

AN APPRAISAL OF THE PRACTICE OF INDEFINITE SUSPENSION UNDER NIGERIA'S LABOUR LAW

By

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Abstract

The employer reserves the right to investigate and discipline the employee for proven wrongdoing. Whenever there is an allegation of wrongdoing or where the employee is proven to have committed a misconduct, the employer can place such an employee on suspension either to aid investigation of as a punishment. However, it has become fashionable for employers to place employees on indefinite suspension during investigation or as a punishment. Several issues are involved where an employer places an employee on indefinite suspension particularly where same is without pay. What is the effect of indefinite suspension on the contract of employment? What is the attitude of the National Industrial Court of Nigeria (NICN) to indefinite suspension? Does indefinite suspension particularly without pay either during investigation or as a punishment amounts to an unfair labour practice? These issues form the crux of this paper.

Keywords: Employee, Employer, Indefinite suspension, Investigation, NICN.

1. Introduction

Upon the creation of an employer-employee relationship, certain rights and obligations inure between the parties.¹ The employee is expected to be of good behaviour and shun all acts/omissions that are lawfully inimical to the interest of the employer while the employer is expected to have at heart, the best interest of the employee. Where there is an allegation of wrongdoing by the employee or where same has been established after compliance with due process of law, the employer reserves the right to discipline the concerned employee.² To either aid investigation of an alleged wrongdoing or as a punishment for a proven misconduct, the employer can place an employee on suspension.³ Based on the foregoing, it has become common place for employers, either at the point where an allegation of wrongdoing is made against an employee or as a punishment after the establishment of the veracity of the allegation, to place an employee on indefinite suspension.⁴ In some instances, employees placed on indefinite suspension are not heard before they are so placed. Some are not paid any

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¹ A. Emiola, *Nigerian Labour Law*, 4th Ed., Ogbomosho, Emiola Publishers Ltd., 2008, P. 113.

² DT Eyongndi, and IS Ilesanmi, "Employee Suspension and the Contract of Employment under Nigerian Labour Law: Matters Arising" (2019) 10 (1) *Ebonyi State University Law Journal* 104-119.

³ *Garba v. Federal Civil Service Commission* [1988] INSCC 306.

⁴ *Amadiume v. Ibok* [2006] 6 NWLR (Pt. 975) 163.

salary/wages during the period hence, catering for their needs becomes a herculean task which exposes them to avoidable hardship and ridicule. Aside this, they are unsure whether their employment subsists or to seek another employment for survival.

Where an employee is placed on indefinite suspension, certain pertinent issues crop up as far as the employer-employee relationship is concerned. What is the effect of indefinite suspension on the subsistence of the contract of employment? Can the employment of an employee on indefinite suspension be terminated based on the date of the indefinite suspension? What is the propriety of suspending an employee indefinitely without a hearing? Is indefinite suspension particularly without pay not a form of an unfair labour practice or when will indefinite suspension amount to an unfair labour practice? What is the attitude of the National Industrial Court of Nigeria (NICN) to the quagmire of indefinite suspension especially where no wrongdoing has been established against an employee? These questions form the crux of this paper.

The paper is divided into four parts. Part one contains the introduction. Part two discusses the employer's powers to investigate and discipline an employee for misconduct. Part three discusses the quagmire of indefinite suspension and the attitude of the NICN towards same. Part four contains the conclusion and recommendations.

2. Explicating the Employer's Power to Suspend an Employee

From the outset, the meaning of suspension is regarded as worthy of adumbration. In *University of Calabar v. Esiaga*⁵ the Court of Appeal stated as follows:

The word "suspension" means a temporal privation or deprivation, cessation, or stoppage of or from the privileges and rights of a person. The word carries or conveys a temporal or transient disciplinary procedure which keeps away the victim or the person disciplined from his regular occupation or calling, either for a fixed or terminal period or indefinitely. The disciplinary measure gives the initiator of the discipline a period of time to make up his mind as to what should be done to the person facing the discipline. Although in most cases suspension results in a disciplinary action, it is not invariably so. There are instances where the authority decides not to continue with the matter. This could be because the investigations did not result in any disciplinary conduct.⁶

The employer reserves the right to investigate and discipline an erring employee upon an established allegation of wrongdoing. This right is traceable to the fact that the employer is subject to the actual or constructive control of the employer. Based on this, where an employee

⁵ [1997] 4 NWLR (Pt. 502) 709 at 739-740, Paras. H-A.

⁶ *Imonikhe v. Unity Bank Plc.* [2011] 12 NWLR (Pt. 1262) 624.

is alleged to have committed a misconduct, the employer has the power to investigate same to either establish the culpability or otherwise of the employee. Chianu⁷ has opined that at common law an employer retains the authority to urge an employee not to report for duty. Even where this is referred to as suspension that is not what it is in law.⁸ In strict legal parlance, suspension only arises where an employer directs his employee not to report for work, and during this period he withholds his salary or an aliquot part thereof.⁹ In the public service suspension is akin to interdiction save that in the latter, the employee is suspended from duty until a criminal charge against him is concluded. The criminal charge may or may not relate to his employment in any way.¹⁰ Suspension is an aspect of the discipline of an employee by an employer which is usually done in the interest of the organization. It is neither a termination of the contract of employment nor dismissal of the employee. It operates to suspend the contract of employment rather than terminate the contractual obligations between the parties as was held in *Atoki v. Ecobank Nigeria Ltd.*¹¹ The Supreme Court in *Longe v. First Bank of Nigeria Plc.*¹² in interrogating the effect of suspension on the contract of employment noted that in a general sense, suspension of an employee from work only means the suspension of the employee from performance of the ordinary duties assigned to him by virtue of his office. Suspension is not a demotion and does not entail a diminution of the rights of the employee given to him under the law.¹³

An employer suspending his employee is legally permitted to impose terms of suspension but in general, suspension of an employee from work, only means the suspension of the employee from the performance of the ordinary duties assigned to him/her by virtue of the office the employee occupies.¹⁴ It is apposite to note that is a disruption of an ordinary employer's business to fetter him with an injunction not to discipline an employee. Thus, an employer is said to have an unfettered right to suspend or discipline an erring employee although the scope of this right is contingent on the contract of employment as enshrined in its terms and condition.¹⁵ It should be noted that while the point has been made and rightly so that an employer reserves the power to discipline an employee and to suspend too, where there is no justification for putting an employee on suspension in the first place, the employee ought to be paid full salary or the other half of his salary if he is put on half salary during the subsistence of the suspension.¹⁶ What this means is that, where an employer puts an employee on suspension with half pay as a precursor to an investigation, where the investigation exonerates the employee of any wrongdoing and the suspension is lifted, the other half of the employee's salary that was not being paid during the suspension, shall be paid. Thus, an employer cannot

⁷ E Chianu, *Employment Law*, (Akure, Bemico Publishers (Nig.) Ltd., 2004) 209.

⁸ *Ms. Claudis Ojinmah v. Coxdyn Nigeria Ltd.* Unreported Suit No: NICN/LA/111/2021 Judgment delivered on the 27th day of March, 2014.

⁹ E Chianu, *Employment Law*, (Akure, Bemico Publishers (Nig.) Ltd., 2004) 209.

¹⁰ *Garba v. Federal Civil Service Commission* [1988] 1 NSCC 306.

¹¹ [2014] 47 NLLR (Pt. 151) 135 at 119, Paras. B-G.

¹² [2010] 20 N.L.L.R. (Pt. 57) 177 at 315, Paras. F-G, G-H.

¹³ *University of Ilorin v. Tosin Akinrogunde* [2002] 3 NWLR (Pt. 755) 626.

¹⁴ *Longe v. First Bank of Nig. Plc.* [2010] 2-3 SC (Pt. III) 61.

¹⁵ *Marshall v. Midland Electric* [1945] 1 All ER 653.

¹⁶ *Africa Continental Bank Ltd. v. Ufodu* [1997] 10 NWLR (Pt. 523) 169.

used suspension as a sham to schism the employee's salary notwithstanding that the employee did not work during the period of suspension same being at the employer's instance. In fact, the NICN in *United Bank for Africa Plc. v. Oranuba*¹⁷ pointed that "where an employer desires to proceed to suspend an employee in order to make room for proper investigation, such ought to be on full salary in order not to create the impression that the employee has already been found guilty without being giving a hearing."

3. The Attitude of the NICN Towards Indefinite Suspension

In a plethora of cases, the NICN has examined the quagmire of indefinite suspension especially where same is not followed by investigation and the employee is not paid. This section examines some decisions of the NICN on the issue with the view of determining the attitude of the court towards the issue. In *Mr. Chide Akwarandu v. Jemmtek Resources Ltd.*¹⁸ the claimant was employed as a supervisor by the defendant in 2006 with terms and conditions of employment spelt out in his contract duly issued to him dated the 14th of February, 2008. Pursuant to an allegation of overloading of a truck in excess 38 barrels of base oil, the claimant was summarily placed on indefinite suspension. The investigative panel that was set up to investigate the allegation levelled against the claimant never submitted any report on its findings nor was there any other investigation especially that of the police indicting him whereas, some employees of the defendant who were indicted on the issue were not suspended but were still in the employ of the defendant. This action of the defendant is indicative of discrimination against the claimant. Thus, on the 1st day of March, 2012, the claimant filed a complaint urging the court to declare that his employment with the defendant is still subsisting, an order directing the defendant to pay his outstanding salary and all benefits or in the alternative, the sum of fifty million naira as general damages for unlawful interference with the claimant's employment.

The defendant entered appearance and denied all the averment made by the claimant and urged the court to dismiss his claims in its entirety. It argued that during the suspension, the claimant secured employment with another organisation and therefore terminated the contract of employment without recourse to due process of law. One of the issues the court examined was the propriety of placing an employee on indefinite suspension without the establishment of any wrongdoing by the employee. Commenting on the implication of indefinite suspension without pay with restriction of an employee from entering the business premises of the employer, the court held that "an indefinite suspension without pay with restriction of the employee from entering the premises of the employer is a clear intention of the employer to dispense with the services of the employee in question. A global reading of the cases suggests that while an employee on suspension is a subsisting employee in service courts are to take account of the length of time that the employee is on suspension." The foregoing position is in consonance with that of the Court of Appeal in *Olafimiyan v. Nova Lay-Tech Nig. Ltd.*¹⁹ thus, where the

¹⁷ [2014] 47 N.L.L.R. (Pt. 154) 470.

¹⁸ [2015] 52 N. L. L. R. (Pt. 176) at 547.

¹⁹ [1998] 4 NWLR (Pt. 547) 608.

period of suspension is unreasonably long as at the time the aggrieved employee challenge same, the court will construe same as unilateral constructive repudiation of the contract of employment by the employer.

In *United Bank for Africa v. Mrs. Doren Nkolika Oranuba*²⁰ the NICN espoused on the propriety of suspending an employee without a hearing and non-payment of salary during such suspension. The Respondent was employed by the appellant in 1980, after several years of diligent work, she rose to the rank of Relationship Manager however, on the 16th of April, 2003, she received a letter wherein she was suspended indefinitely from the employ of the appellant and subsequently, another letter wherein her employment was terminated was received. Both letters did not disclose any reason for either her suspension or subsequent dismissal. After failed several attempts to find out why she was suspended and her employment was subsequently terminated, she filled a writ of summons challenging both the suspension and termination as illegal and unlawful. She urged the court to grant her special and general damages for the illegal and wrongful actions of the appellant. The appellant as respondent, denied the claims of the respondent and urged the court to dismiss same. The respondent/defendant averred that the claimant/respondent was negligent in her duty and violated its Credit Policy Manual by failing to monitor the arrival of vessels and shipping documents in respect of the import finance facilities for two customers introduced by her which resulted in the appellant incurring monumental loss. The lower court granted part of the reliefs of the claimant/respondent against the appellant/defendant. The court held that the failure to give the respondent/claimant the opportunity of fair hearing by issuing her a query before she was suspended and subsequently terminated, runs afoul of the dictates of natural justice. The appellant being dissatisfied with the judgment, appealed to the Court of Appeal.

The Court of Appeal was called upon to determine the issue of whether or not the trial judge was right when he held that the suspension and dismissal of the respondent/claimant from the respondents/appellant's employ was wrongful and the propriety of placing an employee on suspension and half salary without being heard. The Court held that "it is against fair hearing and the rule of natural justice to place an employee on suspension with half salary without first giving a hearing through a query. Such will amount to a punitive measure against the employee."²¹ Thus, by this reasoning, where an employer is desirous to suspend an employee in order to make room for proper investigation, such suspension ought to be on full salary in order not to create the impression that the employee has already been found guilty without being giving a hearing.²²

In *Atoki v. Ecobank Nig. Ltd.*²³ the NICN remarked that an employer has the right to suspend an employee when necessary, with or without pay. However, employers cannot suspend

²⁰ [2014] 47 N.L.L.R. (Pt. 154) 470.

²¹ *United Bank for Africa v. Mrs. Doren Nkolika Oranuba* at Pp. 504-505, Paras. H-H.

²² *Lewis v. Heffer & Sons* (1978) 3 All ER 254.

²³ [2014] 47 N.L.L.R. (Pt. 151) 33.

without pay where there is no express or contractual right to do so. The rationale for this is that in suspending an employee without pay the employer has taken it upon itself (outside of the court) to assess its own damages for the employee's misconduct at the sum which would be represented by the wages of the day the employee remains suspended.²⁴ The same conclusion was reached in *Shell Development Company (Nig.) Ltd. v. Omu*²⁵ which is *in tandem* with the English case of *Hanley v. Pease & Partners Ltd.*²⁶

In *Duru v. Skye Bank Plc.*²⁷ the Claimant who was an employee of the defendant was placed on indefinite suspension and subsequently, his employment was terminated without any reason being adduced. He was suspended on the account of abdication from duty and recklessness owing to the opening and operation of a bank account in the name of the Rivers State Internally Generated Revenue contrary to the laid down procedure of the defendant for the opening of such accounts. He challenged his suspension and subsequent termination as being an unfair labour practice and wrongful. The NICN was faced with the task of determining what must be proved to establish that an indefinite suspension is an unfair labour practice. The court held that for a party to succeed on the relief that indefinite suspension without pay was wrongful and of no effect, he is required to show how the indefinite suspension without pay is wrong primarily by producing his terms and conditions of service containing no such provision.²⁸

From the foregoing, it is trite to conclude that while an employer reserves the right to suspend an employee, the suspension which could be indefinite, cannot be without pay unless same is expressly or impliedly stated in the contract of employment. Thus, where an employer suspends an employee indefinitely without pay, since the effect of suspension on a contract of employment is to keep the performance of work by the employee at abeyance, the employer is duty bound to remunerate the employee because the stoppage is at his instance and not the employee.

Where an employee is suspended and subsequently, the employer decides to terminate or dismiss the employee from its employ, the termination or dismissal cannot be done retroactively i.e. same cannot be backdated to the date of suspension but from the date the decision either to terminate or dismissed was taken or a later date. This point was underscored by the NICN in *Abenga v. Benue State Judicial Service Commission & Anor.*²⁹ The rationale for this is that there is a dichotomy between the legal effect of termination/dismissal and suspension. While the former brings to an end the employer-employee relationship with its varying disadvantages, the later only suspends the performance of work hitherto done by then

²⁴ *Atoki v. Ecobank Nig. Ltd.* [2014] 47 N.L.L.R. (Pt. 151) 33.at Pp. 113-114, Paras. E-A.

²⁵ [1998] 9 NWLR (Pt. 567) 672.

²⁶ [1945] 1 All ER 653.

²⁷ [2015] 59 N.L.L.R. (Pt. 207) 680.

²⁸ *Duru v. Skye Bank Plc.* [2015] 59 N.L.L.R. (Pt. 207) 680 at 731, Para. C-D.

²⁹ [2015] 56 N.L.L.R. (Pt. 192) 342 at 358 Paras. A-D.

employee but the rights and obligations of the parties subsisting without any variation whatsoever.³⁰

It can be safely argued that, the practice of indefinite suspension is not only obnoxious but morally reprehensible and legally unsustainable. It is a form unfair labour practice.³¹ In *Atoki v. Ecobank Nig. Ltd.*³² the NICN in stating when a suspension would amount to an unfair labour practice opined that “where a suspension is vindictive or *mala fide*, it may amount to an unfair labour practice and so is actionable under the dispensation of the Third Alteration to the 1999 Constitution.”

Worthy of note is the point that, suspension that is done to enable thorough investigation short of any form of interference of the concerned employee must be distinguished from suspension that is imposed after investigation as a punishment for an established wrongdoing. In the former case, the employee is regarded as a clean slate against whom no misconduct has been established and therefore, no seeming punitive measure can be taken against him/her but in the latter case, the innocence of the employee has been extinguished having been found guilty of the alleged misconduct hence, the suspension is a disciplinary measure. Thus, By virtue of section 17 (1) (b) of the Labour Act, an employee is not bound to remunerate an employee who is on disciplinary suspension because remuneration is earned. The foregoing assertion correlate with the position of the Supreme Court in *Dupe Olatunbosun v. Nigerian Institute of Social and Economic Research Council*³³ to hold that justice demand that an “employee should not be allowed to reap any further financial gain from the employer for services not rendered.”³⁴

The illuminating dictum of Lord Denning MR in *Lewis v. Heffer*³⁵ is worth commenting on. The law lord opined thus:

Very often irregularities are disclosed in a government department or in a business house; and a man may be suspended on full or half payment pending inquiries. Suspicion may rest on him; and so he is suspended until he is cleared of it. No one, so far as I know, has ever questioned such a suspension on the ground it could not be done unless he is given notice of the charge and an opportunity of defending himself, and so forth. The suspension in such a case is merely done by way of good administration. A situation has arisen in which something must be done at once. The work of the department or the office is being affected by rumours and suspicions.

³⁰ *Bakare v. L. S. C. S. C.* [1992] 8 NWLR (Pt. 262) 641 at 676.

³¹ *Mrs. Abdulrahman Yetunde Mariam v. University of Ilorin Teaching Hospital Management Board & Anor.* [2013] 35 N.L.L.R. (Pt. 103) 40.

³² [2014] 47 N.L.L.R. (Pt. 151) 33 at P. 144, Paras. A-B.

³³ [1988] 3 NWLR (Pt. 80) 25 at 56.

³⁴ A. Emiola, *Nigerian Labour Law*, 4th Ed., Ogbomosho, Emiola Publishers Ltd., 2008, P. 113.

³⁵ (1978) 3 All ER 354 at 364.

The others will not trust the man. In order to get back to proper work, the man is suspended. At that stage the rules of natural do not apply.

The above position of Denning MR which has been adopted by the Court of Appeal in *Udemeh v. Nigerian Coal Corporation*³⁶ is taking as justification for administrative suspension however, same must not be stretched beyond logic to justify indefinite suspension. It is ridiculous to imagine that Denning MR would be advocating for and approving indefinite suspension of an employee for years as being right. What can be made of the position is that where an employer deem it fit to suspend an employee, it shall be for a short period to enable thorough investigation of any alleged misconduct and not surreptitiously punish an employee when no wrongdoing has been established as it is the case with indefinite suspension.

From the above, it is crystal clear that the NICN is seriously frown at the obnoxious practice of placing an employee on indefinite suspension without pay. Although the court recognises and affirms the employer's right to sanction and erring employee and to suspend as well in order to make way for thorough investigation, this must be done in a way and manner that the dignity or innocence of the employee is not impugn before investigation is done and concluded. Allegation of a misconduct, no matter how grievous, remains an allegation which should not be used to impugn or cast unjustifiable aspersion on the innocence of the concerned employee.

4. Conclusion and Recommendations

Extrapolating from the above analysis, it is crystal clear that the employer retains the power to discipline an erring employee in order to maintain the health of the organization and maintain corporate sanctity. Where a misconduct is alleged against an employee, as a precursor to thorough investigation, the employer is legally competent to suspend the concern employee however, it has become fashionable for employers to suspend employees indefinitely. In some cases, the employee is placed on indefinite suspension without pay and thereby exposed to serious financial discomfort aside giving the impression that the alleged misconduct actually occurred even when same has not been proved. This practice is unhealthy and demonstrates the unequal power equation between the employer and employee.

The NICN as a court of law and equity, from its adjudicatory antecedents, frown at this practice and has declared same as an unfair labour practice therefore, same is antithetical to decent employment relationship as it extinguishes the dignity of labour and reduces it to a mere commodity. Thus, where an employee is placed on indefinite suspension especially without pay, same is actionable. It has therefore become imperative to stem this ugly tide.

³⁶ [1991] 3 NWLR (pt. 180) 477.

Based on the findings above, it is recommended that where an employee is placed on indefinite suspension and same is successfully challenged at the NICN, the court should award punitive damages to serve as deterrent.

Also, while it is generally acknowledged and accepted both at common law and under statute that an employer reserves the power to discipline an employee which may include suspension from work, the Labour Act should be amended to statutorily prohibit the practice of indefinite suspension (without pay) especially when it is done as a precursor to investigation.