

## UNFAIR DISMISSAL IN NIGERIA: IMPERATIVE FOR A DEPARTURE FROM THE COMMON LAW<sup>1</sup>

### Abstract

*One burning issue in the modern day labour and employment relations in Nigeria is the security of tenure of employment. The law had developed from the common law position to the position under the statutes where little protection is afforded to employees in employments regulated by statutes down to the present day world of labour wherein security of tenure of employment acquired international outlook. At common law, termination of employment or dismissal of an employee brings the contract of employment in question to an end. Under employments regulated by statutes or regulations made pursuant to powers granted by a statute, termination is not a fait accompli as once it is shown that the termination or dismissal was unlawfully carried out without strict compliance with the procedure prescribed by statutes, the purported termination or dismissal will be declared null and void. However, this statutory protection is only available to contracts protected by statutes and not ones governed purely by contract agreement entered into by parties inter se. However, there is now a move away from what security of tenure has been thitherto in some countries to the new international stand on security of tenure of employment. This position can be found in the International Labour Organisation standards on unfair dismissal provided for in the International Labour Organisation Convention which is considered in this work. The researchers undertake the study of the meaning of unfair dismissal, a comparative appraisal of unfair dismissal situations in Nigeria and other jurisdictions. The researchers adopt construction of statutes, case law, journal articles, textbooks and Internet materials as part of their methodology. At the end, the researchers found that virtually every dismissal and termination situations in Nigeria amounts to unfair dismissal when tested against ILO standards on unfair dismissal. The researchers then recommend that there is need to fill the glaring gap in the Nigerian law on termination of employment to bring it in line with the International Labour Organization's standards.*

**Key words:** *Unfair Dismissal, Common Law, Employment, Labour, Nigeria*

### 1. Introduction

The law on termination and dismissal in Nigeria is built around the common law. Under the common law, the employer has a right to determine the contract of employment of his worker whether for good, bad or no reason at all. The motive behind the termination or dismissal is immaterial provided the employer complies with the notice period as provided in the contract of employment where the contract is one of personal service. Where the contract is regulated by statute, the employer is bound to comply with statutory prescription. However, many countries around the world have moved away from this common law position by making laws to the effect that an employer shall provide reason for the termination of contract of employment or dismissal of an employee. Countries such as South Africa, Ghana, Zambia, and the United Kingdom have embraced this move. This new position emanated from the provisions of the International Labour Organization standards on unfair dismissal which is provided in articles 4, 7, 9 11 of the ILO Convention<sup>2</sup>. This paper will analyze the different unfair dismissal situations prevalent in Nigeria.

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<sup>1</sup> By **Emmanuel O. C. OBIDIMMA, BA, LLB, BL, LLM, PhD**, Senior Lecturer, Faculty of Law, Nnamdi Azikiwe University, Awka, Anambra State, Nigeria. 08034003436, eocobidimma@gmail.com; **M. I. ANUSHIEM Esq, LLB, BL, LLM**, Lecturer, Faculty of Law, Nnamdi Azikiwe University, Awka, Anambra State, Nigeria. 08032641757 matthewanushiem@gmail.com; and **U. M. J. EKENEME Esq, BA (Hons.), LLB (Hons), BL**, Awka based private Legal Practitioner, Anambra State, Nigeria. 08062139786, mj4real86@yahoo.com

<sup>2</sup> ILO Convention 158 of 1982.

## 2. Meaning of Unfair Dismissal

The concept of unfair dismissal though a novel idea in Nigeria labour jurisprudence<sup>3</sup> has not lent itself to a precise definition as there is scarcity of academic work on the concept, particularly in Nigeria where the concept has not really been given recognition. However, reasonable clue is taken from *Osborn's Concise Law Dictionary*.<sup>4</sup> The dictionary citing English Employment Rights Act states that:

When an employee can prove that he has been dismissed, the burden of proving the reason for the dismissal is on the employer.<sup>5</sup> The determination of whether the dismissal was fair or unfair depends on whether, having regard to the reason shown by the employer, the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee.<sup>6</sup> Certain reasons for dismissal are automatically unfair, including those related to membership or non-membership of a trade union, pregnancy, exercising rights under working time regulations or a statutory right.<sup>7</sup>

This merely gives an impression of situations of dismissal that may amount to unfair dismissal. Also a close perusal of the above will equally show that unfair dismissal is one without a reason or reasons not connected with the work of the employee or his capacity. Unfair dismissal is a term used in the UK labour law to describe an employer's action when terminating an employee's employment contrary to the requirements of the Employment Rights Act.<sup>8</sup> It is automatically unfair for an employer to dismiss an employee, regardless of length of service for a reason related to discrimination protected by the English Equality Act<sup>9</sup> or for becoming pregnant,<sup>10</sup> or having previously asserted certain specified rights.

This means that where dismissal is not substantiated with reason or termination is not done with appropriate notice, the dismissal is presumed unfair. Unfair dismissal is the termination of contract of employment of an employee in a harsh, unjust or unreasonable manner. It is termination of a contract of employment for unfair or inadmissible reasons. Apart from cases involving constructive dismissal, a dismissal is presumed unfair unless the employer can show substantial grounds to justify the dismissal.<sup>11</sup> Unfair dismissal therefore is the determination of contract of employment without substantial reasons. The extant legal regime on unfair dismissal is the International Labour Organisation standards on unfair dismissal encapsulated in ILO Convention 158 of 1982.

## 3. Meaning of Labour Standards

Labour standards are the rules that govern how people are treated in a working environment. Compliance with those standards does not require application of complex legal formulae to every situation. It is sufficiently complied with by ensuring that basic rules of good sense and good governance apply in the working environment.<sup>12</sup> Labour standards cover a very wide variety of subjects, mainly basic human rights at work, respect for safety and health and ensuring that people are paid for their labour.<sup>13</sup> At the international level they are found in conventions and recommendations. International Labour Organisation standards are therefore those rules set out by International Labour Organisation. The standards on unfair dismissal connote the rules and regulations set up by the International Labour Organisation regulating the conditions under which an employer can terminate the employment of his

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<sup>3</sup> O, Animashaun, 'Unfair Dismissal: A Novel Idea in Nigerian Employment Law', *NJLIR*, Vol. 2 No. 1 (2008) p. 1.

<sup>4</sup> S, Bone, *Osborn's Concise Law Dictionary* (9<sup>th</sup> edn, London: Sweet & Maxwell, 2001) p. 392

<sup>5</sup> English Employment Rights Act, 1996, S. 98(1).

<sup>6</sup> S, Bone, *Osborn's Concise Law Dictionary*, p. 392.

<sup>7</sup> *Ibid.*

<sup>8</sup> *Op cit.*

<sup>9</sup> 2010.

<sup>10</sup> <http://www.acas.org.uk/index.aspx?articleid=933> SI 2010/2926 Accessed 8/9/2013.

<sup>11</sup> <http://www.citizensinformation.ie/en/employment/unemploymentandfairgroundsfordismissal> Accessed 8/9/13.

<sup>12</sup> O P, Obi, 'The Concept and Purpose of International Labour Standard' *NJLIR*, Vol. 2 No. 5 (2008) P. 66.

<sup>13</sup> *Ibid*

worker as well as prescribing justifiable valid reasons for dismissal and procedural safeguards to be observed before a worker may be dismissed. The source of the standards is the International Labour Organization Termination of Employment Convention 158 of 1982 which replaced the Termination of Employment Recommendation of 1963.<sup>14</sup>

#### 4. ILO Standards on Unfair Dismissal

International Labour Organisation in its efforts to set standards of practice in the work place particularly relating to security of tenure of employment fashioned out recommendations concerning termination of employment<sup>15</sup> and Convention<sup>16</sup> on Termination Employment. The Organisation was influenced in its decision to fashion out the above recommendation and convention as a panacea to the ugly situation where an employer can dismiss his employee without any reason or motive. Such a situation is described as a violation of all things fair and just. It is also said that such a situation amounts to violation of Article 4 of ILO convention 158 of 1982 which provides that “the employment of a worker shall not be terminated unless there is valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service.”<sup>17</sup>

The thrust of the Convention is to ensure both substantive and procedural fairness before dismissal or termination of employment at the will of the employer. Thus, the employer is required to give a valid reason for dismissal or termination. A reason is valid if and only if it is connected with the capacity or conduct of the employee. Such reasons that are connected with the capacity or conduct of the employee are reasons such as gross misconduct, incompetence, disobedience, negligence and such reasons that may be deemed to be connected with the operational requirement of an undertaking, establishment or service such as transfer of undertaking, privatization as in Nigeria, merger and acquisition or takeover of an undertaken as provided in Nigerian laws.<sup>18</sup> This means that any exercise of power of termination of employment or dismissal of an employee contrary to the provisions of the above convention is unfair.

Article 2 of the Convention<sup>19</sup> provides that “the Convention applies to all branches of economic activities and to all employed persons”. The phrase ‘all employed persons’ depicts any person who is engaged in a gainful employment of any category. By the above provision of article 2, the provisions of the Convention apply to employees in purely master-servant relationship as it applies to employees whose contract of employment is backed by statutes without any discrimination. This is unlike in Nigeria labour and industrial law jurisprudence<sup>20</sup> where a clear cut distinction exists between master-servant relationships and employment relationships protected by statutes or regulation made pursuant to a statutory provision. This distinction in Nigeria can be seen in the work of Animashaun when he stated that:

The status and implication of employment with statutory flavour in contra-distinction with master-servant relationship was fully explored by Karibi Whyte in *Imoloane v WAEC*<sup>21</sup> where he said it is now accepted that where a contract of service is governed by the provisions of a statute or where the conditions of service are contained in regulations derived from statutory provisions, they invest the

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<sup>14</sup> www.Ilo.org.com Accessed 2/9/2013.

<sup>15</sup> ILO Recommendation 119 Concerning Termination of Employment at the Initiative of the Employer, 1963.

<sup>16</sup> ILO Convention 158 on Termination of Employment Replaced ILO Recommendation of 1963 *Ibid*.

<sup>17</sup> ILO Convention 158 on Termination of Employment, 1982, Article 4.

<sup>18</sup> G G, Otuturu, ‘The Limits of the Application of the Rules of Natural Justice in Contract of Employment’ *NJLIR*, Vol. 2 No 1. (2008) p. 80.

<sup>19</sup> *Op cit*.

<sup>20</sup> See B, Atilola, ‘Legal Redress for Wrongful Termination of Contract of Employment: What Lawyers Must Note’ *NJLIR*, Vol. 5 No 2 (2011) p. 12

<sup>21</sup> (1992)2 N.S.C.C. 274 at p. 383.

employee with legal status higher than the ordinary one of master-servant relationship. They accordingly enjoy statutory flavour.<sup>22</sup>

This implies that since no distinction exists in ILO standards which are embedded in the ILO Termination of Employment Convention, the distinction with respect to the available remedies to those distinctive categories of contract of employment in Nigeria becomes *non-sequitor*. The appropriate authority to determine the fairness or otherwise of the termination can make any order that is appropriate in the light of the facts and circumstances of a particular case. This is made manifest in the provision of Articles 8 and 9 of the Convention.<sup>23</sup> The provisions of these Articles are set out *seriatim*. Article 8(1) provides that “a worker who considers that his employment has been unjustifiably terminated shall be entitled to appeal against that termination to an impartial body such as a court, labour tribunal, arbitration committee or arbitrator at the place where termination occurred”. Article 9(1) provided thus: “The bodies referred to in Article 8 of the Convention shall be empowered to examine the reasons given for the termination and the other circumstances relating to the case and to render a decision on whether the termination was justified.

In doing so, the body will shift the burden of proving the reasons for termination to the employer.<sup>24</sup> The court shall also have regards to evidence produced by parties and procedures provided by national laws.<sup>25</sup> The body shall then decide whether the reasons adduced for the termination was sufficient valid reasons recognized by Article 4 of the Convention.<sup>26</sup> Article 5 of the Convention<sup>27</sup> captures what does not constitute valid reasons for termination of employment. It provides that “the following *inter alia* shall not constitute valid reasons for termination”<sup>28</sup>:

- (a) union membership or participation in union activities outside working hours or, with the consent of the employer within working hours;
- (b) seeking office as or acting or having acted in the capacity of a workers’ representative;
- (c) the filing of a complaint or the participation in proceedings against an employer involving alleged violation of laws or regulations or recourse to competent administrative authorities;
- (d) race, colour, sex, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin; and
- (e) absence from work during maternity leave.

The implication of the above is that any determination of contract of employment in any manner based on these reasons amounts to unfair dismissal. Still on invalid reasons for determination of contract of employment, Article 6 of the Convention<sup>29</sup> provides that temporary absence from work because of illness or injury shall not constitute a valid reason for termination. What this entails is that when the illness is protracted and in such a nature that it affects the capacity of the employee to carry out the object of the contractual relationship, it may well justify termination of the contract of employment. The definition of what constitutes temporary absence from work, the extent to which medical certification shall be required and possible limitations to the application of paragraph 1 of the Article

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<sup>22</sup> O, Animashaun, ‘Foisting A Willing Employee on an unwilling Employer: The Remedy of Re-instatement Revisited’ *op.cit* p. 5 see also *Olatunbosun v NISER Council* [1988]3NWLR (pt. 8) 25 at p.40; *Eperokun v Unilag* [1986]4NWLR (pt 34) 162 at p.201.

<sup>23</sup> *Op cit.* cited in [www.ilo.org](http://www.ilo.org) accessed on 2/9/2013.

<sup>24</sup> ILO termination Employment Convention *op cit* Article 9(2) 9.

<sup>25</sup> *Ibid* Article 9(2) b.

<sup>26</sup> *Ibid* Article 9(3)

<sup>27</sup> *Ibid*

<sup>28</sup> *Ibid* Article (5)

<sup>29</sup> *Ibid.*

shall be determined in accordance with the methods of implementation referred to in Article 1 of the Convention.<sup>30</sup>

Also Article 7 of the Convention<sup>31</sup> provides that the employment of a worker shall not be terminated for reasons related to the workers conduct or performance before he is provided an opportunity to defend himself against the allegations made, unless the employer would not be reasonably expected to provide this opportunity.<sup>32</sup> The provision of the Article reiterates the fundamental principles of fair hearing in the determination of contract of employment.<sup>33</sup> According to Abugu, the Convention provides that a worker is entitled to notice except in cases of serious misconduct or compensation in lieu thereof. Dismissal for serious misconduct should be limited to cases where the employer cannot in good faith be expected to take any other alternative or option. A worker accused of misconduct should be given adequate opportunity to state his case promptly, with the assistance of a representative where appropriate. The term serious misconduct is not defined in the Convention and its interpretation is left to each country.<sup>34</sup>

However, the Convention provides that a member state may exclude the following categories of employed persons from all or some of the provisions of the Convention:<sup>35</sup> (a) workers engaged under a contract of employment for a specified period of time or a specified task; (b) workers serving a period of probation or a qualifying period of employment, determined in advance and of reasonable duration; and (c) workers engaged on a casual basis for a short period.<sup>36</sup> Despite the leverage seemingly allowed member-states to exclude certain categories of workers from the operation of the Convention if they so wish, the Convention went ahead to impose obligations on a member-state who wishes to exclude such workers from the application of the Convention. The safeguard is imbedded in Article 2(3) of the Convention.<sup>37</sup> It provides that “adequate safeguards shall be provided against recourse to contracts of employment for a specified period of time the aim of which is to avoid the protection resulting from this Convention.”<sup>38</sup> This creates an obligation on a member state who intends to exclude the provision of the Convention to certain employed persons to afford such persons protections equivalent to the protections afforded them under the Convention. This is indeed an international entrenchment of security of tenure to vulnerable categories of employees. This is contrary to the common law position of termination at will in Nigeria.

## 5. Unfair Dismissal Situations in Nigeria

A careful perusal of the International Labour Organisation standards on unfair dismissal deducible from the Convention on Termination of Contract of Employment shows that certain dismissal and/or termination of contracts of employment in Nigeria amounts to unfair dismissal when tested against the Standards. An attempt is made hereunder to highlight some of such situations.

### 5.1 Termination without Reason

The position that the employer is not bound to give reasons for termination of his employee’s contract has severally been upheld by courts in Nigeria. In *Momoh v CBN*,<sup>39</sup> the Court held that “ordinarily, at common law, a master is entitled to dismiss his servant from his employment for good or bad reason or for no reason at all....” A master can terminate a contract of employment at any time with good or bad reason or no reason at.<sup>40</sup> The only obligation under the common law applicable in Nigeria on an

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<sup>30</sup> *Ibid.*

<sup>31</sup> *Ibid.*

<sup>32</sup> *Ibid*; However, this convention did not highlight circumstances under which the employer cannot be reasonably expected to provide an opportunity to an employee who is to be removed from employment.

<sup>33</sup> *Ibid* Article 7.

<sup>34</sup> J E O Abugu, ‘ILO Standards and the Nigerian Law of Unfair Dismissal’ *AJICL* Vol.17 No 2(2009) p.183.

<sup>35</sup> *Ibid* Article 2(2).

<sup>36</sup> *Ibid.*

<sup>37</sup> *Ibid.* Article 2(3& 4).

<sup>38</sup> *Ibidi*, see also Oserogho & Associates [www.oseroghoassociates.com](http://www.oseroghoassociates.com) , Accessed 8 /9/2013

<sup>39</sup> [2007]14 NWLR (pt 1055) 508

<sup>40</sup> *Momoh v C.B.N Supra.* see also *N.R.W. Ind. Ltd v Akingbulugbe* [2011]11 NWLR (pt 1257) 135;

employer is to act within the bounds of the terms of the contract of employment or statutes regulating the contract of employment of the parties sought to be terminated.<sup>41</sup> Although the employer is not bound to give reason, where he relies on any reason he will be bound to substantiate the reason as was held in *NEPA v Eboigbe*.<sup>42</sup> Except where the employer relies on a reason, the onus of proving the wrongfulness or unlawfulness of termination rests squarely on the employee who is alleging wrongful or unlawful termination. In such a circumstance the employee is required to prove to the satisfaction of the court that “(a) he is an employee of the defendant; (b) the terms and conditions of his employment; and (c) the manner and by whom he can be removed.”<sup>43</sup> The common law right of an employer to terminate a contract of employment in Nigeria is also anchored on the principle that he who hires has a right to fire. However, the employer must adhere to the conditions under which the employee was hired before he can validly fire the employee. Otherwise, the employer can *ipso facto* be held liable for wrongful or unlawful termination of the services of the employee.<sup>44</sup> It is therefore evident that purported exercise of right of termination or dismissal which exists in Nigeria at present without the requirements of reasons amounts to unfair dismissal when tested against the ILO standards on unfair dismissal which are contained in ILO Termination of Employment Convention<sup>45</sup> particularly Articles 2 and 4 of the Convention.<sup>46</sup>

## 5.2 Dismissal in Consequence of Union Activities

Employees embark on union activities to force on employers the conditions and terms which are favourable to them. Such union activities include strikes, lock out, work-to-rule, picketing, go slow, and so on. But of major interest in this work is strike because of its recurrence in labour relations in Nigeria. Strike is defined in section 48 of the Trade Disputes Act<sup>47</sup> as:

the cessation of work by a body of persons employed acting in combination or, a concerted refusal or refusal under a common understanding of any number of persons employed to continue to work for an employer in consequence of a dispute, done as a means of compelling their employer or any person or body of persons employed, to accept or not to accept terms of employment and physical conditions of work.<sup>48</sup>

The cessation of work includes deliberately working at less than usual speed or with less than usual efficacy. According to Lord Denning in *Trampshipping Corporation v Greenwich Marine Inc*,<sup>49</sup> strike is a concerted stoppage of work by men... with a view to improving their wages or conditions of employment or giving vent to their grievance or making a protest about something or others or supporting or sympathizing with other workmen in such endeavour. The right to strike is an essential element of the principles of collective bargaining. It is essential element not only of the unions' bargaining itself, but also a necessary sanction for enforcing agreed rules.<sup>50</sup> In *Union Bank of Nigeria*

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*L.C.R.I. v Mohammed* [2005]11 NWLR (pt 935) 4; *Olaniyan v Unilag* [1985] 2 NWLR (pt. 9) 98; *Akinnibosun v Union Bank of Nigeria Plc* [2014] 48 N.L.L.R (pt.158) 489 N.I.C

<sup>41</sup> *Daodu v UBA Plc* [2004]9 NWLR (pt 878) 276 at 280; *Chukwuma v S.P.D.C. (Nig) Ltd* [1993]4 NWLR (pt 289) 512.

<sup>42</sup> [2009]8 NWLR (pt 1142) 150 at p. 152. *Angel shipping & Dyeing Ltd v Ajah* [2000]13NWLR (pt 685) 532; *Obe v Nigersol Const. Co Ltd* (1972)2 UILR (pt 11) 121.

<sup>43</sup> *Ujam v I.M.T. Supra*. See also *Anaja v UBA Plc* [2014]4 ACELR 82

<sup>44</sup> *Akinfe v UBA Plc* [2007]10 NWLR (pt. 1041) 189; *Garuba v K.I.C. Ltd* [2005]5NWLR (pt. 917) 160; *Jumbo v P.E.F.M.* [2005]14NWLR (pt. 945) 443.

<sup>45</sup> *Op cit.*

<sup>46</sup> *Ibid.*, see also Article 4. Article requires all removal to be with valid reasons which must be justified by the employer.

<sup>47</sup> Cap T8 LFN, 2004.

<sup>48</sup> *Ibid.*

<sup>49</sup> (1975) 2 ALL ER 989 at p. 990.

<sup>50</sup> *Goofier Harris Tweed Co Ltd v Veitch* (1942) ALL ER 42 at p. 59.

*Ltd v Edet*,<sup>51</sup> Uwaifo J.C.A. (as then was) stated that “it appears that whenever an employer ignores or breaches a term of that agreement, resort could be had, if at all, to negotiation between the union and the employer and ultimately to a strike action should the need arise for enforcing agreed rules.”<sup>52</sup> According to Oturu,

The right to strike is also an integral part of the freedom of every citizen to associate with others particularly to form or join a trade union of his choice for the protection of his interest, which is entrenched in section 40 of the Constitution.<sup>53</sup> Part of this freedom is the right of every citizen to give or withdraw his services by giving notice to his employer in accordance with the terms of his employment. A denial of this right will amount to forced labour, which is a violation of section 34 of the Constitution<sup>54</sup>except in justifiable circumstances.<sup>55</sup>

The position of law in Nigeria under the statute can be found in section 43 of the Trade Disputes Act<sup>56</sup> which provides that:

Notwithstanding anything contained in this Act, or in any other law – Where any worker takes part in a strike, he shall not be entitled to any wages or other remuneration for the period of the strike, and any such period shall not count for the purpose of reckoning the period of continuous employment and all rights dependent on continuity of employment shall be judicially affected accordingly.

This position of the law was sanctioned by the Court in the case of *Abdulraheem v. Olufeagba*.<sup>57</sup> This shows that strike action amounts to a breach of contract of employment and upon which employers rely on to relieve workers of their employment. Workers in Nigeria have been threatened and victimized as a result of their involvement in a strike action.<sup>58</sup> The position in Nigeria contrasts sharply with the position under the International Labour Organisation standards on unfair dismissal entrenched in the ILO Termination of Employment Convention<sup>59</sup>which provides *inter alia* that union membership or participation in union activities outside working hours, or with the consent of the employer, within working hours shall not be valid reason for termination. It is unfair to dismiss a worker who embarks on a strike action in Nigeria. This is particularly bearing in mind the unenforceability of collective agreements in Nigeria where it takes only but a strike action to enforce a collective agreement duly signed by parties in a trade dispute. Exercise of right to strike must not attract punitive consequences of dismissal or termination of employment because it is what makes collective bargaining and its attendant agreement effective. It is to the process of collective bargaining what an engine is to a motor vehicle.<sup>60</sup> Consequently, any dismissal or termination in consequence of a union activity amounts to an unfair dismissal.

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<sup>51</sup> [1993]4NWLR (pt 287) 288

<sup>52</sup> *Union Bank of Nigeria Ltd v Edet, Supra.*

<sup>53</sup> Constitution of Federal Republic of Nigeria, 1999 as (amended)

<sup>54</sup> *Ibid.*

<sup>55</sup> G G, Otuturu, ‘The Right of workers To Strike In Nigeria: A Critical Appraisal’ *NJLIR* Vol. 3 No 2, (2009) p. 38.

<sup>56</sup> *Op cit.*

<sup>57</sup> [2006]17 NWLR (pt. 1008) 280.

<sup>58</sup> For instance, the popular University of Ilorin case, Lagos state government some time ago relieved medical doctors of their employment in consequence of strike.

<sup>59</sup> 158 of 1982.

<sup>60</sup> O V C, Okene, ‘Collective Bargaining, strikes and the Quest for Industrial Peace in Nigeria’ (2008) Vol. 2 No. 2 *NJLIR*, p. 51; F C, Nwoke, ‘Rethinking the Enforceability of Collective agreements in Nigeria’ *MPJFIL* Vol. 4 No. 4 p. 358; K C, Nwogu, ‘Collective agreement – The imperative for a legal Impetus’ (2005) Vol. 1 No. 3 *Unizik Law Journal*, p. 137.

### 5.3 Dismissal without Notice

It is a notorious principle of law in Nigerian labour and employment jurisprudence that an employer can dismiss his employee without notice. Any employee who is guilty of misconduct which is weighty and of such a character as to undermine the relationship of confidence and trust which should exist between the employer and the employee could be summarily dismissed.<sup>61</sup> Therefore, the act of an employee which is against the interest of his employer amounts to gross misconduct which entitles the employer to dismiss the employee summarily without the necessity of notice under the law regulating dismissal of an employee in Nigeria.<sup>62</sup> It is also worth mentioning here that a statutory recognition of right of an employer to dismiss an employee without notice exist in section 11(5) of Labour Act.<sup>63</sup> The section provides that “nothing in this section affects any right of either party to a contract to treat the contract as terminable without notice by reason of such conduct by the other party as would have enabled him so to treat it before the making of this Act.”<sup>64</sup> The vital point here is that there exists a difference in Nigeria law on requirement of notice in termination and dismissal. Whereas dismissal dispenses with notice, termination *stricto sensu* requires notice or payment of salary in lieu of notice.<sup>65</sup> The ILO Termination of Employment Convention containing the ILO standards on unfair dismissal also recognizes the right of an employee to notice or payment of salary in lieu of notice in Article 11 of the Convention. Also Article 7 of the Convention makes notice a condition in any case of termination of contract of employment.

### 5.4 Dismissal and Termination: Motive Irrelevant

The position of the law in Nigeria is that the motive for terminating a contract of employment is irrelevant provided the employer complies with the terms of the contract of employment or statutory provisions regulating the contract of employment. What this means is that an employer who is actuated by malice or bad faith can just comply with the provisions of a statute regulating an employment in the case of employments with statutory flavour or terms of the contract of employment in the case of contract of employment without statutory protection. This is supported by Nwagbara<sup>66</sup> when he states that ‘it is now settled that where an employer gives the required notice to terminate, the validity of the termination cannot be challenged on the grounds that the employer was actuated by ill will or malice or any other improper motive’. Agomo also states that “the reason or motive for termination is immaterial at common law. It may be spiteful, punitive or petty. The question is whether the termination is wrongful or not”.<sup>67</sup>

The current position in Nigeria is that an employment will terminate at the end of the notice period given even where the termination is prompted by improper motive.<sup>68</sup> The law that motive of termination or dismissal is irrelevant provided an employer complies with the notice period or the statute regulating the employment is no longer tenable particularly in the light of the ILO standards on unfair dismissal. According to Chianu,<sup>69</sup> it is a great pity that in cases of unjustifiable dismissal including outright victimization, the courts allowed the issue to degenerate into the payment of a small sum of money, for this allows employers ‘buy out undesirables cheaply’. This shows that Nigerian labour and industrial law experts are no longer comfortable with the common law position on irrelevancy of motive of termination and dismissal. The National Industrial Court is also making effort towards a move away from the common law position. In *Petroleum and Natural Gas Senior Staff Association of Nigeria v*

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<sup>61</sup> C, Nwagbara, *Determination of Contract of Employment and Remedies for Wrongful Dismissal* (Nigeria: Tait Publishers, 2000) p. 50.

<sup>62</sup> A O, Elias, ‘Summary Dismissal Upon Allegation of Crime – An Overview’ *MPJFIL* Vol. 4 No 3 (2006) p. 136.

<sup>63</sup> Cap L1 LFN, 2004

<sup>64</sup> *Ibid.* Section 11(5).

<sup>65</sup> *Ibid.*, Section 11 (6).

<sup>66</sup> C, Nwagbara, *Determination of Contract of Employment and Remedies for Wrongful Dismissal*, *Op cit* p. 29

<sup>67</sup> C K, Agomo, *Nigeria Employment and Labour Relations, Law and practice*, *Op cit* p. 169. See also *Taiwo v Kingsway Stores Ltd* (1950)119 NLR. 122; *Nwaokoro v Sapele Urban District Council* (1965)1 ALLNLR 224; *UBA Plc v Oranuba* [2014]47 N.L.L.R.(Pt.154)470 N.I.C

<sup>68</sup> *Ajayi v Texaco (Nig) Ltd* [1987]3NWLR (pt 62) 577

<sup>69</sup> E, Chianu, *Employment Law*, *Op cit*, P. 301.



*Schlumberger Anadrill Nigeria Ltd*,<sup>70</sup> the National Industrial Court presided over by the President of the Court, Honourable Justice Adejumo said:

The respondent also argued that it has the right to terminate the employment of any of its employees for reasons or no reason at all. While we do not have any problem with this at all, the point may be made that globally it is no longer fashionable in industrial relations and practice to terminate an employment without adducing any reason for such a termination.

Appraising the above dictum, Agomo<sup>71</sup> states that:

A careful reading of this opinion clearly shows that the employment at will is still the law, but a caveat that it is no longer in keeping with global best practices. The fact that the N.I.C made this observation is a pointer to the direction of the law. The N.I.C is beginning to do for the private sector what the Supreme Court did in the 1980s for the public sector, which changed the face of individual employment law in Nigeria.<sup>72</sup>

This is a welcome development particularly in the light of article 4 of ILO Convention.<sup>73</sup> From these provisions of the Convention, the courts can question any determination of contract of employment actuated by motive that is outside the recognized reasons in Article 4 of the Convention on termination of employment.<sup>74</sup> This, the National Industrial Court can do by relying on section 254C of the Constitution<sup>75</sup> which empowers the Court to deal with matters relating to or pertaining to the application of among other things, international conventions which include convention 158 of 1982.

## 6. Conclusion and Recommendations

The policy of termination and dismissal in Nigeria is regulated by common law except where there is statutory provision regulating a particular employment. There is a need to move away from this ancient and archaic rule which permits an employer to dispense with their workers at any time without any reason bearing in mind that the only obligation on them is to fulfill all righteousness by complying with the formality required by the terms of the contract of employment or provision of a statute regulating the employment in question. There is need for Nigeria to pursue a policy of fair dismissal by ensuring the application of ILO Termination of Employment Convention 158 of 1982. It is time for Nigeria to look beyond the formality and question the motive for such termination or dismissal at least to afford employees a little sense of security which is the global trend in the world of labour and industrial relations.

There is therefore the need for Nigeria to enact Unfair Dismissal Act. Nigerian government through the legislative arm should make haste to enact an Act which will regulate unfair dismissal in Nigeria. In this Act, provision should be made bringing all categories of employees except probationers, casual workers and domestic workers within the scope of the application of the Act. Also the Act should make provisions which will ensure justification for termination of contracts of employment and adopt all the invalid reasons for termination of contract of employment provided in ILO Termination of Employment Convention. In addition, provision for reinstatement and re-engagement as remedies for unfair dismissal in the proposed Unfair Dismissal Act is necessary irrespective of the nature of the contract of

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<sup>70</sup> (2008)11 NLLR (pt. 29) 164.

<sup>71</sup> *Op cit*.

<sup>72</sup> See E E, Uvieghara and C K, Agomo, 'The Changing Pattern of Employer – Employee Relations in Nigeria Labour-Law: Facts or Fiction' Cited by C K, Agomo, *Ibid*.

<sup>73</sup> Termination of Employment Convention No 158 of 1982.

<sup>74</sup> *Ibid*.

<sup>75</sup> Constitution of Federal Republic of Nigeria (Third Alteration) Act, *op cit*

employment involved. Reinstatement is taking the employee back to his old job.<sup>76</sup> This will encourage the employer to train and retrain his employees knowing full well that he cannot terminate the contract of employment of his employee without reason and if he does, the employee will be put back to his job or a job commensurate with his old job. More still, the subtle and seeming controversial distinction between termination and dismissal should be removed statutorily. Once a contract of employment is sought to be determined in whatever form, the employer or employee seeking to determine the contract of employment should be made to do so with valid reason in line with the provision of the proposed Unfair Dismissal Act. Finally, the Unfair Dismissal Act to be enacted for purposes of regulating unfair dismissal situations in Nigeria should also have provision for fair hearing. This fair hearing provision should be available to all categories of employees. Both employees in contracts of employment with statutory flavour and employees in pure master-servant relationship should be entitled to fair hearing in accordance with the provisions of the Nigeria Constitution.<sup>77</sup>

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<sup>76</sup> Equal Rights Act (UK), *op cit* Section 115

<sup>77</sup> Constitution of Federal Republic of Nigeria, *op cit* section 36 (1)