed employee could be terminated in disregard of the express procedure for its termination on

²⁸ *Ogbaji v. Arewa Textile Plc.* [2000] 11 NWLR (Pt. 678) Page 326, *Shell Petroleum Co. Ltd. v. Ifeta* [2001] FWLR (Pt. 80) Page 1617.

²⁹ *Kusamotu v. Wemabod Estate* (1976) 11 S.C. 279, *Ihezuekwu v. University of Jos* [1990] 4 NWLR (Pt. 146) 598 at 615 Para. D.

³⁰ [1990] 4 NWLR (Pt. 146) 598 at 609 Para. H.

³¹ *Olaniyan v. University of Lagos (No. 2)* [1985] 2 NWLR (Pt. 9) 599, *Iderima v Rivers State Civil Service Commission* [2015] 58 N.L.L.R. (Pt. 199) 1, *Union Bank of Nigeria Limited v. Chukwuelo Charles Ogboh* [1995] 2 NWLR (Pt. 380) 647 at 653, *Eperokun v. University of Lagos* [1986] 4 NWLR (Pt. 34) 162, *National Electricity Power Authority v. Adesaaji* [2015] 58 N.L.L.R. (Pt. 202) 498, *Egbe v. union Bank Plc & Anor* [2015] 58 N.L.L.R. (Pt. 200) 192, *Udo v. Cross Rivers State Newspaper Corporation & Anor.* [2015] 59 N.L.L.R. (Pt. 203) 1.

³² *New Nigerian Bank v. Oniovosa* [1995] 9 NWLR (Pt. 419) 327, *Attorney General of Kwara State v. Abolaji* [2009] 7 NWLR (Pt. 1139) 199.

³³ *C.B.N. v Dinneh* [2010] 17 NWLR (Pt. 1221) 125.

³⁴ *U.B.N Plc v. Chinyere* [2010] 16 NWLR (Pt. 1219) 271.

³⁵ *Olatunbosun v. NISER* [1988] 3 NWLR (Pt. 80) 25, *Samuel Isheno v. Julius Berger Nigeria Plc.* [2014] 43 NLLR (Pt. 136) 320.

the basis of gross misconduct, the employment of a probationary worker could be terminated in like manner and for the same reason. This position of the law is not without objection. There issue which arises here is, can an employee also terminate an employment contract whether confirmed or probationary in disregard of the express provision of giving notice of termination or refund or payment of salary in lieu of notice on the ground of gross misconduct on the part of the employer and be absolved of liability? The authorities seem to only support the employer in the exercise of this ‘special capital power’ against labour and not vice versa. This situation attest to one of the hallmarks of inequality in industrial relations in Nigeria which makes the doctrine of equality which is to the effect that, in the formation and continuation of the employment contract particularly with regards to deciding the terms and conditions of the employment, the employer and employee are regarded as equal and have bargained as such equals willingly and whatever has been agreed is deemed to be the outcome of an equal mutual bargain. The exclusive exercise of the power of summary dismissal against the employee by the employer put to rest the fact that, these doctrines are nothing but myths which have been precipitated by the high level of unemployment, underemployment and job insecurity. Under this precarious situation it is unimaginable for an employee who might be working under precarious and inclement employment conditions to complain left not summarily excused him or herself from the employer’s employ. Though the power of summary termination of employment does not inure the employee, he is not without an option. Where the employee whether probationer or confirmed no longer desire to continue with his employment at any time, he is at liberty to exercise his right of resignation which is equivalent to summary dismissal and he is under no duty to give any reason for his resignation. Where an employee exercise his right to resignation, whether validly or otherwise, the effect is that, the master-servant relationship is terminated automatically though he may be liable for wrongful termination and absolve damages in favour of his employer³⁶ he or she cannot be compelled to specifically performed the employment contract as this detract from the concept of forced labour prohibited by the Constitution of Nigeria and the Labour Act.³⁷

The Supreme Court in the case of *Baba v. N.C.A.T.C*³⁸ held that in the termination of the appointment of an officer on probation no procedure is provided for and none needs to be followed once the Board or Principal is satisfied that there is good cause for the termination.³⁹ It is however apposite to state that, the use of the phrase ‘for any good cause’ for termination is not setting down a reason for termination as it were but the court came to that conclusion by upholding the provisions of the regulation pursuant to which the probationary employment was made and is being regulated. Therefore, the phrase ‘for any good cause’ was as provided by the contract instrument and not a creature of the court. The cardinal principle of natural justice that is *nemo iudex in causa sua* and *audi alterem partem* cannot be sacrificed on the altar of the employment is probationary. The only deficiency with due respect with regards to the construction of the phrase ‘for any good cause’ is that the court failed or neglected to defined or at least specify a cause that amounts to a good cause to warrant an employer to refused to abide by procedural fairness in the termination of a probationer’s employment. The decision of the court fortifies the employer to terminate a probationer’s employment with impunity as any reason will pass for a good cause. In a clime like Nigeria where cheap labour is well sort after, the court should be ready to protect the employees from the predatory antics of employers.

³⁶ *International Drilling Co. Nig. Ltd. v. Aji Jala* [1976] 2 SC 115, (1976) 1 ALL NLR 117.

³⁷ *Shell Petroleum Development Company v. Nwaka* [2001] FWLR (Pt. 48) Page 1371. See also T. D. Folorunso, ‘The Right of Resignation of an employee facing Disciplinary Action’ Vol. XI, *The Calabar Law Journal*, 2007 – 2008, Page 271.

³⁸ *Baba v. N.C.A.T.C* (supra).

³⁹ The Court of Appeal upheld this obnoxious position in the case of *National Drug Law and Enforcement Agency v. Zakari* [2014] 45 NLLR (Pt.146) 600 at 623, Paras. B-D ‘In determining an appointment of an officer on probation, no procedure is provided for and none need to be followed once the employer desires and there is good cause for the termination’. See also *Okongwu v. N.N.P.C* [1989] 4 NWLR (Pt.115) 296 at 314; *Ogbaji v. Arewa Textile Plc.* [200] 11 NWLR (Pt. 678) 322 at 335.

Unfortunately, the Court of Appeal in the case of *Igwilo v. CBN*⁴⁰ relied on *Baba case*⁴¹ reiterating that in the termination of the employment of an officer on probation, no procedure need be followed provided there is satisfaction that there is a good cause for termination. But in the termination of a confirmed officer, the procedure for termination must be followed, otherwise the termination is invalid. The slip of the Supreme Court in the cases of *Baba v. N.C.A.T.C*⁴² and *Ihezukwu v. UNIJOS*⁴³ have made the Court of Appeal to come to a rather erroneous and harsh conclusion that a probationer can be dismissed summarily for no reason at all notwithstanding the fact that, this kind of pronouncement can served as a basis for employers to exploit probationer employee and thereby cheapen labour as a probationer can be kept by an employer and be disposed of like disposable waste at any time without any reason. Any judicial pronouncement capable of leading to this kind of a situation is cacophonous and therefore undesirable particularly in a labour sphere like Nigeria where the employers are ready to employ all tactics to get cheap labour.⁴⁴

In the case of *Ondo State University v. Folayan*⁴⁵ where the Respondent was employed as a lecturer for a probationary period of three years, the University regulation provides that a probationer's employment could be confirmed either before the expiry date or at the end of it. At the end of the probation period, the Respondent's employment was not confirmed and he was not relieved of his employment but in the fourth year pursuant to a remarkable recommendation by his head of department, the Respondent was promoted. Unfortunately, three months later, his employment was abruptly terminated without any reason given. The Court of Appeal held the termination to be unlawful on the ground that, the silence of the Appellant with regards to the outcome of the probation while allowing the Respondent to continue to work amounts to confirmation and therefore subject to procedural fairness in the event of termination. The Supreme Court overturned the decision and held that since the regulation provides that at the expiration of the probationary period, the employer may confirm, terminate or extend the period for another three years, having not exhausted six years, notwithstanding his promotion and the Appellant's silence, the Respondent at all material time remained a probationary employee and therefore not entitled to procedural fairness. Where the officer is guilty of misconduct or a breach of regulation, then a *lis inter partes* arises and there arises also no need for a hearing before deciding his guilt.⁴⁶ Hence, where neither the contract of employment nor any regulation regulating the probationary employment provides the procedure for termination, it seems the parties are at liberty to terminate the employment anyhow. It is however doubtful whether the employer is bound by the constitutional guaranteed right of fair hearing to terminate the employment of a probationary appointee in a situation where there is no stipulated procedure since the whole essence of probationary employment is to give an employer an unfettered power to dispense with an employee whom he considers unsuitable either before or at the end of the probationary period and not to expose the employer to the tedious requirement of fair hearing applicable to confirmed employment. However, the employer who intends to do away with a probationer must say so at the expiration of the probationary period and not be silent about it.⁴⁷ Contrary to the position of the Supreme Court that probationary employee whether public or private are not entitled to procedural fairness, Inegbedion who placed reliance on the Federal Civil Service Rules and that of some states argues that civil servants on probation are entitled to fair hearing in the event of

⁴⁰[2000] 9 NWLR (Pt. 672) 302.

⁴¹*Aigoro v. University of Lagos* [1979] 10 – 12 CCHCJ 9; *Olaniyan v. University of Lagos* [1985] 2 NWLR (Pt. 9) 599.

⁴²*Ibid.*

⁴³*Ihezukwu v. University of Jos* [1990] 4 NWLR (Pt. 146) 598 at 609 Para. H.

⁴⁴*Anakim v. Union Bank of Nigeria Ltd.* [1994] 1 NWLR (Pt. 322) 557, *Chukwu v. Nigeria Telecommunications Ltd.* [1996] 2 NWLR (Pt. 430) 290 at 303.

⁴⁵(1994) 20 LRCN 259.

⁴⁶This decision with due respect was reached *per incuriam* as the Court of Appeal in following the case of *Baba* failed to acknowledge the fact that the regulation pursuant to which the Appellant in the case indeed gave the employer the power to terminate the probationary employment for any good cause.

⁴⁷*Oyenuga & 4 Ors. V. Ife University Provisinal Council* (1964) 2 ALR COMM 327; (1965) NMLR 9; *Dr. Adeogun Banjo v. University of Ibadan* (1977) 2 OYSHC (Pt. 1) 182 at 203.

termination and where the employer is not disposed to confirming the employment, he is bound to give reasons and not just remain silent.⁴⁸

The position with regards to termination of probationary employment in Nigeria is a keg of misfortunes for the employee when compared to what is obtainable in other jurisdictions.⁴⁹ Item 8 of Schedule 8 of the Labour Relations Act⁵⁰ of Republic of South Africa prescribes that an employer may only discontinue the employee's contract due to unsatisfactory performance and only after having complied with the following legal obligations:

- a. The employee must be informed in advance that he/she will be placed on probation.
- b. The period of probation must be determined in advanced and should be for a reasonable period.
- c. During the probationary period, the employee's performance should be assessed and the employer should give an employee reasonable evaluation, instruction, training, guidance or counseling in order to allow the employee to render a satisfactory service.
- d. The employer must inform the employee if he determines that the employee's performance is below standard by informing the employee of the aspects in which the employer considers the employee to be failing to meet the required performance standards. If the employer believes the employee is incompetent then the employer should advise the employee on the respects in which the he believes the employee is not competent.
- e. The employer is allowed to extend the employee's probation period in order to further assess the employee's performance. This might occur where the employee shows potential to perform but might have failed in some areas. Before extending the probation period the employer is required to give the employee the opportunity to make representations as regards the proposed extension.

After probation, an employee should not be dismissed for unsatisfactory performance unless the employer has given the employee appropriate evaluation, instruction, training, guidance or counseling; and after a reasonable period of time for improvement, the employee continues to perform unsatisfactorily. The procedure leading to dismissal should include an investigation to establish the reasons for the unsatisfactory performance and the employer should consider other ways, short of dismissal, to remedy the matter.⁵¹ It is apposite to state that during probation, while the employee is expected to bring bare his expertise, knowledge and skill to enable the employer decide on whether to confirm his or her employment or terminate it, the employee is not to do so unaided. It is fair and realistic to expect the employer to provide the employee with adequate evaluation, instructions, training, guidance, or counseling during the employee's probationary period to enable the employee showcase his capability.⁵² However, where the employer fails and or neglects to so do and goes ahead to terminate the employment, it is a form of unfair labour practice and it should not be approved.

7. Length of Time for Probationary Employment

The issue here is, what is the reasonable duration which an employer can employ an employee on probationary basis, can employer hide under the guise of wanting to ascertain the suitability or otherwise of an employee before confirmation to render him perpetually probationary.⁵³ Statutorily, probation is

⁴⁸Inegbedion, N. A., 'Contending Legal Issues in the Determination of Public Employment', Vol. 4, *Edo State University Law Journal*, 1994, page 69, 81. See also Sholanke, O. O. *The Status of University Employee on Probation*, Vol. 2, No. 10, *Justice Journal*, 1991, Page 15.

⁴⁹*Lake Chad Research Institute v. Mohammed* [2014] 44 NLLR (Pt. 138)1 at 36-37, Paras. H-C on right and discretion of employer to determine appointment of employee under probation NICN held that 'where an employee is on probation as temporal staff by virtue of his terms of employment, which state also that the appointment will be confirmed subject to his being 'found suitable', the employer reserves the right and discretion to determine if the employee was suitable'. See also *Nwangwu v. Nzekwu* [] (1957) SCNLR 316, (11957) 2 FSC 36; *Amodu v. Dr. Amode* [1990] 5 NWLR (Pt. 150) 356; (1990) 9 SCNJ 1.

⁵⁰ Labour Relations Act 66 of 1999

⁵¹ Available at <http://mclarens.co.za/employment-probation/> Accessed 3 February 2017.

⁵²M. L. Ian, *Employment – Probation* McLarens Attorney at Law Online publication available at <<http://mclarens.co.za/employment-probation/>> Accessed 3 February 2017.

⁵³E. Sengloh, *The Determinants of Employment Probation Lengths*, Vol. 33, Issue 3, *Industrial Relations*, 1994, page 386 – 406, available at <<http://onlinelibrary.wiley.com/doi/10.1111/j.1468-232X.1994.tb00347.x/full>> Accessed on 14th December, 2016.

a labour practice that is unknown to Nigerian law as there is no statutory provision backing it up. However, probationary period is a product of freedom of contract. Thus, parties are bound by whatever probationary period they agree to in the employment contract or other regulations regulating the employment. The period spans from 3 to 6 months and even up to a year and 3 (three) years. Chianu⁵⁴ is of the opinion that there is no fixed period for probation; it differs from one employer to another. It should be tied to the nature of the employer's undertaking and the service to be rendered. The virtue, quality or attribute an employer desires from a prospective employee may be a determinant for the length of time to place him or her on probation. However, the employer must do this with caution and not seek to take undue advantage of the employee through the sham of probation. Thus, it is vital that the employee's probationary status is given attention before the expiration of the probation period.⁵⁵ The law is that, where the employer fails to indicate whether the probationer's employment has been confirmed before the end of the probationary period, the continuous retention of the employee in the employ of the employer without more constitutes evidence that the contract of employment continues extant on the understanding that same has been translated by the silence of the employer to a confirmed employment.⁵⁶ Thus, an employee on probation whose employer continues to retain in his employ upon the expiration of the probation period without informing him or her of the outcome of the probationary test running exercised nor terminating the employment is deemed as a confirmed employee.⁵⁷ This position has been given judicial approval by the Supreme Court in the cases of *Iwuji v. Federal Commissioner for Establishment*⁵⁸ and *Huble v. Nigerian Maritime Services Ltd.*⁵⁹ In *Huble case*, a Germany who was employed by the Respondent on a probationary period of 6 (six) months. Upon the expiration of the probationary period, the employer was not informed that his services are no more needed but rather was left to continue rendering the services he was rendering during the currency of his probationary employment. His employment was abruptly terminated wherein he instituted an action challenging his termination, Taylor CJ held that, having failed to notify him of the outcome of his performance as a probationer while retaining him in the Respondent's employ, the act of retention tantamount to confirmation by conduct of his appointment and was therefore subject to reasonable notice and not terminable at the pleasure of the Respondent. This reasoning of the Supreme Court is on the principle of *estoppel* by conduct as the law will not allow a party who has made a representation to another which the other person on the strength of the representation have acted to renege from the representation after it has been acted upon. If the court allows such a representer to renege from his representation which have been acted upon it will not only be inequitable but unsolicited hardship could be inflicted on unsuspecting members of the public.⁶⁰ Also, informing the probationer of the outcome of the probation period will aid the employee know his or her fate and to seek alternative employment in the event that the employer finds his service unsatisfactory and not to maintain silence couple with continuous retention of his services. Other reasons for this decision is that, aside from writing, a contract

⁵⁴E. Chianu, op. cit. page 117

⁵⁵ Ibid

⁵⁶Atebata op. cit. Page 80, Akpan, G.S., *The Public Servant and Security Employment: A Comparative Study*, Singapore Journal of International and Comparative Law, 252, 2000, available online at <<http://heinonline.org/HOL/LandingPage?handle=hein.journals/singa4&div=14&id=&page=>> Accessed on 14th December, 2016, The case of *Aigoro v. University of Lagos* [1979] 10 – 12 CCHCJ 9, where the probationary period lapsed but the Appellant was neither informed of the employment being confirmed or terminated but he continued to work. His employment was subsequently terminated through a notice wherein he sued for wrongful termination and the court held that he was no more a probationary employee as at the time his employment was terminated that the silence of the Respondent as to the outcome of his probation period and his continuation in the Respondent's employ translated him to a tenured employee whose employment can only be terminated according to the statutory provisions regulating the Respondent. See also *O.A.U.v. Onabanjo* [1991] 5 NWLR (Pt. 193) 549.

⁵⁷ *The Council of Federal Polytechnic, Ede & Ors. v. Johnson K. Olowookere* [2014] 49 NLLR (Pt. 161) 144 at 170 – 171, Paras. D – E. The Court of Appeal held thus 'where an employer had delayed unnecessarily in making up his mind whether to terminate or confirm an employee's probationary appointment by keeping him in his employment and continuing to pay him for months after the probationary period had expired, he would be deemed by operation of law to have confirmed the employee's appointment, and the doctrine of 'estoppels by conduct' would operate to prevent the employer from alleging and treating him as if he was still on probation. Delay defeats equity.'

⁵⁸ (1985) 1 NSCC 580.

⁵⁹ (1971) UILR 231.

⁶⁰ *Joe Iga v. Ezekiel Amakiri & Ors.* (1976) 2 S.C. 1 at page 11 – 12, *Casir v London North Western Railway Co.* (1975) LR 10 CP. 307; *Pascoe V. Turner* (1979) 2 All E.R. 945 at 949.

of employment could be inferred from the conduct of the parties and a party who has acted in a way and manner that it is suggestive of the fact that he has consented to the continuous employment of another person who has continued to so work base on that representation, the person who has so represented is stopped from reneging thereafter. Thus, where a probationer at the expiration of the probationary period continues in the employ of the employer who takes the benefits of his service, the law presumes that there is a contract of some sort between them. Also, the reasonable legitimate expectation of the probationer would be given effect to by the court where the employer fails or neglects to notify him or her of the outcome of the probationary period but allowed him to continue to work thereafter. Thus, a probationer's expectation is that, at the end of the probationary period his employed will be tenured and if not he should be relieved but where he is not relieved and not formally informed that he has been confirm yet allowed to continue to work, it will be unfair for the employee to be rendered probationer.⁶¹ The act of allowing the employee to discharge his work creates an impression that he has satisfactorily completed his probationary period and that his appointment has been confirmed.⁶²

8. What Remedy Avails a Dismissed Probationer?

Where an employee on probation is wrongfully relieved of his employment certain remedies inures to him or her. In the case of *Adeyemo v. Oyo State Public Service Commission*⁶³ it was held that an employee on a statutorily flavored probationary employment where he is deprived of fair hearing in the termination of his employment is entitled to reinstatement. The reason for this is that the law does not allow employers to exercise their power to terminate employment arbitrarily, and public as well as private employers are expected by law to act at all times in good faith, reasonably and fairly towards their employees. The rules of natural justice cannot be circumvent and not attract liability.⁶⁴ Thus, in the case of a public or civil employee, whose employer is guilty of unfair labour practice and the same have been proved, he should be entitled to reinstatement contrary to the decision of the Supreme Court in *Ihezukwu v University of Jos*⁶⁵ this is to ensure that employees enjoy security of tenure and not be exposed to reckless termination by the employers especially as damages may not be an adequate remedy in every case. Reinstatement should only avail a probationer employee who has served for a reasonable period of time wherein an enduring relationship has been consummated. Where on the grounds of ill health the employment of a probationer is terminated, he is entitled to the equivalent of his remuneration for the notice period as provided in the employment contract. This was the decision of the court in the case of *Sekoni v Shell BP Petroleum Development Company Limited*.⁶⁶

9. Conclusion and Recommendations

It is trite that probationary employment is Nigeria. Its aim is to enable the employer employ only the best hands out of the multitude of employment seekers with regards to skill, knowledge, experience and productivity. This is usually achieved by placing the employee on a trial or competency test period. Promotion of an employee on probation does not translate the employment to confirmation but it is only an appreciation of industry with the hope that at the end the employee will be either confirmed or terminated. Also, the fact that an employee is on probation does not prevent the employer from terminating the employment before the expiration of the probation period so long as he abide by the rules and regulation regulating the contract or obliterates from them in the case of a gross misconduct attracting summary dismissal. Also, probation cannot be used as a sham to keep an employee probationary *ad infinitum*. Therefore, where an employer upon the expiration of the probation period fails and or neglects to make known the result of the probation to the employee but retains him or her in his employ and benefits from his labour, this will amount to conductual confirmation. The labour legal regimes especially the Labour Act and Employee Compensation Act are silent on the incidence of

⁶¹ *Schmidt v. Secretary of State for Home Affairs* [1969] 2 Ch. 149, 170, *Secretary of State for Employment v ASLEF (No. 2)* [1972] 2 QB 443, 498. Nwobike, J. C., 'The Legal Status of an Unconfirmed Employee' Vol. 4, No. 1, *Modern Practice Journal of Finance and Investment Law*, 2000, page 95.

⁶² *O. A. U. v. Onabanjo* supra at page 569, Para. H, Per Sulu-Gambari, JCA.

⁶³ (1979) 1 FNLR, 28.

⁶⁴ *University of Maiduguri Teaching Hospital Management Board v. Dawa* [2001] 16 NWLR (Pt. 739) 424 at 448.

⁶⁵ [1990] 3 NSCC 80.

⁶⁶ [1975] 1 CCHCJ 91. See also *Olukoya v. Intercotra Ltd.* [1969] NCLR 357.

probation. There is no statutory backing for it. Thus, parties are left to bargain. It is hereby recommended that, in order to adequately cater for this employment relationship, the labour and employee compensation Acts be amended to give it statutory recognition. Also, the Acts should stipulate the maximum period of probation an employee can be subjected to which should not be unnecessarily long and a period of 2 (two) years is hereby suggested. It is further recommended that, the amendment should place a duty on the employer to inform the employee of the outcome with the right to contest same in the event that the reason given is unsatisfactory to the employee this will ensure that the employee's legitimate expectation of being confirmed is not flagrantly undermined. Also, the judicial position that, where the employer at the expiration of the probation period, fails and/or neglects to inform the worker of the outcome while retaining his service is tantamount to confirmation should be given statutory backing.