

WRONGFUL TERMINATION OF CONTRACT OF EMPLOYMENT IN NIGERIA: A CASE FOR REINSTATEMENT IN PRIVATE SECTOR

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Abstract

Employment can be said to mean engaging the services of another person in exchange for wages or consideration. Employment creates a relationship between the employer and the employee. Every relationship has a beginning and an end therefore employment relationship is not different cause it has beginning and ending. The problem now is the effect of terminating the contract of employment wrongfully. Wrongful termination refers to a termination which contravenes terms of contract. It occurs only if there is breach of contract of employment. Sometimes the breach occurs as a result of insufficient notice, nonpayment of required entitlements or refusal to follow right procedure in summary dismissal. Wrongful termination attracts remedy. Employee who consider his employment wrongfully terminated either on grounds of insufficient notice, failure of employer to justify his dismissal may seek any one of the remedies available. The paper critically look at remedies via the common law doctrine of employment at will. The common law position is that you cannot impose a willing employee on an unwilling employer are challenges to reinstatement as a remedy therein is not readily applied to employment in private sector. A case for reinstatement in private employment, the position in other jurisdictions. Finally this paper present summary of findings that Nigerian courts and industrial tribunal rely on old English common law position. In conclusion the position of law in Nigeria is common law doctrine, which England has place many changes on, these changes had taken place both at the international and national level to protect workers against arbitrary termination, Nigeria is not moving with the world. This paper recommends that the labour laws be amended to include employers stating the reason for termination, the court to order reinstatement in the case of private sector employee and the domesticating international labour organization conventions will immensely improve job security in Nigeria.

1.0 Introduction

Wrongful termination refers to a termination which contravenes contracts terms, whether expressly agreed or implied by the court. Wrongful termination/dismissal occurs only if there is breach of contract of employment. The breach could be by giving of insufficient notice, nonpayment of required packages or not following the right procedure in summary dismissal. What amount to wrongful termination can be deduced from decided cases? The Supreme Court held that in the absence of a contractual term to guide it, the employee/appellant cannot maintain an action against the defendant that the employee was not wrongful dismissed as the employer/defendants are not in breach of the contract of employment. In wrongful termination the court does not consider the circumstance in which employment was terminated, such as malice, bad faith, caprice, feelings of the appellant or inconvenience a party may suffer. What court considers relevant is whether the termination/dismissal was done in accordance with the terms of the contract however, prove of noncompliance to the term of the contract does not make the termination ineffective rather it makes it wrong whereby the employee would in such case be entitled

to bring an action for wrongful termination which entitles the employee to award of damages. The remedy which an employee who considers that his employment has been wrongfully or unfairly terminated in Nigeria either because he was given insufficient notice or by failure of employer to justify his dismissal, may seek any one of the remedies available for breach of contract, they are damages, injunction, declaration, claim on a quantum meruit and action for reinstatement. However, reinstatement is not readily ordered as a remedy for wrongful termination in private sector, one peculiarity of this remedy is that it has been so far granted only to people holding public office under the statute or under statutory instrument which establish a public institution. This remedy of reinstatement is not readily applied to employees in private sector. This is probably because no willing employee can be imposed by the court on an unwilling employer even where the employer's behavior or motive for getting rid of the worker is wrongful or unjustifiable

In Nigeria, there are three categories of contract of employment.¹

- a. Contract of employment at will. This is governed by the common law.
- b. Contract of employment of master and servant relationship. This is governed by written agreement.
- c. Contract of employment with statutory flavour. This is governed by statute or regulations made under statute. The first two classes of contract of employment have similar intent and they are generally described as ordinary contract of master and servant. Under this class of employment, the master can terminate the contract with his servant at any time by giving the appropriate notice.² The master can pay *salary in lieu* of notice.³ Under the labour Act, either party to a contract of employment may waive his right to notice and accept payment in *lieu* of notice.⁴ Where the contract of employment is terminated in accordance with the terms of the contract, the contract is lawfully terminated and no cause of action arises.

2.0 Termination of Contract of Employment

Termination is simply ending a relationship. In contract of employment relation such relationship may be terminated in many ways Every contract of employment like any other contract always comes to an end The fact that contract of employment is said to be permanent or contains provision that states it as permanent, does not necessarily mean that the contract of employment cannot be terminated by either of the parties.⁵

Termination of contract of employment is a real issue that affect employment relationship as it tends to negatively affect job security. It can be said that in practice the employer is concerned with the availability of work. It is obvious that the more the product the more profit and money making for the employer and the more there is availability of work the more wages and income for the employee. Thus, real issue in contract of employment is the need for employees to be protected against arbitrary

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¹A. Esau 'Termination of Contract of Employment in Nigeria' LinkedIn available at <http://www.linkedin.com/pulse/2014/1019215646-79642839terminatingofemploymentofcontract-in-nigeria>. 2/6/2022.

²Labour Act Cap, L1, Laws of the Federation of Nigeria 2004, S. 11(1) Prescribes Minimum Notice Periods and requires any Notice of Termination for a Period of One Week or more to be in Writing.

³Olatawuru JSC in *Chukwumah v SPDC Nig. Ltd.* (1993) 4 NWLR (Pt. 289) 512 at 571.

⁴Labour Act, 2004.S 11(6).

⁵F M Abbarrett, *Nigeria Labour Law* (Hamby Digital Prints, 2011) 28.

termination and wrongful dismissal from employment. There are ways of ending contract of employment recognized by law in Nigeria and also the International Labour Organisation Standard. However, the International Labour Organisation Standards is applicable in Nigeria as a guide and it is not binding because they are not domesticated by Nigeria Law Makers. The ways of ending contract of employment recognized by Nigeria law⁶ and other contracts are normally terminated are discussed hereunder viz: lapse of time, full performance, mutual agreement, by frustration, notice by either party, payment in lieu of notice, and termination by summary dismissal.

2.1 Lapse of Time

Contract of employment that stated to be done for a fixed specified period will be terminated at the expiration of the fixed period or term.⁷ Notwithstanding the fact that a contract of employment with fixed term or period is discharged by both parties at the expiration of the fixed period, the contract may be brought to an end before the expiration of the fixed term or period if there is a breach of contract In *Glencore International AG v MSC Mediterranean Shipping Company S.A*⁸ Glencore contracted MSC Shipping Company for shipping of three containers of cobalt briquettes and only one container arrived. Claimant shipper commenced proceeding for breach of contract, conversion and bailment against Defendant Company. The Court considered a case regarding the delivering of one instead of three containers of cobalt briquettes. The Court held that the claimant shipper had established its claim in breach of contract and bailment and among other things, the Defendants Company's defence in implied terms and *estoppel* failed.

2.2. Full Performance

A contract of employment is discharged or terminated by both parties upon fully performance of their respective obligation under the contract.⁹ The termination of contract by performance is common practice in contract for service. In contract of service the employer engages the service or services of independent contract examples of an independent contractor are a plumber mending a tap, a watchmaker repairing a watch or a tailor sewing a cloth. Under contract for service a person employee's another person known as independent contractor to perform a specific kind of work.¹⁰ At the end of the performance the contract of employment is terminated.

2.3 Mutual Agreement

A contract of employment that is already in existence may be terminated by either of the parties or by both parties by mutual agreement reached in writing or made orally.¹¹ Example of this is where a person engages the service or services of a builder and the 'builder having commenced the building but before completing the building either parties or both of the parties agreed to stop or relieve themselves of their

⁶ O V C Okene, *Labour Law in Nigeria: The Law of Work* (3rdedn: Claxton and Derrick Publications 2012) 108-109.

⁷F M Abbarrett, *Nigeria Labour Law* (Hamby Digital Prints 2011) 29.

⁸[2015] All ER (D) 129 (JUL), [2015] EWHC 1989 (COMM).

⁹ Okene,(n 6) 108.

¹⁰Okene (n 6), 44.

¹¹T Nwazuo, *Introduction to Nigeria Lower Law* (Department of Public Law & Jurisprudence, Faculty of Law, Olabis, Onabanjo University 2002) 75.

rights, duties and obligation.¹² The parties by mutual agreement may end the contract of employment irrespective of the fact that such contract is permanent or temporary.¹³

2.4 By Frustration

Frustration brings a contract agreement to an end. The Court also has the power to recognize certain event as frustration and thereby discharge both parties of their obligation irrespective of the intention of the parties.¹⁴ In other words, contract can be frustrated by the operation of law. In *Davies Contractors Ltd v Fareham U.D.C*¹⁵ Lord Raddiffe observed that;

...frustration occurs whenever the law recognizes that without default of either party a contractual obligation has become incapable of being performed because of the circumstances in which performance is called for would render it a thing radically different from what was undertaken by the contract.

The doctrine of frustration within the environment of contract of employment occurs when unforeseen event happens which is not the fault of either the employer or employee.¹⁶ For the unforeseen event or changes in circumstances of the employment to amount to frustration it must be such that destroys the ability of either the employer to continue to employ, or of the employee to continue to work under the contract. In *Edwinton Commercial Corporation v Tsvliris Russ (The Sea Angel)*¹⁷ the Court held that delay caused by the defendant ship in delivering the consignment of the claimant amounts to frustration. Viscount Simon LC¹⁸ stated that event such as death of party, illness of the employee, imprisonment of employee and so on. may bring a contract to an end’.

Where any of the party pleads frustration as reason and the frustration is based on destruction of place of employment or anything in the place of employment, that party must prove that what is destroyed is the foundation for the continuation of the employment.¹⁹ In *Gold Group Properties Ltd v BDW Trading Ltd*²⁰ the Court held that there was no injustice in the case which requires the drastic remedy of frustration because the minimum prices could be renegotiated or fixed by expert pursuant to the dispute resolution mechanism and the claim of frustration by the defendant to end the contract failed. In *CTL Group Inc v Transclear SA*²¹ the Court of Appeal rejected the claim for frustration. Making it plain that, the fact that a supplier chose not to make goods available for shipment, thus rendering performance by the seller impossible, was not of itself sufficient to frustrate a contract for sale. A frustrated contract ceases to bind the parties.

¹²*Agbai&Ora v Okogbue* (1991) 7 N.W.L.R. (Pt. 204) 391.

¹³F M Abbarrett, *Nigerian Labour Law* (Hamby Digital Prints 2011) 29.

¹⁴Nwazuo (n 11) 79.

¹⁵[1956] A C 694 at 729.

¹⁶Nwazuo (n 11) 79.

¹⁷[2007] EWCA Civ 547.

¹⁸*Joseph Constantine Steamship v Imperial Smelting Corporation Ltd* (1942) AC 154.

¹⁹(n 21) 79

²⁰[2010] EWHC 323 (TCC).

²¹[2008] EWCA Civ 856.

2.5 Notice by either Party

Notice can be said to mean legal notification given to person as required by law or agreement.²² Unless a contract of employment is determined by operation of law some form of notice is certainly required.

Notice in the context of contract of employment means ‘formal information’ by one party²³ to the other that the contract is to be terminated at a specified date. Hence unless a contract of employment provides that it is made for life (which is rarely obtainable) it may be terminated by either party giving notice to the other.²⁴ In *Fakuade v ObafemiAwolowo University Teaching Hospital Management Board*,²⁵ the appellant was employed in 1976. The letter of appointment stated that the appellant or the respondent may terminate the appointment by a month’s notice in writing or by payment of one month’s salary *in lieu* of notice. By a letter date November 1987, the respondent terminated the appellant’s appointment. The letter did not state any reason for the termination. It was held that the termination was in accordance with the appellant’s contract of service.

While it is important that before the termination of contract of employment one form of notice or the other²⁶ must be given, what calls for answer appears to be the length of notice required to be given whenever the need for notice so arises. With respect to the length of notice so required, it appears that there is no hard and fast rule about it. This is because, the duration or lengths of notice to be given in certain situations and circumstances are determined based on the following factors: Whether the length of notice to be given is contained in the terms of the contract of employment.²⁷; On what is obtainable in the custom and trade of a particular industry in question for an employee in such position; The provisions of relevant statutory provisions and so on. where the length of notice to be given is contained in the statute or made part of contract of employment, it must strictly be adhered to.

In *Hamsard 3147 Ltd (t/a Mini Mode Childrenswear) & Anor v Boots UK Limited*,²⁸ the Court laid down the principles to consider when a contract is silent on term and termination right. Norris J held that, on the basis of the evidence before him, nine months was an appropriate notice period. He identified a number of principles which should be taken into account when deciding what period of notice is reasonable as follows; What length of notice is reasonable must always depend on the facts of a particular case.

2.6 Payment in Lieu of Notice

Payment in lieu of notice is a situation or circumstance whereby the employer pays prospective salary to the employee to represent the length of notice required to be given before the termination of contract of employment.²⁹

²²Labour Act 2004 s 11(1). provided that either party to a contract of employment may terminate the contract on the expiration of notice given by him to the either party of his intention to do so.

²³Either the employer or the employee.

²⁴ Okene, (n 6)109.

²⁵[1993] 5 NWLR (Pt. 291) 47.

²⁶ It could be express, implied or may as well take other constructive forms provided, it brings home to the mind of reasonable intelligent reader that notice of termination was given.

²⁷ Where the length of notice required is made part of the terms, it is expected to be respected and adhered to by parties.

²⁸[2013] EWHC 3251 (CH).

²⁹ Okene, (n 6) 111.

Accordingly, both the employer and employee are at liberty to terminate contract of employment by way of payment *in lieu* of notice. This right is reserved under section 11(6) of the Labour Act, 2004 which provides as follows. ‘Nothing in this section shall prevent either party of a contract of waiving his right to notice on any occasion, or from accepting a payment in lieu of notice’.

Furthermore, section 11(9) of the same Labour Act provides thus: ‘in the calculation of the 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 into account’. From the above provisions, it is a settled law under the Nigeria Labour Act that an employer may terminate the employee’s employment by paying him salary *in lieu* of notice or instead of notice to terminate the contract of employment. Where in addition to his basic salary, the employee has also been receiving benefits like medical allowance, car allowance, holiday allowance, accommodation allowance, etc. he (employee) is only entitled to his basic salary.³⁰

It has been decided by Court of Appeal in *Chukwumah v SPDC*³¹ that when a party to a contract of employment elects to terminate it by payment of salary *in lieu* of notice, the salary must be paid at the point when the letter of termination is handed over to the party. The Court per Edozie FCA stated:

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 put an end to the contract must pay to the other party the salary in lieu of notice at time of the termination.³²

2.7 Termination by Summary Dismissal

The terms “termination and dismissal” are often used interchangeably notwithstanding the fact that the two are not the same.³³ The chambers dictionary³⁴ defined termination as to bring or come to an end; whereas dismissal is defined to mean ‘to send away or to discard. Dismissal is the common law right of the Employer to terminate the contract of service of an employee without notice or payment in lieu of notice on the grounds of proves of misconduct on the part of the employee which strikes at the root of the contract. The act of misconduct justifying summary dismissal must be on that which offends the essential provision of the contract, conduct which proves that the employee no longer treats the contract as relevant.³⁵ An employee who in any way commits an act which shows fundamental breach of his contract can be dismissed summarily by the employer; thus the employee losses his rights and entitlements to notice and payment of salary *in lieu* of notice.³⁶

³⁰Labour Act, 2004 s 11(9).

³¹[1993] 4 NWLR (Pt. 289) 512.

³²*Chukwuma v SPDC* (1993) 4 NWLR (Pt. 289) 512.

³³Okene (n 6), 113.

³⁴ S Anderson and Others, *The Chambers Dictionary* (1stedn: Chambers Harrap Publishers Ltd. 1998) See definition of Termination and Dismissal in the New Lexicon Webster’s Dictionary of English Language.

³⁵ O Ogunniyi, *Nigeria Labour and Employment Law in Perspective* (2nd edn: Folio Publishers Limited 2004) 264-265.

³⁶*Ibid.*

Although dismissal is another way of terminating contract of employment, however, there exist apparent differences between both. It should be also noted that section 11(5) of the Labour Act, 2004 recognizes summary dismissal.

3.0 Grounds for which Employer can Dismiss the Employee Summarily

The following are grounds upon which the employer can dismiss the employee summarily: serious misconduct, misconduct committed outside official function, disobedience to lawful orders, incompetence/defective skill, subsequent impossibility, rudeness to the employer or use of bias or foul languages, infidelity, illness, suspension, dismissal on allegation of crime, dismissal and natural justices

3.1 Serious Misconduct

Serious misconduct applies to a situation where the conduct of the employee is grave and weighty in character as to undermine the confidence which should exist between employee and his employer and it is a ground for dismissal. This is referred to as the Rule in *Sinclair v Neighbour*.³⁷ In *Omoshen v Crowns Relocation (Nig) Ltd*³⁸ it was held that, there is no fixed rule of law defining the degree of misconduct which would justify a dismissal. It is enough that the conduct of the servant is of grave and weighty character as to undermine the confidence which should exist between him and the employer working against the deep interest of the employer clearly amounts to gross misconduct entitling the employee to dismiss the employee irrespective of the conditions of service.

It is a norm and acceptable practice to write what could amount to the act of misconduct in the employee's hand book or staff manual which also forms part of the terms of contract. These acts may include infidelity, drunkenness, gross immorality, drug addiction, incapacity, willful disobedience or insubordination, use of foul language, dereliction of duty, corruption, sleeping on duty and indulgence in violence. The list of what amounts to misconduct is not limited, it extends to whatever the employer terms to be misconduct.³⁹

3.2 Disobedience to Lawful Orders

It is a settle law that willful negligence or disobedience to a lawful and reasonable order of an employer by an employee is a definite act of misconduct which makes the employee liable to be summarily dismissed from employment. Such dismissal shall not be held wrongful, null or void.⁴⁰ Since such willful disobedience of a lawful order is a reflection of total disregard of an essential condition of contract of employment.⁴¹ In *NUMSA & Anor v Kromberg & Schubert (pty) Ltd*⁴² the Court found that the insubordination must be serious, persistent and deliberate, that the employer must proof that the employee was in fact guilty of defying his instruction.

³⁷ [1967] 2 NLR 1 See also *UBNLFU v Ogbob* (1995) 2 NWLR (Pt. 380) 647 at 653.

³⁸ [2015] 53 NLLR (Pt. 178) 188 NLC.

³⁹ Nwazuo, (n 11) 83.

⁴⁰ *Suleiman v Master Stroke Package Limited* (2013) 39 NLLR (Pt. 120) 92 NIC.

⁴¹ *Nwobosi v ACB Ltd* (1995) 6 NWLR (Pt. 404) 658.

⁴² [2008] 29 ILJ 1343 (BCA).

3.3 Incompetence/Defective Skill

When an employer employs a person based on a specific skill or profession that employee is expected to have knowledge in that profession or have the necessary skill. The right to dismiss for incompetence arises where the employee has failed to perform effectively the function or skill for which he has accepted to work by taking the job.⁴³ The failure of the employee to fulfill the function or skill is therefore said to amount to an act of incompetence which justified summary dismissal.⁴⁴

In *Bowater v Northwest London Hospital NHS Trust*⁴⁵ the claimant was summarily dismissed by the trust for acting in breach of her Nursing code of practice and also for making a lewd remark of a patient. The trust considered her to have failed to uphold the reputation of profession.

3.4 Subsequent Impossibility

The employer will be entitled to discharge the employee summarily where for some reason it has become impossible for the employee to perform the duties of his employment. For instance because of his having been sentenced to a term of imprisonment.^{46,47} This is especially so where the employee is a member of a professional body and discontinuation of that membership will seriously affect the effective performance of his. For instance, a legal adviser/secretary to a company⁴⁸ who is debarred or a Medical Doctor who is struck off the roll will not be able to function in his professional roll which made the employer to hire him in the first instance. In such cases, the employer will be justified in dismissing the debarred employee.⁴⁹

3.5 Rudeness to the Employer or use of Bias or Foul Languages

The use of rude or foul language could also constitute a valid ground for summary dismissal. In the *Rysstad v Dependable Turbines Ltd*⁵⁰ the mechanical design technician who was an Employee was dismissed after he called his employer incompetent, a liar and a fucking asshole. Also in *Henry v Foxco Ltd*⁵¹ employee was dismissed for insolence and insubordination. Insubordination are misconducts which can justify summary dismissal. An employer can summarily dismiss or terminate a contract of service of an employee for disobeying lawful orders and for insubordination. In *Sule v Nigerian Cotton Board*⁵² Obaseki JSC emphasized an employee's duty to obey lawful orders of an employer and the consequence of disobedience to such order and insubordination attracts penalty of summary dismissal.

3.6 Suspension

Suspension is a disciplinary measure employed by the master to put the contract of employment at bay or make the same inoperative for duration of time.⁵³ A right to suspend may be acquired by the terms

⁴³ Okene (n 6) 121.

⁴⁴ O Ogunniyi, *Nigerian Labour and Employment Law in Perspective* (2ndedn, Folio Publishers Limited Ikeja 2004) 276.

⁴⁵[2011] EWCA Civ 63.

⁴⁶ Okene (n 6) 121.

⁴⁷O.V.C. Okene, *Labour Law and Industrial Relations In Nigeria* [4thedn, Zubic Infinity Concept Owerri 2019] 130-131

⁴⁸ The Companies and Allied Matters Act, Cap C 20 Laws of the Federation of Nigeria, 2004 s 295(6).

⁴⁹*NBA v Alabi*(2006) 1 4 NWLR (Pt. 1000)

⁵⁰[2007] BCSC 474.

⁵¹[2004] 31 CCEL (3d) 72 (NBCA).

⁵²[1986] 6 SC 62 at 64-65 [1985] 2 NWLR [PT.5] 17 AT 38.

⁵³Okene, (n 6) 117.

of the contract, express⁵⁴ or implied⁵⁵ or by statute. Where the contract of employment expressly stated that the employee has the right not to be paid during such period of suspension, then the pay will be suspended. However, where the suspension is declared wrongful, the servant is entitled to his pay all through the duration of his suspension.⁵⁶

Though, suspension could be regarded as a disciplinary measure, however, it is not in all cases. An employee may be suspended in order to allow the employer have enough time to effectively investigate the allegation leveled against employee.⁵⁷ This is in order for the employee not to have access to the investigation thereby tempering with the any evidence that may be useful in carrying out a thorough investigation. Such employee may be called back to work where investigation process revealed that such employee is innocent.⁵⁸

3.7 Dismissal on Allegation of Crime

A person who is accused of a crime cannot be lawfully dismissed by his employer especially when the employment has a statutory flavour. It appears that two decisions of the Supreme Court have been accepted as establishing this principle of law by virtue of the constitutional provisions on fair hearing in criminal cases.⁵⁹ An employee can be lawfully dismissed for misconduct which also constitutes a criminal offence, only after he has been tried in the Court. This is because it is only the Court that has the exclusive jurisdiction to try criminal matters and not Tribunal or Investigation Panels.⁶⁰ This was the position of the Supreme Court on *Sofekun v Akinyemi*,⁶¹ wherein Fatayi-Williams J.S.C declared:

It seems to me that once a person is accused of criminal offence, he must be tried in a court of law here the complaints of his accusers can be ventilated in public and where he would be sure of getting a fair hearing was set out in subsections (4) to (10) of section 22 of the constitution of the Federal Republic of Nigeria no other tribunal, investigating panel or committee will do.⁶²

3.8 Dismissal and Natural Justices

Natural justices are the principles of fairness which impose obligation on a person having power to make decisions affecting other people to act fairly, in good faith, without and to afford a person the opportunity to be heard and adequately state his case before a decision is made.⁶³

⁵⁴*Olarewaju v Afribank Nigeria Plc* (2001) 13 NWLR (Pt. 731) 769.

⁵⁵*Ibid.*

⁵⁶*Udemah v Nigerian Coal Corporation* (1991) 3 NWLR (Pt. 180) 477; *Okene* (n 6) 117.

⁵⁷*Okene*, (n 6) 117.

⁵⁸*Ibid.*

⁵⁹*Denloye v Medical and Dental Practitioners of Disciplinary Committee* (1968) NSCC 260; *Sofekun v Akinyemi* (1980) NSCC 175.

⁶⁰*Baba v NCATA* (1990) 5 NWLR (Pt. 388) 86; *Garbav University of Maiduguri* (1986) 1 NWLR (Pt. 18) 550; *Okosun v CBN* (1996) 2 NWLR (Pt. 428) 77.

⁶¹[1980] 5-6 SC 1.

⁶² S 36(8) of the Constitution of the Federal Republic of Nigeria 1999 (as amended).

⁶³ E. Malemi, *Administrative Law* (3rd edn, Princeton Publishing Co, Ikeja 2008) 205. See L.O Nwauzi, *Elements of Industrial Law in Nigeria* (Porthacourt: David Stone Publisher Limited 2013)

Thus, natural justice entails that any person accused of any offence or allegations of any kind should be made to do the following; To know the case against him; State his own side of the story or make representation by himself or through his counsel on his behalf; Be given opportunity to prepare his defense and answer the case against him in accordance with the fair hearing provisions of the Nigerian constitution; Be tried by an independent and unbiased tribunal or court.⁶⁴

The principle of natural justice are of universal application and have been adequately been incorporated into the Nigerian Constitution by virtue of section 36.⁶⁵ There are two aspects to it and they are regarded as the two pillars of natural justice, namely; *Audi Alteram Partem*; meaning hear the other side or impartiality; *Nemo Judex in Causa Sua*; meaning no one should be a judge in his own cause or case.

Williams Fortescie J declared the need to observe the rules of natural justice in *R. v Chancellor of the University of Cambridge*⁶⁶ (Otherwise known as Dr. Richard Bentley's case) by pointing to the example set by Almighty God himself for our guidance in the hearing and dispensation of cases thus;

The laws of God and man both give the party an opportunity to make his defense if he has any... even God himself did not pass sentence upon Adam, before he was called upon to make his defense. Adam, says God, where are thou? (He (God) knew where Adam was). Has thou eaten of the tree whereof I commanded thee thou shouldst not eat? (He knew Adam had, hence the leading question). And same question was put to Eve also.⁶⁷

Similarly, in *Adigun v A.G. Oyo State*⁶⁸ Eso JSC put it thus;

Natural Justice Demands that a party must be heard before the case against him in determine. Even God gave Adam an oral hearing despite the evidence supplied by his act of covering his nakedness, before the case against his continued stay in the Garden of Eden was determined against him.

4.0 Remedies for Breach of Contract of Employment

The remedy which an employee who considers that his employment has been wrongfully or unfairly terminated/dismissed in Nigeria either because he was given insufficient notice or by failure of the employer to justify his dismissal, may seek any one of the remedies. The remedies available for breach of contract are: damages, injunction, declaration, claim on a *quantum meruit*, and action for reinstatement.

⁶⁴*Oyeyemi v Commissioner for Local Government, Kwara State and Ors*(1993) 6 NWLR (Pt. 299) 344 See Okene (n 6) 123-124

⁶⁵Constitution of the Federal Republic of Nigeria, 1999 (as amended), s 36

⁶⁶[1962] AC 322.

⁶⁷King James Version, *The Holy Bible* (The Bible Society of Nigeria Apapa, Lagos) Genesis 3:9-13.

⁶⁸[1987] 1 NWLR (Pt. 53) 678 at 721.

4.1 Damages

Damages simply mean money claimed by, or ordered to be paid to; a person as compensation for loss or injury.⁶⁹ Where the employee has been unjustifiably terminated or dismissed, he may claim damages from the employer.⁷⁰

As a general rule the measure of damages is the amount the employee would have earned under the contract for the period until the employer could validly have terminated the contract. In *Ibama v Shell Petroleum Development Company of Nig. Ltd.*,⁷¹ it was held that damages are not intended to give the employee a windfall. From the above decision of the court, it shows that the Court will not grant unmerited salaries. His Lordship, Ogbuagu JSC advised counsel as follows:

it ought to be born in the mind always especially by learned counsel who brings appeal as in the instant cases involving master and servant relation that in the payment of damages, is the salaries and entitlements already lawfully accruable and payable for the period for which the' employee should have been given notice of termination.

Damages are therefore awarded to compensate the employee for the actual pecuniary loss he has suffered as a result of the job loss.⁷² The main reason of damages is the salary or wages which the wrongfully removed employed would have earned up to the earliest time at which the employer could validly have terminated the employment contract.⁷³

The aim of awarding damages for breach of contract is to place the injured party in the position he would have been if there had been no breach, hence, damages are not expected to be gold mine for the aggrieved party but a reasonable assessment of his loss due to the breach.⁷⁴ The measure of damages is the loss and injury from the breach and is incurred in direct consequence of the breach and its quantum need not be proved as it is already presumed by law.⁷⁵ The Supreme Court in *Okongwu v NNPC*⁷⁶ stated that:

The principle of assessment of damages for breach of contract is *restitutio in integrum* – that is in so far as the damages are not too remote, the plaintiff shall be restored,... into the position in which he would have been if the breach had not occurred...

In *Onalaja v African Petroleum Ltd.*,⁷⁷ the Court of Appeal summed up the law on notice and damages as follows;

⁶⁹ B A Garner (ed), *Black's Law Dictionary* (8thedn, West Publishing Co. 2004) 416.

⁷⁰ Okene (n 6) 126

⁷¹ [2005] 10 SC 62 (emphasis added).

⁷² E E Uvieghara *Labour Law in Nigeria* (Malthouse Press Limited, Lagos 2011) 94.

⁷³ *Mobile v Asuah* (2001) 30 WRN 25 at 45, *Udo v C.R.S. Newspaper Corp* (2001) 14 NWLR (Pt. 732) 116 at 163.

⁷⁴ *Shell Petroleum Development Co Ltd v Lawson-Jack* (1998) 4 NWLR (Pt. 545) 249.

⁷⁵ *Gonzee Nig. Ltd v NERDC* (2005) 13 NWLR (Pt. 943) 637, *Stag Engineering Company Ltd v Sabalco Nig. Ltd. &Anor* (2008) LPELR-CA/A/33/2006.

⁷⁶ [1989] 4 NWLR (Pt. 115) 269.

⁷⁷ [1991] 7 NWLR (Pt. 691).

The measure of damages in cases of wrongful dismissal is always the amount of money that is payable during the period of notice to be given by the employer as stipulated in the contract of employment and not salaries up to retirement age. If no period of notice was prescribed then the common law rule will apply, namely that a reasonable period would be given, usually one month or three months, depending on the category of staff being dismissed.⁷⁸

In all cases of wrongful dismissal, it is for the worker to mitigate the loss arising out of and by reason of the dismissal.⁷⁹ The Court takes into consideration the legal obligation to mitigate loss arising from a breach of contract. A wrongful removed employee is expected to take reasonable steps to obtain another suitable employment and if he does, whatever he earns at that employment will be deducted from the damages otherwise recoverable.⁸⁰

4.2 Injunction

The Black's Law dictionary defined injunction as 'a Court order commanding or preventing an action'.⁸¹ Injunction as a remedy is granted to protect an existing legal right of a party. In *Lawrence S.U Azuh v Union Bank of Nigeria Plc.*⁸² Per Kekere-Ekun JSC stated that;

It is also well settled that an order of injunction is usually granted to protect a party's existing legal right from invasion by another. It is trite that an application for an order of injunction is usually granted pending the determination of substantive suit, or the determination of an application pending before the Court before which the application is made.

The Common Law does not favour the enforcement of contracts by remedies which demand or compel the contract to continue especially when it has to do with personal service.⁸³ However, in special or exceptional circumstances, the equitable remedies of injunction may be issued by the court in a contractual relationship. In employments that has statutory flavour, such special circumstances may include or arise where the procedure established by the statute in the determination of the employment is not followed.⁸⁴ But, in contract of personal service (private sector), the equitable remedy of injunction only lies sparingly only on very exceptional cases especially when the contract of personal service has negative covenant.⁸⁵

⁷⁸*Addis v Gramophone Co. Ltd* (1909) AC 488; *PZ & Co. Ltd v Ogedengbe* (1972) All NLR (Pt.1) 202.

⁷⁹ Okene, (n 6) 127

⁸⁰ E E uvieghara, *Labour Law in Nigeria*, (Malthouse Press Limited, Lagos 2001) 98.

⁸¹ B A Garner (ed), *Black's Law Dictionary* (8thedn, West Publishing Co. 2004) 800.

⁸²[2014] SC/71/2004.

⁸³*Omoshen v Crowns Relocations (Nig) Ltd* (2015) 53 NLLRC (Pt. 178) 188 NLC.

⁸⁴*Achu v Civil Service Commission of Cross River State & Anor*(2015) 57 NLLR (Pt. 197) 511 CA.

⁸⁵*Warner Brothers Pictures Inc v Nelson* (1973) 1KB 209.

4.3 Declaration

A wrongfully dismissed employee may ask for a declaration that he is entitled to continue his employment.⁸⁶ A declaration is a Court pronouncement determining the right of the respective parties. The Courts have shown themselves more willing to make declaratory judgment in the case of purported dismissal of an employee who enjoys a special legal statutory employment.⁸⁷ The declaration should state that the plaintiff's dismissal is invalid or illegal or *ultra vires*, null and void.⁸⁸ Declaration is an equitable remedy and the Court will not entertain an action for a declaration where it is clear that no useful purpose would be served by the Court's decision. In *Chukwuma v SPDC Ltd.*⁸⁹ Karibi Whyte JSC declared:

It is the principle that a declaratory relief will be granted where the plaintiff is entitled to relief in the fullest meaning of the word. Furthermore, the relief claimed must be something which it would not be unlawful or unconstitutional or inequitable for the court to grant. It would also not be contrary to the accepted principles upon which the court exercises its jurisdiction.

4.4 Claim on a *Quantum Meruit*

Quantum meruit means a claim or right of action for the reasonable value of services rendered. It also means the reasonable value of service, damages awarded in an amount considered reasonable to compensate a person who rendered services in a quasi-contractual relationship.⁹⁰

Where the employee was to be paid for the completion of a certain task, but he was unable to complete it because of the fault of his employer, the employee will be entitled to sue upon a *quantum meruit* (i.e. as much as he deserves).⁹¹ He cannot claim the agreed entire reward or sum because that would have become due only on the completion of the task. This applies also where the contract did not specify the rate (amount) or pays the employee a particular amount and where it was understood that the service would be paid for but, there was no valid contract in existence between the parties.⁹²

In *Ekpe v Midwest Development Corporation*⁹³ the plaintiff who was employed as a daily worker by the defendant's corporation, sought to be placed on a permanent daily basis. As a result the manager wrote to him a letter stating thus: 'if you are prepared to accept this appointment on the above condition, please sign the attached form of acceptance, your appointment will be subject only to satisfactory references from your previous employers'. There was no evidence of acceptance but the plaintiff worked on the terms stipulated for six and half months. He was refused payment despite repeated

⁸⁶Okene,, (n 6) 130

⁸⁷C Nwagbara *Determination of Contracts of Employment and Remedies for Wrongful Dismissal* (Tait Publisher, Lagos 2000) 77.

⁸⁸*Shitta-Bay v Federal Public Service Commission* (1981) ISC 40.

⁸⁹ [1993] 4 NWLR (Pt. 183) 512 as cited by Okene (n 6) 130.

⁹⁰ Garner (n 89)1276.

⁹¹*Warner v Warner Int. V.F.H.A.* (1993) NWLR (Pt. 297).

⁹² Okene, (n 19) 128

⁹³[1967] NWLR 107.

demand whereupon he instituted an action claiming his salary for the period he worked. It was held that where work was actually done the party who did the work can sue on a *quantum meruit*.

4.5 Reinstatement

The Black's Law Dictionary defined reinstate to mean 'to place again in a former state or position, to restore'.⁹⁴ In *Effiong v Ebong*⁹⁵ reinstatement has been defined as putting the specific person back in law and in fact, in the same position as he occupied in the undertaking before the employer terminated his appointment. However, one peculiarity of this remedy is that it has been so far granted only to people holding public office under the statute or under statutory instrument which establish a public institution.⁹⁶ This remedy of reinstatement is not readily applied to employees in the private sector. This is probably because no willing employee (servant) can be imposed by the Court on an unwilling employer (master) even where the master's behavior or motive for getting rid of the worker is wrongful or unjustifiable. In *Union Bank of Nigeria Plc v Emmanuel Aderewaju Soares*⁹⁷ it was held that in a Master/Servant relationship a willing Servant cannot be foisted on an unwilling Master. It is premised on this that the Court would not order reinstatement. In the instant case, the Court would not order for it is obvious from all indications and the attitude of the defendant towards the Claimant that he has overstayed his welcome in the defendant's company. Consequently, the Claimant's claim for reinstatement fails and is thus dismissed. Claimant's appointment is hereby determined by the Court.

As a matter of principle, two instances exist, where Courts generally order reinstatement as was held in *Petroleum and National Gas Senior Staff Association (PESGASSAN) v Mobile Producing Nigeria Unlimited*.⁹⁸ The first instance is where the employment is statutory and the statutory process for disengagement was not followed; The second is where a worker was disengaged for embarking on trade union activities. This is the product of section 40 of the constitution of the Federal Republic of Nigeria & 1999 (as amended) and Section 9 (6)(b)(i)(ii)(iii) of the Labour Act, 2004. The National Industrial Court may order reinstatement of a wrongfully dismissed or terminated employee where the termination is on ground of trade union activities. In doing this the Court have recourse to section 9(6)(b)(i)(ii) and (iii) of the labour Act, 2004 which provides as follows:

No contract shall cause the dismissal of or otherwise prejudice a worker by reason of trade union membership or because of trade union activities outside working hours, or with the consent of the employer within working hours or by reason of the fact that he has lost or been deprived of membership of a trade union or has refused or been unable to become, or for any other person is not, a member of a trade union.

In the case of *Trans International Bank Plc v National Union Banks, Insurance and Financial Institutions Employees (NUBFIE)*,⁹⁹ the dispute centered on the complaint of the respondent that various

⁹⁴ Garner (n 89) 1312.

⁹⁵ [2006] 18 NWLR (Pt. 1010) 109 CA referred to p623, PARAS H-A.

⁹⁶ For instance, Nigeria Railway Corporation, Federal Ministries and State Ministries Work, NNPC etc.

⁹⁷ [2012] 29 NLLR (Pt. 84) 329 referred to p.623, Paras A-D.

⁹⁸ [2013] NLLR (Pt. 92) 244, see also *Hotel and Personal Service Senior Staff Association v Owena Hotels Limited*, Akure (2005) 3 NLLR (Pt. 7) 163, *Nestle Nig Plc v NUFBTE* (2009) 15 NLLR (Pt. 40) 75 at 76.

⁹⁹ Unreported Suit No NIC/17/2000, delivered on May 3, 2002 cited by JAM Audi, 'Dismissal and Termination of Contract of Employment in Nigeria' (2008) (27-28) *Ahmadu Bello University Law Journal* (A.B.U.L.J.) 10.

attempts which amounts to branching union activities of the respondent's union in the appellant's company were rebuffed by the appellant. In fact that eligible members of the respondent's union in the forefront of forming the branch union within the structure of the appellant company had their services terminated by the appellant on the basis of the said union activities. The Court observed that the evidence before it shows that on May 16, 1996, the day the domestic unit of the union was being inaugurated, the appellant issued queries to absenting staff that were at the inauguration ceremony. On May 17, 1996, the very following day, letters of termination were issued to all those queried the previous day without any recourse whatsoever to the provisions of the condition of service. The Court held thus:

The appellant did not abide by the process in which termination may be effected as provided by its condition of service. We are convinced that the appellant caused the termination of, and hence prejudiced, workers in its employment by reason of the workers trade union membership and activities, thus bringing this matter squarely under the ambit of section 9(6)(b)(i) of the Labour Act. The termination is therefore, wrong, unlawful and hence null and void. For the reasons adduced... the six executive members of the Domestic Unit of NUBIFIE... should be reinstated without loss of benefits and salaries.

Similarly, in the case of *Management of Dangote Industries Limited, Pasta Plant, Ebute Ikoro, Lagos v National Union of Food, Beverages and Tobacco Employees*.¹⁰⁰ The Court found that the appellant acted in contravention of section 9(6)(i) of the Labour Act. It therefore, ordered reinstatement of the sacked officers without loss or benefits and salaries. The Court in this case also, recognized the fact that time factor may affect the order for reinstatement but that it is not an absolute proposition, in this respect, it held that if it dared to order for reinstatement as in its previous case of *Trans International Bank case*¹⁰¹ after eleven years had lapsed, why not also order for reinstatement in this instant case after only four years have elapsed.

(a) Reinstatement in Public Employment

The Courts in Nigeria have in some cases ordered reinstatement especially on the grounds of the statute or tenure of office of the employee in public service that is employment with statutory flavour.¹⁰² Employees whose contract of employment is with statutory flavour enjoy higher privileges. The Court most times makes order for reinstatement in cases of wrongful termination or dismissal of employee with statutory flavour. The reasons is to ensure that the public bodies act within their powers because damages may be appropriate to enforce individual right.¹⁰³ Furthermore, the damage paid to an employee whose employment is wrongfully terminated or dismissed does not come out from the pocket

¹⁰⁰Unreported Suit No. NIC 12/2008, delivered on January 28, 2009 cited by J.A.M. Audi, 'Dismissal and Termination of Contract of Employment in Nigeria' (2008) *Ahmadu Bello University Law Journal* (A.B.U.L.J.) 11.

¹⁰¹Unreported Suit No. NIC/17/2000, delivered on 3 May, 2002.

¹⁰²*Achu v Civil Service Commission of Cross River State & Anor* (2015) 57 NLLR (Pt. 107) 511 CA.

¹⁰³*Ibid.*

of individual officer who made the decision of wrongful dismissal or termination.¹⁰⁴ Thus, the Court is more focused with the public authority power and with the abuse of power or discretion.¹⁰⁵

(b) A Case for Reinstatement in Private Employment

Private employment or sector can be referred to as job or employment that is not government jobs.¹⁰⁶ The employers are non-government agencies in labour or employment relationship. Private employment is mostly treated as common law master and servant relationship.¹⁰⁷ The principle of Common Law do not afford an employee in contract of personal service or private employment opportunity to answer to an allegation of misconduct before his employment is terminated or dismissed.¹⁰⁸ All that is required is justification whenever the employer is called upon to do, and even if the dismissal is wrong, the employee or servant is only entitled to damages for wrongful dismissal. Reinstatement is not normally available at common law.¹⁰⁹

This appears to also be the position in Nigeria except for contract of employment with statutory flavour. In employment protected by statute, the Supreme Court readily grants or order reinstatement where the employee was wrongly dismissed or terminated¹¹⁰ but, will not readily grant reinstatement in private employment.¹¹¹ The Public/Private Labour Law Divide sees this non uniformity in approaching issues of wrongful termination in employment with statutory flavour and private employment as an issue of concern in labour law¹¹² reason being that there are changes brought into employment sector. The public sector now contract out works to private sectors who hire staff on behalf of the government to perform those works also number of industries and services previously under the state ownership are in the process of privatization. The question now is that since the public sector and private sector sometimes shares staff and render common services should there still be a distinctive set of Labour laws governing public employment? In practice, it seems the case for special treatment of employment in employment with statutory flavour remains.¹¹³

In *Chukwurah v Shell Petroleum Dev. Co. of Nig Ltd.*¹¹⁴ The Supreme Court and Court of Appeal stated respectively that the remedy of reinstatement is only applicable to employment in private sector upon proof of special circumstances their lordships did not specifically give examples of what amount to special circumstances in this regard.

¹⁰⁴K. Odeku and S. Animashanu, 'Accentuating the Inherent Precarious Nature of Remedy of Reinstatement in Employer-Employee Relationship' (2012) 6(48) *African Journal of Business Management* 11755 at <http://www.academicjournal.org/AJBM>. Accessed 19/6/2023.

¹⁰⁵*Ibid.*

¹⁰⁶ Jared Lewis, 'What is the of Public Sector Employment vs Private' accessed on <http://www.smallbusiness.chron.com/meaning-public-sector-employment-vs-private-32297.html> Accessed 19/6/2023.

¹⁰⁷ Okene, (n 6) 45-54.

¹⁰⁸ Okene (n 47).

¹⁰⁹*Ibid.*

¹¹⁰*Achu v Civil Service Commission of Cross River State & Anor* (2015) 57 NLLR (Pt. 107) 511 CA.

¹¹¹*Osisanaya v Afribank Nigeria Plc* (2007) LPELR-2809.

¹¹² Gillian S Morris, 'The Future of Public/Private Labour Law Divide' in: Simon Deakin and Catherine Barnard (eds), *The Future of Labour Law: Liber Amicorum Sir Bob Hepple QC* (Hart Publishing 2005) 162-164.

¹¹³ *Ibid*

¹¹⁴[1993] 4 NWLR (Pt. 289) 512 at 539 Ogundere JSC and *Afribank (Nig) Plc v Nwanze* (1998) 6 NWLR (Pt. 553) 283 at 296 Mohammed JCA.

The remedy of reinstatement not applicable in private sector employment is based on three grounds. In contracts of personal service or private sector personal pride, personal confidence, personal feelings and confidentiality may all be involved and all these make it unpleasant to force a willing employee on an unwilling employer.¹¹⁵; Reinstatement in private sector employment would impose mandatorily on the employer to retain an employee whom he does not feel or want to work with again; To order reinstatement in private sector employment would require continual supervision of the Court.

However, the Court orders reinstatement for directors and secretaries in private sector employment because their employment is regulated under Companies and Allied Matters Act, 2004. In the case of *Bernard Longe v First Bank of Nigeria Plc*¹¹⁶ the Court considered that the appellant being a director and subsequently a managing director of the respondent's bank and whose office as a director is covered by Companies and Allied Matters Act and for that reason is regulated by statute.¹¹⁷ The employment of the appellant according to the Court qualifies as an employee whose office is spiced with statutory flavour and therefore the court ordered for reinstatement. This case is unique because it is private employment spiced with a statutory flavour.

Notwithstanding the fact that the three grounds mentioned above are further supported by the arguments of many judges as noted by Chianu,¹¹⁸ there is still reasons for reinstatement in private employment the reason for reinstatement in private employment are as follows;

1. Judges in some cases¹¹⁹ and legal writers¹²⁰ have based their arguments on the grounds of mutuality before stating that the Court cannot impose a willing worker on an unwilling employer and vice versa. It can be suggested that the Court can fault this reasoning of not foisting a willing employer on an unwilling employer on the disparate consequences to the parties. An employees who loses his job is most likely to face poverty, insecurity, health problems, striving for alternative employment or engage in bad social vices.¹²¹ This negative effect is applicable to any employee whose employment is wrongfully terminated whether the employee is under employment with statutory flavour or private employment. Therefore, if reinstatement is sufficient remedy for wrongful termination of contract of employment in contract of employment with statutory flavour it should equally be applicable in private employment on the grounds of fairness, equity and justice.

2. The argument that once an employee's contract of employment is terminated or dismissed for any reason what so ever, whether wrong or not such contract automatically comes to an end and the only available remedy for the employee should be damages.¹²² It can be suggested that the Court can fault this argument on the grounds that certain terms of employment contract continues to be effective regardless of the fact that the employee has indicated or tender termination letter. For instance, employers are able to carry out a restraint order of trade clauses even when an employee has resigned

¹¹⁵ A C Ipay, 'The Suspended Employee under Nigerian Law' (1992) 3(12) *Justice* 62, 67.

¹¹⁶[2010] 6 NWLR (Pt. 1189).

¹¹⁷ CAP. C20 LFN, 2004.

¹¹⁸ E Chianu, *Employment Law* (Bemicov Publishers, Akure, Nigeria 2006) 519.

¹¹⁹*Oyedele v University of Ibadan* (1990) 6 NWLR (Pt. 155) 194, 199.

¹²⁰Edward F Amenl "Mutuality in Specific Performance", (1903) (3) *Columbia Law Review* 1.

¹²¹Odeku and Animashanu, (n 104)

¹²²*Osiasanya v Afribank Nigeria Plc* (2007) LPELR-2809, *UTC Co. Nigeria Ltd v Nwokeruku* (1993) 3 NWLR (PT. 281) 295.

or abandoned his employment.¹²³ Employers have also in some cases rejected employee's resignation on the bases that they should answer to charges against them before they leave. This is mostly where there is an already allegation at the employee before the employee tenders resignation letter. The employers must time insist that the resignation letter is not accepted pending the determination of the Court or panel of enquiring with respect to the charges of misconduct and courts have upheld such decisions.¹²⁴ If the Court could grant repudiation the question is why can't the court grant the order of reinstatement in the event of wrongful or unfair dismissal?¹²⁵

3. Argument based on the grounds that in private employment or personal services, personal pride, feelings, confidence and trust may be involved and therefore it would be unpleasant to impose a willing employee on an unwilling employer¹²⁶ has been criticized based on the fact that most employers in this industrial era run large impersonal organization that comprises many departments and units.¹²⁷ The organization also involves ten to hundreds or even thousands of workers. In circumstances like these factors such as personal pride, trust and confidence may not arise¹²⁸ because the contract is mostly supervised by a manager whose is also an employee. It was noted that in the nineteenth century, when *De Francesco case*¹²⁹ was decided contract of service was mostly between the employer and employee such as an owner of a small workshop and his servant or sales person or a goldsmith and this servant. A learned writer, Chianu¹³⁰ stated that the era of one master one or few servants that involves personal confidence should be distinguished from the era of large-scale organizations. Furthermore, in this industrial warden era of employment most times both the management and workers are all employees as ownership is removed from management.¹³¹ Thus, it is a matter of some privileged employee terminating or dismissing other employee.

4. The argument that when an employer dismisses or terminates the contract of service of an employee, the employer cannot cancel or annul its decision. Therefore, an order of reinstatement is adding more stress and burden to the employer.¹³² Thus it may be suggested that order of reinstatement should be possible the reason being that if employer annuls its decision on being pressured by trade union, the legal practitioners of the employee especially when employee is found innocent after an investigation likewise, an employer should cancel his decision of termination after investigation proves that the decision of termination is wrongful.

5. The argument or the issue of employer dismissing the employee more than once (two times during court proceeding) the second is a big challenge.¹³³ In the case of *Eyutcha v Nigeria Television Authority*¹³⁴ the appellant's employment contract was terminated and he sued to set aside the termination

¹²³*Thomas Marshall Experts Ltd v Guinle* (1978) 3 All ER 193, Odeku and Animashanu, (n 104)

¹²⁴*Ngboye v Obat Oil & Petroleum Ltd* Unreported Suit No.NIC/LA/57/2007.

¹²⁵H Cartey, Dismissed 'Employees; the Search for a more effective Ranger of Remedies (1959) (52) *Modern Law Review* 455 – 456.

¹²⁶Ipaya, (n 142) 67.

¹²⁷Odeku and Animashanu, (n 104)

¹²⁸*Ibid*

¹²⁹*De Francesco v Barnum* (1980) 45 ch. D 430, 438, See Odeku and Animashanu, (n 104) 4

¹³⁰Chianu, (n 131) 519.

¹³¹Odeku and Animashanu (n104)

¹³²(n 86).

¹³³*Amokedo v IGP* (1996) 6 NWLR (Pt. 607) 467.

¹³⁴[1986] 4 NWLR (Pt. 41) 395.

and it was successful set aside. The respondent appealed but while the appeal was still pending, the appellant was dismissed the second time. The Court of appeal felt that its hands were tied by the second dismissal.¹³⁵ It may be suggested that in such a situation the Court should impose a hefty award as aggravated damages to the employee as a deterrent to the employer who is unwilling to retain the worker for no just reason.

6. The argument based on the impression given by most Nigerian judges that reinstatement is not a welcome relief for private employees.¹³⁶ It may be suggested that, most common law jurisdictions such as United Kingdom and India seems to act on the contrary. In *Provincial Transport Services v State Industrial Court*¹³⁷ the Indian Supreme Court ordered the remedy of reinstatement. The Court stated that although they must be recognition of legal relationship that is based on contract but it must be regulated by higher law. The Court likewise in the case of *Hill v C.A. Person and Co Ltd*¹³⁸ held that the appellant case was extraordinary. In this case the plaintiff/appellant, aged 63 was employed by a 35 years engineer. He was dismissed with one month notice despite the fact that he was due to retire in two years time. He applied for an interim injunction to restrain the company from carrying out the dismissal order. He was not successful at trial Court but succeeded at the Court of appeal where it was held that his case was extraordinary as that- he was in a situation to suffer total hardship if his contract was so determined.

The English judges have departed from not granting the order of reinstatement in private employment for a wrongful or unfairly dismissed employee.¹³⁹ The English judges grant the order of re-engagement, reinstatement or compensation following a finding of wrongful dismissal or termination.¹⁴⁰ The Employment Tribunal uses its discretion to make an order of reinstatement. The Tribunal takes into consideration the complainant's wishes and whether it is reasonable and just for the employer to comply with the order reinstatement. The Tribunal will also take into consideration whether it is just to grant reinstatement in a situation where the employee's action contributed to the dismissal. In *Rao v Civil Aviation Authority*¹⁴¹ an employee that has extremely poor attendance record was dismissed. It was held that the dismissal was unfair on procedural ground but the employment tribunal refused the order of reinstatement because of his conduct and award only damages. In *Discount Tobacco v Armitage*¹⁴² the tribunal ordered reinstatement when a shop manager was dismissed unfairly because she requested the trade union for assistance against the management with regards to her rights.

The English Court has refused to order reinstatement where it is proved that the economic situation of the organization does not permit. For instance, where the employer is dismissed as a result of redundancy because of financial issues.¹⁴³ However, the employee will be awarded compensation for wrongful termination or dismissal, which in addition will include awards especially where the employer

¹³⁵ *AG Federation v Roadside Engineering & Foundry Nig. Ltd & Soteye* (1977) 3 CCH CJ 359.

¹³⁶ Chianu, (n 118) 519.

¹³⁷ [1963] SC 114 – 116.

¹³⁸ [1971] 3 ALL ER 1347, CA.

¹³⁹ O Animashanu, 'Unfair dismissed: A Novel idea in the Nigerian Employment Law?' (2008) (2)(1) *Labour Law Review; Nigerian Journal of Labour Law & Industrial Relations*

¹⁴⁰ Ibid

¹⁴¹ [1992] 1 RLR 303 EAT.

¹⁴² [1990] IRLR 15.

¹⁴³ *Port of London Authority v Payne* (1994) IRLR 9 CA.

refuses to comply with the order of reinstate or re-engagement despite the fact that the employee will suffer loss as a result of the non-compliance.¹⁴⁴

5.0 Conclusion

The position of the law in Nigeria is Common law doctrine which England the Original home of Common Law has places many changes on. These changes have taken place both at the international and national especially to protect workers against arbitrary termination and wrongful dismissal by the employer.

However, Nigeria is not moving with the world. The Courts have continued to rely on the Common Law position in deciding issues of employment in Nigeria especial termination and wrongful termination of employment in private sector. Apart from the protection accorded to employees with statutory flavour.¹⁴⁵ Domesticating the international Labour Organization Conventions and Recommendations will immensely improve the state of affairs in the employment relation.

The writer¹⁴⁶ of the literature piece titled 'This is Our Chance' has aptly set the stage for Nigeria to move with the world when he said. 'The world outside is moving very fast and we must move with it'.¹⁴⁷ It is in line with this philosophy of change that a number of recommendations is made in the next subtitle. This is because it has become imperative for the protection of worker especial workers in private sectors against arbitrary termination and wrongful dismissal from employment in Nigeria.

6.0 Recommendations

1. The labour law should be amended to include employers stating the reason for termination/dismissal. This will help the Court to do away with the Common Law position that an employer can terminate the employment of an employee for any reason or no reason at all thereby making it easy for the Court to order the remedy of reinstatement in private sector. It might be said that reinstatement in private sector should be seriously considered as this will be seen as a welcome development towards the entrenchment of fair labour practices in the private sector. This because reinstatement is a sure remedy to combat unfair labour practices such as the employer short-changing the employees by terminating their employment a year or months before they are due for retirement which will entitle them for benefits and gratuity.¹⁴⁸
2. The English law has done all the necessary reforms in its employment and this reforms such as the Employment Rights Act, 1996 has given the Court the discretion to award reinstatement in employment relation dispute but Nigeria is still relying on the old Common Law position which the English law that is the home of Common Law has departed from, therefore, it is suggested that Nigeria should adopt what is obtainable in England and reform its labour laws in the interest of social justice and industrial harmony.

¹⁴⁴*Self-ridges Ltd v Malik*, (1998) ICR 268.

¹⁴⁵*Iderima v Rivers State Civil Service Commission* (2000) 1 NWLR (Pt. 749) 715 at 725 per Ikongbeh JCA, *Mix & Bake Flour Mill Industries Ltd v NUFBTE* (2004) 1 NWLR (Pt. 2) at 281 – 282 per Adejumo P.

¹⁴⁶ James EneHenshaw, *This is Our Chance* (London; University of London Press 1956).

¹⁴⁷*Ibid.*

¹⁴⁸*Ulegede v The Military Administrator of Benue State* (2001) 2 NWLR (Pt. 696) 73 at 90.

3. Nigeria law should make a distinction between wrongful, unfair and constructive dismissal. The concept of unfair dismissal is a novel idea¹⁴⁹ in Nigeria. It is recommended that, the Nigerian Courts should consider what unfair dismissal is and this will help them to see reasons for reinstatement in private sectors this is because what is mostly consider wrongful dismissal are in most cases unfair dismissal.
4. The English Court feels is wrongful termination to terminate an employee's appointment when the year of retirement is close even if salary *in lieu* of notice was given. The Nigerian Courts have consistently maintained that you could even be dismissed a day to the time of attainment of your pension rights,¹⁵⁰ the employee is only entitled to the usual three months salary in lieu or a notice.¹⁵¹ It may be suggested that Nigeria Court should follow the decision in *Silvey v Pendragon*¹⁵² it was held to be wrongful dismissal even though the employee was given more than his contract of employment entitled him to by his employer. This will help to prevent employees from being deprived of their retirement benefits unjustly.
5. Nigeria should domesticate the International Labour Organisation Conventions and Recommendation which she is signatory to in order to promote fairness and justice in employment relationship. Domesticating the International Labour Convention 158 of 1982 and Recommendation 166 of 1982 will help prevent wrongful termination/dismissal of employees. It is also suggested that section 254C(2) and section 12(1) of the Constitution of Nigeria, 1999 (as amended) should be given a clear interpretation so as to avoid confusion in applicability of the International Labour Organisation treaties in Nigeria.

¹⁴⁹ Animashaun, (n 161)16

¹⁵⁰*ibid*.

¹⁵¹ See *Abalogu v Shell Petroleum Development Company* (2003) 13 NWLR (Pt. 837) 308, *Shell Development Company Ltd v Nwamkpa*(2003) 6 NWLR (Pt. 815) 184.

¹⁵²[2001] IRLR 685 CA.