

# Toxic Messages from Digital Lenders: Effects on an Employee's Contract of Employment

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## Abstract

*Digital lending firms are existent in Nigeria. The firms provide financial services through digital platforms by giving loans in an easy and fast way. The debt recovery strategies adopted by some of the firms include sending toxic and shameful messages to the personal contacts of the defaulters. The doctrinal method of research was adopted in this work to examine the effects of the unethical debt collection strategies on an employees' contract of employment. It was found that the Nigerian Constitution guarantees the right to privacy. However, there is no law regulating an employer's decision making with regards to an employee's off duty conduct in Nigeria. Also, employers occupy an advantageous position over employees relating to dismissal of an employee on grounds of scandalous messages from a digital lender's firm and employees with meagre wages may be unable to seek redress in the National Industrial Court of Nigeria due to cost of litigation. It has been recommended that a law should be enacted to regulate an employer's decision making based on an employee's off duty conduct. Second, an administrative board should be established to handle issues such as dismissals administratively without cost. The decisions should be entered as judgement by the NICN and the appeals of the board's decision should lie to the NICN.*

**Key words:** Employer, Employee, Digital Lenders, Loans, Dismissal, Off Duty

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## 1. INTRODUCTION

The digital lending companies are common in Nigeria. The digital lending companies or firms offer loans to the public. The consumers obtain the loans through digital platforms easily by using smartphones. The process of loan application to disbursement of the loans to the consumer is automated. The major characteristic of digital lending is that it is speedy. A process which ordinarily would have taken twenty- four hours or more in a traditional bank setting which is subject to approvals can be done in less than an hour. The essence of the digital finance set up is to lower the cost of lending, provide a transparent system that is accessible to the poor in the society and ensure responsible lending.<sup>1</sup>

Employees can be consumers of digital loans upon application and grant of the loans to them. The entire process of the loan is likely not to be known to the employers and even when known, it is a private matter of the employee. Also, obtaining loans is not fraudulent or illegal. However, in some cases the employers are confronted with the task of balancing the interest of their business and the privacy of the employees to sustain the reputation of the business. The interface between the privacy of the employee and an employer's interest may arise when an employee fails or defaults in payment of the loans and negative messages emanate from the lending firm for default in payment of the loan. The question that may arise is whether the circulation of toxic messages against an employee for default in payment of loans can have any effect on the employee's contract of employment.

To answer the above question, recourse will be had to the Nigerian law to ascertain the extent to which an employer can take actions against an employee for shameful messages published and circulated by a digital lending firm for the employee's default in loan

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<sup>1</sup> C Pazarbasiglu, AG Mora, M Uttamchandani, H Natarajan, E Feyen and M Saal 'Digital Financial Services' <<https://www.google.com/url?sa=t&source=web&cd=&ved=2ahUKEwjL44aispb7AhXux4UKHYJnC1gQFnoECBcQAQ&url=https%3A%2F%2Fpubdocs.worldbank.org%2Ffen%2F230281588169110691%2FDigital-Financial-Services.pdf&usg=AOvVaw2TC4gM5KZWs1-tlGv2-yH>> Accessed 5 November 2022.

repayment. Also, the work will ascertain whether an employee is protected under the law against dismissals for off duty conducts.

## 2. NATURE OF ONLINE LOAN APPLICATIONS

Digital lending firms have developed as an alternative to the traditional banking system.<sup>2</sup> It is referred to as alternative lending.<sup>3</sup> Lately, the cyber space is filled with the digital lending applications which are available for download on smartphones and computers. They offer lending services. Processing of the loans are done digitally (online). The procedure involves supplying personal information of the loan applicant which includes bank details. The loans processed are deposited in the consumer's account within a short period of time after complying with the loan approval process.

The nature of loans granted through the digital lending firms are quick unsecured loans with high interest rate.<sup>4</sup> Repeated patronage and due payment builds the trust between the lending firm and the consumer thereby creating a room for larger sums and more flexible loans.<sup>5</sup> The digital lending firms in Nigeria include: Fairmoney instant loan app, Okash loan app, Palmcredit instant loan and Lydia.co.

The digital lending platforms are offshoots of financial technology (FinTech). FinTech refers to the technology devised to provide financial services.<sup>6</sup> It has transformed the financial sector by

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<sup>2</sup> T Ravikumar, N Murugan and J Shashini 'Digital Lending: Is It Alternative Lending Revolution' (2019) 8(10) *International Journal of Scientific and Technology Research*  
[https://www.researchgate.net/publication/337011141\\_Digital\\_Lending\\_Is\\_It\\_Alternative\\_Lending\\_Revolution](https://www.researchgate.net/publication/337011141_Digital_Lending_Is_It_Alternative_Lending_Revolution) Accessed 9 October 2022.

<sup>3</sup> Ibid.

<sup>4</sup> N Lainez, TP To and BTT Doai 'Lending Apps in Vietnam: Facebook Groups Offer Guidance, Comfort and Contention to Borrowers in Jeopardy' (2021) 72 *Yusuf Ishak Institute*  
[https://www.researchgate.net/publication/351954105\\_Lending\\_Apps\\_in\\_Vietnam\\_Facebook\\_Groups\\_Offer\\_Guidance\\_Comfort\\_and\\_Contention\\_to\\_Borrowers\\_in\\_Jeopardy/link/60b1afb392851cd0d980cdfc/download](https://www.researchgate.net/publication/351954105_Lending_Apps_in_Vietnam_Facebook_Groups_Offer_Guidance_Comfort_and_Contention_to_Borrowers_in_Jeopardy/link/60b1afb392851cd0d980cdfc/download) Accessed 9 October 2022.

<sup>5</sup> Ibid.

<sup>6</sup> S Anyfantaki 'The Evolution of Financial Technology (FINTECH)' (2016) 44 *Economic Bulletin*  
[https://www.researchgate.net/publication/347946398\\_The\\_Evolution\\_of\\_Financial\\_Technology\\_FINTECH/link/5fe9929b45851553a0fb45a6/download](https://www.researchgate.net/publication/347946398_The_Evolution_of_Financial_Technology_FINTECH/link/5fe9929b45851553a0fb45a6/download) accessed 9 October 2022.

enabling consumers to easily get access to financial services. It has also reduced the burden of the client who earlier would have to visit the lending firm and fill forms supplied by the firms on work days. With technological advancement, the client can sit in the comfort of his home and apply for the loans on any day including public holidays with the use of his smartphone.

While it is an applaud that there is technological advancement in the financial industry and people can easily access loans, there have been a wave of unethical strategies adopted by the digital lending firms in a bid to recover loans from defaulters. One method devised by the lenders is accessing the defaulter's contact and sending toxic and shameful messages to the contacts. The messages in some cases portray the defaulters as fraudsters, ritualist and so many other toxic names. It is no doubt that the messages to the contacts affect the reputation of the defaulters in the eyes of the recipients.

The unethical strategy for loan recovery is not peculiar to Nigeria. It is also obtainable in Vietnam. Loan defaulters are confronted with threat messages and cyber harassment from the digital lenders for failure to pay the loans.<sup>7</sup> The situation as stated is same with Nigeria and the common purpose is to scare the debtors to pay up or to embarrass and defame the debtors.

### **3. CONCEPT OF DISMISSAL**

Dismissal is a form of determination of a contract of employment. Dismissal is a disciplinary action taken against an employee which deprives an employee of terminal benefits.<sup>8</sup> Though dismissal repudiates the contract of employment, it is distinct from a termination of a contract of employment.

***Termination Distinguished from Dismissal:*** Termination and dismissal have the same effect of bringing a contract of employment to an end. However, there is a distinction between the two terms. In

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<sup>7</sup> N Lainez, TP To and BTT Doai 'Lending Apps in Vietnam: Facebook Groups Offer Guidance, Comfort and Contentment to Borrowers in Jeopardy' (n 4).

<sup>8</sup> *Chinenye Robinson v Access Bank PLC & I Or* (n 59).

the case of *Union Bank of Nigeria PLC v. Soares*,<sup>9</sup> the Court of Appeal gave a clear distinction by stating that, termination gives parties the right to terminate the contract of employment by giving the prescribed period of notice while dismissal is a disciplinary measure which carries no benefit. In *Ekunola v CBN & Anor*.<sup>10</sup> the Supreme Court stated that an employee who is dismissed is not entitled to any notice or salary in lieu of notice and that it would be wrong to make any award with regards to that effect.

Finally, termination of employment is done in accordance with the laid down procedures as contained in the Labour Act<sup>11</sup> or as agreed upon by the parties. Dismissal on the other hand is done instantly or in accordance with the disciplinary procedure put in place by the employer in the employee handbooks or any other guidelines to curtail misconducts in an organization.

#### 4. LAWS REGULATING DIGITAL LOAN RECOVERY IN NIGERIA

The laws regulating digital money lenders in Nigeria include the Central Bank of Nigeria (CBN) Act<sup>12</sup> and its regulations, Banks and Other Financial Institutions Act (BOFIA),<sup>13</sup> Money Lenders law and the Nigerian Data Protection Regulation 2019. Pertaining to loan recovery following default and use of data, the CBN Act and its regulation as well as the Nigeria Data Protection Regulation 2019 will be discussed hereunder.

- a. ***CBN Act and Regulations:*** The CBN was established under the CBN Act.<sup>14</sup> It is an independent financial body vested with the power to control and administer the policies of the monetary and financial sector of Nigeria.<sup>15</sup> One of the roles of CBN is to promote a sound and healthy financial system in Nigeria.<sup>16</sup> This applies to the operation of digital money

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<sup>9</sup> [2012] 11 NWLR (pt. 1312) 550.

<sup>10</sup> [2013] 15 NWLR (pt. 1377) 224.

<sup>11</sup> Labour Act Cap L1 LFN 2004 (as updated) s 9(7).

<sup>12</sup> CBN Act, 2007.

<sup>13</sup> BOFIA 2020.

<sup>14</sup> CBN Act s 1.

<sup>15</sup> CBN 'About CBN' <https://www.cbn.gov.ng/AboutCBN> Accessed 17 October 2022.

<sup>16</sup> Ibid.

lenders and modes of loan recovery. To protect consumers, the CBN has made a guideline to regulate the activities of digital lending firms. The guideline is known as the Central Bank of Nigeria, Consumer Protection Guidelines on Responsible Business Conduct.<sup>17</sup> The aim of the guideline is to protect consumers from unethical practices that undermine the financial section of Nigeria.

With regards to loan recovery, financial institutions are prohibited from contacting the friends, employer or associates of the clients in connection with repayment of the loan except the person so contacted guaranteed the loan or the person agreed to be contacted.<sup>18</sup>

The guideline contains provisions on sanctions for violation of the guidelines.<sup>19</sup> However, there is no specific sanction for contacting persons close or related to the client. What is contained therein is a general provision stating that other violations of the guidelines in which sanctions are not expressly stated shall attract sanctions as provided in the CBN Act, BOFIA and any other related law.<sup>20</sup> However, CBN Act and BOFIA Act does not stipulate penalties for the unethical debt recovery perpetuated by the digital lending firms.

b) ***Nigeria Data Protection Regulation 2019:*** To monitor the use of electronic data and electronic communication, the Nigeria Data Protection Regulation, 2019 was made and the rules contained therein apply to digital lending firms in Nigeria. The Regulation as made by the National Information Technology Development Agency (NITDA) is an exercise of the power to make regulations stipulated in the NITDA Act.<sup>21</sup>

By the rules of the regulation, data collected from consumers shall be for a legitimate or lawful purpose consented by the consumer.<sup>22</sup> Also, the regulation requires that the data should be

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<sup>17</sup> Central Bank of Nigeria, Consumer Protection Regulations 2019.

<sup>18</sup> CBN Consumer Protection Regulations Part four, paragraph 5.5.7.

<sup>19</sup> CBN Consumer Protection Regulations Part six, paragraph 7.

<sup>20</sup> CBN Consumer Protection Regulations Part six, paragraph 7.6.

<sup>21</sup> NITDA Act 2007 s 32.

<sup>22</sup> Nigeria Data Protection Regulation 2019 part 2 (1a).

without prejudice to the dignity of human persons.<sup>23</sup> In addition, data collected by the lending firm are to be used or applied taking into cognizance the rights of the consumers as contained in the CFRN.<sup>24</sup> The regulation vests a duty of care on the lending firm who is in custody of the data of the consumer.<sup>25</sup> As such, an aggrieved consumer can seek a redress in a court of law for breach of the duty where shameful messages are published and circulated to the consumer's contacts or social media handles.

There are penalties for the violation of the Regulation. For a custodian of data referred to as 'Data Controller' in the Regulation with more than ten thousand data subjects, the fine is stated to be 2% of the annual gross revenue of the preceding year or a fine amounting to the sum of ten million naira (N10,000,000).<sup>26</sup> In the case of a lending firm with less than ten thousand data subjects, the fine is 1% of the annual gross revenue of the preceding year or a fine amounting to the sum of two million naira (N2,000,000).<sup>27</sup> The penalties as stipulated are adequate in preventing violation of the law. However, there are violations of the rights of consumers of loans by the digital lending firms. This means there is non- implementation and non-enforcement of the Regulation in Nigeria.

## **5. CAN DISCIPLINARY ACTIONS BE TAKEN BY AN EMPLOYER FOR LOAN APPS' TOXIC MESSAGES AGAINST AN EMPLOYEE?**

When a person applies for a loan online from a digital lender, the digital lenders require access to the applicant's personal information such as contents of phone (like contacts, call log, text message log), emails and bank account details.<sup>28</sup> The information

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<sup>23</sup> Nigeria Data Protection Regulation part 2 (1b).

<sup>24</sup> Nigeria Data Protection Regulation part 2 paragraph 2.9.

<sup>25</sup> Nigeria Data Protection Regulation part 2 paragraph

<sup>26</sup> Nigeria Data Protection Regulation part 2 paragraph 2.10 (a).

<sup>27</sup> Nigeria Data Protection Regulation part 2 paragraph 2.10 (b).

<sup>28</sup> MB Adisa, CD Ogbonnaya and JT Monye 'Legal Dimensions To The Menace of Digital Lending Companies (Online Loan Apps) in

Nigeria'<https://www.google.com/search?q=laws+regulating+digital+money+lending+in+nigeria+pdf&dq=Laws+regulating+digital+money+lending&aq=chrome.3.69i57j33I3.28144j0j9&client=ms-android-transion-tecno-rev1&sourceid=chrome-mobile&ie=UTF-8> Assessed October 10, 2022

obtained by the digital lending firm is then used against defaulters to lure them to repay the loan. The luring involves sending messages to the contacts of the defaulter defaming or bullying him.<sup>29</sup> Where the employee has the employer's contact in his phone, there is a tendency that the employer may receive such scandalous messages. The situation can be illustrated as follows: Mr. Femi is the sales representative of Gregs Pharmaceutical company. He relates directly with the distributors of the company. Mr. Femi is in dire need of money and he downloaded AshCredit App from play store in his smartphone. He logged into the app. He is requested to grant AshCredit access to his phone contact among other requirements. He grants access to his phone contact. After supplying all other details, Mr Femi's account is credited with twenty-five naira (N25,000) within two minutes.

Mr Femi refunded once and subsequently defaulted. Ashcredit sent messages to him to pay the loan as agreed and he failed to pay as directed. Ashcredit sent messages warning him and threatening to send messages to his contacts if he does not refund the money. Then Ashcredit sends bulk messages to Mr Femi's contact notifying them to avoid Mr. Femi, that he is a chronic cheat, fraudster and a perpetual debtor. His employer, Greg Pharmaceutical Company's managing director and distributors got the messages too. Considering the scenario explained, can he be dismissed by his employer? If Mr. Femi is dismissed, will Gregs Pharmaceutical be justified in dismissing Mr Femi.

It is essential to note that the lending of money from the digital lenders is an off duty activity and not related to the employer's work. Therefore, one will be wondering whether an employee will be dismissed for an employer's receipt of shameful messages against the employee. The dismissal will depend on three factors. They are; the code of conduct of the workplace, likelihood of the employee's act damaging the employer's interest and the position occupied by the employee in the workplace.

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<sup>29</sup> Ibid.



The code of conduct is an organization or company set rules or guidelines that regulate behaviour.<sup>30</sup> The code of conduct of a workplace regulate the employees behaviours in the course of employment. For instance, the International Committee of the Red Cross (ICRC) has its code of conduct for its employees. The purpose of the ICRC's code of conduct is to establish high standards of integrity and professionalism by providing ethical and behavioural framework to be complied with by employees on a daily basis in the workplace.<sup>31</sup> The code of conduct contains rules and regulation of ICRC, policies on workplace harassment, abuse of power and sexual exploitation, rules pertaining to the duty of discretion and use of information technology facilities in a workplace.<sup>32</sup>

While it may appear that the code of conduct regulates the behaviours of employees in a workplace, it does also regulate the lives of the employees to an extent off duty. For example, employees are prohibited from carrying out actions during duties or off duties that they know or ought to know would be inappropriate.<sup>33</sup> Also, employees are required not to do anything that would affect, harm or compromise ICRC's reputation.<sup>34</sup> An employer can hinge on the above stated provisions in the code conduct for shameful messages from digital lenders in disciplining the employee in question which in some cases the disciplinary actions will vary and not necessarily dismissal in the first instance. The disciplinary actions could take the form of queries, warning, suspension and where it amounts to gross misconduct, dismissal. What constitute gross misconduct depends on how it is couched in an employment's rules governing discipline of

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<sup>30</sup> SC Gilman 'Ethics Codes and Codes of Conduct as Tools for Promoting an Ethical and Professional Public Service: Comparative Successes and Lessons' <https://www.google.com/url?sa=t&source=web&cd=&ved=2ahUKEwj12PSTk5j7AhVIgP0HHWTYCDcQFnoECEcQAQ&url=https%3A%2F%2Fwww.oecd.org%2Fmena%2Fgovernance%2F35521418.pdf> Accessed 6 November 2022.

<sup>31</sup> ICRC 'Code of Conduct for Employees of the International Committee of the Red Cross' [https://www.google.com/url?sa=t&source=web&cd=&ved=2ahUKEwio6pbmg\\_n6AhXRR\\_EDHY6jCWAQFnoECAOQAQ&url=https%3A%2F%2Fwww.icrc.org%2Fsites%2Fdefault%2Ffiles%2Fwysiwyg%2Fcode\\_of\\_conduct\\_may\\_2018.pdf&usq=AQvVaw0yzw3ZYTBj5fxsFnVTXoOG](https://www.google.com/url?sa=t&source=web&cd=&ved=2ahUKEwio6pbmg_n6AhXRR_EDHY6jCWAQFnoECAOQAQ&url=https%3A%2F%2Fwww.icrc.org%2Fsites%2Fdefault%2Ffiles%2Fwysiwyg%2Fcode_of_conduct_may_2018.pdf&usq=AQvVaw0yzw3ZYTBj5fxsFnVTXoOG) accessed 22 October 2022.

<sup>32</sup> Ibid.

<sup>33</sup> Ibid.

<sup>34</sup> Ibid.

employees though it has been held to be behaviours of an employee that amounts to dishonesty, gross negligence, disobedience to an employer's lawful order, theft and malicious damage.<sup>35</sup>

The second issue to be considered is whether the messages received have the potential of causing a damage to the employer's business reputation or interest. The case of *Cuculoski v Australian Transit Group T/A Buswest*<sup>36</sup> can be illustrated to explain how an employee's off duty conduct can damage an employer's reputation. In the case, there existed a triangular employment relationship between an employee, his employer (the company) and a client (the Crown Casino). The employee was employed by the company as a bus driver. His duty was to render services to the Crown Casino. The bus driver collected a loan of ninety dollars from one of the patrons of the Casino whom he knew in the course of the employment. The loan was collected on the terms that he would repay on the next day. He failed to pay the patron as agreed. Sometime in February, 2020, the manager of the Casino sent a mail to the company against its employee (the bus driver) complaining that he got a loan from the patron and failed to pay back. The manager however stated that the actions of the employee have the possibility of portraying the casino in a bad light. Upon receipt of the mail, the employee was invited by the company and notified of the content of the email. The company further informed the employee that the act of borrowing from the patron of the casino was unacceptable and could harm the relationship of the casino and the company. Based on that, the chief administration officer served the employee a warning letter. The employee refused service of same and annoyingly left the office. The employee went to the Casino and attempted to discuss the issue with the Casino's staff. The manager of the Casino was notified of the bus driver's visit and he further wrote to the company complaining of the bus driver's behaviour after which the company tendered an apology to the Casino. The company summoned the employee, discussed his actions towards the Casino and subsequently dismissed him on the ground that his actions amounted to serious misconduct.

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<sup>35</sup> *Omagbemi v FBN* (2021) JELR 107153 (CA)

<sup>36</sup> (2020) FWC 3361.

The employee filed a complaint at the Fair Work Commission claiming that the dismissal was unfair. The contention of the employee was that he did not borrow in the course of duty but when he was off work and that he borrowed from the patron as a person and not in his capacity as a patron of the casino. The FWC held that the dismissal was fair as the employee's conduct had the potential of damaging the employer's interest by destroying the relationship of the company and the Casino.

Further, the position occupied by an employee will determine whether the employee will be dismissed for shameful messages circulated against him. Certain positions occupied by employees portray them as role models to persons they are employed to serve. That is, the roles have demands such as maintaining discipline or guiding persons to a successful career path or to counsel persons against illegal acts in the society. In *Woo v Putnam County Board of Education*,<sup>37</sup> the respondent was employed in 1986 by the appellant as a math teacher at Hurricane High School. He was arrested and charged to court for sale of a controlled substance (marijuana) in February 1993. He sold the substance to an undercover police officer. When the school board learnt of his arrest, Mr. Woo was transferred from the teaching position to another position in the board with the intent of preventing the respondent from having a close and regular contact with the students. The respondent was tried by the jury. Though he admitted consumption of the substance at home (off duty), he was not found guilty of selling the substance. After the acquittal, the respondent's case was publicized by two local newspapers and it prompted parents into writing petitions opposing the respondent's repositing to the teaching position. The board considered the respondent's role as a teacher and his admission of taking marijuana. The board dismissed the respondent on the ground of immorality. The respondent appealed the dismissal. The West Virginia Education Employees board upheld the dismissal. The respondent further appealed. The Circuit Court of Kanawha County reversed the decision of the Employee's board. The court held that no rational nexus was established between the off- duty act of

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<sup>37</sup> (No. 24631, Supreme Court of Appeals of West Virginia, June 24 1998).

consuming marijuana and his duty as a teacher. The appellant appealed to the Supreme Court and the court held that there was indeed a nexus between the off-duty act of consuming marijuana and Mr. Woo's duty as a teacher. Subsequently the Supreme Court reversed the decision of the Circuit Court and upheld the decision of the Employees' Board.

Another case which depicts a connection between an employee's private life and the nature of work is the case of *Attorney General, Cross River v Esin*.<sup>38</sup> In the case, the respondent, a High Court Judge of Cross River State judiciary was appointed as the Chairman, Board of Governors of Mary Hanney Secondary School, Oron. Mrs Annie Asaka was the principal of the school. Following scandalous circulation of an unsuccessful sexual favour story from the principal of the school against the respondent, he wrote a letter to her denying the allegation on the 27<sup>th</sup> day of October, 1982. Also, the respondent wrote another letter to Captain Ntiaidem, the director of studies in Nautical College, Oron on the 22<sup>nd</sup> day of November 1982 for intimidating his wife at work in the institution. The letters were submitted to the Cross River Judicial Service Commission. The commission perceived the letters to be vile and immoral thereby constituting a misconduct as a judicial officer. The trial court held that the contents of the letters did not constitute misconduct. The court held that the removal of the respondent was unconstitutional, null and void. The appellant (defendant before the trial court) appealed the decision of the trial court. The decision of the trial court was reaffirmed by the Court of Appeal. Agreeing to the lead judgement, Oguntade JCA (as he then was) stated that:

*I think that the demands of the office of a judge are such that his private life is inseparable from his public life. His private life mirrors his public life. A judge must be as much careful as to what he says or writes in private as in public. He must be a role model in his public and private life. But he is not a saint and cannot be one. He has his weaknesses and these include his temperaments.*

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<sup>38</sup> [1991] 6 NWLR (pt. 197) 365.

The case of *Attorney General, Cross River v Esin*<sup>39</sup> discloses that the nature of employment of employees in some situations could imply a relationship between the employee's professional role in a workplace and the employee's private life. All point to being a good role model. To further buttress the point, the case of *Reilly v Sandwell Metropolitan Borough Council*<sup>40</sup> will be analysed. In this case, Miss Reilly, a head teacher of a primary school was in a close relationship with Mr. Selwood, a sex offender convict. When the school got knowledge of the relationship, Reilly was first suspended and subsequently dismissed on the ground that her relationship with Mr. Selwood was a potential risk to the children in the school directly or indirectly. The court further held that if she had disclosed her relationship to Mr. Selwood to the governors of the school and the governors made her to undertake that the children under her care would be protected from Selwood, likely the dismissal would have been unfair. The decision of the trial court was upheld by the Supreme Court.

Applying the cases of *Woo v Putnam County Board of Education*,<sup>41</sup> *Attorney General, Cross River v Esin*<sup>42</sup> and *Reilly v Sandwell Metropolitan Borough Council*<sup>43</sup> to an employee's dismissal for receipt of shameful messages, it is clear that where an employee occupies a managerial position or works as an investment promotion officer, the employee assume the role to lead the organization and such scandalous messages have the potential of pulling down the reputation of the business or tarnishing the image of the organization. For instance, a life coach (a professional who helps people to make progress in life) employed by Company AZ is the subject of scandalous messages sent by Afrikloans being circulated to the public including the management staff of Company AZ, family members, colleagues and the company's clients. In such a situation, the messages will likely pull down the reputation of the company built over decades ago. In another situation, an examination

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<sup>39</sup> *Attorney General, Cross River v Esin* (n 38).

<sup>40</sup> [2018] UKSC 16.

<sup>41</sup> *Woo v Putnam County Board of Education* (n 37).

<sup>42</sup> *Attorney General, Cross River v Esin* (n 38)

<sup>43</sup> *Reilly v Sandwell Metropolitan Borough Council* (n 40).

officer of school A in Niger was state caught cheating during a certificate course examination in Lagos State. The act of exam malpractice by the exam officer can definitely lead to a dismissal. On the other hand, shameful messages against a security man cannot affect the reputation of the company. This all boil down to the fact that the shameful messages must have the possibility of affecting the employer's business reputation of interest in one way or the other. Where there is no nexus between the shameful message and the employment, dismissal should not be the action to be taken against the employee.

From the explanation above on the code of conduct of the workplace and likelihood of the employee's act damaging the employer's interest, it can be adduced that both relate to the employer's reputation and interest. The court handling such dismissal cases will be confronted with the issue of determining whether the digital lender's shameful messages against an employee sent to his employer, colleagues and family reasonably harmed the reputation of the employer's business and whether it is against the rules and regulation of the employment contained in the code of conduct.

After considering the factors, the question that will arise is whether the Nigerian law prohibits employers from regulating an employee's off duty conduct. This aspect of the law is relevant. This is because with technological advancement, there is a likelihood of the employer being aware of the employees' activities. There are social media platforms that the employer can access the information and can as well receive messages of the off- duty conduct which includes the shameful messages from the digital lenders. The employees however have a right to privacy.

## **6. EMPLOYEES' RIGHT TO PRIVACY**

The right to privacy of citizens of Nigeria is protected and guaranteed in the Nigerian Constitution.<sup>44</sup> The right to privacy entails privacy at home, one's communication and private family life. This right extends to employment settings and by that extension, an

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<sup>44</sup> CFRN 1999 s 37.

employer is prohibited from interfering or acting upon an employee's off duty matters. While one may argue that the act of lending from digital lenders and circulation of toxic, scandalous and shameful messages to the public is personal and an off-duty matter which is protected by the right to privacy, it can be safely stated that the right to privacy is not absolute. Even the constitution contain exceptions to the right.<sup>45</sup> It is stated therein that no law in Nigeria will be invalidated for infringing on the fundamental rights of Nigerian citizens provided it is in the interest of public defence, public safety, public order, public morality or public health or to protect the rights or freedom of others.<sup>46</sup> In addition, no law shall be invalidated for contravention of section 33 and 35 of the constitution in so far as it involves reasonably justifiable measures taken during periods of emergency.<sup>47</sup>

Though the exceptions to the right to privacy are contained in the constitution, the exceptions do not apply directly to a contract of employment. However, the enjoyment of the right to privacy of a person should not be an infringement of the right of another. Thus, where an employee does an act while off duty that affects the business interest or reputation of the employee, it is beyond the right to privacy of the employee as it has infringed on the employer's right or interest.

The constitutional provisions apply to citizens of Nigeria. This does not however mean that non- citizen's right to privacy is not protected in Nigeria. Non-Nigerian employees are protected under international law. The Universal Declaration of Human Rights<sup>48</sup> is an international instrument that contain specific rules on right to privacy. The instrument expressly prohibits an invasion of a person's private life, family, home or correspondence or conducts or acts that are an attack to his reputation or honour.<sup>49</sup>

The right to privacy guaranteed in the constitution and the international instruments apply in all sphere of life including an

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<sup>45</sup> CFRN 1999 s 45.

<sup>46</sup> CFRN 1999 s 45(1).

<sup>47</sup> CFRN 1999 s 45(2).

<sup>48</sup> Universal Declaration of Human Rights 1948

<sup>49</sup> Universal Declaration of Human Rights 1948 Article 12.

employment setting. Thus, citizens of Nigeria and non- citizens who are employees in Nigeria generally have a right to privacy while rendering services to the employer.

Apart from the general constitutional provision and international law on the right to privacy, there is no other law or regulation in Nigeria that limits an invasion of the right to privacy of employees or that restricts an employer's use of off duty activities to make decisions in a workplace. Thus, an employer may use the opportunity to dismiss employees who are the subject of scandalous messages from digital lenders in Nigeria. If there is a regulation or law restricting the employers, it will ascertain the extent to which an employee can be dismissed for off duty conducts. The implication of the lapse so identified is that the employer will be at liberty to determine the contract of employment at will.

Concerning the vulnerability of workers and employees in Nigeria, if there is no restriction on an employer's right to terminate an employee's contract of employment for off duty activities which has become open to the public glare, the state of the employees would become complicated. Therefore, a dismissal on such ground should be justified in cases where the employer has rules that regulate an employee's off duty conduct which specifically prohibit acts that can harm the company's reputation or destroy his interest and in exceptional cases the dismissal should be justified where it is proven that there is a rational nexus between the shameful messages against the employee and his work. The basis of the exemption is because generally, where an act constitutes gross misconduct, an employee could be lawfully dismissed without notice or benefits.<sup>50</sup> Gross misconduct refers to the act or conduct of the employee that undermines the confidence of the employee or greatly affects the interest of the employee.<sup>51</sup>

Also, without any law specifically restricting an employer from taking actions on off duty activities of the employee, the task is on the employers to devise a guide in handling off duty activities of the employee. This can lead to varying decisions by employers in

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<sup>50</sup> *UBN V Ogboh* [1995] 2 NWLR (pt. 380) 647 SC.

<sup>51</sup> *Ibid*



ascertaining whether the employer's interest or reputation has been jeopardized by the toxic and scandalous messages circulated against the employee by the digital lending firm. The fact here is that employees who earn well in the formal sector may likely challenge such dismissals while employees in the informal sector with meager incomes may simply walk away without seeking for justice in the case. To sum it all, the employer is in a more advantaged position as compared to employees pertaining to decisions to be taken on the grounds of off duty conducts or activities of the employees.

The grounds may be that the employee violated the workplace policy that curtail an employee's behaviour on or off duty that undermine the integrity of the employer or harm the business or reputation of the employer's firm or organization. In such case, the employer may exercise the provision of the policy in disciplining the employee. In situations there is no employee handbook or code of conduct that stipulates the rules and ethics of the workplace, the employer may still sanction the employee where in his opinion the toxic messages have harmed the reputation of the business. The vulnerability of employees will negatively affect them as the employer in some cases may not consider if the toxic messages actually affected the business before taking actions against the employee or there is a link between the work of the employee and the scandalous messages. Where an issue pertaining to the dismissal is instituted to the NICN, the courts will determine whether the toxic messages have the potential of destroying the reputation of the company or not. However, how many of such cases will be instituted at the end of the day? Basically, it will be more of cases of dismissals from the formal sector.

## **7. EFFECT OF DISMISSALS OF EMPLOYEE ON AN EMPLOYEE'S CONTRACT OF EMPLOYMENT**

A dismissal of an employee brings the contract of employment to an end. In a master servant employment, an aggrieved employee has a right to challenge a dismissal on the ground that it is unfair or wrongful.<sup>52</sup> That is, there is non-compliance with the procedures for

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<sup>52</sup> *Chinenye Robinson v Access Bank PLC & 1 Or* [2020] JELR 80392 NICN

dismissals as provided in the code of conduct or the employee sees that the publication and circulation of the toxic messages against him is not a sufficient ground for his/her dismissal. The acts of the employer in dismissing the employee are considered by the court in making awards to the dismissed employee.<sup>53</sup>

In an employment governed by statutes, a dismissal can be unlawful, null and void.<sup>54</sup> In the case of *Nigerian Institute of International Affairs v Mrs TO Ayanfalu*,<sup>55</sup> the court distinguished a wrongful dismissal from an invalid/ null and void dismissal. In the case, the respondent was a chief accountant with the appellant. In 1993, N320,000.00 belonging to the appellant could not be accounted for. The respondent's department had not paid the sum into the appellant's bank account. The appellant accused the respondent of gross negligence and caused her to be arraigned, together with some other staff, at the Magistrate Court. The Magistrate Court later discharged and acquitted the respondent. When the respondent returned to her duty post, the appellant invited her to appear before the appellant's Appointments and Promotions Committee and thereafter by a letter dated 26<sup>th</sup> October, 1993 terminated her appointment instead of complying with paragraph 3.02 of chapter 3 of the conditions of service which provides that where an employee under interdiction is not found guilty of all the charges, he may be reinstated and all balance of salary due to him during the whole period of interdiction shall be paid to him. The respondent then filed the suit at the Lagos High Court which held that the dismissal was *ultra vires* the powers of the appellant and therefore the termination was null, void and of no effect. The court ordered the reinstatement of the plaintiff as the chief accountant. The decision of the trial court led to this appeal. In dismissing the appeal, the court also held that there is a distinction between mere wrongful dismissal and an invalid or null dismissal. The situation of payment of damages will be applied where the court makes a finding of wrongful dismissal in favour of a servant. Where however, as in the instant case, a court has made a finding that the dismissal or the

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<sup>53</sup> *Chinenye Robinson v Access Bank PLC & 1 Or*

<sup>54</sup> *Idufueko v Pfizer Products Ltd* [2014] JELR 54920 SC.

<sup>55</sup> [2007] 2 NWLR (pt. 1018) 246 CA.

termination of the servant was null and void, there is no dismissal or termination. It is a nullity.

An employer who has dismissed an employee for receipt or circulation of toxic messages from digital vendors has the duty to satisfy the court or justify the reason before the court.<sup>56</sup> The burden on the employer entails the employer putting forth a strong defence against the claim of the claimant (dismissed employee) justifying the dismissal and adducing evidence in support of the defence. In *Adejo v Arksego Nigeria Ltd*,<sup>57</sup> the claimant was employed by the defendant as a security operative on the 15<sup>th</sup> day of January, 2013. The terms of the contract of employment required either party to the contract of employment to terminate the employment by giving two weeks notice. The claimant worked for the defendant without a complaint or query from the defendant. On the 15<sup>th</sup> day of August, 2017, the claimant's contract of employment was terminated on grounds that he had below average intelligence rating and test score. The claimant challenged the termination claiming that it was invalid and that it was a clear victimization because the defendant inherited him from another company. The defendant did not file any defence or adduce any evidence before the court. The court reinstated the settled position of the law that once an employee states a reason for determining the contract of employment of an employee, the burden lies upon him to justify the reason so stated. Applying the principle to the instant case, the defendant failed to justify the reason as he failed to file a defence or adduce evidence in court. The court held that the termination was not in compliance with international best practices as such it amounted to an unfair labour practice.

A dismissed employee on his part also has a duty to prove that his dismissal is wrongful, unfair or unlawful. Where an employee is unable to prove that the dismissal was done without compliance with the statute, terms and conditions of employment or the dismissal was without a cogent reason, the onus does not shift to the defendant (employer). The claim fails. In *Tijani Kolade v MDS Logistics Ltd*,<sup>58</sup> the claimant who worked for 15 years with the defendant as a store

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<sup>56</sup> SPDC Ltd v Olarenwaju [2008] LPELR 046 SC

<sup>57</sup> [2020] JELR 80455 NICN

<sup>58</sup> [2020] JELR 80397 NICN.

keeper was dismissed. The reason given for the dismissal was that there was a shortfall found in the stock inventory that amounted to a deficit of Twelve Million, Nine Hundred Naira, only. The contention of the claimant was that there was non-compliance with the employee handbook in dismissing him. The claimant further claimed that he was not given fair hearing despite agreeing that he was queried by the defendant whereof he responded and that fact was included in the letter of dismissal which he (the claimant) received. The court considered the procedure adopted by the defendant which included a query to the claimant and subsequent reply of the claimant and the laid down procedure in the employee handbook that involve issuing a query, a hearing and a letter of dismissal which must state the reason for the dismissal. The court came to a conclusion that the procedure laid down in the employee handbook was followed by the defendant as the claimant was issued a query and the claimant explained himself through a reply. The court held that the claimant was not wrongfully dismissed as such he was not entitled to the reliefs sought by him in the case.

The approach of the NICN is that an employer will not be required to justify reasons for dismissal in all cases of dismissals. Non-justification of reason for dismissal of an employee is not needed where the dismissed employee admits to the commission of act in question. In *Chinenye Robinson v Access Bank PLC & 1 Or*,<sup>59</sup> the claimant of the 1<sup>st</sup> defendant bank was employed on the 3<sup>rd</sup> day of June 2010 and was duly confirmed on the 2<sup>nd</sup> day of June, 2011. She performed well on the job and as such, she was the accounting officer of the Mbaise branch of the bank. There was non-repayment of some loans she approved. This led to the 1<sup>st</sup> defendant to place her on recovery suspension without salary pending repayment of the loans thereof. After several efforts to recover the money was made by the claimant, the claimant was dismissed by the 1<sup>st</sup> defendant. The 1<sup>st</sup> defendant's reason for the dismissal of the claimant was that the claimant was dismissed for acts of misconduct which were found by the Personal Management Committee. The court held that the claimant did not adduce evidence to show that the dismissal was

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<sup>59</sup> [202] JELR 80392 NICN.

borne out of malice or that the dismissal was done without due regards to the terms and conditions of employment as the employee's handbook or policies were not tendered in court for the court to evaluate in ascertaining whether there was a breach of the rules and procedures therein in dismissing the claimant. The court therefore held that the claim failed and the reliefs sought were refused accordingly.

## **8. RECOMMENDATIONS**

- a) To regulate an employer's decision making for off duty conducts of employees which is inclusive of matters relating to loans from digital lenders, a law should be enacted in Nigeria to this effect.
- b) It is necessary for the Nigerian government to establish an administrative board to handle employment related matters (inclusive of dismissal) administratively without cost. The decisions of the board should be entered as judgement by the NICN and the appeals of the board's decision should lie to the NICN.

## **9. CONCLUSION**

The privacy of employees in Nigeria is guaranteed by the constitution.<sup>60</sup> Thus, generally, an employer is prohibited from interfering in the private life of its employees. One of such private activities of the employee is collection of loans from digital lending firms. What goes on between the employee and the digital lending firm is entirely an off- duty activity. There are however reports of publications and circulation of scandalous messages against their consumers. The digital lenders circulate the messages to the contacts of their clients or consumers as they have access to the data base of the clients.

The CBN has made efforts in regulating debt recovery process of the digital lending firms. It requires the firm to imbibe responsible business conduct. Expressly, the lenders are prohibited from circulating shameful messages against loan defaulters except the person is a

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<sup>60</sup> CFRN 1999 s 37 (n 44).

guarantor or has consented to the contact.<sup>61</sup> Despite this provision in the guideline, toxic and shameful messages have been employed to blackmail the loan defaulters to pay the loans.

In some cases, the employers receive such messages directly and in other cases, they are informed by other persons in the workplace that the employee in question was involved in a scandal in which the employee has been labelled as a cheat and fraudster. Some employers upon notification of the existence of such scandalous messages, dismiss the affected employees.

The action taken by the employer in dismissing the employee discloses the imbalance in power between the employee and the employer. This is because, there is no specific law in Nigeria that prohibits employers from taking actions against an employee for off duty activities. This vest the employer with the discretion to do as he pleases (to dismiss or not). The employees in employments other than statutory employments are most affected in Nigeria. This is because the employees in the informal sector lack legal protection and most are paid meagre salaries. It is most likely that one with meagre resources will not afford the cost of litigation. Thus, the informal employee may not seek redress for dismissal on grounds of shameful or toxic messages from digital lenders.

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<sup>61</sup> CBN Consumer Protection Regulations Part four, paragraph 5.5.7 (n 17)