

## SUMMARY DISMISSAL OF WORKERS IN NIGERIA: FOCUS ON THE NEED TO ADJUST

By

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### *Abstract*

*Termination and Dismissal are concepts of global concern in labour relations. The incidence of unfair dismissals in Nigeria has become so alarming that it has raised a lot of concerns and appears to be an albatross in modern day employment. This is notwithstanding the International Labour Organisation Convention on unfair dismissal. The incidences range from dismissal without notice, termination without reason, irrelevance of motive for termination, termination consequent upon union activities, absence of right to fair hearing, absence of order of reinstatement in a private sector. This paper aimed at curbing the incidences of unfair dismissal in Nigeria. The International Labour Organisation set a standard which an employer wishing to terminate employment of his employee must comply with. The research methodology applied was the doctrinal research method in the course of this research; the work found that dismissal and termination situations in Nigeria amount to unfair dismissal when tested against ILO standards on unfair dismissal. The paper then recommended that Nigeria needs to adopt ILO standards on unfair dismissal with modifications where necessary. Also, that every legal and institutional impediment that hinders the application of ILO Convention on unfair dismissal should be removed by the concerted efforts of the three arms of Government of Nigeria for purposes of achieving the policy of fair dismissal in Nigeria.*

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## **Introduction**

Contracts of employment can be determined in various ways. Summary dismissal is one of the ways in which a contract of employment is determined which has now become common place in labour relations as the employee most times than not is not adequately protected by the law nor by the terms guiding and regulating the contract of employment. The menace of summary dismissal has deeply taken root in industrial and labour relations in Nigeria; this vicious cycle is visible in every sector of the society. Unfortunately, workers or employees in the private sector tend to suffer more from this.

One burning issue in the modern day labour relations in Nigeria is the security of tenure of employment as the International Labour Organization Convention on termination of contract of employment which provides for standards on summary dismissal protects the employee from unfair dismissal of his contract of employment without recourse to the terms of contract is yet to be fully adopted into Nigeria's legal system.

In Nigeria, the determination of contract of employment is employer friendly as the employer is free to determine such contract at any time and without adducing or giving any reason(s), which is also the common law practice.<sup>1</sup> This is not limited to any gender as the female gender often times is a victim of this, especially after marriage or child birth. The employer tends to determine her contract as it is believed that there is a low input of production and work comes to an end. Those with one form of disadvantage or handicap are not left out, thus making it an issue of major concern globally.

Most countries have deviated from this common law practice as a result of the adoption of international treaties such as the International Labour Organization Convention No. 158 of 1982 and Recommendation No. 166.<sup>2</sup> Hence, about 36 countries of the world have ratified the Convention while about 55 countries including those who have not ratified the Convention, have however embraced the provisions of the Articles of the Convention which contains International Labour Organization standards on summary dismissal. Despite the efforts by the International Labour Organization

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<sup>1</sup>E Chianu, 'Towards Fair Hearing for all Nigerian Employees' [2007] (1) (1) *CALS Review of Nigerian Law and Practice*, 31.

<sup>2</sup> International Labour Organization, 'Countries Urged to Ratify Labour Conventions' <[www.ilo.org](http://www.ilo.org)> accessed 10 September 2021.

towards curbing the incidences of unfair dismissal and ensuring a policy on substantiality of employment, Nigeria is still in full practice of the common law termination of employment which is at the will of the employer.<sup>3</sup>

The Constitution of the Federal Republic of Nigeria<sup>4</sup> requiring ratification and domestication of treaties and conventions before they can be enforced in Nigeria is a factor accounting for the failure of the country to fully embrace the Convention on unfair dismissal. Workers or employees in the private sector tend to suffer more from the vicious cycle of the common law position of termination of contract of employment. There is no doubt that in any relationship, disputes are bound to arise, however when such disputes are not properly handled one party becomes the victim regardless of the contractual relationship involved.

It is trite that the principles of law regulating the determination of contractual relationship of employment are premised on whether such relationship is that of: a. master/servant contract of employment, b. employment with statutory flavor, c. employment at will. If both parties have made for themselves a written contract of employment, it is outside the province of the court and parties to look elsewhere for the terms regulating termination when disputes arise.<sup>5</sup> However, from the periphery of labour relations, most persons/parties have no written contract guiding and regulating the terms of their employment.

In the case of termination with statutory flavor, the employee enjoys certain privileges because his contract has a legal status and goes beyond the ordinary master and servant relationship.<sup>6</sup> Thus, the employee whose contract of employment has statutory flavor is entitled to notice before his contract of employment can be validly terminated. This privilege is not enjoyed by employees who work in the private sector.

There is no doubt that in modern day labour relations, the issue of summary dismissal has raised many concerns globally. It was on that basis that the International Labour Organization set certain standards on termination of contracts of employment which invariably contains standards on unfair dismissal. The International Labour Organization enforced the 1982 Convention through its Committee on Experts on the Application of Conventions and Recommendations. The said Convention

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<sup>3</sup>*Osianya v Afribank Nig. Plc* (2007) 6 NWLR (pt 1031) 565.

<sup>4</sup>CFRN 1999 (as amended) 2011.

<sup>5</sup>*Katto v. Central Bank of Nigeria* (1999) 6 NWLR (pt 607) 390 at 405, paras. D-F

<sup>6</sup>*Balogun v. University of Abuja* [2000] 13NWLR (pt.783) 42 at 53.

plays a veritable role in labour relations even though not applied in some jurisdictions.

The 1982 Convention provides thus: 'The employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker based on the operational requirements of the undertaking, establishment or service'.<sup>7</sup>

The purport of the foregoing provision of the 1982 Convention is that it is mandatory for employers apart from notice to give valid reasons before they can terminate the employment of a worker. It is saddening to say that the salient provision of the Convention is not applied in Nigeria. In Nigeria, provided the employer has given the employee the required notice, without more, the employer can terminate the employment of the employee.

### **Analysis of the Legal Implications of Summary Dismissal of Workers in Nigeria**

A careful perusal and painstaking review of the International Labour Organisation standards on unfair dismissal deducible from the Convention on Termination of Contract of Employment show that certain dismissal and/or termination of contract of employment in Nigeria amounts to unfair dismissal when tested against the International Labour Organisation standards. An attempt is made hereunder to highlight some of such situations and their legal implications:

#### **i. Dismissal without Reason**

Bearing in mind the distinction already drawn between termination and dismissal which are two limbs of determination of contract of employment, effort is made here to test the power of the employer to terminate or dismiss an employee without reason against the background of the ILO standards on unfair dismissal. The position of the law in Nigeria seems settled that an employer is not obligated to furnish an employee with reasons for his termination of the employee's contract of employment provided the employer terminates the contract by complying with the terms and conditions of the contract of employment in the case of master servant relationship. In the case of contracts with statutory flavour, the employer is only required to comply with the statutory prescribed procedure for terminating a contract of employment backed by statutes or regulations made pursuant to the statute. The position that the employer is not bound to give reasons for termination of his employee's contract has severally been

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<sup>7</sup>International Labour Organisation Convention 158 of 1982, art. 4

sanctioned by courts in Nigeria. In *Momoh v CBN*,<sup>8</sup> on the power of an employer to terminate contract of employment and whether the employer is bound to give reasons, the Court held:

*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. In consonance with this principle, the courts rarely order specific performance of a contract of employment so as not to create a situation whereby an employee will be foisted upon an unwilling employer, just as no employer could be allowed to prevent an employee from seeking employment elsewhere. However, where there is a written contract of employment, statutory provisions and regulatory conditions of service, equity demands that the courts should hold the parties bound by the terms of the employment agreement.*<sup>9</sup>

A master can terminate a contract of employment at any time with good or bad reason or no reason at<sup>10</sup>. The only obligation under the common law applicable in Nigeria on an employer is to act within the bounds of the terms of the contract of employment, statutes or regulation regulating the contract of employment of the parties sought to be terminated<sup>11</sup>. Although the employer is not bound to give reason; where he relies on any reason he will be bound to substantiate the reason otherwise the termination will be wrongful or unlawful as the case may be. In *NEPA v Eboigbe*,<sup>12</sup> the Court stated that:

*A private limited company or any employer of labour does not have any obligation to retain the services of any unwanted employee and may terminate the appointment of the employee without any reason given. In other words, an employer of labour is not bound to be saddled with an unwarranted staff and may terminate the services of such an employee without any reason for the termination. However, where an employer states a reason for the termination, such reason must be plausible to justify such termination of the appointment of the employee.*

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<sup>8</sup>(2007)14 NWLR (1055) 508.

<sup>9</sup>*N.R.W. Ind. Ltd v Akingbulugbe* (2011)11 NWLR (pt 1257) 135.

<sup>10</sup>*L.C.R.I. v Mohammed* (2005) 11 NWLR ( 935) 4; *Olaniyan v Unilag* (1985) 2 NWLR (pt. 9) 98; *Akinribosun v Union Bank of Nigeria Plc* (2014) 48 N.L.L.R ( pt 158) 489 N.I.C

<sup>11</sup>*Daodu v UBA Plc* (2004) 9 NWLR (878) 276, 280; *Chukwuma v S.P.D.C. (Nig) Ltd* (1993) 4 NWLR ( pt 289) 512.

<sup>12</sup>(2009)8 NWLR (1142) 150 at152.; *Angel shipping & Dyeing Ltd v Ajah* (2000)13 NWLR ( pt 685) 532

In such a situation where the employer relies on a ground for termination, the burden which ordinarily would have been on the aggrieved employee to prove wrongfulness of the termination will move to the employer who has chosen to give reason. 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>13</sup>

From the above, it is 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>14</sup> particularly Articles 2 and 4 of the Convention.<sup>15</sup>

## **ii. Dismissal in Consequence of Union Activities**

Employees embark on union activities to force on the employer 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 research is strike because of its recurrence in labour relations in Nigeria. Strike is defined in section 48 of the Trade Disputes Act<sup>16</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>17</sup>

Under the common law, a refusal to work in consequence of a strike could be treated as a breach of contract voidable at the instance of the employer.

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<sup>13</sup>*Anaja v UBA Plc*[2014]4 ACELR 82

<sup>14</sup>158 of 1982

<sup>15</sup>*Ibid*

<sup>16</sup>Cap T8 LFN, 2004.

<sup>17</sup>*Ibid.*

The employer then has the option either to ignore the breach or to accept such breach as a repudiation of the worker's obligation under the contract. This is also given vent by the case of *Anene v Allen & Co Ltd*<sup>18</sup> wherein his Lordship Brett J.S.C (as he then was) said a servant who deliberately absents himself from work commits a breach of contract sufficient to justify his dismissal and does not necessarily by so doing terminate the contract.

Under the statute however, section 43 of the Trade Disputes Act<sup>19</sup> provides:

*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>20</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 in as a result of their involvement in a strike action. 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>21</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. After all, the right to strike by workers and their organisations is the only recognized means of defending their occupational interests. This right is an essential element in the principle of collective bargaining without which organized labour is

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<sup>18</sup> (1975) 5 U.I.L.R 404

<sup>19</sup> *Ibid.*

<sup>20</sup> [2006]17 NWLR (pt. 1008) 280.

<sup>21</sup> 158 of 1982.

powerless to deal with management.<sup>22</sup> Consequently any dismissal or termination in consequence of a union activity amounts to an unfair dismissal.

### **iii. Dismissal without Notice**

It is a notorious principle of law in the 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>23</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>24</sup> Dismissal here is referred to as summary dismissal which dispenses with the necessity of notice.

There exists a difference in Nigeria law on requirement of notice in termination and dismissal. Whereas dismissal dispenses with notice, termination *strictu sensu* requires notice or payment of salary in lieu of notice<sup>25</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.

### **iv. Dismissal and Termination without Motive**

The position of 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

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<sup>22</sup>K C Nwogu, *Collective Agreement in the settlement of Trade Dispute in Nigeria: Implications for Industrial and Labour relations*, (Enugu: Nolix Educational Publications Nig, 2010) 181; P E Oshio, 'Banks Strike and The Law in Nigeria' [2004] (8)(1-2) *MPJFIL*, 206; O V C Okene, 'The Legal Regulation of Strike in Nigeria: A Critical Appraise' [2001](5)(4) *Modern Practice Journal of Finance and Investment Law*, 606.

<sup>23</sup>C Nwagbara, *Determination of Contract of Employment and Remedies for Wrongful Dismissal* (Nigeria: Tait Publishers, 2000) 50.

<sup>24</sup>*New Nigerian Bank v Osunde* [1998] 9 NWLR (pt. 566) 511, 514.

<sup>25</sup>LA, s.11 (6).

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>26</sup> when he states: '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'.

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>27</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. This is a welcome development particularly in the light of article 4 of ILO Convention.<sup>28</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>29</sup>. This, the National Industrial Court can do by relying on section 254C of the Constitution<sup>30</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.

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 provisions of a statute regulating the employment in question. It is time, for us 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.

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<sup>26</sup>C K Agomo, *Nigeria Employment and Labour Relation, Law and Practice* (Lagos: Concept Publications Ltd, 2011) 169.

<sup>27</sup>*Ajayi v Texaco (Nig) Ltd* [1987] 3 NWLR (pt. 62) 577.

<sup>28</sup>Termination of Employment Convention No 158 of 1982.

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

<sup>30</sup>Constitution of Federal Republic of Nigeria 1999 (as amended) (Third Alteration) Act.

### **Remedies for Summary Dismissal**

An employee whose contract of employment is wrongfully terminated and/ or unfairly dismissed has certain remedies available to him. The contract of employment may itself make express provisions concerning the remedies available to the parties in the event of a breach. In such instances, the court will follow the express provisions of the contract.

Generally, the remedies available to an unfairly dismissed employee are: conciliation, reinstatement, damages, declaration, compensation, claim on a *quantum meruit*. However, the nature of the contract of employment between the employer and employee will determine the remedy available to an aggrieved employee. In a master/servant type of employment, the court in *New Nigeria Newspapers Ltd v Atoyebi*,<sup>31</sup> stated that a servant unfairly dismissed in a master/servant type of employment, the only remedy available to him is an award of damages in the amount he would have earned if his appointment had been properly determined. The servant is to be paid all his salaries and entitlements up to the date of his dismissal and salary in lieu of notice where the terms of the contract of employment provide such.

An unfairly dismissed employee whose contract of employment is clothed with statutory flavor, the remedies available to the employee are specific performance of the contract, injunction, and/or reinstatement, which are not available to employees whose appointments are terminated in simple contracts of master and servant<sup>32</sup>. Where an employee is to be paid wages for the completion of a certain task, but he was unable to complete it because of the fault of his employer, the employee will be entitled to sue upon a *quantum meruit* (as much as he deserves).<sup>33</sup> Therefore, remedies available to an employee unfairly dismissed will depend on the nature of the contract, the terms of the contract, the facts and circumstances of the case.

### **International Labour Organization Standards on Summary Dismissal**

International Labour Organization is an agency of the United Nation Organization dedicated towards prescription of labour standards and recommending actions for member states. It was established following

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<sup>31</sup> (2013) LPELR – 21489 (CA).

<sup>32</sup> *Emmanuel Odibo v First Bank* (2018) LPELR -46628 (CA).

<sup>33</sup> Okene (n 33) 128.

the treaty of Versailles which ended the World War II.<sup>34</sup> There is absence of statutory protection against unfair dismissals in Nigeria. However, the ILO in its efforts to set standards of practices in the work place particularly as it relates to security of tenure of employment fashioned out recommendation, concerning termination of employment and convention on termination of employment.<sup>35</sup> International Labour Organization was influenced in its decision to set out the above recommendation and convention as a panacea to the ugly situation where an employer can dismiss the employee without any reason or motive.

It is instructive to note that the standards on unfair dismissal which are encapsulated in ILO Termination of Employment Convention 158 of 1982 was adopted by the organization as a result of changes and developments in different counties on the subjects of termination of employment.

Such a situation where an employee is dismissed without any reason or motive is described as a violation of all things fair and just, which amounts to a 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 unless connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service.

The aim 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 employers are 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 reason such as gross misconduct, incompetence, disobedience, negligence amongst others, and such reasons that may be deemed to be connected with the operational requirement of an establishment.<sup>36</sup> This means that any exercise of power of termination of employment or dismissal of an employee contrary to the provisions of article 4 is unfair.

The ILO standards on termination of employment seek to find a balance between maintaining the employers right to dismiss workers for valid reasons and ensuring that such dismissals are fair and used as a last

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<sup>34</sup>International Labour Organisation 'International labour standards on Employment Security' <[www.ilo.org/global/standards/employment-security](http://www.ilo.org/global/standards/employment-security)> accessed 20 September 2021.

<sup>35</sup> ILO Convention 158 on Termination of Employment.

<sup>36</sup> G G Otuturu, 'The Limits of the Application of the Rules of Natural Justice in Contract of Employment' [2008] (2)(1) *Nigerian Journal of Labour and Industrial Relation*, 80.

report, and that they do not have a disproportionate negative impact on the worker<sup>37</sup>. It will be reiterated that valid reasons are mandatory requirement of the International Labour Organization Standards for Termination of Contract of Employment. It is a fundamental duty an employer owes an employee during the termination of the appointment of the employee. Article 2 of the convention<sup>38</sup> provides that the convention applies to all branches of economic activities and to all employed persons the phrase all employed person's depicts any person who is engaged in a gainful employment of any category. By the above provision of article 2, it applies 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 Nigeria labour and industrial law jurisprudence<sup>39</sup> where a clear cut distinction exists between master servant relationship and employment relationships protected by statutes or regulation made pursuant to a statutory provision.

This implies that since no distinction exist 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 provisions of article 8 and 9 of the convention. 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 in the place where termination occurred'. Article 9 (1) provide thus: 'The bodies referred to in article 8 of the convention shall be employed 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 burden for proving reasons for termination is on the employer.<sup>40</sup> The court shall also have regards to evidence produced by

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<sup>37</sup> *Ibid.*

<sup>38</sup> ILO Convention 158 on Termination of Employment 1982.

<sup>39</sup> B Atilola, 'Legal Redress for Wrongful Termination of Contract of Employment: What Lawyers must note' [2011] (15)(2) *Nigerian Journal of Labour and Industrial Relation*, 12.

<sup>40</sup> (n 38), art. 9(2).

parties and procedure provided by national laws<sup>41</sup>. The body shall then decide whether the reasons adduced for the termination was sufficient valid reasons recognized by article 4 of the Convention.”

Article 5 of the Convention captures what does not constitute valid reasons for termination of employment. It provides that the following shall not constitute valid reasons for termination.

- 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 proceeding against an employer involving alleged violation of laws or regulations or recourse to competence 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. Article 6 of the Convention 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 the termination of the contract of employment. The definition of what constitute 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 shall be determined in accordance with the methods of implementation referred to in Article 1 of the Convention.

Article 7 of the convention provides that the employment of workers shall not be terminated for reason to the workers conduct or performance where the employee was not given an opportunity to defend himself against the allegation made, unless the employer would not be reasonably expected to provide this opportunity. The provision of the article reiterates the fundamental principles of fair hearing in the determination

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<sup>41</sup> *Ibid.*, art. 9(2) (b).

of contract of employment<sup>42</sup>. According to 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 in 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. However, the convention provides that a member state may exclude the following categories of employed persons from all or some of the provision of the convention.<sup>43</sup> (a) workers engaged under a contract of employment for a specified period of time or a specified task;

- i. Workers serving a period of probation or a qualifying period of employment, determination in advance and of reasonable duration, and
- ii. Workers engaged on a casual basis for a short period.

Despite the leverage seemingly allowed member states to exclude obtain categories of workers from the operation of the convention if they so wish, the convention when added to impose obligation on a member state wishes to exclude such workers from the application of the convention the safeguard is embedded in article 2/3 of the convention which 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>44</sup>. This creates an obligation on a member state who intends to exclude the provision of the convention to certain employed persons to find such person's protection equivalent to the protection afforded them under the convention this is indeed and international entrenchment of security of tenure to vulnerable categories of employees. This is contrary to common law position of termination at will in Nigeria

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<sup>42</sup> (n 38), art. 7.

<sup>43</sup> *Ibid.*, art. 2(2).

<sup>44</sup> *Ibid.*, art. 2(3)(4).

## **Applicability of International Labour Organisation Standards on Summary Dismissal in Nigeria**

Application of International Labour Organisation Standards revolves around the roles of the organs of government of a particular country and the Constitution of the Country. In Nigeria, there are three arms of government which are: the Legislature, Executive and Judiciary and they have a role to play on the applicability of International Labour Organisation Standards on unfair dismissal in Nigeria. For this reason, effort is focused on the roles of the three arms of government in Nigeria in the application of ILO Standards on unfair dismissal.

Once International Labour Organisation deems it fit to adopt a particular standard for purposes of curbing a global labour issue, it becomes the duty of the executive arm of government of a state with the executive power to accede to the convention and ratify same. The executive power aforesaid is vested in the President as provided in the Constitution:

*Subject to the provisions of this Constitution, the executive powers of the Federation is vested in the President and may be, subject as aforesaid and to the provisions of any law made by the National Assembly be exercised by him either directly or through the Vice President and Ministers of the Government of the Federation or officers in the public service of the Federation.<sup>45</sup>*

From the foregoing provision, it is obvious that the president of the Federal Republic of Nigeria has the duty to ensure that International Labour Organisation conventions adopted by the International Labour Conference are ratified since the power to make laws with respect to implementation of international treaties and conventions lies with the Government of the Federation.<sup>46</sup>

It is also the duty of the Executive to pursue social and foreign policy objectives of Nigeria as enshrined in the Constitution.<sup>47</sup> Member states of the International Labour Organisation are under obligation to ensure that effect is given to the standards adopted by the Organisation. The ILO Termination of Employment Convention<sup>48</sup> which provides the International Labour Organisation standards on unfair dismissal is

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<sup>45</sup>Constitution of Federal Republic of Nigeria,1999(as amended), s. 5 (1).

<sup>46</sup>CFRN, s. 12.

<sup>47</sup>*Ibid*, s 15 & 16(2).

<sup>48</sup>158 of 1982.

targeted at ensuring employment security in member-countries of the International Labour Organisation.

If the Federal executive council of Nigeria deems it necessary to stop arbitrary exercise of power of dismissal and termination, then they will have to ratify ILO Convention on Termination of Employment which contains the standards on unfair dismissal the subject matter of this work and pursue the legislature to domesticate it.

The legislature has a role to play in the domestication of International Labour Standards. The concept of domestication in the context of international treaties simply refers to a process by which a state party to a treaty achieves incorporation of the treaty into its municipal law. This incorporation of international treaties and conventions requires the legislative actions of the legislative arm of government in Nigeria. This is because by the Nigeria Constitution, any international treaty or convention without domestic legislative cover cannot give rise to any legally enforceable right or obligation on the part of any person in a domestic court. This means that the legislature has the obligation to ensure that any treaty or convention ratified by the Executive Arm of Government is enacted into domestic law so that citizens can take the benefits and rights inherent in the treaty or convention.

The National Assembly is constitutionally empowered to undertake the domestication of international treaty which Nigeria entered into and ratified by the executive arm of government not minding the subject matter of the international treaties and conventions. This is pursuant to the Constitution which provides that: 'The National Assembly may make laws for the Federation or any part thereof with respect to matters not included in the Exclusive Legislative List for purposes of implementing a treaty'.<sup>49</sup>

Therefore, the legislature saddled with the responsibility of ensuring the implementation of labour standards on unfair dismissal is the National Assembly. It is urged that as soon as the Convention is ratified, that the National Assembly will proceed immediately to give the Convention an enabling legal framework that will ensure the application of the convention without the necessity of domestication just like it happens in monist countries.

The Court as the institution of the third arm of government has enormous role to play. This role is purely interpretation of laws to ascertain the

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<sup>49</sup> CFRN 1999, s 12(2).

rights, duties and liabilities of individuals and bodies in Nigeria. This primary duty of court is enshrined in the Constitution:

*The judicial powers rested in accordance with the forgoing provision of this section shall extend to all matters between persons, or between government or authority and to any person in Nigeria, and to all actions and proceedings relating thereto for the determination of any question as to the civil rights and obligations of that person.*<sup>50</sup>

This depicts that the court is in the business of determining rights and obligations of persons in a particular society. These rights and obligations are in the provisions of a country's laws which form part of its legal system. What then is the attitude of Nigerian courts to implementation of treaties in Nigeria? The application of treaties by domestic courts in Nigeria is anchored on the constitutional framework. Analysis of the role of courts in Nigeria over implementation of international treaties and conventions involves four main approaches which are:

- a. Direct application of international law;
- b. Use of international law as a guide for interpreting domestic law;
- c. Establishment of a jurisprudential principle, based on international law; and
- d. Reference to international law to strengthen a decision on domestic law.

### **Lessons from Other Jurisdictions**

Having examined dismissal of workers in Nigeria, it is necessary to examine dismissal of workers in other jurisdictions with a view to knowing the practice in other countries. Thus, the work examines the dismissal of workers in the United Kingdom and Ghana so as to learn some key lessons in these countries.

### **United Kingdom**

In the United Kingdom, the legal framework for unfair dismissal is the Employment Rights Act.<sup>51</sup> This Act provides a statutory framework for job security by specifying grounds upon which any act of dismissal may be anchored. This statutory framework is as provided in section 94 of

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<sup>50</sup>CFRN 1999 (as amended), s. 6(6) b.

<sup>51</sup>(UK)1996.

Employment Rights Act<sup>52</sup>. It is automatically unfair for an employer to dismiss an employee, regardless of length of service, for reasons related to discrimination as protected by the Equality Act,<sup>53</sup> the woman employee becoming pregnant, or having previously asserted certain specified employment rights. However, an employee must have worked for a year to have the right against unfair dismissal and the claim must be brought within 3 months after the cause of action arose.

Fair reasons for termination include:

- a. a reason relating to the employee's conduct;
- b. a reason relating to the employee's capability or qualifications for the job;
- c. because the employee's job was redundant;
- d. some other substantial reason of a kind which will reasonably justify dismissal.

Assuming the employee has proven dismissal, the employer will carry the burden of proving whether the dismissal was potentially fair or automatically unfair<sup>54</sup>. This burden rests squarely on the employer<sup>55</sup>. Where the tribunal finds a claim of unfair dismissal proved in the United Kingdom, the tribunal can order reinstatement of the employee which means that the employee will go back to his old job. The tribunal is also competent to order re-engagement of the employee which means re-employment of the employee in a new job or compensation.

## **Ghana**

Termination of employment in Ghana is governed by the Labour Act.<sup>56</sup> Section 15 of the Labour Act provides for the termination of employment which are: by mutual agreement between employer and the worker, by the worker on grounds of ill treatment or sexual harassment, by the employer on death of the worker before the expiration of the period of employment, by the employer if the worker is found on medical examination to be unfit for employment, by the employer because of the inability of the worker to carry out his or her work due to sickness or accident, incompetence, proven misconduct of the worker.

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<sup>52</sup> *Ibid.*

<sup>53</sup> Equality Act, 2010.

<sup>54</sup> Employment Rights Act, s.98.

<sup>55</sup> *Adams v Derby City Council* (1986) IRLR 163.

<sup>56</sup> Labour Act 2003.

By this provision, any act of termination/dismissal in which none of the grounds listed above is found, amounts to wrongful termination. Parties to employment contract are also bound to give reason for termination and such reasons must fall under the ground listed above.

Section 17<sup>57</sup> provides for the notices of termination applicable to contract of employment, and all notices must be in writing and the day in which the notice is issued is included in the calculation of the period of notice.<sup>58</sup> A worker's employment is said to be terminated unfairly in the Act<sup>59</sup> if the only reason for the termination is:

- a. That the worker has joined, intends to join or has ceased to be a member of a trade union or intends to take part in the activities of a trade union;
- b. That the worker seeks office as, or acting in the capacity of, a worker's representative;
- c. That the worker has filed a complaint or participated in proceedings against the employer involving alleged violation of this Act or any other enactment;
- d. The worker's gender, race, colour, ethnicity, origin, religion, creed, social, political or economic status;
- e. In the case of a woman worker, due to the pregnancy of the worker or the absence of the worker from work during maternity leave;
- f. In the case of a worker with disability, due to the worker's disability;
- g. That the worker is temporarily ill or injured and this is certified by a recognized medical practitioner;
- h. That the worker does not possess the current level of qualification required in relation to the work for which the worker was employed which is different from the level of qualification required at the commencement of his or her employment; or
- i. That the worker refused or indicated an intention to refuse to do any work normally done by a worker who at the time was taking part in lawful strike unless the work is necessary to prevent actual danger to life, personal safety or health or the maintenance of plant and equipment.

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<sup>57</sup> LA. Ghana.

<sup>58</sup> LA. Ghana, s 17(4).

<sup>59</sup> *Ibid*, s 63.

A termination may also be unfair where the employer fails to prove that the reason for the termination is fair, or the termination was made in accordance with a fair procedure of this Act.<sup>60</sup>

The remedies for unfair dismissal are provided for in section 64<sup>61</sup> which includes:

1. A worker who claims that the employment of the worker has been unfairly terminated by the employer may present a complaint to the Commission
2. If upon investigation of the complaint the Commission finds that the termination of the employment is unfair. It may:
  - a. Order the employer to re-instate the worker from the date of the termination of employment;
  - b. Order the employer to re-employ the worker, either in the work for which the worker was employed before the termination or in other reasonably suitable work on the same terms and conditions enjoyed by the worker before the termination, or
  - c. Order the employer to pay compensation to the worker.

These provisions are not in Nigeria's Labour Act. The Supreme Court of Nigeria is rather of the position that you cannot force an employee on an unwilling employer.

### **Conclusion**

The current status of law and practice of termination of employment and dismissal from employment in Nigeria still leaves much to demand. The position of law still twists the fate of an employee in the hand of a draconian employer who could dismiss his employee at will and without a valid reason for same. Sadly, Nigerian still stick to the unfair position of common law in determination of employment notwithstanding the fact that so many countries of the world have moved away from this ugly trend and embraced the ILO standards for fair and good grounds for determination of contract of employment whenever the need arises. This ILO Convention has not witnessed life in Nigeria, some challenges have been bottlenecks for its realization. These challenges are but not limited to non-ratification of the convention by the Executive Arm of Government of Nigeria, the un-readiness of Nigerian Government to domesticate the

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<sup>60</sup> *Ibid*, s 63(4)(a)

<sup>61</sup> L.A, Ghana.

convention, the seeming inconsistency in the Constitution as regards application of labour treaties and conventions. Another factor is the absence of a legal framework for effective application of ILO standards on unfair dismissal in Nigeria. Undoubtedly, the above positions have led to insecurity of tenure of employment in Nigeria particularly in the private sector employment where the terms of employment are not backed up with a statute. However, if the recommendations in this paper based on the findings of facts are to be put in practical operations, termination of employment will wear a new look particularly with regard to unfair dismissal of employees.

### **Recommendations**

Having compared the ILO Standards with the current statutory authorities on contract of employment as regards the unfair dismissal of employees in Nigeria and having stated the need for the domestication of ILO standards in Nigeria as to what is obtainable elsewhere, the following recommendations are hereby suggested with a view of making a policy of fair dismissal in Nigeria:

- i. Set up a Committee in the National Assembly for Ratification of ILO Conventions.
- ii. Expunge the Constitutional Provision Requirement for Domestication of Labour Treaties and Conventions.
- iii. Create a Supervisory and Monitoring Body for Implementation of Labour Treaties and Conventions.
- iv. Adequate funding of the body/institution created for effective implementation.
- v. Enactment of Unfair Dismissal Act.
- vi. Provision for Reinstatement as a remedy for Unfair Dismissal in the Proposed Unfair Dismissal Act.
- vii. Fair Hearing Provision in the Proposed Unfair Dismissal Act.