Determination of Contract of Employment by Redundancy, Resignation and Retirement: An Appraisal

Prof. E.A. Kenen*

Abstract

There are various ways by which a contract of employment may be brought to an end, three of which are: redundancy, resignation and retirement. These three modes of the determination of contract of employment are the primary concerns of this paper. The three concerns have different legal connotations. The paper has employed doctrinal methodology in critically examining these modes of determination of contract of employment and made certain findings with regard to each of them. Some of these findings and recommendations are as stated hereunder: With regards to redundancy, the right to declare redundancy by an employer is controlled and restricted by the Labour Act which amongst others requires the employer to inform the trade union of the reasons for and the extent of the anticipated redundancy. Even though the courts have construed the provision as being otiose as no sanction is provided for its breach, it is recommended that in line with the spirit and express provision of the Act, the provision should be construed as being mandatory. With regards to resignation, the finding is that the employee has an absolute right to resign and the employer has no discretion to refuse to accept the notice of resignation. The effective date of resignation is the date the employer receives the employee's letter of resignation and once the letter is received, resignation becomes effective and the employee cannot withdraw unless there is a waiver of the right on the part of the employer. Resignation with immediate effect bestows on an employee the right to leave service automatically and immediately without benefits while in resignation with notice, it is recommended that since it takes effect on the expiration of the notice, the employee should be entitled to benefits. In retirement, there is absolute right to retire and no discretion to refuse to accept notice of retirement by an employer even where the employee is being investigated. In an unlawful/wrongful retirement, the current trend is that the court can now order for the payment of salary up to the retirement age. This is commendable and the courts are urged to maintain the spirit.

Key Words: Redundancy, Resignation and Retirement.

* Professor of Law in the Department of Commercial Law, Benue State University, Makurdi.

1. Introduction

Three of the ways in which a contract of employment may be brought to an end are redundancy, resignation and retirement.[1] There are several issues associated with each of these modes of determination of contract of employment. In redundancy, (which is usually declared by the employer) the right of an employer to declare redundancy has been statutorily circumscribed by the Labour Act[2] which requires the employer to inform the trade union - the umbrella body of the workers. But what will failure to inform entail? Must an employer stick to the principle of last in, first out (LIFO) provided by the Labour Act? The right to redundancy is conferred by the contract of employment but where an employee shows an entitlement to redundancy payment but fails to show how the details may be calculated e.g. as provided in employee's Handbook, what will the court do?

Resignation by an employee may be with immediate effect or with notice. Once a notice of resignation has been received by the employer, can an employee thereafter withdraw such notice of resignation? Where an employee is being investigated, can an employer refuse to accept the employee's notice of resignation? What is the legal effect of resignation with immediate effect? Refusal of an employer to accept employee's letter of resignation by a letter to that effect – what does such refusal entail? Where a clause in Employee's Handbook expressly gives management the right to reject employee's resignation, what is the legal effect of such a clause?

Retirement occurs where an employee's appointment comes to an end but he/she is entitled to gratuity, pension and other benefits. Retirement may be voluntary on the part of the

---

1 A contract of employment may also be determined through termination & dismissal which are not within the scope of my discussion.

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

employee or involuntary where he is compulsorily retired by the employer. What is the legal effect/consequence of a notice of retirement? Where an employer refuses to accept notice of voluntary retirement, can he rely on such refusal to his benefit? In wrongful retirement, can a court grant payment of salary up to the retirement age of the employee? In unlawful retirement, where salary in lieu of notice has been collected by the employee, can he thereafter complain of unlawful retirement? Is there any distinction between retirement and resignation?

The issues highlighted in each of the three concepts above as well as other sundry issues and the answers thereto are what this paper seeks to achieve.

2 Redundancy

Under redundancy, the paper shall attempt to examine certain salient aspects to wit: the meaning of redundancy, conditions precedent for declaring redundancy, right to redundancy payment and what the claimant needs to do having shown an entitlement to redundancy payment.

2.1 Meaning of Redundancy

Redundancy has been defined statutorily, judicially and by text writers. Statutorily, section 20(3) of the Labour Act defines 'redundancy' to mean "an involuntary and permanent loss of employment caused by an excess of man power". Even though the Act talks of 'excess manpower', it does not explain how excess manpower may occur or arise. Recourse will therefore be had to judicial interpretation. In *Obaleye v Dunlop Nigerian Industries Ltd*,[3] the court, per Bate, J held:

> *There must be a change in the circumstances of the business in which the employee is or has been employed and this change must result in a*

[3] [1975] ECSLR 445 at 446

> *state of affairs where the employers find themselves with too many employees or too many employees in a particular place or for work of a particular kind. This is what excess manpower means and it must be shown to exist before a claim to have been made redundant may properly succeed.*

From the above pronouncement, excess manpower would occur when there is a change in the circumstances of a business in which an employee was or had been employed and that change results in a state of affairs where the employer finds himself with too many employees in a particular place or work of a particular kind.

Judicially, the Court of Appeal in *Peugeot Automobile Nigeria Ltd v Oje*[4] attempted to give the meaning of redundancy. Muhammed, JCA stated:

> *Redundancy in service, in my view, is a mode of removing off (sic) an employee from service when his post is declared "redundant" by his employer. It is not a voluntary or forced resignation. It is not a termination of appointment as is known in public service. It is a form unique only to its procedure where an employee is quietly and lawfully relieved of his post.*

By the above pronouncement, even though redundancy is distinguished from other forms of determination of the contract of employment, the definition is inadequate as it fails to mention the reason why redundancy may be declared in the

[4] [1997] 11 NWLR (Pt.530) 625 at 635

first place which is 'excess of manpower' and also how this excess of manpower would occur.

According to Chianu:[5]

> *Redundancy – also referred to as retrenchment arises when an employer discharges surplus labour. The surplus employees are terminated even though they are otherwise fit and willing to continue in service if their services are needed. The removal must not be as a result of any fault on the part of the employee…*

The above definition, even though it acknowledges the fact that redundancy arises as a result of surplus labour ('excess manpower' as used by the Labour Act) has failed to state the circumstances that may give rise to the surplus manpower. To that extent, the definition is also inadequate.

Having examined the various meanings of 'redundancy' as given by the Labour Act, the court and a text writer and having found each inadequate, I would give the meaning of redundancy as "an involuntary and permanent loss of employment caused by excess manpower which excess manpower arises as a result of a change in the circumstances of a business which an employee was or had been employed; and that change results in a state of affairs where the employer finds himself with too many employees in a particular place or work of a particular kind".

Even though section 20(3) of the Labour Act talks of 'redundancy' in terms of excess manpower, an organization may, through its handbook, specify what 'redundancy' means other than the meaning ascribed to the word by the Labour Act. For instance, the Access Bank Plc Staff Handbook, 2013 clause 18.4 provides under 'redundancy' as follows:

---

[5] Emeka Chianu, Employment *Law* (Bemicor Publishers (Nig) Ltd 2004) 335

> *Redundancy means the involuntary loss of employment i.e the bank no longer requires the services of the employee. If a member of staff cannot be placed in another position, he/she may be declared redundant.*

By the above definition, redundancy means involuntary loss of employment where the bank no longer requires the services of the employee. Redundancy payment is thereafter made to a staff declared redundant in accordance with the formula provided by such Handbook.

2.2 Conditions Precedent for Declaring Redundancy

From the meaning of redundancy given above, it follows therefore that before an employer declares redundancy, the following conditions must be present: (a) there must be excess manpower; (b) the excess manpower must be occasioned by a change in the circumstances of a business which the employee was or had been employed; and (c) as a result of the change, the employer finds himself with too many employees in a particular place or work of a particular kind.

In addition to the above conditions, the right to declare redundancy is also restricted by the Labour Act. Section 20 of the Act provides:

> *(1) In the event of redundancy –*
>
> *(a) the employer shall inform the trade union or workers' representative concerned of the reasons for and the extent of the anticipated redundancy;*
>
> *(b) the principle of "last in, first out" shall be adopted in the discharge of the particular category of workers affected, subject to all factors of relative merit,*

including skill, ability and reliability; and

(c) the employer shall use his best endeavours to negotiate redundancy payments to any discharged workers who are not protected by regulations made under subsection 2 of this section.

(2) The Minister may make regulations providing, generally or in particular cases, for the compulsory payment of redundancy allowances on the termination of a worker's employment because of his redundancy.

From the above statutory provisions, other conditions precedent for declaring redundancy may arise for discussion. These are: (a) the employer informing the trade union (the umbrella body of workers) of the reasons for and the extent of the anticipated redundancy & (b) the employer negotiating redundancy payments to discharged workers; and in deciding which workers to retrench or declare redundant, to use the principle of 'last in, first out' (LIFO).

(a) Informing the Trade Union of the reasons for and the extent of the anticipated redundancy.

This provision is salutary. A trade union is the umbrella body of workers whose objective is to fight for the welfare of its members. It is therefore in a better position to fight for the welfare of its members as opposed to individual members fighting their cause. It is therefore necessary that the union should be informed not only of the reasons but also the extent of the anticipated redundancy. The issue is: where an employer fails to inform a trade union of the reasons and extent of the anticipated redundancy, what remedy, if any, has the union over such an employer? In *National Union of Hotels and*

Personal Services Workers v Imo Concorde Hotels Ltd[6], Edozie, JCA stated:

> *It is crystal clear (from section 20(1)(a) of the Labour Act) that the only right conferred on a Trade Union is merely a right to be informed by an employer for a redundancy in his establishment. No sanction is provided for failure by employer to do so. The section does not confer a right to sue in default of the employer notifying the trade union of a redundancy…*

It is my submission, with the greatest respect to Edozie, JCA that his pronouncement is not in accord with the spirit and intendment of the section. Even though no sanction is provided for failure by an employer to inform a trade union, the wordings of the section in using 'shall' connote mandatory provision. An employer's failure to do so will amount to a breach of statutory provisions to which consequential relief inform of either nullification of the said redundancy or award of substantial damages should be available. Chianu[7] has submitted, and I am in agreement with him that Edozie, JCA's pronouncement is contrary to all known principles of statutory interpretation. In *Hotel and Personal Services Senior Staff Association v Owena Hotels Ltd*[8] the National Industrial Court ordered the reinstatement of three union leaders whose appointments were purportedly terminated on ground of redundancy. The National Industrial Court held:

> *The reason given for the termination of the appointments… is 'redundancy', but in carrying out the purported redundancy exercise, the*

---

6 [1994] 1 NWLR (Pt.320) 306 at 322
7 Chianu (n5) p. 340
8 [2005] 3 NLLR (Pt.7) 163 at 182-3

> *management… breached the provisions of section 19 of the Labour Act which requires that 'the employer shall inform the trade union or workers' representative concerned of the reason for and the extent of the anticipated redundancy.*

The above pronouncement by the National Industrial Court is a more progressive one and more in line with the spirit and intendment of the Act on the issue. It is hoped that the National Industrial Court will continue with its progressive and sound reasoning in this regard.

(b) The Employer Negotiating Redundancy Payments to Discharged Workers.

Again employers are enjoined to negotiate redundancy payments to discharged workers particularly workers not covered by the Minister's regulations providing for compulsory payment of redundancy allowances as specified in section 20(2) of the Labour Act. Here too, negotiation may be done with a trade union on behalf of its members declared redundant. Most organisations provide for the mode of payment of redundancy benefits in their Employees' Handbook. Where this is in place, recourse may be had to it for payment of redundancy benefits, without any further requirement of negotiation on the part of the employer.

(c) Deciding which workers to retrench or declare redundant.

In deciding which workers to declare redundant, the Act enjoins the employers to use the principle of 'last in, first out' (LIFO) - Section 20(1)(b). By this principle, employees in a particular category considered for retrenchment are retrenched or removed in the order in which they were employed. The last that were employed are the first to be retrenched, while the first employed become the last to be removed. This mode of selecting workers to retrench leaves no room for the exercise of managerial discretion. But must an employer stick to this

principle of LIFO? The Act, while providing for LIFO, still gives room for the exercise of managerial discretion. Hence the Act subjects the principle of LIFO "to all factors of relative merit, including skill, ability and reliability". By the above provision in section 20(1)(b), it means that an employer can dispense with the principle of LIFO in the choice of workers to be retrenched and be guided by merit in each case which will be influenced by factors like skill, ability and reliability of individual workers. This selection criterion is to the employer's advantage and enables him to exercise his discretion in the choice of employees to be laid off. The exercise of managerial discretion was in issue in *Guinness (Nigeria) Ltd v Agoma*[9]. Ejiwunmi, JCA (as he then was) held:

> *It is… clear (from section 20(1)(b)) that the application of the principle of LIFO was made subject to factors of relative merit, including skill, ability and reliability. In my view, while that section seems to preserve the rights of an employee who had been long in the employment of an employer to remain in his employment in a general retrenchment exercise by his employers, it would appear that he can only escape being retrenched if he has shown that he is relatively better, in merit, skill, ability than the other workers who are in the same category with him. In this appeal under consideration, the respondent has not in my view led any evidence to show that she was better qualified than the person whose services was retained by her employers.*

[9] [1992] 7 NWLR (Pt.256) 728 at 741

It can therefore be seen from the above pronouncement that the primary criterion used in determining workers to be retrenched is the principle of LIFO. However, this principle is subjected to managerial discretion and so while employing the principle, an employer may be guided by merit which is influenced by factors like skill, ability and reliability. This way, strict adherence to LIFO may be dispensed with.

2.3 Right to Redundancy Payment

The right to redundancy payment does not extend to every category of workers since the Labour Act (which provides for redundancy) applies to a restricted class of workers.[10] So, in respect of workers outside the ambit of the Act, it is the contract of employment which can confer such right. In *Shell Petroleum Dev. Co. (Nig) Ltd v Nwaka*[11], the Supreme Court held that an employee has no general right not to be declared redundant beyond what his contract or collective agreement provides, and that usually, but not invariably, the conditions on which an employee may be declared redundant are found not in the terms and conditions of service but in the collective agreement between the employer and its employees.

It can be seen from above that other than workers covered by the Labour Act, the right to redundancy payment is conferred by the individual contract of employment made in this regard. In appropriate cases, the conditions of service may also provide for this. In *Mathew Afolabi v Sterling Bank Plc*,[12] the National Industrial Court held:

> *The fact of redundancy cannot be proved by conjectures, opinions or assumption. Simply because there was a merger does not, on its own*

---

10 See the meaning of 'worker' given by section 91 of the Labour Act and those excluded from the definition from paragraphs (a)-(f) of the section

11 [2003] 5 NWLR (Pt.815) 184

12 [Unreported] Suit No NICN/LA/297/2013 the judgment of which was delivered on 31st December, 2015 at pp 21 & 22

> *and without more, prove the fact of redundancy or the fact that thereby there is excess manpower. Also the fact that employment is terminated because services are no longer required does not, without more, thereby signify that it must be because of redundancy. Conceptually, redundancy stems from and is declared by the employer… so the claimant cannot simply assume or conclude that his termination was as a result of redundancy without proving that he was so declared in accordance with Exhibit C3. All the requirements enjoined under section 20 (of the Labour Act) are actually obligations on employer, not employee.*

In the above case, the claimant's appointment was terminated for 'services no longer required'. He averred that the court should order that his termination was on ground of redundancy due to excess staff as a result of the merger between the defendant and Equitorial Trust Bank. The court rejected his contention.

The above pronouncement leads to an important issue worth examining. Even though it is the obligation of the employer to declare redundancy, where an employer terminates employees' appointments in circumstances that amount to a declaration of redundancy yet fails to allude to the fact of redundancy, can an employee prove that he was actually laid off as a result of redundancy? This is in view of the fact that redundancy usually attracts terminal benefits far above mere termination where salary in lieu of notice may be paid. Some employers, in a bid to avoid payment of redundancy benefits may simply terminate employee's appointment for services no longer required and simply pay salary in lieu of notice. Where

the circumstances are such that the workers were in fact retrenched without being declared redundant, can such employees make a case in court for redundancy payment? It is my considered opinion that if such employees are able to establish the fact that their appointments were terminated in circumstances pointing to redundancy, the court should uphold such claim by claimants and direct payment of redundancy benefits appropriately. After all 'excess manpower occasioned by a change in the circumstances of the business in which the employee is or has been employed' is elastic enough to accommodate mergers and acquisitions. So where an employer terminates an employee's appointment in circumstances which point to redundancy without expressly declaring same, such employee should be able to get an order from the court directing such employee to be paid redundancy benefits in accordance with such organisation's policy on redundancy.

2.4 Redundancy Benefits

Having been declared redundant, what is the nature of the benefit to be paid as redundancy benefits? In *Isheno v Julius Berger Nig. Plc,*[13] the court held that redundancy is a form unique only to its procedure whereby an employee is quickly and lawfully relieved of his post. Such type of removal from office does not carry along with it any other benefits except those benefits enumerated by the terms of the contract to be payable to an employee declared redundant. No employee is entitled to both retirement and redundancy benefits as retirement and declaration of redundancy cannot happen simultaneously. In *PAN v Oje,*[14] the Court of Appeal held that redundancy benefits do not include gratuity benefits. So having been paid gratuity, an employee cannot claim redundancy payment. That the conditions applicable to redundancy are

[13] [2003] 14 NWLR (Pt.840) 289
[14] [1997] 11 NWLR (Pt.530) 625 CA

quite distinct from those applicable to retirement or other conventional modes of relieving an employee from active service, such as termination, resignation or dismissal.

Generally, with regards to the quantum of redundancy compensation, most organisations provide for the formula in the Employee Handbook. The factors that determine how much a retrenched employee gets include the number of years spent in the organisation, followed by the compensation itself.

2.5 Having shown an entitlement to redundancy payment, what should an employee do?

Having established an entitlement to redundancy benefit/payment, the next step for an employee is to show the court how he arrived at the detailed calculation. Thus he should plead the appropriate Handbook where details are calculated. But where he fails to specifically plead and prove the actual sum that he is entitled to, what will the court do? In *Charles Ughele v Access Bank Plc*[15], the claimant filed the suit claiming interalia, a declaration that the defendant's decision that the services of the claimant were no longer required constitutes the declaration of redundancy of the claimant by the defendant and an order for the sum of N11,068,750.07 as redundancy payment in accordance with the Bank's Policy to be paid to the claimant. Even though the National Industrial Court held that the claimant had established an entitlement to redundancy payment, the sum of N11,968,750.07 claimed as redundancy payment had not been proved. The court nevertheless directed the defendant to calculate the claimant's redundancy payment as per the Access Bank Plc Staff Handbook and pay to the claimant. The court's pronouncement is quite instructive:

---

[15] [Unreported] Suit No NICN/LA/287/2014 the judgment of which was delivered on 10th February, 2017 para 67 pp 28-29

> *So while entitlement to redundancy payment has been shown, and hence proved to this court by the claimant, the claim for the sum of N11,068, 750.07 as redundancy (relief iv) has not been proved; and so the said sum cannot be granted since it has not been proved how the claimant arrived at the sum. The fact (e.g. his salary) necessary to prove the grant of the sum of N11,068,750.07 were not even pleaded, not to talk of proved. But I note the Supreme Court decision in Hon Chigozie Eze & Ors v Governor of Abia State & Ors [2014] LPELR – 23276 (SC). …The point to note here is that despite that the actual sums of salaries and allowances 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 as per clause 18.4 of the Access Bank Plc Staff Handbook 2013 (Exhibit C1/D8). I so hold.*

The above pronouncement by National Industrial Court is commendable, I do not say more. However, claimants are advised to always ensure that they plead and prove how they arrived at the sum claimed in order to avoid a situation where

employers will be ordered to calculate and pay. For then, they can only rely on the integrity and honesty of their employers.

3. Resignation

Resignation as one of the ways in which a contract of employment is brought to an end is usually done by the employee. While resignation is usually at the instance of the employee and therefore voluntary, it may also be at the instance of the employer where an employee is forced to resign by the employer which resignation may be termed involuntary. Resignation may also be with immediate effect (which brings the contract to an end immediately) or with notice (which brings the contract to an end in the future). The issues that this paper seeks to examine here include: the legal effect of resignation; resignation by an employee being investigated; effective date of resignation; refusal of an employer to accept employee's letter of resignation; distinction between resignation and retirement.

3.1 Meaning of Resignation

According to Black's Law Dictionary,[16] resignation is a formal notification of relinquishing an office or position.

At common law, a worker has an absolute right to resign from his employment. In *Nokes v Doncaster Amalgamated Collieries Ltd,*[17] Lord Alkin, while recognizing the existence of this right at common law also held that it is the existence of the right to resign by a servant that distinguishes a servant from a slave. In *Benson v Onitiri,*[18] the Federal Supreme Court affirmed this common law right by holding that an employee has an absolute right to resign and no discretion exists on the part of the employer to refuse to accept the resignation. That it

---

16 Bryan A Garner, *Black's Law Dictionary* (9th edn, West Publishers 2009) P 1424
17 [1940] AC 1014; [1940] 3 All ER 549
18 [1960] 5 F.S.C 61

would amount to forced labour if employers have the discretion to reject as this will not only be contrary to the common law freedom of contract theory but also contrary to the provisions of the Constitution of the Federal Republic of Nigeria.[19] In *Yesufu v Governor of Edo State & Ors*[20] Ogundare, JSC held that the resignation need not to have been formally accepted by the employer before taking effect.

3.2 Resignation with Immediate Effect – Its Legal Effects.

Resignation with immediate effect carries with it three legal effects: (a) the right to leave service automatically; (b) the employee's forfeiture of any benefit; and (c) the employee paying any indebtedness to his employer. The above position was aptly captured by the National Industrial Court in the case of *Beloved Anokwuru v Omatek Ventures Plc & Anor*[21]. Kanyip, J (as he then was) having rationalized case law authorities on the issue held:

> *Resignation with immediate effect by an employee carries with it three legal effects: the right to leave service automatically; the employee's forfeiture of any benefit; and the employee paying any indebtedness to his employer. The justification for having to allow the resigning employee to leave immediately and automatically is the fact that he thereby forfeits any benefit he may be entitled to as well as the duty to pay off all indebtedness that he may have towards the employer; as such, the forfeiture of benefits inures as contractual consideration for the immediate and automatic*

---

19 See section 34(1)(c) of the Constitution of the Federal Republic of Nigeria, 1999 as amended which provides that "no person shall be required to perform forced or compulsory labour" (please note that subsection 2 provides for exceptions)

20 [2001] 26 WRN 121 at 133

21 [Unreported] Suit No NIC/LA/140/2011 the judgment of which was delivered on 16th March, 2016 p.8

> *separation of contractual relationship as per the employment in issue. So it cannot be that an employee who resigns with immediate effect is allowed to also benefit from such immediate separation by claiming benefits from the employer. What all of this means is that in the instant case, given that the claimant resigned his appointment with immediate effect, he cannot thereby claim any benefit from the defendants.*

In *WAEC v Oshionebo*[22] the Court of Appeal had earlier stated the legal effect of resigning with immediate effect. It held that tendering of a letter of resignation by an employee carries with it the right to leave the service automatically without any benefit subject to his paying any of his indebtedness to his employer. The question is: what exactly is the term 'any benefit' referred to in the above judgment? In other words, what does 'employee benefit' connote? In *Dave Nwabor v Oilflow Services Ltd*[23] the National Industrial Court, in an effort to explain the meaning of the term 'employee benefit' held:

> *Since the claimant in the instant case resigned with immediate effect, is he caught up by the rule that he thereby forfeits any benefit he may be entitled to? In other words, is earned salaries (which remain unpaid, such as the N2,250,000 due to the claimant from the defendant) a benefit, for which the claimant, having resigned with immediate effect, is thereby disentitled? The Black's Law Dictionary defines benefit as*

[22] [2006] 12 NWLR (Pt.914) 258 CA

[23] [Unreported] Suit No NICN/LA/552/2015 the judgment of which was delivered on 10th July, 2017 pp 20-21 para 51

> *advantage, privilege, profit or gain (from something). More particularly, in employment law, it means a payment or gift made by an employer. Wikipedia on the other hand, defines employee benefit and benefits in kind (also called fringe benefits, perquisites or perks) to include various types of non-wage compensation provided to employees in addition to their normal wages or salaries. In other words, employee benefits are non-salary compensation that can vary from one establishment to another; often indirect and non-cash payments within a compensation package, and provided in addition to salary to create a competitive package for the potential employee. In this sense, earned salary would not qualify as benefit for purposes of the application of the rule in WAEC v Oshionebo. This being the case, the claimant in the instant case is entitled to his earned salary of N2,250,000 which remained unpaid by the defendant. I so find and hold.*

The sum total of what the above pronouncement is all about is that one of the legal effects of resignation with immediate effect by an employee is the employee's forfeiture of any benefit and 'any benefit' is interpreted to mean non-salary compensation which invariably means that earned salary would not qualify as 'benefit' and so if any employee resigns with immediate effect, he is still entitled to all his earned salaries which remained unpaid by the employer.

3.3 Resignation with Notice

This is akin to termination of contract of employment by the employee by giving the requisite length of notice. Here, resignation does not take effect immediately but at a future date on the expiration of the notice. Here even though there is no definite judicial pronouncement, it would appear that at the expiration of the notice when resignation becomes effective, the employee will be entitled to all his earned benefits particularly cash payments which remained unpaid by the employer. It means here, the employee will be entitled to earned salary and benefits (particularly cash payments) which remained unpaid by the employer.

Where an employee resigns by converting unutilized annual or accumulated leave days to notice thereby leaving the employment immediately, what is the status of such resignation? Is it resignation with immediate effect or resignation with notice? In *Beloved Anokwuru v Omatek Ventures Plc & Anor,*[24] even though the National Industrial Court noted that the claimant in his letter of resignation titled "Resignation of Appointment" claimed that he resigned his appointment with immediate effect and then went on to state that his annual leave of 2007, 2008, 2009 and 2010 is the notice, the court was silent on the issue in its judgment and still held that the claimant resigned with immediate effect. It is my submission that where an employee purports to resign with immediate effect but makes reference to his accumulated leave days that should be used as notice, if the said number of days would be adequate to serve the length of notice required, then such resignation should be taken to be one with notice entitling the claimant to unpaid salary as well as unpaid monetary benefits.

3.4 Resignation – Effective Date

[24] [Supra] at p.7

The effective date of resignation is the date the employer received the letter of resignation. Thus in *Yesufu v Governor of Edo State*,[25] the Supreme Court held that a notice of the resignation of an appointment becomes effective and valid the moment it is received by the person or authority to whom it is addressed. In *WAEC v Oshionebo* (Supra), the Court of Appeal held that a notice of resignation is effective not from the date of the letter, or from the date of any purported acceptance, but from the date on which the letter was received by the employer or his agent. Flowing from the above principle, the National Industrial Court in *Ebele Felix v Nigerian Institute of Management*[26] held:

> *In the instant case, the claimant resigned with immediate effect on 19/5/2014. The defendant received the said letter of resignation on the same 19/5/2014. This means that going by the above case law authorities, the claimant's resignation was effective from 19/5/2014, the date the defendant received the letter of resignation. I so find and hold.*

From the foregoing discussion, it may be summed up that the date the letter of resignation is received becomes the effective date of resignation and even the ambiguity of a letter of resignation does not affect its effectiveness; and there would be no equivocation of resignation inspite of an expression of willingness to continue serving if the law permits.[27] Furthermore, once resignation becomes effective, the employee cannot withdraw the said letter unless the employer waives his right thereto.

---

25 [2001] 13 NWLR (Pt.731) 517 SC

26 [Unreported] Suit No NICN/LA/321/2014 the judgment of which was delivered on 4th July, 2017 para 46

27 See *Benson v Onitiri* [1960] NSCC (Vol II) 52

3.5 Refusal of an Employer to Accept Employee's Letter of Resignation.

Refusal of an employer to accept the Employee's letter of resignation by a letter to that effect renders such refusal null, void and of no effect. In *Taduggoronno v Gotom,*[28] the Court of Appeal specifically held that no employer can prevent an employee from resigning from its employment to seek greener pastures elsewhere. It is not open to the employer for whatever reason to refuse to accept the resignation of the employee for the employee has an absolute power to resign and the employer has no discretion to refuse to accept the resignation.

Even where a clause in Employee's Handbook expressly gives management the right to reject notice of resignation, the courts have held such provision to be illegal and unconstitutional. In *Ineh Mgbeti v Unity Bank Plc*[29] the National Industrial Court held that a clause in the Employee Handbook which provided interalia that management reserves the right to reject a notice of resignation or payment in lieu from an employee if it is seen as a strategy to cover up a fraud or misconduct to avoid disciplinary action was not only struck down but it was held to approximate to forced labour contrary to section 34(1)(c) of the 1999 Constitution and section 73(1) of the Labour Act; as such the provision was held to be illegal and unconstitutional. In arriving at this decision, the court placed reliance on the International Labour Organisation (ILO) Convention Concerning Forced or Compulsory Labour No. 29 of 1930 otherwise called Forced Labour Convention.

What may also be deduced from the above is that an employee who is being investigated may resign his employment and the employer is duty bound to accept the resignation. This swas held by the Court of Appeal in *Adefemi*

---

[28] [2002] 4 NWLR (Pt.757) 453 CA

[29] [Unreported] Suit No NICN/LA/98/2014 the judgment of which was delivered on 21st February, 2017

v Abegunde.[30] Furthermore, the National Industrial Court held that if the employer refuses to accept the resignation on the ground that the employee is being investigated for whatever infractions, this will amount to unfair labour practice.[31]

4. Retirement

This is one of the ways in which a contract of employment comes to an end. Here, an employee's appointment comes to an end but he/she is entitled to gratuity, pension and other benefits. Retirement may be voluntary or forced (otherwise referred to as compulsory retirement). Grounds for retirement may include age, number of years in service, ill health, compulsory retirement etc. Issues associated with retirement that are sought to be discussed here include: the right to retire; the legal effect of notice of retirement; distinction, if any, between retirement and resignation; where an employer refuses to accept a notice of retirement and the remedies for unlawful/wrongful retirement.

4.1 Meaning of Retirement

According to Black's Law Dictionary,[32] retirement is the termination of one's own employment or career, especially upon reaching a certain age or for health reasons; retirement may be voluntary or involuntary. From the above definition, retirement refers to the coming to an end of one's employment particularly on attaining a particular age popularly referred to as retirement age. This age may be biological age of birth which varies from one establishment to the other or different classes of employees. For public and civil servants, sixty years is usually the bar. For university employees, 65 years for teaching staff who are below the professorial cadre as well as

---

30 [2004] 15 NWLR (Pt.895) 1 CA

31 See *Ineh Mgbeti v Unity Bank Plc* Suit No NICN/LA/98/2014 the judgment of which was delivered on 21st February, 2017

32 Black's Law Dictionary (n16) p.1431

non-teaching staff is the limit while for professorial cadre, the retirement age is 70 years.[33] For Judicial Officers (Judges) the retirement age is 70 years for the Justices of the Supreme Court and Court of Appeal while 65 years for other Judges.[34] Other establishments provide for the number of years in service e.g. 35 years in service or 60 years of birth, whichever comes first. Retirement may also be for health reasons. Where an employee has an option of retiring at a lower age e.g. 45 or higher limit e.g 60, only he may elect to retire voluntarily at age 45 or compulsorily at age 60. This was held in the case of *Ejitagha v Psychiatric Hospital Management Baord.*[35] Whether retirement is premised on age or health reasons, the bottom line is that the retired employee should be entitled to all his/her retirement benefits.

4.2 The Right to Retire

Just like there is an absolute right to resign, there is also an absolute right to retire. In *Benson v Onitiri*[36] applied by the Court of Appeal in *Kola Adefemi & Anor v Muyiwa Abegunde & Ors*[37] the Federal Supreme Court held that "there is absolute power to resign and no discretion to refuse to accept notice". A *fortiori*, there is absolute right to retire and no discretion to refuse to accept the notice to retire. Where an employer, still in defiance to the position of law refuses to accept the employee's notice of retirement, can the employer thereafter rely on the notice to his favour? In *OSHC v Shittu,*[38] the Court of Appeal

---

33 See Universities (Miscellaneous Provisions) (Amendment) Act, 2012 Section 4 of which amends section 8 of the Principal Act by inserting a new sub-section "(3)" to the following effect: "(3) As from the commencement of this Act, the compulsory retiring age for: (a) academic staff in the professorial cadre shall be 70 years; and (b) non-academic staff shall be 65 years".

34 Section 291 of the Constitution of the Federal Republic of Nigeria 1999 as amended provides: (1) A judicial officer appointed to the Supreme Court or the Court of Appeal may retire when he attains the age of sixty-five years and he shall cease to hold office when he attains the age of seventy years. (2) A judicial officer appointed to any other court, other than those specified in subsection (1) of this section, may retire when he attains sixty years and shall cease to hold office when he attains the age of sixty-five years.

35 [1995] 2 NWLR 189 at 199

36 [1960] SCNLR 177 at 189-90; [1960] 5 FSC 69 This case was also applied by NIC in *Emmanuel Musa v Arbico Plc* Suit No NICN/LA/356/2012 judgment of 15th December, 2014 p.25

37 [2004] 1 NWLR at 27-28)

38 [1994] 1 NWLR (Pt.321) 476 CA

held that where an employee gives notice of his voluntary retirement to his employer and the employer refuses to accept the notice, the position is that the employee is still in the employer's service. But it is only that employee who can rely on that notice in his favour and not the employer who rejected the notice. This is because it has to be adjudged not only a deviation from "natural equity" but also contrary to law for an employer who is guilty of the illegality of refusing a notice of voluntary retirement to turn around and benefit from that illegality. And in *Osu v PAN Ltd*,[39] the Court of Appeal held that the notice of retirement will appropriately expire at the stipulated periods regardless of directives from the employer that the employee should stop work before the date stipulated; as such an employee remains a staff of the employer up to and including the last day when the notice would have properly expired.

4.3 Notice to Retire – It's Legal Effect.

Where an employee gives a notice to retire, what is the legal effect of such notice? In *WAEC v Oshionebo* (Supra) the Court of Appeal held interalia that in case of retirement, giving notice of retirement carries with it the right to be paid a pension and gratuity, but does not confer the right to withdraw from the service immediately and automatically. This position was re-echoed by the National Industrial Court in *Emmanuel Musa v Arbico Plc.*[40] Thus any retirement that is purported to be with immediate effect will be contrary to the case of *WAEC v Oshionebo* as was held by the National Industrial Court in *Emmanuel Musa v Arbico Plc.* But where an employee's conditions of service provide for automatic retirement as was the case in *Emmanuel Musa's* case, can such express provision override the principle in *WEAC v Oshionebo* which is to the

---

39 [2001] 13 NWLR (Pt.731) 627

40 [Unreported] Suit No NIC/LA/356/2012 judgment of which was delivered on 15th December, 2014 p.25

effect that notice of retirement does not confer the right to withdraw from service immediately and automatically? In *Emmanuel Musa's* case, Article 23 of 'Exhibit C' which applied to the claimant provided:

> *On attaining the age of 60 years, an employee's appointment will automatically terminate on grounds of retirement. Provided he has completed 10 years of continuous service; the employee may retire or be retired by the employer on/or after attaining the age of 50 (fifty) years.*

On whether flowing from the above provisions of 'Exhibit C' the claimant could retire with immediate effect, the National Industrial Court held:

> *...and the question here is whether the claimant can retire with immediate effect. WAEC v Oshionebo held that he cannot. In paragraph 12 of the claimant's further witness statement on oath of 14th August 2012, the claimant deposed that, further to paragraph 11 wherein he reiterated the provision of Article 23 of the NJIC (The National Joint Industrial Council Agreement on Terms and Conditions of Service in the Building and Civil Engineering Industry in Nigeria for all senior employees) agreement as to compulsory retirement at age 60, he tendered his notice of final retirement. This presupposes that the claimant retired given that he attained the age of 60 years. In this sense, retirement under the said Article 23 is automatic. Being automatic, it takes immediate effect and so cannot be rejected by the defendant. Here, it must be noted that though*

> *WAEC v Oshionebo held that a notice of retirement does not confer the right to withdraw from service immediately and automatically, this cannot override the clear intention of contracting parties in a contract of employment where the terms and conditions of employment as per the contract of employment is often the determinant of the rights, privileges and obligations of the contracting parties.*

The sum total of the above pronouncement is that even though the notice to retire does not confer the right on an employee to withdraw from service automatically and immediately, where the terms and conditions of employment contract evince a clear intention to the contrary, such employee may be capable of retiring with immediate effect. I also associate myself with the above reasoning.

4.4 Unlawful/Wrongful Retirement

Generally, it is the employee that gives a notice of retirement and subsequently retires when the period of notice comes to an end. However, an employer may, in appropriate circumstances, retire an employee particularly where the employee fails to give a notice of retirement on attaining the mandatory retirement age. This may be lawful. In some circumstances, the compulsory retirement by the employer may be unlawful or wrongful, for example where the employee is retired without any justification e.g. not attaining the retirement age. In case of employments with statutory flavour, that retirement may be termed 'unlawful' while in private employments, it may be termed 'wrongful'. The issue is; what are the remedies that are available to an employee unlawfully or wrongfully retired?

For employments with statutory flavour, where retirement is unlawful, the court may, in appropriate circumstances order reinstatement. In the absence of reinstatement, the court may award damages. In employments without statutory flavour (private employments) only damages can be awarded for wrongful retirement. It is in the area of damages both in employments with statutory flavour and employments without statutory flavour that this paper is more concerned with. What is the measure or quantum of damages that are awardable? Can the court grant payment of salary up to the retirement age of the employee?

4.4.1 Can the court grant payment of salary up to the retirement age of the employee in case of wrongful retirement?

A review of the judicial authorities will show that there are conflicting decisions of the courts on the issue. In *Okeke v Civil Service Commission, Edo State,*[41] the Court of Appeal 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/retirement. The principle laid down in the above case was applied by the National Industrial Court in *Folayemi Alonge v WAEC.*[42] In this case, the claimant claimed against the defendant interalia for a declaration that the retirement of the claimant from the service of the defendant by a letter dated 4th day of April, 2003 was wrongful having not allowed the claimant to put in his full years in service of the

[41] [2000] 14 NWLR (Pt.68) 480 CA

[42] (Unreported] Suit No NICN/LA/277/2016 judgment of which was delivered on 5th October, 2017 p.5 paragraph 16

defendant and that the retirement was not in accordance with any of the provisions of the conditions of service of the defendant. Flowing from the above, the claimant sought an alternative order directing the defendant to effect full payments to the claimant of all his salaries and emoluments to the retirement age of 60 years. i.e from April 2003 to March, 2018 when he would have attained the retirement age of 60 years. The National Industrial Court, citing the principle in *Folayemi Alonge v WAEC* held that "the claimant cannot ask for his salary for the period April 2003 to 2018 as he is presently doing". The court further found that the claimant by his act had accepted his retirement; "as such it is not open to him to come to court as he has presently done asking for his reinstatement or payment of his salaries and emoluments up to 2018 when he would have clocked 60 years. I accordingly see no merit whatsoever in the case of the claimant. The claimant's case fails and is hereby dismissed". The point being made here is that the National Industrial Court cited with approval the principle in *Folayemi Alonge v WAEC* (Supra).

However, in an isolated case of *Beredugo v College of Science & Technology,*[43] the Court of Appeal held that once wrongful termination of appointment by the employer is established, damages which is the amount the employee would have earned had his employment run up to retirement age will follow. Applying the principle in the above case, the National Industrial Court in *Mahmud Alabidun v President of the Federal Republic of Nigeria & Anor*[44] held that the claimant who was wrongfully disengaged from service (the defendants having not succeeded in justifying the reasons for which the claimant was disengaged) even though he was not entitled to reinstatement as his employment was without statutory flavour, was nevertheless entitled to his full salary and allowances from

[43] [1991] 4 NWLR (Pt.187) 651 CA
[44] [Unreported] Suit No NICN/LA/74/2014 the judgment of which was delivered on 30th January, 2015

4/10/2011–29/4/2015, the time that his 8-year rule as a Director would have come to an end. Even though the claimant had not pleaded his salry, the National Industrial Court, relying on the later decision of the Supreme Court in *Chigozie Eze & 147 Ors v Governor of Abia State & Ors*[45] ordered the employer to pay full salaries and allowances of the claimant since he had shown an entitlement even though the actual amount was not quantified by way of pleading pay slips. Most recently, in *Capt. Benedict Akanni (Rtd) v The Nigerian Army & 3 Ors*[46] the National Industrial Court declared that the compulsory retirement of the claimant by the 1st defendant was illegal, null and void and consequently ordered the 1st defendant to pay to the claimant a whooping sum of N75 Million being general damages for loss of expectation in the claimant's chosen career, training and psychological trauma suffered by the claimant as a result of the arbitrary and illegal action of the 1st defendant. This amount should be in addition to all other benefits and entitlements contained in Annexture 3. This is taking damages awardable for unlawful retirement to a higher level. This judgment is indeed commendable and in line with the broad principle of labour law which is to safeguard the interest of the employee given his/her inferior position relative to the employer.

4.4.2 Unlawful/Wrongful Retirement – Where Salary In lieu of Notice has been collected by an Employee, can he thereafter complain?

As has earlier on been stated, one of the legal consequences of a notice to retire is that the employee thereby becomes entitled to gratuity, pension and other benefits. But where an employee has been unlawfully/wrongfully retired and collects salary in lieu of notice, can he/she be heard to

[45] [Unreported] Suit No SC 209/2010 judgment of which was delivered on 11th July 2014
[46] [Unreported] Suit No NICN/ABJ/125/2018 judgment of which was delivered on 27th May 2020

complain later of unlawful/wrongful retirement? In *Military Administrator of Benue State v Ulegede & Anor*,[47] the Supreme Court, per Karibi-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 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.*

From the above pronouncement, what the Supreme Court is saying is that where there has been an unlawful or wrongful retirement, despite the fact that the employee would have collected salary in lieu of notice, he/she can still complain in a court of law for such unlawful/wrongful retirement. The Supreme Court's pronouncement should not, however, be construed in its widest and general sense to include where retirement benefits have generally been collected by the employee. For here, the employee, having collected his/her full retirement benefits comprising gratuity and other benefits as well as pension should not be heard to complain thereafter of unlawful/wrongful retirement. To the extent that salary in lieu of notice does not constitute 'full retirement benefits', having collected only salary in lieu of notice, he/she should still be heard to complain of unlawful/wrongful retirement where the appropriate relief will be granted i.e re-instatement or damages up to retirement age. In *Ulegede's* case, since it was unlawful retirement, the Supreme Court ordered for re-instatement of the employees.

---

[47] [2001] 9 & 10 SCNJ 43 at 61

However, where gratuity has been collected and pension being enjoyed by the employee, he cannot be heard to complain later of wrongful retirement. Thus in *Folayemi Alonge v WAEC*[48] the claimant (employee), having 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. The National Industrial Court having dismissed his claim held:

> *The claimant did not contest that he accepted the gratuity paid to him in 2003 and that since then, he has been on pension. Infact Exhibit D22 is a hand written letter by the claimant himself wherein he acknowledged the payment of gratuity, although he complained of being under paid in respect of rent allowance. The claimant did not file this suit at the Federal High Court until 27th February 2019 (this case was a transferred case from FHC to NIC). This means that between 2003 and 2009, the claimant collected gratuity and pension before turning around to file this suit claiming for salaries and emoluments up to 2018. 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 windfall, which no court should allow.*

It is therefore my submission that whether an employee may be heard to complain of wrongful retirement or not having collected terminal benefits is dependant on the nature of the benefits collected. If it is only salary in lieu of notice, he can

[48] (Supra) (n40) P5, paragraph 17

still be heard to complain of wrongful retirement. If however he/she has collected benefits that may amount to gratuity and pension, he cannot be heard to later complain of wrongful retirement.

One final point that should be made here is that there is a distinction between wrongful retirement and wrongful termination. The principles discussed above are applicable to wrongful retirement only. Where there is a wrongful termination of contract of employment and the employee accepts or collects his entitlements which include salary in lieu of notice, it is a different ball game altogether. He cannot be heard to complain later of wrongful termination of contract of employment. This position of law was clearly stated by the Supreme Court in *Agoma v Guiness (Nig) Ltd.*[49] The 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.*

4.5 Distinction between Retirement and Resignation

There is a world of difference between retirement and resignation particularly resignation with immediate effect. The legal effects of notice to retire and notice to resign with immediate effect were clearly laid down by the Court of Appeal in *WAEC v Oshionebo*[50] to the effect that tendering of a letter of resignation by an employee carries with it the right to

[49] [1995] 2 NWLR 672 at 689
[50] [2006] 12 NWLR (Pt.994) 258 CA

leave the service automatically without any benefit subject to his paying any of his indebtedness to his employer. However, giving notice of retirement carries with it the right to be paid a pension or gratuity, but it does not confer the right to withdraw from the service immediately and automatically. This position was re-echoed by the National Industrial Court in *Emmanuel Musa v Arbico Plc.*[51]

From the above, it can be seen that retirement and resignation are two different legal concepts with different legal connotations. The only instance where resignation may be similar to retirement is resignation with notice. Here, withdrawal from service is not immediately and automatically but on the expiration of the notice just like a notice to retire. Furthermore, the employee resigning with notice may be entitled to benefits where he is so qualified as may be specified by his conditions of service. Beyond this, retirement and resignation with immediate effect are radically different and the two terms should not be used interchangeably.

5. Conclusion

The article has examined the determination of contract of employment through redundancy, resignation and retirement. With regards to redundancy, the right of an employer to declare redundancy has been restricted by the Labour Act which provides for the conditions precedent among which is the requirement that the employer shall inform the trade union of the reasons for and extent of the anticipated redundancy. Courts have interpreted this requirement as not being mandatory as no sanction for its breach has been provided. It has been noted that this position by the court is not in tune with the spirit and express provisions of the Act and as such, the provisions should be construed as being mandatory.

[51] [Unreported] Suit No NICN/LA/356/2020 the judgment of which was delivered on 15th December, 2014 p.25

Furthermore, where an employee shows an entitlement to redundancy payment but fails to plead and show how he arrived at the detailed calculation, the court may, nevertheless direct the employer to calculate the employee's redundancy payments and pay. This is commendable. Even though the principle of last in, first out (LIFO) provided by the Act is ordinarily to be used in laying off redundant employees, the Act also provides for the exercise of managerial discretion.

With regards to resignation, the effective date of resignation is the date the employer receives the letter of resignation. It does not require formal acceptance by the employer. Thus, once the letter of resignation is received by an employer, it becomes effective and cannot be withdrawn by an employee except where the employer waives his right thereto. Resignation with immediate effect has the legal effect of bestowing on the employee the right to leave service immediately and automatically but without any benefit and subject to his paying any indebtedness to his employer. The employee has an absolute right to retire and the employer has no right to refuse to accept resignation.

With regards to retirement, there is an absolute right to retire and no discretion on the part of the employer to refuse to accept notice of retirement. The legal effect of a notice to retire is that it carries with it the right to be paid gratuity and pension but does not confer the right to withdraw from service automatically and immediately. In unlawful/wrongful retirement, the current trend is for the court to order payment of salary up to the retirement age. Where only salary in lieu of notice has been collected or accepted by an employee unlawfully/wrongfully retired, he can thereafter be heard to complain of unlawful/wrongful retirement. However, where he collected gratuity or pension, he cannot be heard to complain later of unlawful/wrongful retirement.

It is hoped that the issues discussed in the paper would have enriched and broadened the reader's knowledge of these aspects of labour and employment law.