Determination of Contract of Employment through Termination and Dismissal: The Current Trends in Nigeria

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Abstract

One of the major concerns of labour and employment law is to ensure the security of tenure of employment for employees. This may be achieved by the provisions or principles of law which ensure that employees' contracts of employment are not determined unjustifiably. Two of the ways in which a contract of employment may be brought to an end are through termination or dismissal. The termination or dismissal may be unlawful in case of employment with statutory flavour (public employment) or wrongful in case of employment regulated by the common law rules of master and servant (private employment). While in the former, security of tenure is ensured by ordering re-instatement, in case of the latter, only damages may be awarded. It is in the area of wrongful determination of the contract of employment in private employments and the measure of damages awarded by the courts that is of primary concern to this paper. Are these damages adequate to provide succour to employees in the event that they lose their employments? It has been found that Nigerian courts particularly the National Industrial Court (NIC) have now moved away from the conservative and harsh position at common law where only paltry sums are awarded by way of salary in lieu of notice to a more progressive stance where substantial damages by way of general damages are now awarded. It has also been found that any time a leeway is provided by the appellate courts (Court of Appeal and Supreme Court) to cushion the effect of strict adherence to the common law position, the National Industrial Court always cashes in on the

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situation in awarding substantial damages to deserving litigants or claimants. Furthermore, the award of substantial damages has been extended by the NIC to loss of expectation interest. In some deserving cases, the National Industrial Court has even awarded damages up to retirement age. The National Industrial Court's position in this regard is commendable and it is my recommendation that the National Industrial Court should keep up the spirit. This way, the security of tenure of employment may be guaranteed even if not by re-instatement, but by the award of substantial damages in case of wrongful determination especially in private employments.

Key Words: Termination, Dismissal, Contract of Employment, Wrongful Termination, Unlawful Termination and Constructive Dismissal.

1. INTRODUCTION

Two of the ways in which a contract of employment may be brought to an end are through termination of contract of employment and dismissal of an employee. These two are the commonest ways of determination of contract of employment.[1] Lawful termination of contract of employment may be at the instance of either the employee or the employer through the issuance of the appropriate notice to that effect. Dismissal on the other hand is usually carried out by the employer except in case of constructive dismissal where the wrongful act(s) of the employer forces the employee to resign. Unlike termination, dismissal does not require notice by the employer. The employee is usually summarily dismissed. In most cases, these two modes of determination of contracts of employment may be unlawful or wrongful. For instance, in termination of contract of employment, the required notice may not be given while in dismissal, the reason for such dismissal may not be justifiable.

Experience has shown that most of employment cases filed at the National Industrial Court border on unlawful or wrongful termination/dismissal. The common law position with regards to the remedies available to an employee for wrongful termination or

1 Other ways are through Resignation, Redundancy, Retirement, Operation of Law and Effluxion of Time. These are not within the scope of this paper.

dismissal is to say the least, disappointingly inadequate. This is particularly with regards to employments regulated by the common law rules of master and servant where only damages are awardable as opposed to re-instatement which may be available to only employments with statutory flavour. But even for the damages that are awardable, the quantum is so dismal that one wonders what purpose it may serve. However, there seems to have been a paradigm shift from the dismal quantum of damages available at common law to a substantial award now by the National Industrial Court to an employee whose appointment has been wrongfully determined, thereby improving on the common law position. It is in this area of wrongful termination/dismissal and the current trends in the quantum of damages awardable as well as other sundry issues that this paper seeks to critically examine.

2. DISTINCTION BETWEEN TERMINATION AND DISMISSAL

At the level of International Labour Organisation (ILO), termination and dismissal are used interchangeably. However, Nigerian law makes clear distinctions between the two concepts. The difference is usually expressed in the legal consequences that follow each concept. In *Union Bank of Nig. Plc v Soares*,[2] citing *Adeko v Ijebu-Ode District Council*[3] the Court of Appeal held: "There is a clear distinction between termination of a contract of employment and a dismissal. Termination gives the parties the right to determine the contract at any time by giving the prescribed period of notice. Dismissal on the other hand is a disciplinary measure which carries no benefits".

However, in *Olaniyan & Ors v University of Lagos & Anor*,[4] the pronouncement of Oputa, JSC seemed to have obliterated the above distinction between the two concepts. He stated:

> *Another fault with the passage of the Learned President (of the CA) quoted above is that it tends to equate dismissal with loss of benefit. That is*

2 [2012] LPELR – 8018 (CA)
3 [1962] 1 NLR 349 SC
4 [1985] All NLR 363, at 391-392; [1985] 2 NWLR (Pt.9) 599

> *not correct. What constitutes dismissal in any particular case will ever remain a question of fact. In law however, dismissal means such act or acts on the part of the master as amount to a repudiation by him of the essential obligations imposed on the servant by the contract. Thus a man may dismiss his servant if he refuses by word or conduct to allow the servant to fulfil his contract of employment. Loss of benefit is not at the root of dismissal but repudiation of the servant's obligations under the contract is. Once there is that repudiation by the master, then there is dismissal or termination or removal, it does not matter which expression is used the effect is the same.*

By the above pronouncement, Oputa, JSC seems to be saying that there is no distinction between termination and dismissal and that the legal consequences of the two concepts remain the same. But is this the true position? Other than the fact that this position does not seem to be in tandem with the position of the same Supreme Court taken in *Adeko's* case cited before, some writers have also not agreed with the position taken by Oputa JSC. Thus Emiola[5] has submitted, and I also associate myself with his submission that the pronouncement of Oputa, JSC should be taken as illustrating only the factual effect of repudiation of the contract by the master and not the legal consequences. It is therefore my submission, in agreement with the cases of *Union Bank of Nig. Plc v Soares* (supra) and *Adeko v Ijebu-Ode District Council* (supra) that the fundamental difference between termination and dismissal is that while in the former, there is no loss of benefits, in the latter there is.

Finally, it should be noted that even though there is loss of benefits as far as dismissal is concerned, it has been held by the

5 Emiola, A, *Nigerian Labour LawI* (4th edn, Emiola Publishers Ltd, 2008) 162

courts that all earnings of an employee prior to dismissal must be paid by the employer to such an employee.[6]

3. DETERMINATION THROUGH TERMINATION OF CONTRACT OF APPPOINTMENT

As stated earlier, termination gives the parties the right to determine the contract at any time by giving the prescribed period of notice. Most contracts of employment provide for the right to terminate the said contract by either party giving to the other party the prescribed period of notice or salary in lieu of notice. Once the prescribed period of notice is given, the contract of employment comes to an end at the expiration of such notice. Where there is provision for salary in lieu of notice, once such salary is paid, the contract of appointment comes to an end through termination. There are therefore two aspects of termination viz: termination through notice and payment of salary in lieu of notice.

3.1 ***Termination by Notice:*** 'Notice' is the formal information by one party to the other that the contract is to be brought to an end at a specified date.[7] In *Rufus Amokeodo v IGP*,[8] it was held that the legal consequence of giving notice of termination by or to an employee is that the employee remains in service until the expiration of the notice.

At common law, the master can terminate the contract with his servant at any time and for any reason or for no reason at all and once the required notice is given, the employee cannot complain of wrongful termination. Even where there was an advertisement offering permanent employment, this does not mean that an employment for life was offered. In the absence of any special condition, such employment is still determinable by notice.[9]

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6 See the following cases: *Udegbunam v FCDA* [2003] 10 NWLR (Pt.829) 487 SC; *Kasali Olugbenga v Access Bank Plc* [Unreported] Suit No NICN/LA/430/2013 Judgment of which was delivered on 3rd December, 2015; *Titilayo Akinsanya v Coca Cola Nig. Ltd* [Unreported) Suit No NICN/LA/40/2012 Judgment of which was delivered on 7th April, 2016 p.60

7 Emiola, (n5) p. 143

8 [1999] 6 NWLR (Pt.60) 467

9 *Mc Clelland v N. Ireland Health Board* [1957] 2 All E.R 129 at 133-134

Termination by notice is therefore regulated by the terms of the contract of employment. Once the terms of the contract provide for the length of notice to be given, this must be strictly complied with and such length of notice specified in the contract deemed reasonable. Even where there is no such length of notice provided by the contract of employment, reasonable notice must be given. Thus in *De Stempel v Dunkels*,[10] Greer, LJ held: "…I think that there must be implied in the contract… a term to the effect that the plaintiff's employment should be determined only by a reasonable notice." What is reasonable, of course is dependent on the circumstances of each case. At common law therefore, notice is all an important requirement for a valid determination of the contract of employment. Where there is provision for salary in lieu of notice, then notice may be dispensed with on payment of salary.

Under the statute, the Labour Act[11] specifically requires that the appropriate period of notice to be given by a party wishing to terminate the contract must be incorporated as a written term of the contract of employment. Section 7 which provides for written particulars of terms of employment provides:

> (*1) Not later than three months after the beginning of a worker's period of employment with an employer, the employer shall give to the worker a written statement specifying –*
>
> *(e) the appropriate period of notice to be given by the party wishing to terminate the contract, due regard being had to section 11 of this Act.*

Section 9(7) which provides for the various ways in which a contract of employment may be terminated provides:

A contract shall be terminated –

(a) by the expiry of the period for which it was made; or

10 [1938] 1 All ER 238at 247

11 Cap L1 LFN, 2004 as updated to 31st December, 2010

(b) by the death of the worker before the expiry of that period; or

(c) by notice in accordance with section 11 of this Act or in any other way in which a contract is legally terminable or held to be terminated.

Section 11 which provides for termination of contracts of employment by notice specifies the length of notice to be given in each case before a contract of employment may be validly terminated. It provides:

(1) Either party to a contract of employment may terminate the contract on the expiration of notice given by him to the other party of his intention to do so.

(2) The notice to be given for the purposes of subsection (1) of this section shall be –

(a) one day, where the contract has continued for a period of three months or less;

(b) one week, where the contract had continued for more than three months but less than two years;

(c) two weeks, where the contract has continued for a period of two years but less than five years; and

(d) one month, where the contract had continued for five years or more.

(3) Any notice for a period of one week or more shall be in writing.

(4) The periods of notice specified in subsection (2) of this section exclude the day on which notice is given.

(5) Nothing in this section shall prevent either party to a contract… from accepting a payment in lieu of notice

From the above statutory provisions, it can be seen that other than the requirement that the appropriate period of notice to be given

a party desiring to terminate a contract of employment must be incorporated as one of the written terms of the contract of employment, such periods of notice as specified by the Labour Act must be complied with before there can be a valid termination of contract of employment. Furthermore, any such notice that is for a period of one week or more must be in writing. In computing the period of the notice given, the day on which the notice is given shall be excluded. It can therefore be seen that just like the requirement of notice is all an important consideration and requirement at common law for a valid termination of contract of employment, the Labour Act equally makes it a condition precedent for a valid termination of contract of employment. It has therefore been submitted by Agomo[12] and I am also in total agreement with her that the provisions of the Labour Act have not added to nor taken anything away from the common law position i.e that termination must be done by either notice or salary in lieu of notice.

3.2 ***Termination by Salary in Lieu of Notice:*** At common law, the terms of the contract of employment may provide for termination of contract by payment of salary in lieu of notice by either party to the contract. Where there is such provision, then notice may be dispensed with and payment of salary in lieu of notice will validly determine such a contract. The Labour Act also recognizes the right of the parties to a contract of employment to determine such contract by payment of salary in lieu of notice. Section 11(6) of the Labour Act provides: "Nothing in this section shall prevent either party to a contract from waiving his right to notice on any occasion, or from accepting a payment in lieu of notice".

In reckoning or computing the amount of salary to be paid in lieu of notice, only the basic salary, exclusive of overtime and other allowances shall be taken into account. To this effect, section 11(9) of the Labour Act provides: "In the calculation of a payment in lieu of notice, only that part of the wages which a worker receives in money, exclusive of overtime and other allowances, shall be taken

12 Agomo, CK, *Nigerian Employment and Labour Relations Law and Practice. (*Concept Publications Ltd. 2011) p 159

into account". With regards to the time to pay such salary in lieu of notice, the Court of Appeal in *NNPC v Idoniboye Obu*[13] and *NEPA v Isiereore*[14] held that where a contract of service gives a party a right of termination of the contract by either giving a particular length of notice or payment of salary in lieu of the length of notice, and the latter course is chosen, the party seeking to end the contract must pay to the other party the salary in lieu of notice at the time of termination of the contract; the said salary in lieu of notice must be actually paid since mere offer to pay is not sufficient. In *Ben Chukwuman v Shell Petroleum Dev. Co.*[15], the Supreme Court held that where the employer chooses to pay salary in lieu of notice, it must be paid at the time the letter of termination is delivered to the employee. *Afortiori*, an employee must do same.

4. DETERMINATION THROUGH DISMISSAL

'Dismissal' as one of the ways in which a contract of employment is brought to an end is usually carried out by the employer. Here, the employee's contract of employment is brought to an end summarily. An employer has the right to dismiss an employee, even if the right is not specifically written in the contract of service. In *Simon Ansambe v Bank of the North Ltd.*,[16] the court held that the fact that there is no specific provision as to termination or summary dismissal in the terms of the contract will not prevent the employer from exercising his right to so terminate or dismiss e.g. for gross misconduct. This position was re-affirmed by the Supreme Court in *Ziideh v RSCSC*[17]. The Supreme Court held that it is now firmly settled that in statutory employment, just as in private employment, an employer can summarily dismiss the servant in all cases of gross misconduct provided of course, the employee is given the opportunity of fair hearing.

The sum total of what the above mentioned cases are saying is that the right to dismiss an employee is an unfettered right of the

13 [1996] 1 NWLR (Pt.427] 655 CA
14 [1997] 7 NWLR (Pt.511) 135 CA
15 [1993] 4 NWLR (pt.289) 512; [1993] 5 SCNJ 1
16 [2005] 8 NWLR (Pt.928) 650
17 [2007] 3 NWLR (Pt.1022) 554; [2007] LPELR 3544 SC

employer and this right can be exercised irrespective of whether it is expressly contained in the contract of service or not. While the employer usually dismisses the employee summarily, the employee's resignation in certain circumstances may be deemed to be constructive dismissal by the employer. There are therefore two aspects of dismissal viz: summary dismissal and constructive dismissal.

4.1 ***Summary Dismissal:*** An employer reserves the right to dismiss his employee summarily for gross misconduct. But what does the term 'gross misconduct' connote? In *PC Eze v Spring Bank Plc,*[18] the Supreme Court, relying on *Ajayi v Texaco Nig. Ltd.*[19] defined 'gross misconduct' as conduct of an employee which is of such grave and weighty character as to undermine the relationship of confidence which should exist between the employer and the employee. From the above pronouncement, it would appear that what constitutes gross misconduct as to justify summary dismissal is dependent on the circumstances of each case. In practice, the acts of the employee that would justify dismissal and which in most cases are expressly provided for in the conditions of service include: disobedience, insubordination, infidelity, negligence, dishonesty, incompetence, absenteeism etc. The detailed discussion of these acts are not within the scope of this paper.[20] The following holdings of the courts will suffice. In *Nigeria Arab Bank Ltd v Shuaibu*,[21] the Court of Appeal held that employee's measuring up to standard is not confined to his efficiency at work but includes a commitment to safeguard the interest of his employer, minimize financial losses and maintain the reputation and good will of the establishment. In

18 [2011] 18 NWLR (Pt.1278) 113 at 131-132

19 [1987] 3 NWLR (Pt.62) 577

20 For a detailed discussion on grounds that would justify dismissal, see Chianu, *Employment Law* (Bemicov Publishers (NIG) Ltd, 2004) 165-208 . The offences that attract the penalty of dismissal as expressly listed under section 4.09 of the Conditions of Service of Corporate Affairs Commission are: corruption, false claims, unauthorized disclosure of official information, embezzlement, the falsification of records, absconding from duty, conviction of criminal offence, fraud, gross negligence, assault, fighting.

21 [1991] 4 NWLR (Pt. 186) 450

Oladipo Maja v Leandro Stocco[22] the Supreme Court held that a servant who takes advantage of his position to enrich himself would be accountable to his master for the proceeds of such advantage and will be liable to an instant dismissal. In *Abomadi v NRC*[23] the Court of Appeal held that an employee owes it a duty to his employer to protect its property or use same in such a way that no preventable loss would occur. Where he is tardy or there is lack of diligence in his approach to his duty or he is negligent and the master by the same suffers loss, due to the unacceptable conduct and untoward behaviour of the employee, such employee is guilty of misconduct to which appropriate disciplinary action can be taken against him. It should be noted that in all instances of summary dismissal, the requirement of fair hearing must be complied with.

4.2 ***Constructive Dismissal***

4.2.1 *Meaning of Constructive Dismissal:* This is variously referred to as constructive discharge, forceful resignation, involuntary resignation etc. According to Chianu[24], constructive dismissal arises where an employer provokes an employee to resign either by creating or tolerating a hostile work environment or by unilaterally changing (or proposing to change) the nature of the employment, the place of employment, or important terms in the contract such as those relating to pay. Once any of the above mentioned acts occurs on the part of the employer, he is deemed to have repudiated the contract of employment and even though the employee in form resigns, he infact accepts the employer's repudiation and he is deemed to have been dismissed by the employer.

In a constructive dismissal, an employee resigns either because he was actually asked by the employer to do so or the employer merely provokes him to resign by creating a hostile work environment or by unilaterally changing the nature of employment. Where an employee has been asked to resign without having infracted any term of the employment contract, he is deemed to have been harassed into resigning and this would constitute constructive

22 [1991] 1 All NLR 141 SC
23 [1995] 1 NWLR (Pt. 372) 451 CA
24 Chianu, (n20) p.315

dismissal. Thus in *Patric modilim v UBA Plc*[25] the National Industrial Court held an employee who was asked to resign by his employer as having been constructively dismissed and awarded damages in the sum of three months' salary in lieu of notice as stipulated in the contract of employment. In *Vivien Asana v First Bank of Nigeria Ltd.*[26] the National Industrial Court held:

> *By Exhibit C5/D3, the claimant stated thus: "Further to the request that I should resign, by Management of First Bank of Nigeria Ltd. I hereby tender my letter of resignation". Here, the claimant made it very clear that she was requested to resign by the defendant… The statement in italics that the claimant was advised to resign based on her poor performance and instead of having her appointment terminated, the claimant decided to resign her appointment is the classic case of constructive dismissal/discharge, and suggests that the defendant did advise the claimant to resign in order to avoid being sacked for poor performance. Secondly, the claimant in Exhibit C5/D3 categorically stated that she is resigning because the Management of the defendant requested her to resign. There is no evidence before the court that the defendant replied to Exhibit C5/D3 denying the fact that it requested the claimant to resign. The natural conclusion is that the defendant accepted that fact when it did not deny it.*

On the other hand, where an employer makes the work environment so hostile for an employee (for example sexual harassment) or unilaterally changes the nature of employment or terms of employment (for instance drastic reduction in the salary or nonpayment of salary) so that the employee resigns, the employee is

25 [Unreported] Suit No NICN/LA/353/2012 the Judgment of which was delivered on 19th June, 2014 at p.28

26 [Unreported] Suit No NICN/LA/184/2016, the judgment of which was delivered on 9th October, 2018 para 78

deemed to have been constructively dismissed and the employer cannot claim that the employee voluntarily resigned. The issue of creating a hostile work environment for an employee was considered by the National Industrial Court in *Lucia Balonwu v Voluntary Service Overseas (VSO) International*.[27] The claimant who was the Country Director in charge of the Nigeria Country Office of the defendant from August 2016-October 2018 resigned her appointment alleging that the defendant (her employer) had created a hostile working environment for her and so she would no longer continue in her employment. The National Industrial Court in holding that the action of the employer created a hostile working environment, capable of forcing the claimant (employee) to resign thereby amounting to a constructive dismissal held at pp 31-32:

> *What I gather from Exhibit C5 is that the claimant felt betrayed by the behaviour of the defendant carrying out her lawful duties, which behaviour forced her to tender her resignation letter. In paragraphs 3-32 of her statement on Oath of 25th October 2018, the claimant recounted how the defendant belittled her, refused to look into a complaint she filed against her staff, how the petition of the staff was preferred over and above her complaint, how her junior was asked to head an investigation into the petition against her, how she was found not guilty and yet had to face an audit enquiry, etc. Aside from the fact that all of this was not controverted by the defendant, they represent to me a harrowing experience capable of forcing a resignation. If as a Head of an establishment, an employer would demean such head by preferring juniors to the head, then the action of the employer is capable to force a resignation; and if the resignation is so forced, that to my*

27 [Unreported] Suit No NICN/ABJ/280/2018 the judgment of which was delivered on 22nd July, 2020

> *mind would warrant a finding of constructive dismissal. The actions of the defendant in the instant case were series of such demeaning conduct.*

The court continued:

> *In the instant case, the defendant did not ask the claimant to resign. But the behaviour of the defendant was such that it was sufficient to force the claimant to resign. The defendant's behaviour was intolerable that the claimant had no choice but to resign. The defendant created a working condition that the claimant had little choice than to resign. The defendant made the claimant's working life extremely difficult. The only way out for the claimant was to tender her resignation. I am accordingly satisfied that the claimant resigned given the pattern of incidents of the defendant, and that the claimant resigned soon after the incidents. I am satisfied that the claimant has successfully made out her case for constructive dismissal.*

Accordingly, the court awarded the sum of N1 Million as general damages for the constructive dismissal of the claimant.

The concept of constructive dismissal has been recognised at common law. It is based on the common law concept of breach of fundamental term of a contract which gives the innocent party the right to unilaterally repudiate it. By the English Court of Appeal decision in *Western Excavations (ECC) Ltd v Sharp*,[28] Lord Denning, MR stated *interalia*:

> *These provisions are not confined to cases where the employer himself dismisses the man. They also apply to cases where the man leaves of his own choice, if he can show that it was due*

28 [1978] QB 761; [1978] 1 All ER 713

> *to the way the employer treated him. In otherwords, compensation is payable, not only for actual dismissal, but also for constructive dismissal.*

According to Chianu,[29] the concept of constructive dismissal has also been statutorily recognised in Nigeria by the provisions of the Labour Act[30]. Section 11 which deals with termination of contracts of employment by notice provides in subsection(5):

> *Nothing in this section affects any right of either party to a contract to treat the contract as terminable without notice by reason of such conduct by the other party as would have enabled him so to treat it before the making of this Act.*

Chianu has interpreted the above provisions of the Labour Act as conferring a right on an employee to claim damages for wrongful dismissal where the employer is guilty of a fundamental breach in the contract of employment as a consequence of which an employee resigns without notice which resignation should be deemed to be constructive dismissal by the employer.

4.2.2 *The Legal Effect of Constructive Dismissal:* The concept of constructive dismissal, whether at common law or under statute has been embraced by the Nigerian Courts, particularly the National Industrial Court. In *Ebere Ukoji v Standard Alliance Life Assurance Co Ltd*[31] the National Industrial Court, dwelling on the meaning and effect of the concept held:

> *Globally, and in labour/employment law, constructive dismissal, also referred to as constructive discharge, occurs when an employee resigns because his/her employer's behaviour has become intolerable or heinous or made life difficult that the employee has no choice but to*

29 Chianu (n20) p. 317
30 Cap L1 LFN, 2004 as updated to 31st December, 2010
31 [2017] 47 NLLR (Pt. 154) 531 NIC

> *resign. Given that the resignation was not voluntary, it is in effect, a termination. In an alternative sense, constructive dismissal or constructive discharge is a situation where an employer creates such working conditions (or so changes the terms of employment) that the affected employee has little or no choice but to resign. Thus where an employer makes life extremely difficult for an employee, to attempt to have the employee resign, rather than outright firing the employee, the employer is trying to create a constructive discharge. The exact legal consequences differ from country to country, but generally a constructive dismissal leads to the employee's obligations ending and the employee acquiring the right to seek legal compensation against the employer. The employee may resign over a single serious incident or over a pattern of incidents. Generally, the employee must have resigned soon after the incident. See generally Western Excavating v Sharp [1978] 1 All ER 713 and Oladosu Ogunniyi's Nigerian Labour and Employment in Perspective (folio Publishers Ltd: Ikeja, 2004) 2nd edition pp 462-464. Constructive dismissal/discharge therefore brings to an end the employment of the employee constructively dismissed or discharged by the employer leaving the employee with only the right of recompense.*

From the above pronouncement, the legal effect of a constructive dismissal is that it brings to an end the employee's contract of employment, leaving the employee with only the right to be compensated by way of damages. Constructive discharge once

proved evinces a poor and unfair labour practice on the part of the employer.[32]

4.2.3 *Requirements for a Successful Plea of Constructive Dismissal:* For a claimant (plaintiff) to succeed in an action for constructive dismissal, he/she must prove the following: that there is a repudiatory breach (actual or anticipatory) on the part of the employer which must be sufficiently serious to justify the employee resigning; the employee must resign in response to the breach; and the employee must not delay too long in acting on the breach. The National Industrial Court in *Joseph Okafor v Nigerian Aviation Handling Co. Plc* **[33]** in summing up the requirements, put the position quite succinctly (even though a claim for constructive dismissal failed)

> *…to be able to succeed in a claim for constructive dismissal, the claimant must show that he resigned soon after the incident(s) he is complaining about. See Miss Ebere Ukoji v Standard Alliance Life Assurance Co. Ltd [2014] 47 NLLR (pt. 154) 531 NIC. The claimant himself agreed with the defendant that for the claimant's case to succeed, he must prove as enumerated in Western Excavations v Sharp [1978] 1 All ER 713 that there is a repudiatory breach (actual or anticipatory) on the part of the employer, which must be sufficiently serious to justify the employee resigning; the employee must resign in response to the breach; and the employee must not delay too long in acting on the breach…*

What is the length of period of delay that will be considered as being too long? In *Vivien Asana v First Bank of Nig Ltd., (supra)* the defendant argued that the delay of 3 days was too long a period for

32 See *Vivien Asana v First Bank of Nig*. Ltd. [Unreported] Suit No NICN/LA/184/2016 Judgment of which was delivered on 9th October, 2018.

33 [Unreported] Suit No NICN/LA/29/2016 the Judgment of which was delivered on 25th April, 2018.

the claimant's claim for forceful resignation to be hinged on. The court rejected this contention and held that three days was not too long a period in this regard.

Once constructive dismissal is proved, damages become thereby awardable. But what is the nature of damages to be awarded? Can general damages be awarded? The National Industrial Court answered in affirmative. In *Charles Ughele v Access Bank Plc*,[34] out of the N20 Million claimed as general damages for constructive dismissal, the National Industrial Court awarded N1 Million as general damages. The court stated:

> *…The law is that general damages are always made as a claim at large, the quantum of which need not be pleaded and proved as is awarded for loss or inconvenience which flows naturally from the act of the defendant. It does not depend upon calculation made and figure arrived at from specific items. See UBN Plc v Alhaji Adams Ajabule & Anor [2011] LPELR – 8239 (SC). Section 19(d) of the National Industrial Court (NIC) Act 2006 permits this court to make an award of compensation or damages. Given the circumstances of this case, therefore, I agree with the claimant that he is entitled to general damages…*

In *David Fadipe v Cedarcrest Hospital Ltd.*[35] the NIC, relying on its previous judgment in *Charles Ughele v Access Bank Plc* (Supra) awarded N1 Million as general damages to the claimant for constructive dismissal.

5. WRONGFUL TERMINATION/DISMISSAL

An attempt will be made here to consider what constitutes wrongful termination/dismissal and the remedies available for such wrongful termination or dismissal. Experience has shown that 80%

34 [Unreported] Suit No NICN/LA/287/2014 the judgment of which was delivered on 10th February, 2017 para 72

35 [Unreported] Suit No NICN/ABJ/147/2018, the judgment of which was delivered on 8th July, 2020 p.24 para 80

of the employment cases filed at the National Industrial Court border on wrongful termination/dismissal.[36] As such, this area of employment law becomes one of the most important areas requiring attention and consideration. The discussion will however be segmented into two broad areas i.e public employments popularly referred to as employments with statutory flavour on one hand and private employments regulated by the common law rules of master and servant on the other hand.

5.1 Employments with Statutory Flavour (Public Employments):

5.1.1 Meaning of Employment with Statutory Flavour: An employment with statutory flavour is one where the terms and conditions of the contract of employment or service are specifically provided for by statute or regulations made there under. The locus classicus on the concept of employment with statutory flavour is the Supreme Court's decision in *Olaniyan v University of Lagos.*[37] This concept has been subsequently followed and espoused in a number of cases.[38] More specifically, in *Ujam v IMT*[39] the Court of Appeal held that an employment is said to have statutory flavour if the employment is directly governed or regulated by statute or by a section(s) of the statute, power is delegated to an authority or body to make regulations or conditions of service as the case may be. In the case of the latter, the section(s) of the statute must clearly and unequivocally govern or regulate the employee and must be unmistakably clear in the provisions as to delegated legislation. That the regulations and/or the conditions of service must be implicitly borne out from the section(s) delegating or donating the authority. In other words, there must be clear nexus between the delegating

36 I have had the privilege of receiving electronically the judgments of Dr. B.B. Kanyip (who is now the President, National Industrial Court Nigeria) from 2014 to 2022, the time of writing this paper. I can say categorically that 80% of those cases border on wrongful termination/dismissal. This may replicate itself in other Divisions of the court

37 [1985] 2 NWLR (Pt.9) 599

38 See the following cases: *Fakuade v OAUTH* [1993] 5 NWLR (Pt.291) 47; *Imoloame v WAEC* [1992] 9 NWLR (Pt.265) 303; *Jirgbagh v UBA Plc* [2001] 2 NWLR (Pt.696) 11 CA*; Iloabachi v Philips* [2002] 14 NWLR (Pt.787) 264 CA; *FMC, Ido-Ekiti v Olajide* [2011] NWLR (Pt.1258) 256 CA; *Ogieva v Igbinedion* [2004] 14 NWLR (Pt.894) 467 CA; *Azenabor v Bayero University, Kano* [2009] 17 NWLR (Pt.1169) 96 CA; *Idoniboye-Obu v NNPC* [2003] NWLR (Pt.805) 589 SC;

39 [2007] 2 NWLR (Pt.1089) 470 CA

section(s) and the regulations or conditions of service. In such a situation, the regulations or conditions of service must commence with the provision of the enabling statute. In *PHCN v Offeolo***,**[40] the Supreme Court was quite emphatic that for an employment to be statutory, there must be a nexus between the employee's appointment with the statute creating the employer or corporation.

In O*loruntoba-Oju v Abdul-Raheem,*[41] the Supreme Court held that the question whether a contract of employment is governed by statute or not depends on the construction of the contract itself or the relevant statute; the duty to construe being the exclusive preserve of the courts. The supreme court further held in *Institute of Health ABU Hospital Management Board v Anyip***[42]** that where an employee has a contract of service with an employer determinable by agreement of the parties to the contract, it is quite clear without more that an employee under such a contract of service cannot be said to enjoy an appointment with statutory flavor as to give the employee an appointment with any special security of tenure.

5.1.2 What constitutes unlawful Termination/Dismissal of Employment with statutory flavour. Unlawful termination/dismissal of employment with statutory flavour occurs where either the procedure for such termination/dismissal laid down by the statute or regulations made there under has not been complied with or the reason(s) adduced for such termination/dismissal is not justified. In *Oloruntoba-Oju v Abdul-Raheem* (Supra), the Supreme Court held that in the matter of discipline of an employee whose employment has statutory flavour, the procedure laid down by such statute must be fully complied with; if not, any decision affecting the right or reputation or tenure of office of that employee will be declared null and void. In *Longe v FBN PLC*[43] the Supreme Court again held that the procedure for discipline in an employment with statutory flavour must be complied with; otherwise, the dismissal ensuing thereof will be null and void.

40 [2013] 16 WRN 28 SC
41 [2009] 13 NWLR (Pt.1157) 83 SC
42 [2011] LPELR – 1517 SC
43 [2010] 6 NWLR (Pt.1199) 292 SC

5.1.3 Remedies for unlawful termination/dismissal of employment with statutory flavour.

5.1.3 (a) *Re-instatement:* Since contracts with statutory flavour are meant to provide security of tenure to employees, any unlawful termination or dismissal will lead to re-instatement of such an employee. However, for re-instatement to be ordered by the court, the appropriate declaration and order must be sought by the claimant/plaintiff. To this end, the Supreme Court has laid down a distinction between wrongful dismissal and unlawful (invalid) or null and void dismissal. A finding by the court that the dismissal or termination was wrongful will lead to payment in lieu of notice while a finding that the dismissal or termination was unlawful, null and void will lead to re-instatement. Thus in *BCC PLC v Ager*[44], the Supreme Court held that there is a distinction between wrongful dismissal and an invalid or null and void dismissal. That where the court makes a finding of wrongful dismissal, payment in lieu of notice will apply; but where the finding is that the dismissal or termination was null and void, then there is no dismissal or termination as what the employer did was a nullity before the law. Accordingly, unless the court makes a finding that the claimant's dismissal is unlawful, null and void, the question of re-instatement will not arise; a finding that the dismissal is wrongful is insufficient to grant the remedy of re-instatement.

From the above position of the Supreme Court, it follows that declaratory orders for wrongful termination or dismissal are suitable for only non-statutory/private employments while unlawful, null and void orders are suitable for employments with statutory flavour/public employments. Legal practitioners are therefore advised that while seeking for the relief of re-instatement for their clients in employments with statutory flavour, the order sought should be preceded by seeking for a declaration that such

44 [2010] 9 NWLR (Pt.1199) 292 SC

termination/dismissal is unlawful, null and void and avoid the use of the word 'wrongful'.

The distinction between wrongful termination/dismissal and unlawful termination/ dismissal may appear cosmetic or more apparent than real, however since the Supreme Court has brought out the distinction between the two, it is better to comply by the choice of appropriate phrases during the drafting of pleadings. For private employments regulated by the common law rules of master and servant where re-instatement cannot be ordered, a declaration that such termination/dismissal is wrongful is the most appropriate one to use.

5.1.3*(b) Can Damages and Re-instatement be Ordered Simultaneously?* Damages and re-instatement cannot be ordered simultaneously. For to do so, may be tantamount to double compensation. It is either damages are awarded or re-instatement ordered but not both, it must be one or the other. In *Onalaja v African Petroleum Ltd*[45], the Court of Appeal held that an employee cannot claim for re-instatement after collecting damages awarded by the court for unlawful dismissal; for to do so will amount to double compensation which the court frowns at. In *CCB (Nig) Ltd v Okonkwo,*[46] the Court of Appeal again held that the court will not make an order of re-instatement after awarding damages to an employee for his unlawful dismissal as this would amount to double compensation. It can therefore be concluded that in contract with statutory flavour, the remedies available are either damages or re-instatement but not both simultaneously.

5.2 Private Employments or Employments Regulated by the Common Law Rules of Master and Servant: Where an employment is not one with statutory flavour, it is most likely to be a private employment regulated by the common law rules of master and servant. Here, the contract of employment merely provides for its determination by either party giving to the other the prescribed

45 [1991] 7 NWLR (Pt.206) 691
46 [2001] 15 NWLR (Pt.735) 114

period of notice or salary in lieu of notice. In *Ekeagwu v The Nigerian Army*[47], Onnoghen, JSC (as he then was) held that in an action for wrongful termination/dismissal, only two primary issues call for consideration. These are: whether the termination/dismissal of the plaintiff is wrongful; and the measure of damages recoverable where the termination/dismissal is found to be wrongful.

5.2.1 *What Constitutes Wrongful Termination/Dismissal of Private Employments:* Wrongful termination/dismissal of private employments may arise due to the following: failure to give notice or salary in lieu of notice; alleged malpractice not justified and reason for termination not given.

5.2.1(a) *Failure to give notice or salary in lieu of notice:* In contracts of employment regulated by the common law rules of master and servant, the commonest mode of terminating such contract wrongfully is by doing so without giving notice or the length of notice prescribed by such contract of employment. What this means is that where no notice is given at all, this will amount to wrongful termination. Where notice is given, but the length of notice is not in accordance with that prescribed by the contract of employment, this will also constitute wrongful termination. Where the contract provides for notice or salary in lieu of notice and neither notice is given nor salary in lieu of notice paid, such termination is said to be wrongful.

5.2.1(b) *Alleged Malpractice not Justified:* The termination of the claimant's/plaintiff's employment may also be wrongful where it was based on an alleged malpractice which was not justified by the employer. In *Omoniyi Osusanya v E-Motion Advertising Ltd*,[48] the National Industrial Court found that though the defendant (employer) acknowledged that the termination of the claimant's employment was wrongful for failure to give the requisite notice or salary in lieu of notice, it was also clear that the termination of the claimant's

47 [2010] 16 NWLR 419

48 [Unreported] Suit No NICN/LA/457/2013 Judgment of which was delivered on 15th November, 2016 para 44.

employment was also based on an alleged malpractice and not just failure to give the requisite notice or payment in lieu of notice.

5.2.1(c) *Reason for Termination Not Given:* The next important issue for consideration is whether any termination/dismissal without reason is wrongful or not. At common law, the master can terminate the contract of employment at any time and for any reason or for no reason at all and once the required notice is given, the servant/employee cannot complain of wrongful termination/dismissal. Emphasizing this common law position, Kutigi, JSC (as he then was) in *Fakuade v OAUTH*[49] stated:

> *Generally speaking, a master can terminate the contract of employment with his servant at any time and for any reason or for no reason at all, provided the terms of the contract of service between them are complied with. The motive which led an employer to lawfully terminate his servant's employment is not normally a relevant factor and the court will have no business with such motive…*

The above rigid and harsh common law position does not conform with the International Labour Standards (ILSs). Article 4 of the International Labour Organisation (ILO) Convention[50] concerning Termination of Employment at the Initiative of the Employer for instance provides that "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 or based on the operational requirement of the undertaking, establishment or service". From the above position of ILO Convention, it can be seen that the requirement of a valid reason before any termination of employment by an employer shall be valid is one of the international best practices. Even in England where the common law principle originated from, the archaic principle has undergone statutory reforms. Under the Employment Rights Act,

49 [1993] 5 NWLR (Pt.291) 47 at 58
50 No. 158 of 1982

1996 of the United Kingdom as amended, an employee is entitled to a written statement giving particulars of the reason for termination where he makes a request.

The National Industrial Court has recently moved away from the archaic, rigid and harsh position of the common law and embraced the concept of International Best Practices (IBPs) provided by the Third Alteration to the Constitution to do away with the common law position. In *Aloysius v Diamond Bank Plc*,[51] the National Industrial Court Per Kola-Olalere, J held that the practice of terminating employment without stating reasons is contrary to International Best Practices and Labour Standards. He held:

> *…the Termination of Employment Convention, 1982 (No 158) and the Recommendation No 166 regulates termination of employment at the initiative of the employer. Article 4 of this Convention requires that the employment of an employee shall not be terminated unless there is a valid reason for such termination connected with his capacity or conduct or based on the operational requirements of the undertaking, establishment or service. The Committee of Experts has frequently recalled in its comments that the need to base termination of employment on a valid reason is the cornerstone of the Convention's provisions. This is the global position on employment relationship now. It is the current International Labour Standard and international Best Practice. Although this Convention is not ratified by Nigeria, but since March 4th, 2011 when the Constitution of the Federal Republic of Nigeria, 1999 (Third Alteration) Act, 2010 came into effect, this court has the power under the Constitution to apply International Best Practice and International Labour Standard to*

51 [2015] 58 NLLR (Pt. 199) 92. See also an earlier similar decision of the National Industrial Court in *PENGASSAN v Schlumberger Anadrill Nig. Ltd* [2008] 11 NLLR (Pt. 29) 164

> *matters like this by virtue of section 254C(1)(f) and (h) of the Constitution as amended.*
> *…I find that it is now contrary to International Labour Standard and International Best Practice and, therefore, unfair for an employer to terminate the employment of its employee without any reason or justifiable reason that is connected with the performance of the employee's work …I hold that it is no longer conventional in this 21st century labour law practice and Industrial Relations for an employer to terminate the employment of its employee without any reason even in private employment.*

From the above pronouncement of the National Industrial Court, it can be seen that even in private employments, the common law position has been jettisoned and the employer cannot now validly terminate the employment of its employee without any reason. It therefore follows that any such termination/dismissal without a reason will be declared wrongful. The above judicial activism and a shift from the old common law position are indeed commendable and a welcome development. It is hoped that the Court of Appeal will also uphold this progressive reasoning by the National Industrial Court.

When reasons for termination/dismissal of an employee are given by the employer, the burden is on the employer to prove or justify the said reason or reasons to the satisfaction of the court. In *Institute of Health ABU Hospital Management Board v Jummai Anyip*,[52] the Supreme Court held:

> *Although It is trite that an employer is not obliged to give any reason for firing his servant, all the same it is settled law that where he has preferred any reason at all, it is obliged to satisfactorily prove the same as the onus is on him in that regard, otherwise the*

52 [2011] LPELR – 1517 SC

> *termination/dismissal may constitute a wrongful dismissal without more.*

It may be remarked here that the first portion of the above pronouncement by the Supreme Court that has to do with the employer not being obliged to give any reason for firing his employee represents the old common law position which is no longer in tune with the International Best Practice provided by the Constitution as amended, the latter portion of the pronouncement still represents the law i.e not only is the employer obliged to give the reason for termination, the onus is also on him to justify such reason. In *Esther Ogbodu v Global Fleet Oil and Gas Ltd & Nicon Properties Ltd*[53] the National Industrial Court held termination to be wrongful because neither reasonable notice was given nor salary in lieu of notice paid as well as the reasons given for termination by employer not being plausible or not justified.

5.2.2 *Remedies Available for Wrongful Termination/Dismissal of Private Employments*: After an employee has succeeded in establishing that his termination/dismissal was wrongful, the next step is to seek for the requisite remedy or remedies. It has been held that for private employments, reinstatement cannot be ordered and the only remedy available to an employee wrongfully terminated/dismissed is damages.[54] Since only damages are recoverable, the measure of damages recoverable becomes the bone of contention. This is an area of labour law that has attracted heavy litigation – wrongful termination/dismissal and the measure of damages awarded. There has been a shift from the old common law position where paltry sums were awarded to a more progressive position beneficial to employees where substantial damages are now awarded far beyond salary in lieu of notice. It is this current position that this paper seeks to examine. Before the examination of the current position, it should be noted that almost all Nigerian cases that were decided prior to the National Industrial Court Act 2006 and the

53 [Unreported] Suit No LA/32/2012 Judgment of which was delivered on 5th December, 2014 p.44

54 See *Esther Ogbodu v Global Fleet Oil & Gas Ltd & Nicon Properties Ltd.* (Supra)

Third Alteration to the 1999 Constitution in 2010 insisted on the measure of damages in termination/dismissal being restricted to only payment in lieu of notice which typifies the stance of the common law on the matter. Thus the common law rule which represents the old dispensation as laid down in a long line of cases such as *Nigerian Produce Market Board v Adewunmi;*[55] *Onalaja v African petroleum*[56]; *Morohunfola v Kwara Tech*[57] and *Olanrewaju v Afribank Plc*[58] is that the remedy of any employee wrongfully terminated or dismissed is to sue for damages and the measure of such damages is the salary for the length of time for which notice of termination could have been given in accordance with the contract of employment. In fact *Isievwore v NEPA*[59] specifically held that where an employee is able to show that his appointment was wrongly terminated, he would be entitled to damages; and this would be what was due to him for the period of notice.

However, the Court of Appeal decision in *British Airways v Makanjuola*[60] provided a leeway for departure from precedent of the cases cited above and provides a more progressive precedents. Here, the court held that the quantum of damages recoverable by an employee depends on whether the wrongful termination of employment was as a result of the failure to give the required notice or as a result of an alleged malpractice. If the former, the quantum of damages may be the employee's salary in lieu of notice; but if the latter, then since such a termination carries with it some stigma on the character of the employee, he shall be entitled to substantial damages far beyond the payment of salary in lieu of notice which was put at two years salary.

The National Industrial Court has keyed into the progressive position of the Court of Appeal in *British Airways v Makanjuola* (Supra) and has indeed applied it in several cases. In *Mrs Folarin Maiya v The Incorporated Trustees of Clinton Health Access*

55 [1972] 11 SC 111
56 [1991] 7 NWLR (Pt. 2006) 691
57 [1990] 4 NWLR (Pt. 145) 506
58 [2001] FWLR (Pt.72) 2008
59 [2002] 13 NWLR (Pt. 784) 417 SC
60 [1993] 8 NWLR (Pt. 311) 276

Initiative, Nigeria & 2 ors[61] Adejumo, President, National Industrial Court of Nigeria (PNICN) awarded as damages one year's gross salary for termination based on pregnancy which came to Five Million, Five Hundred and Seventy-Six Thousand, Six Hundred and Seventy Naira (N5,576,670.00) to the claimant. In *Mrs Titilayo Akinsanya v Coca-cola Nigeria Ltd*[62] Kanyip, J (as he then was), being guided by what his learned brother Adejumo, PNICN had done in *Folarin Maiya's* case, awarded damages/compensation of one year's gross salary to the claimant which amounted to N17,368,486.00 (Seventeen Million, Three Hundred and Sixty Eight Thousand, Four Hundred and Eighty Six Naira). In *Omoniyi Osusanya v E-Motion Advertising Ltd*,[63] Kanyip, J again having found that the termination of the claimant was also based on an alleged malpractice and not just failure to give the requisite notice or payment in lieu of notice, and applying the principle in *British Airways v Makanjuola* (Supra) which should have entitled the claimant (employee) to two years' salary which ordinarily would have been N18,400,000, awarded the sum of N5 Million only as claimed by the employee since the court could not grant more than what was asked for. In *Shefiu Adejare v MDS Logistics Plc (Subsidiary of UACN Plc)*[64] the National Industrial Court having found that the termination of the claimant's employment by the defendant was for theft which was not proved and so the termination was wrongful held that the claimant was entitled to damages over and above payment in lieu of notice and accordingly awarded two years' salary as damages amounting to N564,146.00.

What all of the above cases show is that there has been a shift in the traditional common law position of awarding only salary in lieu of notice to awarding substantial damages in form of general

61 [2012] 27 NLLR (Pt.76) 110 NIC

62 Suit No NICN/LA/40/2012 the Judgment of which was delivered on 7th April, 2016

63 [Unreported) Suit No NICN/LA/457/2013 the Judgment of which was delivered on 15th November, 2016 para 44

64 (Unreported] Suit No NICN/LA/20/2013 the Judgment of which was delivered on 28th June, 2016

damages.[65] This is indeed a welcome development and a source of great relief to employees.

The National Industrial Court has extended the award of substantial damages to loss of expectation interest where the claimant has been wrongful terminated/dismissed and this leads to loss of expectation interest. The measure of damages in expectation interest is calculated on what the claimant (employee) would have earned had the defendant (employer) kept to his commitment. In *Patric Modilim v United Bank for Africa Plc*[66] the facts of which are interesting are as follows: the claimant was a Deputy General Manager at Zenith Bank Plc when on 23rd November, 2007, he was offered employment by the defendant as Deputy General Manager with effect from 3rd December, 2007 subject to the terms and conditions contained in the letter of employment and a letter of commitment (both dated 23rd November, 2007). To the claimant, the defendant promised to confirm him as General manager after six months subject only to the claimant being able to meet certain set objectives and targets which were contained in a performance contract executed between the claimant and the defendant. The claimant asserted that he worked assiduously and via a letter dated 27th August 2008, the defendant confirmed his employment with effect from 5th August, 2008 which indicates that he had met all the targets that were pre-conditions for his confirmation. However, the defendant continued to pay him the salary of a Deputy General Manager for the 20 months that he worked after his confirmation and despite his repeated complaints regarding the issue. He was also not accorded the perquisites of office that he was entitled to as General Manager. Following the defendant's recalcitrant failure to review his emolument to that of a General Manager after his confirmation, he repeatedly demanded that his salary be reviewed appropriately. As a

65 See also *Amaechi Onyekachi v Stanqueen Investment Ltd* Suit No NICN/LA/271/2014 the Judgment of which was delivered on 4th December, 2015 where general damages of N500,000.00 claimed by the claimant were awarded even though they fell short of one year's gross salary of 504,000.00 which would have been awarded for termination on ground of pregnancy. The Court could not award more than what was claimed.

66 [Unreported] Suit No NICN/LA/353/2012 Judgment of which was delivered on 19th June, 2014

result of his repeated demands, the defendant through Mr. Kennedy Uzoka, the then Executive Director (Resources), in the presence of Mr. Kevin Ugwuoke forced him to resign on 30th March, 2010 by demanding that the claimant resigns his appointment. He was therefore compelled and/or cajoled into tendering his resignation letter on 31st March, 2010 following the defendant's forceful demand on him to resign and the defendant purportedly accepted the resignation via a letter dated 30th March 2010 (a day before he resigned), which the defendant's acceptance letter shows that it had constructively terminated the claimant's employment wrongfully. The National Industrial Court declared that the claimant was constructively and wrongfully terminated and that the defendant's failure to review the claimant's level to General Manager on confirmation was a breach of his contract of employment contained in the offer letter and letter of commitment (both dated 23rd November, 2007. Kanyip, J (as he then was) held at p. 28: "The claimant in the instant case is accordingly entitled to a remedy regarding the loss of expectation interest in terms of the breach of the defendant's commitment to be willing to review his position to the level of General Manager". Accordingly, he awarded to the claimant the sum of N75,535,128.00 (Seventy-Five Million, Five Hundred and Thirty-Five Thousand, One Hundred and Twenty-Eight Naira) being the difference in salary between that of a Deputy General Manager and that of a General Manager for the period of 20 months representing what the claimant would have earned had the defendant kept to its commitment. The claimant was also awarded the sum of N1,120,221,60 as damages for wrongful termination of the claimant's contract of employment in terms of constructive dismissal.

The above judgment and the measure of damages awarded by the National Industrial Court are commendable. Even though re-instatement as a remedy may not be available here, the substantial amount of damages awarded may be sufficient for the dismissed employee to re-order and plan for his future life and livelihood.

The next issue is whether the court will grant a claim for payment of salary up to the retirement age of the employee in a claim for wrongful dismissal. The courts have not been consistent in their

decisions in this regard. In *Okeke v Civil Service Commission, Edo State*,[67] the court held that an employer does not guarantee a job to an employee until the employee's retirement age; and that the time stipulated for retirement only sets out the maximum duration possible for the employment under the existing contract. Consequently, the court will not grant a claim for payment of salary up to the retirement age of the employee in a claim of wrongful dismissal. Applying the above principle, the National Industrial Court in *Folayemi Alonge v WAEC*[68] held that the claimant could not ask for his salary for the period April 2003 to 2018 when he would have reached 60 years, his retirement age. Here, the claimant (employee) who had collected gratuity and pension turned around after six years to file an action claiming salaries for wrongful retirement up to the retirement age of 60 years. His claim was dismissed. But in *Beredugo v College of Science and Technology*[69] the Court of Appeal held that once wrongful termination of appointment by the employer is established, then damages which is the amount the employee would have earned had his employment run up to retirement age will follow. Applying the above principle, the National Industrial Court in *Mahmud Alabidun v President of the Federal Republic of Nigeria & Anor*[70] per Kanyip, J held that the claimant, who was wrongfully disengaged even though he was not entitled to reinstatement as his employment was not with statutory flavour, was entitled to his full salary and allowances from 4th October, 2011-29th April, 2015 the time that his 8-year rule as a Director would have come to an end. The interesting aspect of this decision however is that even though the claimant had not pleaded his salary and therefore ordinarily, on the authority of the Supreme Court's decision in *University of Jos v Ikegwuoha*,[71] the claimant would be entitled to no relief whatsoever, the National Industrial Court relied on a later decision of the Supreme Court in *Chigozie Eze*

67 [2000] 14 NWLR (Pt.68) 480
68 [Unreported] Suit No NICN/LA/277/2016 the Judgment of which was delivered on 5th October, 2017 Para 16. Per Kanyip, J (as he then was)
69 [1991] 4 NWLR (Pt.187) 651 CA
70 Suit No NICN/LA/74/2014 Judgment of which was delivered on 30th January, 2015 PP 12-14
71 [2013] 9 NWLR (Pt.1360) 478

& 147 Ors v Governor of Abia State & 2 Ors[72] and held that the claimant be paid his salary and allowances for the period 4/10/2011 – 29/4/2015. According to the court, the claimant had shown an entitlement even though the entitlement was not quantified by way of pleading the payslips. This takes me to the next interesting discussion.

Where a claimant shows entitlement to salary, allowances, gratuity, pension or redundancy payment but the actual sums are not proved e.g by tendering pay slips where details may be calculated, what should the court do? In *Suraju Rufai v Bureau of Public Enterprises & Ors*[73] the National Industrial Court stressed:

> *In labour relations, the burden is on the claimant who claims monetary sums to prove not only the entitlement to the sums, but how he/she came by the quantum of the sums; and proof of entitlement is often by reference to an instrument or document that grants it (Mr. Mohammed Dungus & Ors v ENL Consortium Ltd [2015] 60 NLLR (Pt. 208) 39, not the oral testimony of the claimant except if corroborated by some other credible evidence.*

From the above, it means the first step is to prove the entitlement by pleading the appropriate instrument that confers such entitlement. In labour relations, instruments that may confer such entitlements are the law (statute), conditions of service, circulars and collective agreements. One or more of these instruments may jointly confer such entitlement. The second step is to show how he/she came by the quantum of the sums claimed. This may be by tendering the pay slips where details may be calculated. The court is not allowed to make its own estimate of the items claimed.

Where a labour entitlement has been proved but the actual sum not proved eg by tendering pay slip where details may be calculated, the Supreme Court held in *University of Jos v Ikegwuoha* (Supra)

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72 [Unreported) Suit No SC 209/2010 the Judgment of which was delivered on 11th July, 2014 per Rhodes-Vivour, JSC delivering the lead Judgment

73 [Unreported] Suit No NICN/LA/19/2013, the Judgment of which was delivered on 4th June, 2018

that the claimant would not be entitled to any relief whatsoever. However, the later decision of the same Supreme Court in *Chigozie Eze & Ors v Governor of Abia State & Ors* (Supra), held otherwise. The Supreme Court, per Rhodes-Vivour, JSC who delivered the lead judgment held that even "in the absence of the fact that no evidence was led to establish the sums due to the appellants as salaries and allowances" and for which "no specific sum can be ordered by this court", the Supreme Court went on to state that "all courts in the land are courts of law and equity and equity demands that the executive should not be allowed to get away with a wrongful act"; as such "judges are expected at all times to decide according to the justice of the case and what is right, and always lean towards equity instead of strict law". The Supreme Court then went on to order that "the 1st respondent pays immediately to all the appellants their salaries and allowances for 23 months". This decision is a great source of relief to employees.

The National Industrial Court, in relying on the above case, stated in *Charles Ughele v Access Bank Plc*[74] thus:

> *The point to note here is that despite that the actual sums of salaries and allowance were not proved, the Supreme Court still went on to order their payment since an entitlement to them was shown. In like manner, in the instant case, the claimant has shown the entitlement to redundancy payment but has not proved the actual sum of the redundancy payment. This being the case, and on the authority of Hon. Chigozie Eze & Ors v Governor of Abia State & Ors (Supra), the claimant is entitled to an order of this court directing the defendant to calculate his redundancy payment per clause 18.4 of the Access Bank Plc Staff Handbook 2013 (Exhibit C1/D8). I so hold"*

74 Suit No NICN/LA/287/2014, the Judgment of which was delivered on 10th February, 2017 at para 67

Please note that in *Charles Ughele's* case, even though the Handbook entitling the claimant to redundancy payment was pleaded, the detailed calculation of sums due to him was not done. Thus the judgment was given, not in terms of a specific amount but the defendants (employer) were enjoined to calculate and pay in accordance with the defendant's Handbook. Even though the Supreme Court's position in *Chigozie Eze's* case is salutary, claimants are advised that it is better to prove the actual sum claimed so that judgment may be given in the sum claimed rather than directing the defendants to calculate and pay. For here, the sum so calculated may be based on the defendant's whims and caprices for which the claimant may not be able to contest again.

5.2.3 *Wrongful Termination or Dismissal – Can an Employee Complain after Receiving His Terminal Benefits?:* The courts are not unanimous on this issue. While some authorities posit that where an employee receives his terminal benefits after his employment is brought to an end, he cannot be heard to complain later of wrongful termination or retirement, others hold that receiving such terminal benefits does not constitute a waiver of his right and he can be heard to complain later of wrongful disengagement. In *Agoma v Guiness (Nig) Ltd*[75] the Supreme Court held:

> *The question is whether the appellant can now maintain this action after collecting her terminal benefits. It is the law that she cannot. She had put paid to any contract, real or imagined which she thought or that she had with the respondent. The contract was completely and validly determined when she accepted her terminal benefits which included her two months salary in lieu of notice.*

Following the principle laid down by the Supreme Court in the above case, the National Industrial Court in *Folayemi Alonge v West African Examination Council*[76] held:

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75 [1995] 2 NWLR 672 at 689

76 [Unreported] Suit No NICN/LA/277/2016, the Judgment of which was delivered on 5th October, 2017 para 17

> *…Contrary to the thinking and argument of the claimant, the law is now well established that once an employee accepts payment after his employment is terminated, it is late in the day for him to complain that his employment was not properly determined; see Ekeagwu v Nigerian Army [2006] 11 NWLR (Pt. 991) 382 and Osaye v The Honda Place Ltd [2015] 53 NLLR 51. Additionally, Julius Berger (Nig) Plc v Nwagwu [2006] 12 NWLR (Pt.995) 518 CA held that where an employee receives his terminal benefits after his employment is brought to an end, he can not be heard to complain later that his contract of employment was not properly determined because the acceptance of payment by the employee renders the determination mutual…*

Accordingly, the court dismissed the claimant's case having found that between 2003 and 2009, he collected gratuity and pension before turning around to file this suit claiming for salaries and emoluments up to 2018 when he would have clocked the retirement age of 60 years. The court further held that "the actions of the claimant show an acceptance of his compulsory retirement. To turn around and make the claims he is making in this suit is to play smart and to go for a windfull, which no court should allow".

However, it appears in employments with statutory flavour where termination or retirement is unlawful, and therefore null and void abinitio, receiving salary in lieu of notice cannot preclude an employee from suing later for unlawful termination or retirement. Thus in *Military Administrator of Benue State v Ulegede & Anor*[77] Kaibi-Whyte, JSC stated:

> *The retirement of the respondents was therefore not in compliance with the enabling law… The retirement being unlawful and void, a valid act cannot arise therefrom. Therefore, that*

77 [2001] 9 & 10 SCNJ 43 at 61

> *acceptance of three months salary in lieu of notice cannot in the circumstance preclude the respondents from complaining about unlawful retirement which was void abinitio.*

It is my recommendation that the National Industrial Court should extend the application of the above principle to private employments where the wrongful determination of contract of employment was as a result of alleged malpractice where salary in lieu of notice was accepted by employee. This way, substantial damages may thereafter be awarded. After all in *Nigerian Telecommunications Ltd v Ikaro*[78] the Court of Appeal held that the acceptance did not constitute a waiver of employees right to complain later since the respondent, a low-income employee should not be expected to protest on an empty stomach.

5.2.4 *Wrongful Termination/Dismissal – What an Employee must prove:* Where an employee alleges that his/her contract of employment was wrongfully determined, there are certain material facts that he/she must prove in order to succeed. In *NRW Industries Ltd v Akingbulube*,[79] the Court of Appeal held that an employee who seeks a declaration that the termination of his employment was wrongful must prove the following material facts: (a) That he is an employee of the defendant; (b) The terms and conditions of his employment; (c) The way and manner and by whom he can be removed; and (d) The way and manner the terms and conditions of his employment were breached by his employer. It is the employee's duty to prove these facts and not the duty of the employer to prove any of these facts.[80] A brief consideration of the above elements may be necessary.

(a) *That he is an employee of the defendant:* Here, the employee must prove the existence of the contract of service as opposed

78 [1994] 1 NWLR (Pt.320) 350 at 364

79 [2011] 11 NWLR (Pt.1257)

80 See also the following cases: *Afribank (Nig) Plc v Osisanya* [2000] 1 NWLR (Pt.642) 592 CA; *Adams v LSPDC* [2000] 5 NWLR (Pt.656) 291 CA, *Kabelmetal Nig Ltd v Ativie* [2002] 10 NWLR (Pt.775) 250 CA; and *Emokpae v University of Benin* [2002] 17 NWLR (Pt.795) 139 CA

to contract for service.[81] In otherwords there must be the existence of employer/employee relationship. Generally, the pleading and tendering of the letter of offer of employment and its acceptance by the employee would suffice. However, in *Okoebor v Police Council & Ors*,[82] the Supreme Court, by majority decision held that the fact of employment can also be proved circumstantially i.e not necessarily by direct evidence in terms of pleading and tendering of the letter of employment.

(b) *The terms and conditions of his employment:* The terms and conditions of employee's appointment must also be pleaded and all the necessary documents constituting same tendered. What documents contain the terms of contract of employment or service is a question of fact. More than a single document may provide for the terms and conditions of employment. These documents include: the law (statute), regulations governing conditions of service, collective agreements and circulars. In *Ladip v Chevron (Nig) Ltd*,[83] the Court of Appeal held that what documents contain the terms of contract of employment or service is a question of fact. It held further that where more than a single document provides for the terms, such documents must be construed jointly in order to have the correct and total account of what the terms of the contract are.

Emphasising the need to plead the conditions of service by the claimant in an action for wrongful termination or dismissal, the Supreme Court recently held in *Bukar Modu Aji v Chad Basin Development Authority & Anor*[84] per Peter-Odili, JSC (who delivered the lead judgment) that waving the flag of a breach of the constitutional right to fair hearing does not provide any saving grace once the conditions of service are not pleaded and

81 See generally the case of *Shena Security Co. Ltd v Afropak (Nig) Ltd & Ors* [2008] 4-5 SC (Pt.II) 117 at 128-130 where the Supreme Court laid down the factors that should guide courts in determining whether a contract is one of service or for service. See also Bamidele Aturu, *Law and Practice of the National Industrial Court* (Hebron Publishing Co. Ltd, 2013) 17-18

82 [2003] 12 NWLR (Pt.834) 444

83 [2005] 1 NWLR (Pt.907) 277 CA. See also the Supreme Court decision of *Ondo State University v Folayan* [1994] 7 NWLR (Pt.354) SC

84 [2015] LPELR – 24562 (SC)

brought before the court by a claimant who is complaining of wrongful termination of or dismissal from employment.

(c) *The way and manner and by whom he can be removed:* The conditions of service usually provide for the way and manner an employee may be removed or disengaged from his employment. This must therefore be pleaded. Furthermore, the conditions of service also usually provide for the person or body vested with the authority to remove an employee, this must also be shown by way of pleading.

(d) *The way and manner the terms and conditions of his employment were breached by his employer:* In order to establish wrongful termination/dismissal, the employee is required to simply show that the way and manner he was removed is not in accordance with the way and manner provided by the conditions of service for his removal or disengagement. Once he is able to show this, then he would have made out or proved wrongful termination/dismissal.

5.2.5 *Conversion of Termination to Dismissal:* The issue to be discussed here is whether after an employee's appointment has been terminated, can such termination be later converted into dismissal as some employers usually do in order to deprive such employee of terminal benefits. The principle is that an employee whose appointment has been terminated can no longer be dismissed since by termination, such employment has ceased to exist and therefore a dismissal coming after termination of appointment would be a futile exercise. You cannot put something on nothing and expect it to stand or stay so goes the popular adage. This principle is in accord with the principle that an employer cannot dismiss or terminate his employee's employment with retrospective effect emphasized by the Supreme Court in *Underwater Eng. Co. Ltd v Dubefon.*[85] If termination of employment is allowed to be converted to dismissal, it means the subsequent dismissal is with retrospective effect i.e taking effect from the date of the earlier termination for which the Supreme Court frowns at. Flowing from the principle laid down by the

85 [1995] 6 NWLR (Pt.400) 156 SC

Supreme Court in *Underwater Emg. Co. Ltd v Dubefon,* (Supra) the Supreme Court in *Jombo v PEFMB*[86] held that an employee cannot be dismissed from an employment that had ceased to exist and a dismissal coming after the termination of appointment would be a futile exercise.

The principle laid down in *Jombo's* case above has been followed by the National Industrial Court in a number of cases to the effect that an employer cannot dismiss an employee after a termination of employment has been done. In *Ignatius Ugwuoke v Aero-Maritime (Nig) Ltd*[87] the court held:

> *…Once Annexture 4 was written, it became effective; as such there was no longer an appointment that could be subsequently terminated. By Jombo v PEFMB [2005] 14 NWLR (Pt.145) 443 SC, it is elementary that an employee cannot be dismissed from an employment that had ceased to exist. Therefore, a dismissal coming after the termination of appointment would be futile exercise. Accordingly, Annexture 5 is ineffective as there was no employment that could be terminated. Even if there was, the termination cannot be backdated. Annexture 5 is accordingly invalid, null and void; and I so find and hold. This means that Annexture 4 is the effective document that determined the employment of the claimant.*

The principle has also been extended to cover resignation by an employee. Thus where an employee resigns his appointment with immediate effect and the letter of resignation is received by the employer, there is no longer an employment relationship between the parties for which the employer can reject and so dismiss the

86 [2005] 14 NWLR (Pt.945) 443 SC

87 [Unreported] Suit No NICN/LA/482/2013 the Judgment of which was delivered on 30th November, 2016 para 32. See also *Olufemi Amodu v Epesok Paper Mill Ltd* Suit No NICN/LA/304/2013 Judgment of which was delivered on 22nd June, 2016; *Kelvin Nwaigwe v Fidelity Bank Plc* Suit No NICN/LA/85/2014 Judgment delivered on 24th January, 2017 and *Ineh Mgbeti v Unity Bank Plc* Suit No NICN/LA/98/2014 Judgment delivered on 21st February, 2017

employee. This was held by the National Industrial Court in *Ebele Felix v Nigerian Institute of Management.*[88]

6. CONCLUSION

This paper has examined two of the ways in which a contract of employment may be validly brought to an end to wit: Termination of the contract of employment through notice or salary in lieu of notice and summary dismissal of the employee occasioned by the employee's gross misconduct. In discussing dismissal, the all-important concept of constructive dismissal and its emerging trends have been examined.

Unlawful termination/dismissal of contracts with statutory flavour (Public employments) and wrongful termination/dismissal of contracts regulated by the ordinary common law rules of master and servant (private employments) have been discussed. This being an area that is heavily litigated upon as far as employment cases are concerned, requires a critical examination especially in view of the fact that recent attitudes of Nigerian courts especially the National Industrial Court show acts of judicial activism and a shift from the old and harsh common law positions to more pragmatic and progressive moves in order to achieve the goal and broad principle of labour law i.e. safeguarding the interest of the employee given his/her inferior bargaining power relative to the employer. In this regard, the current trends by the court are: (a) awarding substantial amount of damages in the nature of general damages for employees in private employments whose employments are wrongfully determined; (b) awarding substantial damages by way of general damages for constructive dismissal; (c) awarding substantial damages to employees for loss of expectation interest; (d) awarding damages to employees in deserving cases up to the retirement age; and (e) procedurally, where the claimant has shown entitlement to salary, allowances or redundancy payment but the actual sums are not proved e.g. by tendering pay slips where details may be calculated, the claimant is nonetheless entitled to an order of the

88 Suit No NICN/LA/321/2014 the Judgment of which was delivered on 4th July, 2017 para 46.

court directing the defendant (employer) to calculate the entitlement and pay the claimant.

It is hoped that the National Industrial Court will maintain this tempo and even continue to improve on the quantum of damages awardable in the area of wrongful determination of contract of employment especially contracts without statutory flavour.