

THE MARSH OF EMPLOYEE SUSPENSION AND THE CONTRACT OF EMPLOYMENT IN NIGERIA: MATTERS ARISING*

Abstract

Contract of employment is an agreement, written or oral between an employer and employee with definite terms and condition pursuant to which the employee offers to work for the employer in return for remuneration. It is the basis upon which the employer-employee relationship revolves. This contract bequeaths both rights and liabilities on both parties. One of the unfettered rights of the employer is the right to discipline an erring employee. Where the contract is explicit on the procedure for discipline, same must be followed religiously and even where there is none, fair hearing must be complied with. Often, either as a precursor to seamless investigation, or as punishment thereafter, it is very common for the employer to suspend the employee either for a specified period of time or indefinitely. The exercise of this right raises certain issues. Some of which are; what is the effect of suspension on the contract of employment? Can an employer validly suspend an employee where the contract of employer does not provide for suspension or is suspension an inherent right of an employer? What is the propriety of placing an employee on indefinite suspension? Does suspension keep at abeyance the performance of the employees' duties or the status of being an employee? Should a suspended employee not be entitled to remuneration during the period of suspension? What is the difference

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between administrative and disciplinary suspension? Whether indefinite suspension without pay for the purpose of investigation is not an unfair labour practice? Would under any circumstance suspension be treated as an unfair labour practice? This paper through doctrinal research methodology examines these issues.

1.0 Introduction

For an employer-employee relationship to exist, there must subsists an employment contract. Employment contract¹is an agreement, oral or written, whereby a person called the employee/worker offers to work for another known as employer in exchange in return for wages/remuneration specifying terms and conditions creating rights and liability for both parties².

Thus, the employment contract is the fulcrum upon which the employer-employee relationship is established and its existence creates rights and liabilities in favour of the parties thereof³. While some of the rights are express, some are implied or inherent⁴. For instance, an employee has the inherent right to resign his or her employment whether the employment contract makes provision for it or not⁵. Also, an employer particularly in master-servant employment, has the inherent right to terminate the appointment for no reason or any reason whether good or bad subject however to the acceptable mode of termination where it exist and where there is none, to adherence to fair hearing⁶.

¹ C. K Agomo, *Nigerian Employment and Labour Relations Law and Practice*, Lagos, Concept Publications Limited, 2011, P. 68.

² E. A Oji, and O. D Amuchaezi, *Employment and Labour Law in Nigeria*, Lagos, Mbeyi and Associates (Nig.) Ltd., 2015, P. 12.

³ C. K Agomo, (No. 1) Op. cit. P. 68.

⁴ B. C Okoro, *Law of Employment in Nigeria*, Lagos, Concept Publications Limited, 2011, P. 29.

⁵ *Benson v. Onitiri* (1960) NSCC 52; (1960) SCNLR 177.

⁶ *Jumbo v. Petroleum Equalization Fund Management Board* [2005] 14 NWLR (pt. 945) 443 at 467, Paras. A-B.

In executing the employment contract, the employer can be rendered liable for the act or omission of the employee as the contract makes the act/omission of the employee under certain circumstances, that of the employer⁷. Furthermore, one other inherent power of the employer is the power to discipline an erring employee⁸. Quiet often than not, as a precursor to punishment pending investigation for an alleged misconduct or as a form of punishment after investigation of a misconduct, it is not uncommon for an employer to suspend an employee. This could be done as a precursor to punishing the errant employee paving way for a seamless investigation or as a punishment upon the conclusion of investigation. Either ways, suspension could be definite or indefinite. Where an employer suspends an employee, certain issues arise.

Thus, some of these issues are, does suspension of an employee merely keep at abeyance the performance of the duties hitherto performed by the employee or distinguishes the status of employee bestowed on the employee by the employment contract. In other words, what is the legal status of a suspended employee and what is the legal effect of suspension on the contract of employment? Also, if suspension merely put at abeyance the performance of the duties hitherto performed by the employee, should a suspended employee be entitled to remuneration in either full or half? What is the propriety of placing an employee on indefinite suspension without pay and since an employee has the moral right to survival, can an employee on indefinite suspension resort to another employment for survival during the currency of his/her

⁷. O. Ogunniyi, *Nigerian Labour and Employment Law in Perspective*, 2nd ed., Lagos, Folio Publishers Ltd., 2004, P. 193

⁸ *Obiekwe v. MTN Nigeria Communications Ltd.* [2014] 43 NLLR (pt. 136) 414 at 465, Paras. E-H, Tugbiyele, T. A. O., *Labour Law and Practice*, Lagos, T. A. O. Tugbiyele & Co., 2012, P. 50. 467

indefinite suspension if suspension only keep at abeyance the performance of the duties hitherto performed and does not extinguish the status of being an employee? Is an administrative suspension different from disciplinary suspension? While it is conceded that the issue of employee suspension during the currency of the employment contract is not a novel practice, its continuous occurrence and possible reoccurrence makes it a subject of continuous relevance worthy of academic articulation in order to highlight its contours towards creating public awareness. Moreover, the fact that the current labour legal regime is obsolete and inadequate notwithstanding the persistency of its practice, academic articulation is a vibrant vehicle for foregrounding the need to have a legislative action on the subject which forms part of the recommendations made by the paper.

These issues form the fulcrum of this paper. The paper is divided into four parts. Part one which includes this general introduction, examines the meaning and types of suspension in labour and employment law. Part two discusses the legal effect of suspension on the contract of employment and the legal status of a suspended employee viz-a-viz the contract of employment. Part three highlights matters arising from the suspension of an employee and its effect on the contract of employment. Part four contains the conclusion and recommendations.

1.1 Meaning and Types Of Suspension In Labour Relations

According to Amuchaezi and Oji⁹, suspension is a temporary stop, an interruption of something for a period of time; and the temporary removal of somebody from a team, position, school, or organization, especially as a punishment, to temporary keep a person from performing

⁹ O. D Amuchaezi, & E. A Oji, “Effect of Suspension on an Employee's Contract of Employment” Vol. 1, No. 2, +(2009) Apogee Journal of Business, Property and Constitutional Law, P. 7.

a function, occupying an office, holding a job, or exercising a right or privilege or the temporal withdrawal from employment, as distinguished from permanent severance.

According to Chianu:

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. 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 thereof¹⁰. 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 way¹¹.

The above assertion stems from the general duty of the employer at common law. At common law, the employer has a duty to provide work for the employee¹² however, so long as the employer remunerates the employee, the later cannot complain if no work is provided¹³. However, the exception applicable to this rule applies mutatis mutandis to the issue of suspension or mere asking an employee to stay off from work which is if continuous work enhances the viability and marketability of the employee, then none provision of work would be detrimental to his/her

¹⁰ E. Chianu, *Employment Law*, Akure, Bemico Publishers (Nig.) Ltd., 2004, P. 209.

¹¹ *Garba v. Federal Civil Service Commission* [1988] 1NSCC 306.

¹² See Section 17, Labour Act 1986 Cap. L1, LFN 2004.

¹³ See the dictum of Asquith J in *Collier v. Sunday Referees Publishing Co.* (1914) 2 K. B. 647at 650.

career and will not be allowed as in such circumstance, the employee has a right to work¹⁴. Suspension like contract could either be in writing or oral¹⁵. However, where the employment contract specifies the mode in which an intended suspension must be effectuated, unless and until that mode is strictly complied with, any suspension effectuated short of the prescription would be wrongful. Such a wrongful suspension is tantamount to breach of contract and entitling the employee to damages if it is a mere master-servant relationship because parties are bound by their terms of contract¹⁶.

From the above, where an employer merely directs an employee to abstain from work without necessarily stopping or reducing his/her salary it does not amount to suspension in the strict legal sense. Suspension is a state of affairs which is effectuated when there is in force a contract of employment but no work is done in pursuant of it nor remuneration paid¹⁷.

¹⁴ See the dictum of Lord Denning M.R. in *Langston v. Amalgamated Union of Engineering workers* (1974) 1 All E.R. 927 at 980.

¹⁵ *Obiekwe v. MTN Nigeria Communications Ltd.* [2014] 43 NLLR (pt. 136) 414 at 463-465, Paras. H-A.

¹⁶ E E Aloba, *Law of Contract*, 2nd ed., Lagos, Princeton Publishing Co. Ltd., 2016, P. 100.

¹⁷ M R Freedland, *The Contract of Employment*, Oxford, Clarendon Press, 1976, 77. See also Feron, M., "Suspension of Employees during Disciplinary Proceedings: Approach with Caution" available online at <<https://www.linkedin.com/pulse/suspension-employees-during-disciplinary-proceedings> > accessed 12 July 2018. Defined suspension thus "suspension will mean that the employee will be sent home and not allowed to enter their place of work or engaged in any work at all, such as working from home. It will also mean that the employee will not be allow to have any contact with any work colleagues or customers during that period without express permission. place of work or engaged in any work at all, such as working from home. It will also mean that the employee will not be allow to have any contact with any work colleagues or customers during that period without express permission.

Before an examination of the types of suspension is considered, it is pertinent to note that there is difference between mode and types of suspension. Mode of suspension is concerned with the duration of the suspension why types is in regard of why the suspension was imposed. By mode, suspension could be for a definite or an indefinite period of time either as a prelude to discipline or as punishment upon conclusion of investigation into an alleged wrongdoing. Suspension could be disciplinary or administrative. We shall now proceed to examine them *in toto*. However, before we examine the types of suspension, it is very necessary for us to make the following observation. While it is trite law that in a master servant employment relationship, an employer can terminate the employment of an employee for any reason (good or bad) or no reason at all, in the case of suspension, an employer cannot suspend an employee for no reason or no reason at all as this would tantamount to unfair labour practice. In fact, the employer can only suspend the employee upon giving of notice and stating the reason for the suspension which must be justifiable or reasonable¹⁸. Where the employee is of the opinion that the stated reason (s) is not justified, it could be contested.

Disciplinary suspension going by its name is a sanction imposed on the employee by the employer upon the conclusion of investigation of an allegation leveled against an employee. Thus, it is a punitive measure meted out to the employee for a reproachable omission or act done during work¹⁹. Another name for disciplinary suspension is punitive suspension. For a suspension to fall within the scope of a punitive suspension it must be disciplinary in nature and intent.

¹⁸ Can you be suspended from Work without being given a reason? Available online at <<https://www.google.com.ng/search?q=does+suspension+mean+termination&sa=X&ved=0ahUKEWjApeClhaTcAhVrLcAKHUezA3AQ1QII3gEoAw&biw=1242&bih=577>> > accessed 16/7/2018.

¹⁹ G Fyver, "When is Suspension an Unfair Labour Practice? The Essential Law Series, available online at <<http://www.seesa.co.za/when-is-suspension-an-unfair-labour-practice/>> accessed 16/7/2018.

This form of suspension differs from a preventative suspension in that a punitive suspension is only implemented after guilt has been established and is imposed as a sanction and usually without pay^{20, 21}. The rationale is that the common law declares that a term entitling the employer to suspend the employment will not be implied into the contract of employment in the absence of special evidence to support it²². Thus, disciplinary suspension which is punitive in nature, seeks to achieve a rehabilitative outcome at its expiration.

Administrative or precautionary suspension on the other hand is resorted to as a matter of business/administrative exigency to protect the business of the employer where an allegation of wrong doing has been leveled against an employee. Usually, it is implored as a preventive measure pending conclusion of investigation of an alleged misconduct²³. As of necessity, precautionary suspension must fulfill certain conditions. The employer must have a justifiable reason to believe, prima facie at least, that the employee has engaged in serious misconduct and there is some objectively justifiable reason to deny the employee access to the workplace based on the integrity of any pending investigation into the alleged misconduct, or some other relevant factor that would place the investigation or the interests of affected parties in jeopardy. Also, the employee is given the opportunity to state a case or to be heard before any final decision to suspend is made. Thus, an allegation especially one of criminal dimension is leveled against an employee, the employer may hand such an employee over for prosecution and await the outcome and

²⁰ O. DAmuchaezi, and E. A Oji, (No. 9) Op. cit. P. 8.

²¹ Findlaw.com, Suspension: Can my Employer Legally Suspend Me?, available online at<<http://www.findlaw.co.nz/articles/4275/suspension-can-my-employer-legally-suspend-me.aspx>>accessed 16/7/2018.

²² M. R Freedland, (No. 17) op. cit. P. 80.

²³ O. D Amuchaezi, and E. A Oji, E. (No. 9) Op. cit. P. 8.

dismiss him or may set up a disciplinary panel to inquire into the matter simultaneously or solely. During the period, it is expedient that for a transparent exercise, the employee be placed on suspension pending the outcome of the investigation/trial²⁴. During the subsistence of the investigation or employer administrative adjudication, the employer's interest becomes the paramount consideration and to protect same, suspension is justifiably resorted to. This point was underscored by the Court of Appeal in *University of Calabar v. Esiaga*²⁵ per Tobi JCA (as he then was) thus:

The word suspension ... means a temporary privation or deprivation, cessation or stoppage of or from the privileges and duties of a person. The word carries or conveys a temporary or transient disciplinary procedure which keeps away the victim or person disciplined from his regular occupation or calling, either for a fixed or terminal period, or indefinitely. The disciplinary procedure gives the initiator of the discipline a period to make up his mind on what should be done to the person facing the discipline.

This form of suspension is a prelude to infliction of punishment which could be suspension, termination of the employment contract or outright summary dismissal depending on the outcome of the investigation and or trial.

²⁴ *Longe v. First Bank Plc.* [2006] 3 NWLR (pt. 967) 228.

²⁵ [1999] 4 NWLR (Pt. 502) 719 at 739.

1.2 Fair Hearing and Suspension of An Employee

It has been stated above that in practice, an employer could either suspend an employee with or without pay for a definite or an indefinite period either as disciplinary or administrative measures. However, where the employer fails to retain the power to suspend without pay in the contract of employment, the law is that the common law does not imply it in his favour as was held in the case of *Yusuf v. Volkswagen of Nigeria Ltd*²⁶. Where the contract of employment provided that where the employee commits an offence which the management considers serious misconduct, he may be suspended without pay. An allegation of malpractice arose in the company's treasury department, and the appellant was consequently suspended indefinitely upon conclusion of police investigation, the appellant was exonerated and he therefore applied for the termination of the suspension but unsuccessfully. He thereafter brought an action which was successful for his salary arrears, Christmas bonus and other allowances during the period of suspension. On appeal to the Court of Appeal, it was held that upon the police exoneration, the Respondent's right of suspension was abated. However, in *Aghwe v. Zapata Marine Service (Nig.) Ltd*²⁷. Omo J, held that if an employer is able to established a practice of suspending employees without pay, it would be binding on all employees in the establishment even if a particular employee is ignorant of it as his ignorance would not excuse him/her.

The issue that arises under this subsection is, is an employee entitled to pre-suspension hearing by the employer before his employment can be validly suspended bearing in mind the possible consequence of such

²⁶ [1996] 7 NWLR (pt. 463) 746.

²⁷ (1976) 6 ECSR 268.

suspension? This becomes germane when viewed from the standpoint of section 36(1) of the 1999 Constitution of the Federal Republic of Nigeria which presumes a person accused of wrongdoing innocent until the contrary is established through fair hearing. The dictum of Lord Denning M.R. in *Lewis v. Heffer*²⁸ is not only instructive but illuminating and seems to be the anchorage of avalanche of authorities on the above subject. Due to its importance we take the liberty to reproduce verbatim and in extenso the opinion of the erudite jurist thus:

Very often irregularities are disclosed in a government department or in a business house; and a man may be suspended on full or 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. 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 justice do not apply.

Though the above postulation has been given judicial approval by the

²⁸ (1978) 3 All ER 354 at 364.

Nigerian Court of Appeal in *Udemeh v. Nigerian Coal Corporation*²⁹ and *Yusuf v. Volkswagen of Nigeria Ltd*³⁰. the assertion that no one has ever objected to being suspended without a pre-suspension hearing does not by any stretch of logic means it is not necessary. It may suppose that aside being overwhelmed by the negative euphoria of the impending suspension, the employee may be ignorant of the constitutional safeguard and the justification that the work of the department is being affected by rumour and suspicion is unattainable as mere suspicion does not translate to culpability. At least a pre-hearing no matter how informal or ceremonial it may seem should be afforded an employee particularly where the ground of such suspension sneers on the reputation of the employee³¹. Chianu³², in taking a view diametrically opposed from that of Lord Denning M.R. above by some sort of providential interposition queried “before anyone conclude that Lord Denning's view is impeccable, it should be recalled that there are various types of suspension. Suspension may last for between a few days to months, even years; suspension may be with half pay of only basic salary, or without pay. Who will doubt a suspension for two years or more with half pay is punitive? It is doubtful if Lord Denning had in mind the practice among Nigerian employers who suspend their employees indefinitely for months, even years on end.”

²⁹ [1991] 3 NWLR (pt. 180) 477.

³⁰ [1996] 7 NWLR (pt. 463) 746.

³¹ J Megaw “Law and Justice” Vol. 3, (1973) Northern Island Law Quarterly, Pp. 267, 277. By this position, the postulation of Megaw LJ, that “the requirement of natural justice which states that a man is presumed innocent until the contrary is established should be treated with common-sense. To do otherwise, it would preclude the suspension of a man from his job; for if he is truly and fairly deemed innocent, how is his suspension justified? Natural justice cannot require one course of action when commonsense suggest another course of action” is untenable as at least a prima facie case should be established to warrant suspension to ensure security of tenure in a jurisdiction like Nigeria where employers aide by the lopsidedness of the legal regimes and exponential level of under and unemployment, take undue advantage of employers.

³² L32. Garba v. Federal Civil Service Commission [1988] INSCC 306.

Garba v. Federal Civil Service Commission [1988] 1NSCC 306. Further attenuates his rejection of the *Lewis v. Heffer*³³ postulate by asking “is the present practice soundly based on the reasonable expectation of the employees? Would it not be fairer if an employer were obliged to prove that a particular suspension is especially of an urgent necessity, that the offence for which the employee is suspended is of a serious nature? Where suspension is without salary or with only an aliquot part should the court not consider the immediate financial loss to the employee?”

However, it is apposite to note that it is a trite principle of law that determination of employment contract is wrongful in the case of statutory employment if the procedure laid down by the statute is infringed and in master-servant relationship if the procedure agreed by the parties is not abide by³⁴. It follows therefore that, where in a master-servant employment contract, there is a specified procedure for suspension in the employment contract or in a statutory employment the statute provides the procedure for suspension, unless and until there is strict compliance, such a purported suspension would be wrongful and null and void depending on the typology of employment contract. The rationale for this assertion is that parties are bound by their agreement and anything done not within the contemplation of the agreement to the hurt of a party thereof avails the hurting party damages³⁵. Although in *Amadiume v. Ibok*³⁶ the Court of Appeal held that an employer reserves the right to suspend an employee when necessary³⁷, however, it is

³³ (1978) 3 All ER 354 at 364.

³⁴ T. A. O Tugbiyele, *Labour Law and Practice*, Lagos, T. A. O. Tugbiyele & Co., 2012, Pp. 56-57.

³⁵ *Adamu v. College of Education Akwanga* [2015] 54 NLLR (pt. 183) 412.

³⁶ [2006] 6 NWLR (pt. 975) 163.

³⁷ The Supreme Court came to the same conclusion in the case of *Ayewa v. University of Jos* [2000] 6 NWLR (pt. 659) 142. However, the phrase “when necessary” for all purpose and intent, must be construed as when the law regulating the contract or the parties agreement permits and not otherwise as to do so is to open the floodgate of chaos and uncertainty which is undesirable.

illogical for one to come to the conclusion that “when necessary” as used by the court would override the agreement of the parties even to the detriment of a party. Such a conclusion would make us slaves to words when in fact and in law we are their masters as was held by *Nsofor JCA in Yusufu v. Obasanjo*³⁸. In agreement with this position, the National Industrial Court of Nigeria (NICN) in *Obiekwe v. MTN Nigeria Communications Ltd*³⁹. held that “the suspension of an employee must always be in accordance with the condition of service and the letter of employment.” Thus, where suspension is wrongful the cherished principle of law of contract restitution in integrum⁴⁰ enunciated by Park B in *Robinson v. Harman*⁴¹ and adopted in *Taiwo v. Princewill*⁴² should be invoked to restore the employee to the position he would have been but not for the wrongful suspension. This is because the remuneration which the employee would have earned but not for the wrongful suspension is the damages which is reasonably foreseeable by both parties as at the time of the wrongful suspension and should not be left without a remedy⁴³. When the dictum of Noonan J is considered in *The Governor and Company of the Bank of Ireland v Reilly*⁴⁴ with regard to the effect of suspension on the future marketability of an employee, the need for caution and substantive and procedural fairness becomes more apparent. Due to its aptness to the discussion above, we take the liberty to reproduce it without further amplification.

³⁸ [2003] All FWLR (pt. 172) 1862.

³⁹ [2014] 43 NLLR (Pt. 136) 414 at 463-465, Paras. H-A.

⁴⁰ IE Sagay, Nigerian Law of Contract, 2nd ed., Ibadan, Spectrum Books Limited, 2000, P. 618.

⁴¹ (1848)1 Ex. 85.

⁴² (1961) All NLR 240.

⁴³ *NRC v. Umera* [2006] 17 NWLR (pt. 1008) 265.

⁴⁴ [2015] IEHC 228.

The suspension of an employee, whether paid or unpaid, is an extremely serious measure which can cause irreparable damage to his or her reputation and standing. It is potentially capable of constituting a significant blemish on the employee's employment record with consequences for his or her future career. As noted by Kearns J. (as he then was) in Morgan v. Trinity College Dublin [2003] 3 IR 157, there are two types of suspensions, holding and punitive. However, even a holding suspension can have consequences of the kind mentioned. Inevitably, speculation will arise as to the reasons for the suspension on the premise of there being no smoke without fire. In Mr. Reilly's case, his evidence was that rumours and reports circulate about his ranging from possibly being involved in fraud to participation in a tiger kidnapping. Thus, even a holding suspension ought not to be undertaken lightly and only after full consideration of the necessity for it pending a full investigation of the conduct in question. It will normally be justified if seen as necessary to prevent a repetition of the conduct complained of, interference with evidence or perhaps to protect persons at risk from such conduct. It may perhaps be necessary to protect the employer's own business and reputation where the conduct in issue is known by those doing business with the employer. In general, however, it ought to be seen as a measure designed to facilitate the proper conduct of the

investigation and any consequent disciplinary process.

2.1 Suspension and Termination of Employment Dichotomized

This section of the paper examines the difference between suspension and termination of an employment contract. It argues that legally, there is a difference between the two concepts but some employers surreptitiously in practice, hide under the cloak of the former to achieve the later. Oji and Amuchaezi⁴⁵ posit that “determination is a general term used to describe the bringing of a contract of employment to an end.” Another name for determination of contract of employment is termination. Thus, the legally recognized process through which a contract of employment ceased to exist is what is known as determination and this could happen through various means. For example, it could be through dismissal, operation of law, agreement, novation or notice⁴⁶. Generally, section 9(7) and 11(1) (2) of the Labour Act provides modes of termination of an employment contract. However, it is apposite to note that although dismissal is a means of bringing to an end an employment contract, its legal consequences differs from termination in terms of severity and makes the two not usage interchangeable⁴⁷. The only convergence between the two is the fact that they both bring the contract to an end⁴⁸. In accentuating the dichotomy of the legal effect of the two the Supreme Court in *Irem v. Obubra District Council* held that dismissal carries infamy and deprives on of benefits, which termination does not⁴⁹.

⁴⁵ E. A Oji, and O. D Amuchaezi, (No. 2) Op. cit. P. 335.

⁴⁶ F Aborisade, Determination of Contract of Employment, Ibadan, Humanitas Consult Ltd. & Centre for Labour Studies, 2015, P. 124.

⁴⁷ *Jumbo v. PEFMB* [2005] 14 NWLR (pt. 945) 443.

⁴⁸ J A M Audi, “Dismissal and Termination of Contract of Employment in Nigeria” Vol. 27-28, Ahmadu Bello University Law Journal, 2008, Pp. 2-3.

⁴⁹ *Abomeli v. N. R. C.* [1995] 1 NWLR (pt. 372) 51.

In this vein, the Supreme Court in *Mr. A. S. Jumbo v. Petroleum Equalization Fund (Management Board) & 2 Ors*⁵⁰. Succinctly captured the convergence and divergence between termination and dismissal in the following flowery manner “termination or dismissal of an employee by the employer translates into bringing the employment to an end. Under a termination of appointment, the employee is enabled to receive terminal benefits under the contract of employment... dismissal on the other hand is punitive and, depending on the contract of employment, very often entails a loss of terminal benefits. It also carries an unflattering opprobrium to the employee⁵¹.” Dismissal is usually premised on ground of gross misconduct. These grounds include infidelity⁵², failure to abide by lawful order⁵³, theft⁵⁴, and negligence⁵⁵.

Suspension on the other hand only keeps the employment contract at abeyance and does not bring it to an end at least by its legal effect on the employment contract. It is in some circumstances a prelude to termination or a punishment in itself after the determination of the wrongdoing of an employee by his/her employer. However, it is very unfortunate that in Nigeria today as the practice has shown, employers hide under the cloak of suspension to actually terminate an employment contract short of the words termination anyway. This assertion is very easy to justify when recourse is hard to the cases cited above where the court have unfortunately assisted employers to unwittingly convert suspension into termination notwithstanding that is tantamount to unfair labour practice⁵⁶.

⁵⁰ . [2005] 14 NWLR (pt. 945) 443 at 467, Paras. A-B.

⁵¹ E. A Oji, and Amuchaezi, O. D., (No. 2) Op. cit. P. 344

⁵² *Maja v. Stocco* (1965) 1 All NLR 141; (1968) NMLR 372.

⁵³ *Teliat Sule v. Nigerian Cotton Board* [1985] 2 NWLR (pt. 5) 17.

⁵⁴ *Abukugbo v. African Timber & Plywood Ltd.* 1965 ALR Comm. 425.

⁵⁵ *Usen v. B. W. A. Ltd.* (1965) 1 All NLR, 244.

⁵⁶ *Smith v RSA Insurance Ireland Limited* UD1763/2013.

2.2 The Legal Effect of Suspension on Contract of Employment

This section answers the question, what is the effect of suspension on the contract of employment with regard to the rights and liabilities arising from the contract? When an employer suspends an employee, what becomes of their contract of employment? The National Industrial Court of Nigeria in *Ramoni Oladimeji Ladigbolu v. PCI Paints Ltd. & Anor*⁵⁷. On the legal effect of suspension of an employee, for the purpose of completeness, we take the liberty to reproduce the relevant holden of the court thus:

Suspension is usually a prelude to dismissal from an employment. It is a state of affairs which exists while there is a contract in force between the employer and the employee, but while there is neither work being done in pursuance of it nor remuneration being paid. Suspension is neither a termination of the contract of employment nor dismissal of the employee. It operates to suspend the contract rather than terminate the contract obligations of the parties to each other⁵⁸.

The above position is in tandem with that taken by the Supreme Court in *University of Calabar v. Esiaga*⁵⁹. Thus, in *Longe v. First Bank of Nigeria Plc*⁶⁰.

⁵⁷ [2015] 50 NLLR (pt. 164) 75 at 102, Paras. C-F, P. 101, Para. H.

⁵⁸ *Longe v. First Bank of Nigeria Plc.* [2010] 6 NWLR (pt. 1189) 1 at 60.

⁵⁹ [1994] 4 NWLR (pt. 502) 719.

⁶⁰ [2010] 6 NWLR (pt. 1189) 1 at Pp. 35, Paras. C-G, 36, Paras. B-C.

The Supreme Court held that suspension by its legal colouration in a statutorily flavoured employment (and by implication, master-servant employment) is not a demotion and does not entail a diminution of rank, office or position. It cannot import a diminution of the rights of the employee given to him under the law. An employer suspending his employee from work only means the suspension of the employee from performance of the ordinary duties assigned to him by virtue of his office. Hence, it is trite that the contemplation of the law is that suspension would not extinguish the employee status as an employee nor jettison the employment contract. Thus, one would wonder the justification for suspending an employee indefinitely particularly without pay. It is logical that where it becomes expedient for an employee to be suspended, by virtue of the legal effect of suspension on the employer-employee relationship as amplified from the judicial authorities above, the employee be placed on at least half salary, such a position is a win-win position.

3.1 The Legal Status of a Suspended Employee

When the employer either for the purpose of investigation upon an allegation of misconduct, suspends an employee or after investigation suspends an employee as punishment, as far as the contract of employment is concerned what is the status of such an employee? This section addresses this issue. Gleaning from the preceding section, the legal status of an employee on suspension is undoubtedly obvious. However, for the purposes of completeness and clarity, it is considered important to emphasize here the legal status of a suspended employee. It is our undisputable contention that an employee on suspension remains an employee of the suspending employer.

This position is buttressed by the National Industrial Court of Nigeria decision in *Duru v. Skye Bank Plc*⁶¹. when it held that:

During the period of suspension of an employee, the employment is neither terminated nor dismissed. Rather, it is merely put on hold to enable the employer properly carry out its investigations on its allegations against the employee. For the period of the employee's indefinite suspension without pay, he is still in the employ of the employer and so is entitled to his salaries and allowances⁶².

The above position is in accordance with the decision of the Court of Appeal in *Federal Airport Authority of Nigeria v. Greenstone Ltd*⁶³. and *Joseph v. Kwara State Polytechnic*⁶⁴. Bearing this in mind, it is rather pathetic especially in a jurisdiction like Nigeria where there is astronomic unemployment and insecurity of employment to understand why the court would usually treat a claim for re-absorption pursuant to an indefinite suspension as a claim for reinstatement and consequently hold the contract as repudiated. In *Ilodibia v. Nigerian Cement Coy*⁶⁵. Where an employee who was placed on indefinite suspension on half-pay after a protracted period brought an action for recall and still entitled to his salary and other entitlements notwithstanding the suspension.

⁶¹ [2015] 59 NLLR (pt. 207) 680 at P. 731, Paras. E-B.

⁶² *Bamisile v. National Judicial Council* [2013] All FWLR (pt. 678) 911.

⁶³ [2009] All FWLR (pt. 711) 755.

⁶⁴ [2014] All FWLR (pt. 750) 1215.

⁶⁵ (1997) 53 LRCN 2507.

The Court of Appeal held that by failing, refusing and or neglecting to recall the employee, the defendant had repudiated the contract of employment and the employees' claim is tantamount to a claim for reinstatement which is only available to an employee whose employment is statutorily flavoured. Consequently, the claim was refused. In *Ekpeogu v. Ashaka Cement Coy*⁶⁶. The Appellant was suspended indefinitely without pay on allegation of stealing the Respondent's property and charged to court, he was subsequently discharged and acquitted and he brought an action for his recall which was not granted. On appeal though the Court of Appeal acknowledged the fact that he ought to have been recalled after his acquittal as the notice of suspension cannot metamorphosis into a notice of termination nevertheless summersault and held that:

The matter boils down to this, namely, that even though the suspension notice could not take the position of one month's notice or one month's salary in lieu of notice, the fact remains the same, that is to say the employment was effectively terminated. There is nothing one can do. The common law view is that in the ordinary case of master and servant ... if the master wrongfully terminates the servant (or even wrongfully dismisses him) either summarily or by giving insufficient notice, the employment is effectively terminated, albeit in breach of contract⁶⁷.

⁶⁶ [1997] 6 NWLR (pt. 508) 280.

⁶⁷ *Mbukurta v. Abbo* [1998] 6 NWLR (pt. 554) 456. .

It is rather unfortunate to note that despite the legal effect of suspension, the courts in the above cases sojourned through the route of technically converting suspension into termination. The Court failed or neglected to take into cognizance the dire need to protect employees from the antics of employer and in an ostrich manner, turned a blind eye to the precarious nature of the employer employee relationship in Nigeria. The court shed crocodile tears when it wailed that “there is nothing one can do”, the court's hands were not tied in the circumstance because the fact of suspension was not in contention nor was the appellant's claim for reinstatement and since the Respondent did not terminate the employment, the court bringing itself into a seemingly hopeless and helpless situation as it did is unjustified. While the court rightly stated the common law position on termination of master servant employment relationship, but where the employer chose to be wise by half, the damages should be punitive and not the regular computation of what ought to be earned by the employee if the statutory or prescribed period of notice was adhered to. This would discourage the practice of termination through suspension and its attendant negative consequences.

3.2 Matters Arising

From the discussion above, some issues have arisen. They include, what is the propriety of placing an employee on indefinite suspension without pay? Since an employee has the moral right to survival, can an employee on indefinite suspension resort to another employment for survival during the currency of his/her indefinite suspension since suspension only keep at abeyance the performance of the duties hitherto performed and does not extinguish the status of being an employee? Should an employee who is on suspension pending the determination of an allegation made against him/her not be entitled to at least half salary for maintenance? Would statutory regulation by incorporation in the Labour Act, the issue of suspension having regard to its socio-economic impacts

on the life of an affected employee better safeguard the employee? While it is the law that an employee reserves the right to discipline an erring employee, it is our vehement contention that except for disciplinary purposes suspending an employee without pay or at least half pay is an unfair labour practice. This contention is hitched on the grounds that aside the fact that where a wrongdoing is alleged against an employee, until proven, he or she is presumed innocent, where an employee is suspended for administrative exigencies, it should not affect his earnings. If at the end of the investigation, the allegation leveled against the employee is proven to be true, he can be meritoriously suspended and his salary rightly withheld at that juncture. This is in tandem with both common sense and the just expectations of a reasonable man whether in the stead of either of the parties.

Furthermore, the practice of indefinite suspension particularly without pay either as an administrative or disciplinary measure is condemnable in the strongest of terms. It is retrogressive, oppressive, clandestine, vexatious and a deliberate attempt to suffocate life out of an employee. Nothing is a worrisome and oppressive as putting a man on an imbalance stead of life, the trauma of an employee not knowing his fate is better imagined than experienced. Work is an integral aspect of human life and it propels other aspects of life, the right to dignity of the human person and life is intrinsically tied to the right to work. A man without an income but who is capable and willing to work to earn a living but whose willingness and ability are kept at abeyance and in darkness, cannot be professing right to dignity of human person and life. Just as the law abhors perpetuity in litigation so that a man would know his fate in a legal tussle, an employee should not be kept waiting at the pleasure of the employer to know his fate. Besides, since the legal expectation of suspension is to keep at abeyance performance of the employees' duties and not extinguishment of the contract itself, administrative suspension should be within a definite period as well as disciplinary. An employee

should not be punished (suspended) indefinitely as indefinite punishment with a subsisting relationship is not only illogical but unjustifiably punitive, some sort of impunity. Moreover, commonsensical, where an employer against the dictate of fairness suspends an employee indefinitely without pay and it has persisted for an unreasonable period of time, it would not be illogical for the employee to treat the contract as technically repudiated and seek for another employment to cater for his needs. Every employee has needs which requires him/her working, it would be unrealistic to expect an employee who has been suspended may be pending investigation for a period beyond five months to fold his/her arms and sit waiting to be recalled. Depending on the status of the employee involved, if it is a person who is married, the question is, how is such a person legitimately expected to meet with his family demands of providing food, shelter, clothing and other sundry needs that keep accumulating? Would the person resort to begging? A person capable and willing to work should not be placed in a position where he cannot do so as it is antithetical to human existence and the need for survival.

Considering the implication and rather unscrupulous manner some employers have exploited the right of suspension and the silence of the legal regime on it, it is believed that amending the Labour Act which is the principal labour legislation in Nigeria with a view to statutorily regulating how suspension should be carried out, the employees can be safeguarded. Thus, the intended amendment should out rightly prohibit indefinite suspension without pay and declares it as an unfair labour practice, provides punitive damages for its practice to serve as deterrent. From the authority, the attitude of the Nigeria court is to treat with careless abandon the need for procedural fairness through pre-suspension hearing notwithstanding the readiness of the employers to exploit the employer couple with their reluctance to adhere to fair hearing where they are supposed to, the courts should jettison the idea of

turning a blind eye to the precarious and employee unfriendly nature of Nigeria's labour and employment law and be more egalitarian towards the employees need for protection.

4.1 Conclusion

Evident from the discussion above is the fact that the contract of employment which could either be oral or written is the basis for the subsistence of an employer-employee relationship and it creates rights and liabilities qua parties. Inherent in this contract is the employer's right to discipline an erring employee and the employee also reserves the right to resign from the contract at any time though may be held liable for breach of contract where the resignation infracts the express provision of the employment contract. These rights are anchored on the cherished doctrine of freedom of contract which connotes that nobody can be compelled to employ or continue to be in the employ of another whom he does not wish to. Thus, during the currency of the employment contract where an employee is alleged to have been found wanting, either as a form of punishment or precursor to punishment; it is common for an employer to suspend an employee either definite or indefinitely, with payment of half or no salary at all. Suspension as a practice in labour and employment relations is very crucial and its effect on the employment contract is not a termination of same but a mere suspension of the employee's right of performing the duties assigned to him/her under the contract. Thus, a suspended employee is still an employee of the suspending employer. This notwithstanding, in practice, employers have unscrupulously hidden under the sham of indefinite suspension to technically determine the employment particularly where such indefinite suspension is coupled with non-payment of salary. Moreover, while it is trite that before an employment contract can be determined whether that of master-servant or statutory flavoured, the employer must abide by the time tested doctrine of fair hearing, in suspending an employee especially when it is done as an administrative exigency,

there is usually no pre-suspension hearing. The issue however is where an employee is on indefinite suspension without pay, his needs and wants are not suspended also, how does he meet the need of survival and would he be infracting the suspended employment contract where he secures another employment since his/her right to life is concomitant on continuous employment?

4.2 Recommendations

From the above articulation, it is hereby recommended that the Labour Act which is the principal labour legislation in Nigeria be amended with a view to providing that the practice of indefinite suspension without pay which tantamount to technical dismissal is illegal and where an employer adopts it a punitive fine of not less than N50,000 should be paid to the affected employee at the first instance and double of that sum for any subsequent act. Also, the Courts are enjoined to take a proactive stand where an employer suspends an employee indefinitely with or without pay as a precursor to investigation but at the conclusion the employee is absolved of any wrongdoing however the employer refuse, failed and or neglects to recall the suspended employee but treats the contract as determined; in such circumstances, the courts while upholding the doctrine of freedom of contract, should grant punitive damages against such an employer declaring such practice as an unfair labour practice. Thus, decision such as *Ilodibia v. Nigerian Cement Co*⁶⁸, *Olafinmihan v. Nova Lay-Tech Ltd*⁶⁹. and *Ekpeogu v. Ashaka Cement Co. Ltd*⁷⁰. Which treated indefinite suspension as technical termination of the employment without more where the opportunity present itself, should be upturned.

⁶⁸ [1997] 53 LRCN 2507.

⁶⁹ [1998] 4 NWLR (pt. 547) 608.

⁷⁰ [1997] 6 NWLR (pt. 508) 280.