

SUPREME COURT OF NIGERIA

16TH JULY, 1993. SC.197/1990

**CORAM:- A. G. KARIBI-WHYTE, S. M. A. BELGORE, A. B.
WALI, O. OLATAWURA, I. L. KUTIGI, JJSC**

O. A. ADEYEMI ADENIYI APPELLANT

AND

GOVERNING COUNCIL OF
YABA COLLEGE
OF TECHNOLOGY RESPONDENT

CONSTITUTIONAL LAW - Fundamental human rights - fair hearing - in respect of compulsory retirement of employee - motion for enforcement of- wrongfully refused by the two lower courts - when the Supreme Court will intervene.

CONTRACT OF SERVICE - Purported compulsory retirement of employee - not in compliance with statutory provisions - whether contract of service is still subsisting.

FAIR HEARING - Compulsory retirement of Appellant on charge of leaking official secret-Appellant not confronted with the accusation before being retired - whether fair-hearing is denied him thereby.

INTERPRETATION OF STATUTES - Section 12 of the Federal Polytechnic Act -the proper import thereof.

WAIVER - Demand by Appellant of 3 months salary in lieu of notice of retirement - purported retirement is ultra vires and void - whether Appellant has by such demand waived his right of action against Respondent.

FACTS

The Appellant is the Deputy Registrar of the Respondent Council. Following an allegation of a leakage of the Council papers in connection with the appointment of a new Rector for Yaba College of Technology, the Appellant was compulsorily retired by the Respondent after investigations by an Investigating Panel. The Investigating Panel merely called the Appellant as a witness and proceeded to find him liable. The Panel made recommendations to the Respondent Council which retired the Appellant compulsorily without letting him know his accusation nor giving him any hearing. The Appellant applied for 3 months salary in lieu of notice of retirement. Finally the Appellant filed a motion for the enforcement of his fundamental human rights challenging his purported retirement by the Respondent without affording him an opportunity of making his representation in person.

The trial court held that the Appellant had notice and was given opportunity of representing himself in person. It held further that by applying for 3 months salary in lieu of notice, the Appellant accepted his compulsory retirement. It then dismissed the action of the Appellant. Dissatisfied with this judgment, the Appellant appealed to the Court of Appeal which unanimously dismissed his appeal. He then appealed to the Supreme Court. The apex court had to determine whether fair hearing was given to the Appellant and whether his compulsory retirement was in compliance with the provisions of s. 12 of the Federal Polytechnic Act, 1979.

HELD (unanimously allowing the appeal)

1. No determination involving the civil rights and obligations can be properly made, until the person whose civil rights and obligation may be directly affected has been notified of the matter and given the opportunity of answering the case against him. (p. 19 L17)
2. It is accepted law that the principles of natural justice are applicable to both judicial and administrative determinations. (p.20 L19)
3. It is non-negotiable fundamental pre-condition that a person accused of wrong doing must be confronted with the accusation before any action involving detriment to him can be legally taken. (p.23 L8)
4. As the Appellant was at no stage at the Investigating Panel accused of leaking the Panel's Report, his testimony before the

Panel was not directed at answering any such accusation. It is therefore, not correct to hold that the Appellant was given fair hearing. (p.23 L 31)

5. It is obvious from the first paragraph of the letter retiring Appellant from services that the Respondent acted on the Investigating Panel's Report without giving the Appellant a hearing on the allegation against him and Appellant was not heard at all on the allegations before the Respondent acted on it. Accordingly, the decision retiring Appellant from service is ultra vires and void. (p.24 L25 & p.26 L2)
6. Since the Investigation was not as to the conduct of the Appellant, but as to the circumstances of the leakage, the Respondent having been informed that Appellant was involved, is under an obligation to put to the Appellant this accusation and hear him before taking an action. (p.24 L29)
7. The Respondent having purported to remove the Appellant on grounds of misconduct as it is empowered under s. 12 (1) of the Federal Polytechnic Act 1979, is required to do so in compliance with the provisions of the said section. (p.27 L13)
8. It is a general principle that where a contract of service is predicated upon compliance with the statutory provisions, non-compliance with the provisions renders the removal ultra vires and void. (p.27 L 32)
9. As the Respondent Council has not complied with the enabling statutory provisions in the determination of the contract, it follows that the letter of compulsory retirement of the Appellant is ultra vires and void, accordingly his contract of service with the Respondent is still subsisting. (p.33 L24)
10. Since the Appellant did not know at the time he was asking for three month's salary in lieu of notice that his appointment with the Respondent Council was subsisting, the compulsory retirement being invalid, Appellant could not be regarded as having waived a right which he was not aware of. (p.34 L24)
11. The Court of Appeal cannot be right to rely on Olaniyan's case in holding that Appellant's collection of his retirement benefits was an election which must prevent him from seeking reinstatement and to accede to such argument is to convert an ultra vires act

4 Adeniyi v. Governing Council Yabatech (1993) 10 KLR
committed in breach of an enabling statutory provision into a valid
act. (p.34 L35)

PER KARIBI-WHYTE JSC *"I have never heard it accepted or said that
an accusation of wrong doing merely by inference, possibly by insinuation
5 was sufficient to deny a person his right to fair hearing. Our Criminal law
prohibits it. Common sense clearly suggests the contrary. I believe justice
will swoon at the mention of such a proposition."* (p.25 L37)

PER OLATAWURA JSC *"A man who appeared before a tribunal with-
10 out any specific accusation of a misconduct and who was called as a
witness cannot be said to have been given a fair hearing when at the end of
the tribunal and subsequent findings he was found liable for misconduct of
which he was not specifically accused".* (p.40L29)

15 **REPRESENTATION**

Chief G.N. Uwechue SAN with P.O. Uwechue and J.N. Mbadugha, for the
Appellant.

20 Seyi Sowemimo, for the Respondent

CASES REFERRED TO

1. Aiyetan v. NIFOR 1987) 3 NWLR (pt 59) 48
2. Adedeji v. Police Service Commission (1968) NMLR 102
- 25 3. Denloye v. Medical Dental Council (1968) 1 ALL NLR 306
4. Garba v. Univ. of Maiduguri (1986) 1NWLR 550
5. The State v. Onagoruwa (1992) 2 NWLR (pt 221) 33
6. Kirn v. The State (1992) 4 NWLR (pt. 233) 17
7. Re Pergamon Press Ltd (1971) ch. 388
- 30 8. R v. Gaming Board for Great Britain (1970) 2 QB 417
9. R v. Race Relations Board (1975) 1 WLR 1686
10. Russel v. Duke of Norfolk & ors (1949) 1 ALL ER 109
11. R v. Chancellor of Cambridge (1723) 1 Strange 557
12. Board of Education v. Rice (1911) A.C. 179
- 35 13. Local Government Board v. Aolidge (1915) A.C. 120
14. Wood v Woad (1874) LR. 9 Ex. 190
15. Baba v. NC A.T.C (1991) NWLR 388
16. Fawehinmi v. Legal Practitioners Disciplinary Tribunal (1985) 1
NWLR. 300

17. Reg. v.Kent Police Authority &ors. Exparte Golden(1971)2QB 662
18. Govt. of Gongola State v. Tukur (1989) 4 10 WLR 592
19. R. v. Logun (1959) L.L.R. 64
20. Olaniyan v. University of Lagos (1985) NWLR (pt. 9) 599.
21. Olatunbosun v. NISER COUNCIL (1988)3 NWLR (pt. 80) 25
22. Adigun v. A-G Oyo State (1987)3 SC. 250 5
23. Irem v. Obubra District Council (1960) 5 FSC 24
24. Hoffman-La Roche v. Secretary for State & Industry (1975) AC 295
25. Glynn v. Keele University (1971) 1 WLR 487
26. Ward v. Bradfor Corporation (1971) 70 LGR 27
27. Adeeko v. Ijebu Ode District Council (1962) 1 ALL NLR 220 10
28. F.C.S.C v. Laoye (1989) 2 NWLR 652
29. Ariori & v. Elemo (1983) 1 SC. 13
30. R. v Amendt (1915) 2 KB 593
31. Gandy v. Gandy (1985) 30 ch. D. 57
32. Howard v. Pickfore Tosi Co. Ltd (1951) 1 KB 417 15
33. Heyman v. Darwins Ltd. (149) AC 356
34. Hocheter v. De La Tour (1853) 2 F&B 678
35. Johnstone v. Milling (1886) 16 WBD 460
36. U.A.C. Ltd. v. Macfoy (1961) 3 ALL ER 1169 20
37. Shitta - Bey v. Federal Public Service Commission (1981) 1 SC 40
38. Falomo v LagosState Public ServiceCommission(1968) NWLR 102

STATUTES

Federal Polytechnic Act No. 33 of 1979 s. 12

Constitution of the Federal Republic of Nigeria, 1979 s. 33 (1) 25

LEAD JUDGMENT BY KARIBI-WHYTE JSC

On the 10th day of March, 1987, Famakinwa J, of the High Court of Lagos State sitting in Lagos, dismissed appellant's application for the enforcement of his fundamental rights against the respondent for retiring him compulsorily from his office as Deputy Registrar, without fair hearing. On the 5th day April, 1989 his appeal to the Court of Appeal, Lagos Division was dismissed. The appeal before us is against the judgment of the Court of Appeal. 35

The legal issues involved in this appeal, though not *primae impressionis* are of momentous constitutional and administrative importance. They involve a determination of the scope of the observance of the well settled concept of fair hearing where a statutory body is called upon to

exercise its statutory powers in enforcing the recommendations of an investigative tribunal. Also involved is the determination of how a statutory body is to exercise its enabling disciplinary powers in respect of a witness to an investigating panel found guilty on the recommendation of the panel. The appeal also raises the question whether a person whose employment is
 5 statutorily protected, can by taking a benefit arising from a purported termination of his service; cure the invalidity in the termination of his contract.

The Facts:

Appellant is the Deputy Registrar of the respondent College of
 10 Technology. In a letter dated 29th October, 1985 he was compulsorily retired from the service of the respondent. The letter, subject matter of this proceedings is reproduced below.

"YABA COLLEGE OF TECHNOLOGY

P.M.B. 2011 YABA, NIGERIA

15 *Telephone: Lagos 800160-1-2-3-4*

Telegrams: Tekinst, Yaba.

Our Ref:

Your Ref:

29th October, 1985

Deputy Registrar,

20 *(Mr. A.O. Adeniyi)*

Yaba College of Technology,

Yaba.

25 *RETIREMENT FROM THE SERVICES OF YABA COLLEGE OF TECHNOLOGY*

*As you are aware, the Council of this College set up an Investigation Panel to look into sources of leakage of Council Papers in connection with the appointment of a new Rector. The findings are that you are connected with the leakage of the classified information which a fictitious "Concerned Alumni
 30 Members" of this College included in their petition over the interview for the appointment of a new Rector for Yaba College of Technology.*

*The council views your involvement in this matter as gross official misconduct, having regard for the serious legal implication of divulging official
 35 secrets.*

Consequently, you are hereby retired from the services of this College with immediate effect. Your retirement is with full benefit.

You are please to vacate your official residence within three months of the receipt of this letter, and to hand over all the property of the college in

your care immediately.

The Council will like to thank you very much for your long years of services to this college, but must add that it cannot close its eyes to its responsibilities to this college, in the interest of this country.

(Sgd.) I.M. Mora

Acting Chairman of Council

Yaba College of Technology"

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In a letter dated 8th November, 1985, appellant wrote petitions to the Honourable Minister of Education, Chairman of the Governing Council of the respondent protesting against his retirement, and pleading for a re-consideration of the decision to retire him. Nothing positive resulted from this effort. On the 30th January, 1986, appellant commenced proceedings against the respondent by way of an application under the Fundamental Rights (Enforcement Procedure) Rules, 1979, claiming as follows:

"(i) An order enforcing the Fundamental Right to fair hearing in respect of a decision dated the 29th day of October, 1985 made by the Governing Council of the Yaba College of Technology.

15

(ii) An order quashing the decision of the Governing Council of the Yaba College of Technology."

It is important to what will be said later in this judgment, to observe that the decision challenged on the ground of absence of fair hearing is the decision of the Governing Council dated 29th day of October, 1985, already quoted above.

At the expense of repetition, which I consider necessary for clarity, I reproduce the first three paragraphs of this letter which are as follows:

25

"As you are aware, the Council of this College set up an Investigating Panel to look into sources of leakage of Council Papers in connection with the appointment of a new rector. The findings are that you are connected with the leakage of the classified information which a fictitious "Concerned Alumni Members" of this College included in their petition over the interview for the appointment of a new Rector for Yaba College of Technology.

30

The Council views your involvement in this matter as gross official misconduct, having regard for the serious legal implication of divulging official secrets.

35

Consequently, you are hereby retired from the services of this College with immediate effect. Your retirement is with full benefit."

The background facts of the events resulting in this litigation is the notice of voluntary retirement from the services of the respondent by the

incumbent Rector, Mr. G. M. Okufi. His three months' notice was to expire on the 30th September, 1985. Arrangements were accordingly made to appoint a new Rector. The incumbent Registrar, Dr. Adeyeye was interested in the position. He applied and was among those short-listed and to be considered at the interview. The interview was held on 1he 8th August, 5 1985. Appellant who was the Deputy Registrar was the secretary of the meeting. He recorded the proceedings and was responsible for the preparation and production of the Report of the Interview Panel. Appellant finished a draft Report and submitted the draft as directed by the Chairman, to both the Rector, and Professor Fajemirokun, a member of the Council. The 10 drafts were returned to him on Monday the 12th, and on Wednesday the 14th August, he took the faired copy personally to the Federal Ministry of Education where he submitted the Report to Mrs. Coker. Appellant thereafter on Monday the 19th proceeded on an 18 days annual leave.

Appellant stated that he kept all the papers about the interview in 15 a file jacket which he put in a brown envelope as security to ensure that there was no slip of any of the papers from the file jacket. He took the brown envelope to his house. Before he went on leave he directed his Secretary to put the Report on stencil. She did. He corrected the stencil and sealed and clipped them along with the interview jacket and took both to 20 his house.

Appellant's first inking of the leakage of his draft to the public, was during the last meeting of respondent Council. This was when Professor Fajemirokun observed that the Report then being distributed was already public property - a household word. At the end of the meeting the Chair- 25 man of the Council referred the leakage of the Report and showed photocopies to members.

Following upon this, respondent council at its meeting of 13th September, 1985, decided to set up an Investigating Panel to investigate the source of the leakage of Council Papers which Mr. Adeniyi, the appel- 30 lant, was responsible for preparing. The document setting up the Investigation Panel which was dated 27th September, 1985, is reproduced hereunder for ease of reference.

"YABA COLLEGE OF TECHNOLOGY
GOVERNING COUNCIL

35

27 September, 1985

*Directors of Schools,
Heads of Departments,
All Staff members.*

INVESTIGATION PANEL

The Governing Council of Yaba College of Technology at meeting on September 13, 1985 appointed a Committee to investigate a number of issues raised in some petitions related to the general administration of the College.

Members of the Committee are:

5

Dr. I. Imogie - Chairman

Mrs. M. Adenubi - Member

Alh. M. I. Ishaku - Member

Mr. O. Ajose - Member

The terms of reference of the Committee are as follows:

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(a) To investigate the source and circumstances leading to the leakage of Council Papers as contained in a petition by some members of the Alumni of Yaba College of Technology requesting for the cancellation of the interview for the post of Rector.

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(b) To investigate allegations on the manipulation of contracts, College Project Consultants and indiscriminate offer of temporary appointments.

(c) To investigate any other matter related to the general administration of the College as may come up in the course of items (a) and (b) above.

20

(d) To make recommendations appropriately on items (a) - (c) above to the Council.

Any member of the College who may wish to comment on any of the above issues is invited to submit in writing a memorandum to the Committee. Such a memorandum should reach the Secretary, Mrs. G.T. Ogunsola, (Department of Secretarial Studies) not later than Friday, 4th October 1985.

(Sgd.) Dr. I. Imogie

Chairman,

Investigation Panel"

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Appellant deposed in paragraphs 18-24 of his affidavit in support of his application about the Investigation Panel as follows:

"18. *It was at the meeting of the Council on the 13th day of September, 1985 that I first learnt of the leakage of Council papers from the matters listed on the agenda for discussion.*

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19. *That towards the end of the said Council meeting I was asked to leave the meeting for a while by the Chairman, the Registrar having left earlier after a private conversation with the Chairman.*

20. *That I was recalled to the meeting about 20 minutes later and it was when the Chairman was reading the outcome of the Council's deliberations during my short absence from the meeting that I first became aware of the setting up of an Investigation Panel to inquire into the sources of such leakage.*
- 5 21. *On the 27th day of September, 1985 whilst in normal duty, a junior member of staff relayed a verbal instruction, purportedly sent by the Investigation Panel to appear before them that day to give evidence on the issue of the leakage of the Interview Report. I was then interrogated by them between the hours of 1.30p.m. to*
- 10 *3.15p.m. and 5-5.30 p.m. that same day.*
22. *That at the Council meeting of the 29th day of October, 1985, at which the Registrar and myself were present, I observed from the agenda of the meeting that the Report of the Investigation Panel was expected to be discussed.*
- 15 23. *When it came to the point of discussing the said Report of the Investigation Panel, the Registrar and myself were asked to leave the Council meeting for a while.*
24. *About four hours later, we were both recalled to the meeting and the Chairman of the Council announced the decision of the council to retire both of us compulsorily and we were subsequently*
- 20 *served with a letter to this effect, a copy of which is herein attached and marked Exhibit "A".*

Although the respondent deposed to an affidavit, none of the averments of the appellant in the above mentioned affidavit was contradicted.

25 They were, except for paragraph 10 which is different, indeed expressly affirmed. Paragraphs 11, 12, 13, 14, and 16 of the respondent's affidavit state as follows:

- "11. *That I am informed by Dr. Ajose and I verily believe it to be true that Mr. Adeniyi was asked by the Council Chairman to leave the*
- 30 *meeting for sometime so that the Council could decide on what to do about leakage of Council papers that Mr. Adeniyi prepared.*
12. *That I am also informed by Dr. Ajose and I verily believe it to be true that Mr. Adeniyi was then recalled to the meeting and was informed that an Investigating Panel had been set up to investi*
- 35 *gate the allegation of leakage of Council papers prepared by Mr. Adeniyi.*
13. *That I am informed by Dr. Ajose and I verily believe it to be true that the Council at its meeting of 13th September, 1985 decided to set up an Investigating Panel to investigate the source of the*

leakage of Council papers which Mr. Adeniyi was responsible for preparing.

14. *That I am informed by Dr. Ajose and I verily believe it to be true that in addition to being informed at the Council meeting that there was a leakage of a Council Report prepared by the applicant, a circular was also sent by the Investigating Panel Chair 5 man to all staff of the College asking that representation be made to the Investigating Panel.*

16. *That I am informed by the said Dr. Ajose and I verily believe it to be true that the applicant, Mr. Adeniyi was asked to appear before the Panel to explain his role in the leakage."* 10

I also reproduce paragraphs 10, 1, 19, 20, 21, 22 which deposed as follows:

10. *That I am informed by Dr. Ajose and I verily believe it to be true that Mr. Adeniyi was confronted with the photocopy of the Interview Report that was attached to the petition.*

17. *That a copy of the proceedings of the Investigating Panel where the applicant admitted knowledge of the charge against him is herewith attached and marked Exhibit 'B'.* 15

19. *That I am informed by Dr. Ajose and I verily believe it to be believe it to be true that from the circumstance of the case Mr. Adeniyi already knew the allegation against him as it was communicated to him at the Council meeting.* 20

20. *That I am informed by Dr. Ajose and I verily believe it to be true that Mr. Adeniyi's knowledge of these allegations caused him, Mr. Adeniyi to conduct an Internal Investigation in his office as to the leakage of the Interview Report prepared for the Council meeting.* 25

21. *That I am informed by Dr. Ajose and I verily believe it to be true that Mr. Adeniyi came to the Investigating Panel after having an opportunity to conduct an Internal Inquiry in his office.*

22. *That I am informed by Dr. Ajose and I verily believe it to be true that Mr. Adeniyi was then recalled and the decision of the Council was communicated to him."* 30

I have reproduced these averments merely for the sake of completeness and to show the nature of the case of the parties. I also must not ignore the opening statement of the Chairman of the Investigation Panel to the appellant when he appeared before the Panel, as a witness. He said; 35

"You will recall at the last Council Meeting, Council noticed that deliberations of the Interview Panel for the selection of the Rector have leaked to the public and Council papers were attached to petitions circulated over

the country; and this Panel was set up to find out the sources of this leakage and make recommendation to Council; and why we are calling you is the fact that you were the secretary to the Panel; and we thought it necessary to hear from you to throw light on what actually happened and if you have any useful information that may help this Panel in arriving at an objective decision. So I will call on you to give us the information as you know of it and then we may ask you one or two questions if necessary."

Thus the Chairman having stated the purpose of the Investigating Panel, namely, to find out the sources of the leakage of the Report of the Interview Panel, and to make recommendation to Council, went further to state the role expected of the appellant and why he was invited. *It is to "throw light on what actually happened" and as Secretary of the Interview Panel give "any useful information that may help this Panel in arriving at any objective decision."* There is no doubt therefore that the Panel before who appellant appeared was an Investigating Panel, whose terms of reference were as stated above and to make recommendation to Council on their findings.

There was evidence that following the setting up of the Investigation Panel, memoranda were invited to be submitted not later than October 14, 1985. Appellant said that he did not receive any such invitation; but responded when on the 27th September, he was informed by a member of staff that the Panel was sitting on that day. He went to the venue and was called upon to testify. Appellant testified at length about the part he played in the production of the Interview Panel Report. He explained the measures he took to ensure its confidentiality and secrecy, and how he came to know that despite his efforts, there was a leakage. Appellant was examined at length and in detail by members of the Panel.

On the 29th October, 1985, Council relying entirely on the findings of the Investigation Panel, and without hearing him wrote to appellant retiring him from its services on grounds of "gross official misconduct, having regard for the serious legal implication of divulging official secrets."

On the 30th January, 1986, appellant commended proceedings against the respondent by way of an application under the Fundamental Rights (Enforcement Procedure) Rules 1979, claiming as follows:

Hearing the Application:

The learned trial Judge Famakinwa J. having heard evidence to resolve the conflicts in the affidavits relied upon by the parties, dismissed the application of the appellant. He held that appellant had notice of the complaint against him by the respondent, and he was also afforded opportunity of making his representation in person to the respondent/council and he did.

Finally, the learned trial Judge held that the letter of the appellant dated 10th December, 1985, Exhibit A applying for three months' salary in lieu of notice was tantamount to acceptance of his compulsory retirement by the respondent/council. He held therefore that appellant's appointments was validly terminated under Section 12(3)(d) of Decree No.33 of 1979.

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In the Court of Appeal:

Appellant appealed to the Court of Appeal. Only two issues for determination were formulated and considered by the Court below. These are: (i) whether appellant was accorded a fair hearing before he was retired by the Respondent/Council, having regard to the provisions of Section 12 of the Federal Polytechnic Act 1979, No. 33 and Section 33(1) of the Constitution 1979. (ii) whether the subsequent application and payment to the appellant of his retiring benefits and salary in lieu of notice constituted a bar to the presentation.

In a unanimous decision of the court, in the judgment read by 15 Awogu, J.C.A. the appeal was dismissed. The Court held on the facts that appellant "by making his submissions, he was certainly given a fair hearing." It is however interesting to refer to the pertinent observation of the court immediately after. It said,

"It was after the Governing Council had considered the Report of the Panel that it decided to retire him with full benefits, for gross misconduct. No fresh charge or inquiry was, from the facts called for.

This might have been the end of the matter save that the learned judge raised the issue of election at page 62 of the record of appeal when he stated that the appellant had collected his entitlements and emoluments and if he felt aggrieved or not satisfied in this regard "he ought to head to the law court for a declaration of his rights and claiming damages."

Following this trend of argument and relying on the submission that appellant having elected to take his three months' salary in lieu of 30 notice and retirement benefits, he was precluded thereby from seeking reinstatement; the Court summed up its conclusion thus,

"In otherwords, he chose not to regard the wrongful termination as the end of the contract of employment but yet still took his benefits thereunder and then proceeded to sue for the setting aside of the decision to retire him with full benefits because of infringement of his fundamental right to fair hearing under Section 12(1) of the Federal Polytechnic Act No. 33 of 1979, and Section 33 of the 1979 Constitution of the Federal Republic of Nigeria."

In the Supreme Court

Dissatisfied, appellant has now come to this Court with leave granted by the Court below. Appellant filed six grounds of appeal. The six grounds of appeal contain challenges on issues of fair hearing, (grounds 1, 2, 3) Non-compliance with the statutory provisions governing his termination (ground 4), and waiver of his rights and election (grounds 5 and 6).

Learned Counsel to the appellant formulated five issues for determination as arising from the grounds of appeal. The issues so formulated are as follows:

- 10 *"(i) Was the Court of Appeal right when it held that the appellant was given fair hearing because he appeared before the Investigating Panel?*
- (ii) Was the Court of Appeal right when it held that the respondent was right in retiring the appellant without instituting fresh charges against him?*
- 15 *(iii) Was the Court of Appeal right in its interpretation of Section 12 of the Federal Polytechnics Act, 1979?*
- (iv) Was the Court of Appeal right in its interpretation of the decision in*
- 20 *Olaniyan v. University of Lagos?*
- (v) Did the appellant waive his right to seek redress in Court?"*

On his part learned counsel to the respondents formulated two
25 questions for determination. They are:

- "(1) Was the Court of Appeal right in holding that the appellant had been accorded a fair hearing before his compulsory retirement? As a corollary to this question, two subsidiary issues also arise for consideration, namely (a) whether the appellant's conduct was*
- 30 *not such as to disentitle him to the remedy sought and (b) whether the appellant is entitled to succeed given the fact that he had been afforded a rehearing by the High Court; and*
- 35 *(2) Was the conduct of the appellant in requesting for and receiving his salary in lieu of notice pension and gratuity tantamount to an election to accept his retirement. "*

Both formulations of the issues for determination are concerned with the crucial issues of fair hearing, and the additional issue whether the subse-

quent conduct of appellant amounted to a waiver of his right to exercise his right of action to sue for his termination.

It is important to state at once that the two issues are not related. The contention of waiver seems to be related to the exercise of the right to question the termination. This is different from whether the appellant was given a fair hearing before the Respondent/Council terminated his appointment. Appellant challenge of the invalidity his compulsory retirement is based on whether Respondent/Council complied with the enabling statutory power.

The four issues formulated by learned counsel to the appellant can conveniently be subsumed within the two issues of the respondent without losing much of their intrinsic relevance to the result of this appeal. I agree entirely with the formulation of the issues by learned counsel to the respondent. There is no doubt the dominant issues in this appeal are those of fair hearing and waiver of the right to challenge the action of the Respondent/Council. In the interest of clarity and completeness, even though the interpretation of S.12 of the Federal Polytechnic Act, would be considered in the issue of fair hearing, it is appropriate to consider the third issue on the Interpretation of Section 12 of the Federal Polytechnics Act 1979.

The issues I have adopted for determination in this appeal are:

- (1) Whether the Court of Appeal was right in holding that the appellant had been accorded a fair hearing before his compulsory retirement.
- (2) Whether the conduct of the appellant in requesting for and receiving his salary in lieu of notice and pension and gratuity tantamount to an election to accept his retirement.
- (3) Whether the Court of Appeal was right in its interpretation of Section 12 of the Federal Polytechnics Act, 1979."

I have not considered the issues subsidiary to issue (1) as formulated by learned counsel to the respondent since ex necessitate they will be argued.

The issues will be considered in the order in which I have stated them. I begin with the first issue, i.e. on fair hearing.

Arguments of Counsel:

(1) Appellant's

Learned counsel to the appellant in his brief of argument referred to the reasoning of the Court below that appellant was accorded fair hearing before the Respondent/Council compulsorily retired him. In his submission against the finding learned counsel submitted that the Court of Appeal was wrong to so conclude because the conduct of the appellant per se was

not the subject matter of investigation by the Investigating Panel. Counsel referred to the Panel's terms of reference. He defined the essential requirements of fair hearing, citing in support the cases of Aiyetan v. NIFOR (1987) 3 NWLR (Pt.59) 48; Adedeji v. Police Service Commission (1968) NMLR 102 and Denloye v. Medical & Dental Council (1968) 1 All NLR 306.

5 It was submitted that there was no evidence on the record that appellant was informed, either orally or in writing of the charge that had been preferred against him. The evidence on record as disclosed by the speech of the Chairman of the Investigation Panel, was that appellant was invited to assist the Panel to arrive at an objective decision. Learned counsel
10 sel then submitted that accordingly the conduct of appellant was not the subject matter of the investigation. Aside from not being formally accused of responsibility for the leakage, appellant was not told of any person or persons who made such allegations against him. No opportunity was given to appellant to confront and if necessary, cross-examine persons who ac-
15 cused him of the misconduct.

Citing and relying on Aiyeton v. NIFOR (supra) and Garbo v. Univ. of Maiduguri (1986) 1 NWLR (Pt. 18) 550; Adedeji v. Police Service Commission (1968) NMLR 102, learned counsel submitted that the proposition is that a person or public officer invited before an Investigation Panel as a
20 witness and not as an accused, cannot be subjected to disciplinary action on the basis of the Report of the Investigation without the person or public officer being formally accused or charged on the basis of such report.

Learned counsel submitted that the fact that appellant was aware that there had been a leakage of Council papers was not in dispute. What
25 is in dispute is the fact that appellant knew that he was the one accused of causing the leakage. In the circumstances and on the authorities cited, it was submitted the Court of Appeal was wrong to hold that appellant was given fair hearing merely because he appeared before the Investigating Panel and gave evidence. Mr. Uwechue who argued the appeal for the appellants
30 pointed out that respondent failed to address the issue of the nature and purpose of the enquiry. He observed that it is necessary to determine whether the enquiry was (a) merely investigatory and exploratory or (b) intended to determine the rights and obligations of the person affected.

Learned counsel submitted that the purpose of the enquiry was to
35 determine the rights and obligations of the appellant. Since the civil rights and obligations of the appellant were involved as he was being tried for wrong doing, he should have been given opportunity to confront his accusers. Learned counsel submitted that the Court below having found that appellant was not given adequate opportunity for preparation of his de-

fence, was a breach of the right of fair hearing. The appeal ought to have been allowed on that ground on the authority of *The State v. Onagoruwa* (1992) 2 NWLR (Pt.221) 33, and *Kim v. The State* (1992) 4 NWLR (Pt.233) 17 at p.37.

(ii) Respondent

Mr. Seyi Sowemimo, for the respondent both in his brief of argument and in his oral expatiation before us supported the reasoning of the Court below. Learned counsel admitted that appellant was not informed of the allegation against him by the Investigating Panel, but relying on what counsel regarded as the "peculiar facts of this case" he submitted that both the High Court and Court of Appeal were right in holding that the appellant had been accorded a fair hearing prior to his compulsory retirement. 10

Mr. Sowemimo's argument is based on the following reasoning stated in respondent's brief.

"...when one considers the extensive nature of the evidence which he gave before the Investigating panel. It was quite obvious from his testimony before the Panel that he knew that his role as secretary was being called into question as he was the key official charged with the preparation and preservation of the confidentiality of the Report of the Interview Panel. Furthermore, throughout his testimony the appellant appeared to be on the defensive trying time and time again to exculpate himself. His evidence was that of a man who knew that accusing fingers were being pointed at him." 15 20

Learned counsel relied for this conclusion on his deduction from the evidence and conduct of the appellant before the Investigating Panel. He also took into account the fact that appellant was the secretary of the Interview Panel, whose Report was the subject matter of the leakage; and that even before the Investigating Panel was set up, appellant had himself set about his own enquiries in his office about the leakage. 25

Considerable reliance was also had to the findings and reasoning of the trial Judge and of the Court below. Again, Mr. Sowemimo referred to several circumstances which leads one to the conclusion that appellant was aware at all times before and during the proceedings of the Investigating Panel that he was being suspected of having leaked the Report. He referred to appellant's testimony about being a victim of blackmail with respect to the leakage. 30

Counsel referred to the cases of *Aiyetan v. NIFOR* (supra)); *Adedeji v. Police Service Commission* (1968) NMLR 102; *Denloye v. Medical and Dental Council* (1968) 1 All NLR 306 and *Garba v. University of Maiduguri* (1986) 1 NWLR (Pt.18) 550 cited and relied upon by appellant's counsel, in support of the propositions that appellant was entitled to know the charge 35

against him, the evidence given against him, and finally given a fair opportunity to correct and contest the charges against him. He submitted that Aiyetan and Garba were cited in support of the proposition that merely being a witness in an inquiry cannot satisfy the requirement of natural justices.

5 Stressing the peculiar facts of this case, and relying on the English cases of *Re Pergamon Press Ltd* (1971) Ch. 388 at 403, *R v. Gaming Board for Great Britain* (1970) 2 QB 417, at p. 439; *R v. Race Relations Board* (1975) 1 WLR 1686; *Russell v. Duke of Norfolk & ors* (1949) 1 All ER 109, *Wade: Administrative Law* (5th Ed.) p. 581, Mr. Sowemimo submitted that the rules of natural justice are supposed to be flexible tools for attaining the demands of justice in each case. Hence every case has to be considered on its merits. It was submitted
10 that the cases cited and relied upon by the appellant are clearly different on the facts from the instant case. It was contended that appellant was not merely a witness to the Investigating Panel, he was the central figure in the whole proceedings.

Learned Counsel submitted that the important consideration is that
15 appellant be given, and he was so given in this case, an indication of the complaint raised against him so that he can answer them as fairness requires.

It was submitted that the purpose of giving notice is to allow the party to effectively prepare his own case and to answer the case against him. In the instant case appellant had an ample notice of two weeks 13th-27th September of the allegation of involvement in the leakage. Appellant indeed conducted his own
20 defence without complaining.

Mr. Seyi summarised the grounds on which appellant based his claim as follows:

- (i) that he was never faced with any charge nor told of the nature of any allegation against him.
- 25 (ii) that he was no afforded an opportunity of defending himself on any charge before his compulsory retirement.
- (iii) that in so far as the procedure stipulated in Section 12(1) of the Federal Polytechnics Decree 1979 was not followed, he was not accorded a fair hearing.

30 Consideration of the Contentions

This issue deals with the violation of the right to fair hearing. In considering this issue so much of the interpretation of section 12(1) of the Federal Polytechnics Decree 1979 as it concerns fair hearing will be discussed.

Our law recognises two fundamental principles of justice as natural and
35 inherent to the proper and effective administration of justice. These are that no person should be a judge in his own cause, and that the parties to a case should be given adequate notice and opportunity to be heard. At least both of these fundamental principles regarded as rules of natural justice are entrenched in the Constitution of the Federation 1979.

These are universal principles of ancient origin and common to mankind. They were recognised by the Ancient Greeks and Romans, enshrined in the Holy Bible, and recognised as part of our indigenous and other African cultures and philosophy of principles of justice. It is indeed, as asserted by Coke, a principle of divine justice. We are in this issue concerned with the second of the twin principles of natural justice. This is the principle of fair hearing in its Latin expression *audi alteram partem*. 5

Fortescue J. in *R v. Chancellor of Cambridge* (1723) 1 Strange 557 is quoted to have made a graphic analogy of how the principle was invoked in the investigation of the offence of Adam and Eve in the garden of Eden. He put it thus:

"The laws of God and man both give the party an opportunity to make his defence, if he has any. I remember to have heard it observed by a very learned man upon such an occasion, that even God himself did not pass sentence upon Adam, before he was called upon to make his defence. Adam (says God) where art thou? Hast thou not eaten of the tree, whereof I commanded thee that thou shouldst not eat? And the same question was put to Eve also." 10 15

I do think any proposition can be more clearly established in the administration of justice. There is no doubt that no determination involving the civil rights and obligations can be properly made, until the person whose civil rights and obligations may be directly affected, has been notified of the matter and given the opportunity of answering the case against him. In the recent case of this Court of *George v. Dominion Flour Mills Ltd* (1963) 1 SCNLR 117 at p. 123 20 *Bairamian F.J.* commenting on the aim of pleadings and fairness of a trial, said;

"The fairness of a trial can be tested by the maxim audi alteram partem. Either party must be given an opportunity of being heard; but a party cannot be expected to prepare for the unknown; and the aim of pleadings is to give notice of the case to be met; which enables either party to prepare his evidence and arguments upon the issues raised by the pleadings, and saves either side from being taken by surprise." 25

It is pertinent to reproduce Section 33(1) of the Constitution of the Federation 1979 which states that, 30

"In the determination of his civil rights and obligations, including any question or determination by or against any government or authority, a person shall be entitled to a fair hearing within a reasonable time by a court or other tribunal established by law and constituted in such manner as to secure its independence and impartiality." 35

It seems to me that this section which guarantees and has entrenched fair hearing is on strict interpretation limited to the determination of civil rights and obligations. It follows therefore that where the determination of civil rights and obligations are not in issue, particularly in an investigation committee the

observance of fair hearing is not *stricto sensu* obligatory. But our Courts have held that although a non-judicial tribunal is entitled to decide its own procedure and lay down its own rules for the conduct of enquiries regarding discipline, it is of the utmost importance that the inquiry be conducted in accordance with the principles of natural justice. See *Denloye v. Medical*
 5 *and Dental Practitioners Disciplinary Committee* (1968) 1 All NLR 306...

The role of non-judicial or administrative bodies was clearly expressed in *Board of Education v. Rice* (1911) AC 179, at p.182 where Lord Loreburn L.C. stated the position thus:

10 *"...they must act in good faith and fairly listen to both sides, for that is the duty lying upon everyone who decides anything. But I do not think they are bound to treat such a question as though it were a trial... They can obtain information in any way they think best, always giving a fair opportunity to those who are parties in the controversy for correcting or contradicting any*
 15 *relevant statement prejudicial to their view."*

See also *Local Government Board v. Arlidge* (1915) AC 120, 132-
 20 134. It is therefore accepted law that the principles of natural justice are applicable to both judicial and administrative determinations. In *Woody v. Woad* (1874) LR 9 Ex. 190, 196 Kelly C.B. stated that the rule,

"....is not confined to strictly legal tribunals but is applicable to every tribu-
 25 *nal or body of persons invested with authority to adjudicate upon matters involving civil consequences to individuals."*

In *Baba v. NCATC* (1991) 5 NWLR (Pt.388) this Court held that the principles of fair hearing is binding on administrative bodies as it is to judicial tribunals: See also *Fawehinmi v. Legal Practitioners Disciplinary*
 30 *Tribunal* (1985) 2 NWLR (Pt.7) 300. In the determination of civil rights and obligations erstwhile distinction between judicial bodies and administrative bodies has now given way to the concept of persons who must comply with the rules of natural justice because civil rights and obligations are involved.

In *Reg v. Kent Police Authority & ors. Ex Parte Golden* (1971) 2
 35 QB 662, it was held that a Medical Practitioner making a decision which may lead to a person being retired compulsory must act fairly. The view is that such decisions which affect civil rights and obligation are of a judicial nature and must conform to the rules of natural justice.

The contention of the appellant is that he was never informed and

was not confronted of the misconduct in respect of which he was subsequently compulsorily retired, and was not afforded an opportunity for defending himself of the allegations. The respondent council set up an Investigation Committee, a fact finding body, to investigate the source of the leakage of the Council Paper. Appellant, was the secretary of the Panel whose report was the subject matter of investigation. Appellant was invited 5 as a witness to assist the committee to trace the source of the leakage. He was at no stage of the investigation accused of responsibility for, or implicated with the leakage. Appellant gave evidence of his role in the production of the report and was extensively examined.

The suggestion of Mr. Seyi Sowemimo that appellant was accused 10 by implication, and ought to be aware of the accusation because of the role he played in the production of the Report, that he was examined in detail by members of the Panel, and that he made independent effort to trace the source of the leakage in his department is to me stretching the word accusation to unreasonable meanings. It was submitted that a very 15 heavy cloud of suspicion hovered around the appellant before the Investigation Committee. It was contended that appellant knew that he was being suspected of responsibility. He therefore was fully aware of the allegations against him.

Learned counsel to the respondent conceded that no accusation 20 formal or informal of misconduct was made against the appellant.

It is also not disputed that the Investigation Committee was not mandated to determine the responsibility of the appellant in the leakage. I have already reproduced the terms of reference of the Committee, which was to find out the sources of the leakage of the Report of the Interview 25 Panel, and to make recommendations to Council. The fact that appellant was the Secretary of the Interview Panel, and was responsible for the production of the Report of the Interview understandably raised strong suspicion of the possibility of the leakage emanating from him.

It is somewhat surprising to observe that the learned trial Judge 30 answering the objection that appellant was not given notice of the reasons of the complaint against him, and that he was not afforded opportunity of making representation in person in the matter to Council, relied on Section 12(1)(a)(b) Federal Polytechnic Act 1979 Decree No. 33 of 1979 to say,

"From the totality of the facts placed before me by the applicant and respondent, I have no difficulty in coming to a decision that applicant in this case had notice of the reasons of the complaint in the case in which he was connected, (ii) he was given or afforded opportunity of making his represen-

tation in person to the Council."

Commenting further on appellant's reply to the counter-affidavit in which he did not deny the content of the record of proceedings of the Investigating Panel, he said;

5 *"I have read carefully the whole proceedings as recorded in Exh. "B" and the conclusion on his head is that the applicant has been given opportunity of making the representations which he did. It is indeed startling to say here that when the applicant became aware of the leakage he conducted his own investigation among his staff or aides working under him. He even*
 10 *gave them a query. Could one say in all sincerity that this conduct of a man who did not have a notice of the reasons why he was being interrogated by the Investigating Panel?"*

The Court of Appeal also adopted a similar line of reasoning as the trial judge. Admitting that the action of the Investigating Panel fell
 15 outside the provisions of Section 12(1) relied upon by the applicant, the Court of Appeal went on to give reasons for holding that appellant had fair hearing. Awogu, J.C.A. with whom Akpata, Babalakin, J.J.C.A., agreed said;

"In the instant appeal, the appellant was the Secretary of the short-listing
 20 *Panel. He submitted the Report to the Federal Ministry of Education. The Report leaked. He was the co-secretary on the day the council discussed the matter and decided to set up an Investigating Panel, He appeared before the panel and made his explanations. Thereafter, the Governing Council decided to retire him with full benefits. This is not to say that the*
 25 *Investigating Panel deserved any accolade for inviting memoranda on 27/9/85 to be submitted on or before 4/10/85, and thereafter proceeded on the same 27/9/85 to take the evidence of the appellant."*

After criticising the Investigating Panel for failing to give appellant
 30 adequate opportunity for preparation to appear before it, the Court went on to conclude as follows:

"Fortunately or unfortunately, the appellant chose to testify and did so at great length. He consented to do so without any protest. This, coupled with the fact that he was at the Council meeting which set up the Panel, shows
 35 *his state of preparedness for the enquiry and he was not therefore taken by surprise. By making his submissions, he was certainly given a fair hearing."*

I have set out the reasoning of the courts below to demonstrate that:
 (a) Appellant was invited before the Investigation Panel as one of its witnesses. (b) Appellant testified before the Panel, as a witness. (c) Appellant

was not accused of causing the leakage of the Report (d) Appellant was not interrogated that he was responsible for the leakage. Throughout the investigation, appellant did not deny his participation in the production of the Report.

It is of critical and crucial importance that appellant appeared before the Investigating Panel as a witness, but the Council to who the statutory duty for imposing discipline is vested, without further hearing from the appellant retired him from its service.

It is a fundamental pre-condition which is not negotiable, that a person accused of wrong doing must be confronted with the accusation before any action involving detriment to him can be legally taken: See *Aiyetan v. NIFOR* (supra).

This Court has held that Section 33(1) of the Constitution 1979 can only be successfully invoked where the civil rights and obligations of the person invoking it are in issue: See *Govt. Gongola State v. Tukur* (1989) 4 NWLR (Pt.592). A person who appears before a tribunal as a witness is not a person accused of the commission of a wrong. Accordingly, the issue of fair hearing does not arise.

In a domestic tribunal such as the Investigating Panel in this case neither the appellant nor any other person was on trial. The terms of reference of the Investigating Panel clearly supports this conclusion.

Now, Mr. Sowemimo drawing from the conclusions of the Court below has submitted that appellant knew from the surrounding circumstances of the case that he was being suspected of leaking the Report. That did not raise the lurking suspicion into an overt accusation requiring positive refutation.

It is clearly not unusual for a person in the position of the appellant in the circumstance to be under suspicion. I, think it is well settled that in matters of this nature, suspicion however strong cannot support a conclusive inference of guilt. It is still the wavering accusing finger of suspicion. Guilt can only be accepted when the accusing finger stops wavering and stand straight and erect pointing unwaveringly at the accused: See *R v. Logun* (1959) LLR 64. Appellant was at no stage at the Investigating Panel accused of leaking the Report of the Panel. His testimony before the Panel was therefore not directed at answering any such accusation. It is therefore not correct to hold that appellant was afforded fair hearing.

Now the important consideration is whether the Respondent Council, afforded appellant a fair hearing before they acted on the finding of the Investigation Panel. The letter retiring appellant from the services of Respondent Council clearly states as follows:

"YABA COLLEGE OF TECHNOLOGY

P.M.B. 2011 YABA NIGERIA

Telephone: Lagos 800160-1-2-3-4-

Telegrams: Tekinst, Yaba

5 *Our Ref:*

Your Ref:

29th October, 1985

Deputy Registrar,

(Mr. A.O. Adeniyi)

Yaba College of Technology,

10 *YABA.*

RETIREMENT FROM THE SERVICES OF YABA COLLEGE OF TECHNOLOGY

As you are aware, the Council of this College set up an Investigation Panel

15 *to look into sources of leakage of Council Papers in connection with the appointment of a new Rector. The findings are that you are connected with the leakage of the classified information which a fictitious "Concerned Alumni Members" of this College included in their petition over the interview for the appointment of a new Rector for Yaba College of Technology.*

20 *The Council views your involvement in this matter as gross official misconduct, having regard for the serious legal implication of divulging official secrets.*

(Sgd.) I. M. Mora

25 *Ag. Chairman of Council*
Yaba College of Technology."

It is obvious from the first paragraph of this letter that Respondent Council acted on the Report of the Investigating Panel, without giving appellant a hearing on the allegations against him. There is no doubt therefore that appellant was not heard at all on the allegations before the Respondent acted on it. The Investigation was not as to the conduct of the appellant, but as to the circumstances of the leakage, and as to who was responsible for the leakage. The Panel having found that appellant was involved and respondent having been so informed is under an obligation to put to the appellant this accusation and hear him before taking an action.

This was the situation in *Aiyetan v. NIFOR* (1987) 3 NWLR (Pt. 59) 48. In that case I held the view, which I am still to be convinced to the contrary, that in the observance of the principle of natural justice and the essential requirement of fair hearing, there is a distinction between the rec-

ommendation of an Investigation Panel which has no statutory powers, and the acting on the recommendation by a statutory body with requisite statutory powers. Whereas the recommendation of the investigation will not affect the civil rights and obligations of the appellant, the acting upon such recommendation does. Hence the implementation of the recommendation must comply with the rules of natural justice. 5

Olatunbosun v. NISER (1988) 3 NWLR (Pt.80) 25 is a similar situation. Here the new Council of NISER relied on the Investigation and conclusion of the outgoing Council that Olatunbosun should be redeployed. They never recommended dismissal or termination. Without hearing him on the allegations the new Council relied on the findings of the former 10 Council to terminate his appointment. This Court held that his right to fair hearing was violated and the termination invalid.

Learned Counsel to the respondent has relied on the English cases of *Re Pergamons Press* (1970) 2 All ER 449, *R v. Race Relations Board, Ex parte Selvarajan* (1975) 1 WLR 1686 and *R v. Duke of Norfolk & ors* 15 (1949) 1 All ER 109. The application of the principle in each of these cases, though adhering to the principle of fair hearing cannot be said to be on all fours.

In *R v. Race Relations Board*, (supra) Selvarajan was afforded more than ample opportunity to state his case. He elected not to appear 20 before the Board.

In *Russell v. Duke of Norfolk & ors.* (1949) 1 All ER 109 concerned the unfettered exercise of discretion to withdraw the trainer's licence without any inquiry vested under the Rules of the Association. There was no evidence that any principle of natural justice had been violated. 25

In *Regamon Press Ltd* (1970) 2 All ER 449, the respondents refused to answer the questions of the Inspectors investigating the affairs of the Company. The inspectors were appointed by the Boards of Trade and the Court held that they were not justified in their refusing to answer the 30 questions. The rules of natural justice did not apply to the case. Whilst it is conceded that the rules of natural justice must not be stretched too far, it cannot be denied that the rules are sufficiently elastic and malleable for the establishing of the innocence or guilt of a person accused of wrong doing.

Learned counsel to the respondent stressed the fact of formal accusation of a wrong doing by inference from the circumstance. I have never 35 heard it accepted or said that an accusation of wrong doing merely by inference, possibly by insinuation was sufficient to deny a person his right to fair hearing.

Our criminal law prohibits it. Common sense clearly suggests the

26 Adeniyi v. Yabatech Council (1993) 10 KLR Karibi-Whyte JSC
contrary. I believe justice will swoon at the mention of such a proposition.

There is no doubt appellant who was not heard by the respondent Council before implementing the recommendation of its Investigating Panel, violated his right to be heard. Accordingly the decision retiring him from the service is ultra vires and accordingly void.

5 This is not the only ground on which the decision can be set aside.
Respondent is bound to comply with the statutory provision enabling removal of the appellant.

Issue (iii)

10 I now turn to issue (iii) which is the interpretation of Section 12(1) of the Federal Polytechnics Act 1979 by the Court below. Section 12(1) of the above Act provides as follows:

15 *"12 (1) If it appears to the Council that there are reasons for believing that any person employed as a member of the academic, administrative or technical staff of the polytechnic, other than the Rector, should be removed from office on the ground of misconduct or inability to perform the functions of his office, the Council shall:*

- (a) *give notice of those reasons to the person in question;*
- 20 (b) *afford him an opportunity of making representations in person on the matter to the Council; and*
- 25 (c) *if he or any three members of the Council so request within the period of one month beginning with the date of the notice, make arrangements:*
 - (i) *if he is an academic staff, for a joint committee of the Council and the Academic Board to investigate the matter and to report on it to the Council: or*
 - 30 (ii) *for a committee of the Council to investigate the matter, where it relates to any other member of the staff of the Polytechnic and to report on it to the Council; and*
 - 35 (iii) *for the person in question to be afforded an opportunity of appearing before and being heard by the investigating committee with respect to the matter; and if the Council, after considering the report of the investigating committee, is satisfied that the person in question should be removed as aforesaid, the Council may so remove him by an instrument in writing signed on the directions of the Council."*

It is important to consider together the provisions of Section 12(3)(c)(d), which are as follows:

"12(3) For good cause, any member of staff may be suspended from office or his appointment may be terminated by the Council; and for the purposes of this subsection, "good cause" means:-

5

(c) conduct of a scandalous or other disgraceful nature which the Council considers to be such as to render the person concerned unfit to continue to hold his office; or

10

(d) conduct which the Council considers to be such as to constitute failure or inability of the person concerned to discharge the functions of his office or to comply with the terms and conditions of his service."

It is clear from section 12(1) that appellant is a person employed as a member of the administrative staff of the Respondent Council and falls within the jurisdiction of the respondent under this Section for removal on the grounds of misconduct. Respondent has purported to remove appellant on that ground and is therefore required to comply with the provisions of the Section. The section has stipulated that the Council shall:

15
20

(a) give notice of those reasons to the person in question

(b) afford him an opportunity of making representations in person on the matter to the Council; and....

This provision is mandatory. Hence before a person is removed for misconduct these twin conditions must be satisfied. There is no evidence that the respondent satisfied any of these preconditions for the exercise of the power to remove the appellant. Respondent is not the Investigating Panel before who appellant appeared as a witness. Appellant never appeared before the respondent. He was not given notice to do so, and he did not make any representation to Council before the decision to retire him was taken. Statutes in pari materia with the above have been construed by this Court in *Olaniyan v. University of Lagos* (1985) 2 NWLR (Pt.9) 599, *Olatunbosun v. NISER COUNCIL* (1988) 3 NWLR (Pt. 80) 25.

25
30

In all the cases, the general principle is that where the contract of service is protected by statute, and the removal of plaintiff is predicated upon compliance with the statutory provisions, non-compliance with the statutory provisions renders the removal ultra vires and void.

Learned counsel to the appellant relied on *Olaniyan's* case, in his submission that the termination of the appellant for gross official miscon-

duct was void, as respondent did not fulfil the preconditions for the exercise of the power to do so. It was also submitted that once appellant shows that his right to fair hearing has been infringed, he need not proceed to prove damnum: See *Adigun v. A-G Oyo State* (1987) 1 NWLR (Pt. 53) 678; (1987) 3 SC 250.

5 Learned counsel criticised the Court below for the distinction made between Section 12(1) and 12(3)(c)(d). I have already reproduced the sections. The view adopted by the Court of Appeal was that appellant could be removed for misconduct either under Section 12(1) or Section 12(3)(c)(d). The Court then stated the difference in the application of the two sections
10 thus:

*"Under (1) the appellant must be given notice of the misconduct complained of and afforded an opportunity of making any representations in person to the Governing Council. Then, if and only if, her or any three members of the Governing Council so request, arrangements may be made
15 for an investigating Committee. Under 3(c)(d), all that is necessary is that the appellant be given notice of his misconduct and afforded an opportunity of making a representation to the Governing Council."*

The Court of Appeal conceded that the Investigating Panel did not come
20 within the purview of Section 12(1).

Learned counsel to the respondent argued that appellant was given a fair hearing. He submitted "that the provisions of Section 12(1) cannot foist on the courts a rigid standard for the rules of natural justices." Arguing in support of the view held by the Court of Appeal, it was submitted that
25 even if the respondent could be said to have violated Section 12(1), it cannot be said that it did not comply with Section 12(3). It was submitted that Section 12(3) is the applicable section. The case of *Irem v. Obubra District Council* (1960) 5 FSC 24 at p.27, (1960) SCNLR 70 was cited as authority.

30 Considering the use of the words "dismissal" "termination" and "removal" it was argued each of these words was intended to convey a specific meaning and that the more specific provision is not covered by the general provision. If Section 12(3) was intended simply to define the grounds of removal, it would not have been necessary to employ the term termination
35 in Section 12(3), since Section 12(1) would have adequately taken care of the situation.

It is an important principle for the construction of statutes, that the section should be read as a whole. It seems to me clear that Section 12 as a whole deals with the removal and discipline of academic, administra-

tive and technical staff. Whereas Section 12(1) governs removal on grounds of misconduct or inability to perform functions of office, Section 12(3) deals with misconduct alone, which in the opinion of the Rector is prejudicial to the interests of the polytechnic. The Rector only has the powers of suspension. He shall forthwith report the matter to Council. Section 12(3) deals with cases of termination or suspension of any member of staff for "good cause". "Good cause" has been defined to include conduct which could justifiably be categorised as "Misconduct" in Section 12(1). 5

The observance of the rules of natural justice invariably applies to all the situations in Section 12 since they involve the determination of the civil rights and obligations of the persons affected: See section 33(1) Constitution 1979. All the English decisions cited to us appear to me inapplicable in our circumstances where the matter is governed by an entrenched provision of the Constitution. Thus Hoffman-La Roche v. Secretary for State & Industry (1975) AC 295, at p.320, Glynn v. Keele University (1971) 1 WLR. 487; Ward v. Bradford Corporation (1971) 70 LGR 27, must be 15 considered within the context of the common law jurisdiction where the cases were decided.

The decision of the Federal Supreme Court in Adeko v. Ijebu Ode District Council (1962) 1 All NLR 220; (1962) SCNLR which was decided along the same lines and in violation of Regulation 16 of Western Region (Local Government) Staff Regulations 1955 will be decided differently today: See Olatunbosun v. NISER Council (1988) 3 NWLR (Pt. 80) 25; FCSC v. Laoye (1989) 2 NWLR (Pt. 106) 652. 20

I agree with the analysis by the Court of Appeal of Section 12(1) and 12(3)(c)(d) that in both cases the validity of action must be predicated by compliance with the Fundamental and essential principles of natural justice. These are the notification of the person of the misconduct or conduct alleged, and the opportunity to answer the allegations. The only difference is the circumstance in Section 12(1) where on the request of three members of the Governing Council arrangements could be made for an investigating Committee. 25 30

The Respondent Council did not notify appellant of the allegation against him contained in the Report of the Investigating Panel. Appellant was also not afforded opportunity for answering the allegations before respondent retired him in accordance with Section 12(1). As the Court of Appeal pointed out, *"It was after the Governing Council had considered the report of the panel that it decided to retire him with full benefits, for gross official misconduct. No fresh charge or inquiry was from the facts called for. This is a complete violation of Section 12(1)(a)(b) and also an infringe-* 35

ment of the rules of natural justice. The decision retiring appellant is accordingly void.

Issue (II)

I now come to the last issue which is whether appellant in requesting for and receiving his salary in lieu of notice and pension and gratuity tantamount to an election to accepting his retirement.

As the Court below pointed out, it was the learned judge who raised the issue of election. In the opinion of the learned Judge, appellant had collected his entitlements and emoluments and if he felt aggrieved or not satisfied in this regard. *"He ought to head to the law Courts for a declaration of his rights, and claiming damages."* The implication of this view has been taken to mean that appellant having applied for and taken his entitlements and emoluments resulting from his compulsory retirement had elected to abandon his claim to enforce the breach of his fundamental rights to fair hearing under the Constitution. I say so because the learned trial Judge admitted that appellant still could make a claim for declaration of his rights, but only in damages. The implication is that he has accepted the retirement and cannot ask for reinstatement.

In this case the Court of Appeal after considerable hesitation and holding the view that appellant ought to be able to sue for his reinstatement even after petitioning against his retirement with benefits and receiving the benefits, held that the Court was bound by the recent decision in *Olaniyan & ors. v. University of Lagos (supra)*.

The Court of Appeal distinguished that case from the instant case but went on to follow that case on grounds of binding precedent. In *Olaniyan's* case, the appointments of the Professors were similarly terminated with the payment of six months' salary in lieu of notice. They all rejected the termination and returned the amount so tendered. In the instant case appellant had applied after his compulsory retirement to be given his salary in lieu of notice to enable him "maintain his family." This no doubt is now being regarded as acceptance and ratification by him of his compulsory retirement, and waiver of the right to complain.

Argument of Counsel: (1) appellant

It was the submission of the appellant that the Court of Appeal had no factual basis on the evidence before it for arriving at such a conclusion. There was no evidence that appellant had taken the benefits before he instituted the action. Learned counsel referred to Exhibit A, i.e. the letter relied upon for this conclusion. Respondent tendered Exhibit B, the payment Voucher in answer to Exhibit A in proof that respondent had paid the emoluments and retirement benefits due to appellant.

It was submitted that appellant was only paid his January 1986 salary to which he was entitled in any case. Appellant applied for his three months' salary in lieu of notice which was salary for the period November, December, 1985 and January 1986. There was no indication that this payment was in full and final settlement of his retiring benefits.

The Courts below were wrong to hold that appellant had collected his retirement benefits and therefore waived his rights bring this action. 5

There is evidence that appellant did not accept his compulsory retirement, since he petitioned the Minister and the Respondent for reconsideration of the decision.

Appellant referred to the dictum of the Court of Appeal, and its reliance on Olaniyan's case and submitted that Olaniyan's case did not govern the instant case. It was submitted that the ratio decidendi of Olaniyan's case is that a statutory body has no power or authority to act outside the provisions of its enabling statute. Any such acts will be ultra vires and void. The reasoning applied is based on the view in a supporting judgment which stated that *"an action for reinstatement is only possible when: there is a unilateral repudiation of contract of service by the Master (employer) which has not been accepted by the (employee) servant."* 10 15

It was further submitted that the Courts can only bring the facts of the case within the scope of the dictum by first deciding whether or not appellant accepted the compulsory retirement. The evidence available to the court was to the contrary. It finally submitted on the authority of *Ariori & ors v. Elemo* (1983) 1SC 13, that the right not being for the benefit of the appellant but for the public good cannot be waived by the appellant. 20

(II) Respondent

In his reply, Mr. Sowemimo submitted that the Court below was right in following the judgment of the Supreme Court in *Olaniyan & ors v. University of Lagos* (supra). In his argument he contended that a contrary view will enable a person to approbate and reprobate on matters of this nature. Counsel relied on the application of the appellant for payment of the three month's salary in lieu of notice due on retirement, and that he had been paid his terminal benefits. Learned counsel referred to the admission in evidence by appellant that he had collected three months' salary in lieu of notice. It was submitted that appellant cannot now argue as is being done by his counsel that he has not received his terminal benefits. 25 30 35

The contention of respondent's counsel is that the situation in which appellant has placed himself is more disadvantageous than a waiver. Appellant having elected to accept his compulsory retirement by collecting the accruing benefits is estopped in the interest of justice from challenging the

retirement. Learned Counsel cited Halsbury's Laws of England, 3rd Edn. Vol. 15 paragraph 340 at p. 171, where the applicable principle of estoppel is stated.

The English cases of *R v. Amendt* (1915)2 KB 593 and *Gandy v. Gandy* (1985) 30 Ch. 57 were cited to us.

5 Consideration of the Arguments

The resolution of this issue seems to me the only enigmatic of the three. The issue is predicated on certain assumptions which have been dispelled in the resolution of the other issues. In the first place, there is the assumption that at the time appellant applied to be paid his three months' salary in lieu of notice he has been compulsorily retired from the service of the Respondent Council and was therefore entitled to receive the entitlement. Secondly, having been compulsorily retired with full retirement benefits, it has been assumed that appellant was making a choice in asking for his retirement benefits. Finally, it is assumed that appellant has by asking to be paid his retirement benefits approved of the retirement. None of these assumptions is correct, as I will proceed to show in this judgment.

The Court of Appeal relied on the judgment in *Olaniyan & ors v. University of Lagos* (supra), as authority for the proposition that a servant who accepts the entitlements upon the termination of his contract of service cannot thereafter challenge the termination of the appointment and ask for reinstatement. The statement in *Olaniyan's* case relied upon by the Court of Appeal is where I said at p.684,

25 *"An analysis of the decided cases leads to the conclusion that an action for reinstatement is only possible where there is a unilateral repudiation of the contract of service by the Master (Employer) which has not been accepted by the (employee) Servant."*

All the decided cases relied upon for this proposition are the cases of the ordinary master and servant without statutory protection of the employee as in the instant case. For instance *Howard v. Pickford Tool Co. Ltd.* (1951) 30 1 KB 417 where Asquith L.J. was speaking of the effect of repudiation, he said;

"An unaccepted repudiation is a thing writ in water and of no value to anybody; it confers no legal right of any kind of any sort or kind."

35 Two years earlier in *Heyman v. Darwins Ltd* (1949) AC 356 p.361, Viscount Simon L.C. on the same issue had said;

"But repudiation by one party standing alone does not terminate the contract. It takes two to end it, by repudiation on the one side, and acceptance of the repudiation on the other."

In Olaniyan's case I gave the rationale for my proposition as follows: at p.683.

"The proposition is founded on the elementary principles of the formation and discharge of contractual obligations. Where there is unilateral repudiation of a contract, this is treated as an offer by the guilty party to the innocent party of the termination of the contract. It is the acceptance of the offer by the innocent party which acts as a discharge of the contract: See Hockster v. De La Tour (1853) 2 F & B 678; Johnstone v. Milling (1886) 16 WBD 460. It is then open to the innocent party to sue only for damages since by his acceptance of the repudiation the contract comes to an end. Hence where the innocent party refuses to accept the repudiation the contract remains in existence."

On a careful reading of this dictum it would be observed that I pointed out that these principles are of general application to contracts of personal service.

It is important to observe the difference in status between these contracts of personal service, and contracts of service which enjoy statutory protection. The latter can only be terminated in the manner prescribed by the governing statutory provision. A breach of the enabling statutory provision cannot result in a unilateral repudiation. It affects no change in the contractual relationship of the parties. The act is ultra vires and void. The contract cannot be discharged on the agreement of the parties without compliance with the enabling statutory provision. This is the fundamental difference between contracts having a statutory flavour to which the instant case belongs, and ordinary contracts of personal service.

Now, the position in the instant case is that respondent Council has not complied with the enabling statutory provisions in the determination of the contract. Section 12(1) has prescribed the procedure for determining the contract of the appellant on the grounds of misconduct. It follows therefore that the letter of compulsory retirement of the appellant, is ultra vires and void. Accordingly since the compulsory retirement of the appellant is void, his contract of service with respondent is still subsisting.

Learned counsel to the respondent has stressed the fact that appellant having accepted his compulsory retirement, acted on it by applying for payment of three months' salary in lieu of notice due. It was submitted that having accepted the retirement, appellant was estopped from repudiating that he has accepted. The conduct of the parties was predicated on the erroneous premise and assumption that appellant had been compulsorily retired. It is now established in this judgment that the compulsory retirement was ultra vires and void. This raises the important question of the

effect of appellant's application to be paid three months' salary in lieu of notice due on retirement?

It has been suggested that by the application, appellant has waived his right to come to court to challenge the invalidity of his compulsory retirement. Mr. Sowemimo has even put the effect higher than a waiver. He
5 thinks this is a case of estoppel. He relied on the statement in Halsbury's, Laws, of England.

The principle has been stated to be as follows: *On the principle that a person may not approbate and reprobate; a specie of estoppel has arisen which seems to be intermediate between estoppel by record and estoppel in*
10 *pais. The principle that a man may not approbate and reprobate expresses two proposition; first, that the person in question, having a choice between two courses of conduct, is to be treated as having made an election from which he cannot resile, and second, that he will be regarded, in general, at any rate, as having so elected unless he has taken a benefit under or arising*
15 *out of the course of conduct which he has first pursued and with which his subsequent conduct is inconsistent."*

It is difficult to bring the conduct of the appellant within the scope of the above principles. No one can reasonably speak of approbation of retirement by a person compulsorily retired. He has no choice between being
20 retired, and taking any other action. On being retired his choice is between accepting the retirement and repudiating it. The contention is that having sought for a benefit under the retirement, he is estopped from repudiating it.

The important consideration in the instant case is that there is no valid retirement, in law, compulsory or otherwise. Accordingly appellant
25 could not have approbated a non-existent condition. The implication is that appellant has waived a right which he could have exercised.

I do not think this argument is tenable. Appellant did not know at the time he was asking for the payment of three months' salary in lieu of notice that his appointment with the respondent Council was subsisting
30 and that the compulsory retirement was invalid. He could therefore not be regarded as having waived a right which he was not aware of.

In *Ariori v. Elemo & ors.* (1983) 1 SC NLR 1, Idigbe, J.S.C. defined waiver as:

"The intentional and voluntary surrender or relinquishment of a known privilege and or right, it therefore implies a dispensation or
35 *abandonment by the party waiving of a right or privilege which, at is option, he could have insisted upon."*

The Court of Appeal could therefore not be right when it relied on Olaniyan's case to hold as follows:

"...Appellant did make an election which must prevent him from seeking reinstatement after collecting his retirement benefits. In other words, he chose not to regard the wrongful termination as the end of the contract of employment but yet still took his benefits thereunder and then proceeded to sue for the setting aside of the decision to retire him with full benefits because of the infringement of his fundamental right to fair hearing under Section 12(1) of the Federal Polytechnics Act No. 33 of 1979 and Section 33 of the Constitution of the Federal Republic of Nigeria."

The consequence of acceding to this argument is to Convert an ultra vires act committed in breach of an enabling statutory provision into a valid act. The compulsory retirement of appellant on grounds of misconduct under Section 12(1) is void. It cannot be rendered valid because appellant had applied for benefits thereunder. This is a sterling example of Denning L.J's dictum in *UAC Ltd v. Macfoy* (1961) 3 All ER 1169.

The compulsory retirement is void. It remains void notwithstanding the erroneous recognition by appellant of its validity.

I consider it necessary to comment on a point of fact on which both counsel seem to have laid some emphasis. This is the question how much was paid to appellant as a result of his application to be paid his three month's salary in lieu of notice.

Learned counsel to the appellant argued in his brief that appellant was not paid his retirement benefits. What was paid was his salary for January, 1986 to which he was entitled in any case. Whether his appointment was terminated or not. Learned counsel referred to the payment voucher exhibited to the Counter affidavit Exhibit B and submitted in support of the contention that only salary for January 1986 was paid to appellant. There was no indication from the respondent that this was a full and final settlement of appellant's retirement benefits. In the absence of evidence that the sum of N701.02 paid to appellant was in full and final settlement of his retirements, it was wrong for the Courts below to have come to the conclusion that appellant had collected his retirement benefits and accordingly waived his right to seek, to set aside the decision to retire him.

Learned counsel to the respondent's reply was based on the admission of appellant in his testimony that he had collected three months' salary in lieu of notice. Admission was answer to the question that he had collected 3 months' salary in lieu of notice and his retirement benefits.

Now it is obvious from Exhibit A, the application of the appellant reproduced below, appellant applied for the payment of 3 months' salary in lieu of notice plus earned salary increment for 1985. The letter reads:

"Dear Sir,

Application for the payment of 3 months' salary in lieu of notice, plus earned increment for 1985.

Further to my retirement from the service effective immediately on 29th October, 1985, may I request for a kind consideration to settle the
5 *above claims. Certainly, the settlement would ease any present difficulty in settling my family and myself for the future sincere regards for acting speedily. Best wishes and seasonal compliments.*

Yours faithfully,

O.A. Adeniyi"

10 *NB I hope my entitlements would be based on the present salary scale."*

Although appellant referred to his retirement from the service, there was no reference in the application to his retirement benefits. He asked for payment of 3 month's salary in lieu of notice.

It is obvious that Exhibit B, the voucher on which payment was
15 made clearly indicated that the payment of N70 1.02 made to appellant for the month of January, 1986.

It is therefore difficult to conceive how it could be regarded as including payment of appellant's retirement benefits.

I agree with the contention of appellant's counsel that the courts
20 below were wrong to hold that respondent had paid appellant his retirement benefits.

Conclusions

The conclusions in this judgment are that appellant was denied fair hearing in breach of the provision of Section 12(1)(a)(b)(c) of the Federal Polytechnics Act, 1979 and Section 33(1) of the Constitution 1979.
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Appellant was a witness in the Investigating Panel set up by the respondent. His responsibility for the subject matter of the investigation was not directly in issue in the investigation. Appellant was not directly or even by implication, inference or insinuation accused by the Panel.

30 The decision to retire appellant was not taken by the Investigating Panel which heard the appellant as a witness and not as person accused of any wrong doing.

The decision of retire appellant was taken by respondent which did not give a hearing, fair or otherwise to the appellant before the decision
35 to retire him compulsorily for misconduct on the report of the Investigating Panel was taken.

The decision of the Respondent Council of the 29th October, 1985 compulsorily retiring the appellant from its service and in his office as Deputy Registrar of the Yaba College of Technology in breach of the provisions of

Section 12(1)(a)(b)(c) of the Federal Polytechnics Act 1979 is accordingly ultra vires void and of no effect.

All the issues having been resolved in favour of the appellant, the appeal therefore succeeds.

Appellant is entitled to the costs of this appeal in the sum of N1,000 in this Court and N250 in the High Court. 5
There is no order as to costs in the Court of Appeal.

BELGORE JSC

The appellant, by merely being told that his evidence would be of 10
some help in investigating how the working documents of the Council got
leaked out, never for one moment thought he was a suspect much less
being accused. With this thought he was never for a moment thinking he
was being put on trial. To be confronted at the end of the day with a verdict 15
of guilt for an offence for which he was never tried, certainly occasioned a
miscarriage of justice. He was denied natural justice. That was what hap-
pened to the appellant in the instant case.

For the foregoing reasons and the enumeration of facts and the
analysis of the applicable laws in the judgment of my learned brother,
Karibi-Whyte, J.S.C., which I entirely agree with and adopt as mine, I 20
allow this appeal.

WALI JSC

The appellant commenced proceedings by way of application un- 25
der the Fundamental Human Right (Enforcement Procedure) Rules, 1979
claiming that before he was terminated as he was neither informed of the
charge of the misconduct against him nor was he given hearing to defend
himself. He therefore prayed the trial court to quash the termination of his
appointment. 30

At the end of the hearing by the trial court his case was dismissed.
His appeal to the Court of Appeal against the High Court judgment was
also dismissed, on the ground that the appellant by collecting "his entitle-
ments and emoluments" had waived any right he had against the wrongful
termination of his appointment. 35

It is not enough where a person is being accused of misconduct
that may lead to termination of his appointment to invite him as a witness
only before an investigation panel set up for the purpose. Nor can it be
assumed that because he was invited to testify, that he was aware of the

nature of the allegation against him. There is nothing known to law like a charge by presumption or by implication.

It could be right to suspect the appellant of either divulging or aiding and abetting in the divulgence of the council papers, but that did not tantamount to serving him with a formal accusation against him to enable
5 him to prepare and defend himself when called upon.

Even if the investigation panel were to be treated as a disciplinary panel, it did not lay any accusation of misconduct against the appellant before he was invited before it as a witness. The college council adopted and accepted the recommendations of the investigation panel which it applied and terminated the services of the appellant, thus committing the
10 the same serious omission of not laying any formal accusation against the appellant and affording him hearing to defend himself.

A person cannot be said to have waived or presumed to have waived what he had not been made aware of. Strong suspicion may provide a sufficient ground for making a formal accusation, but, it per se, is
15 neither such a formal accusation nor charge.

In my view, there is in this case, clear infraction of the appellant's right to fair hearing as entrenched in Section 33(1) of the 1979 Constitution as well as non-compliance with the provision of Section 12(1) of the Federal Polytechnics Act 1979. The appellant's invitation before the investigation panel as a witness, even on suspicion that he could have been involved in the leakage of the council papers fell far short of what both Section 31(1) of the Constitution, 1979 and Section 12(1) of the Federal Polytechnic Act 1979 require to be done before the termination of the appellant's appointment. See *Garba v. University of Maiduguri* (1986) 1 NWLR (Pt. 18) 550, *Aiyetan v. NIFOR* (1987) 3 NWLR (Pt. 59) 48 and *Adedeji v. Police Service Commission* (1968) NMLR at 107.
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It is for this and the more elaborate reasons contained in the lead judgment of my learned brother, Karibi-Whyte, J.S.C. that I also hereby
30 allow this appeal and abide by the consequential orders made therein.

OLATAWURA JSC

I had a preview of the judgment of my learned brother Karibi-Whyte, J.S.C. I agree with his conclusions. I will allow the appeal. My comments will be limited to issues (i) and (iii) raised in the appellant's appeal. They are:
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"(i) Was the Court of Appeal right when it held that the appellant was given fair hearing because he appeared before the investigating panel?
(iii) Was the Court of Appeal right in its interpretation of Section 12 of the

Federal Polytechnics Act, 1979?"

In dealing with issue J, Awogu, J.C.A said:

"Surely, a right to fair hearing must include a right to adequate opportunity for preparation, which the investigating panel clearly breached in respect of the appellant. No explanation was offered by the panel for the turn-about. Fortunately or unfortunately, the appellant chose to testify and did so at great length. He consented to do so without any protest. This, coupled with the fact that he was at the council meeting which set up the panel, shows his state of preparedness for the enquiry and he was not therefore taken by surprise. By making his submissions, he was certainly given a fair hearing."

When a man complains of fair hearing, it is a complaint by a party accused of a wrong doing and in respect of which he was not offered adequate time to defend himself. In other words there must be an accusation or allegation of a breach of any rule. A witness called for the purpose of an inquiry should be told in plain language why he should suddenly turn to an accused person. Section 33(1) of the 1979 Constitution appears to me clear when this section can be invoked. A man called as a witness may not be cautions in his evidence before a tribunal of inquiry in that his conduct is not the subject of any investigation, but where a man knows his conduct is the subject of an inquiry, he may at that stage decide to seek the assistance of a solicitor. He will be on guard about his evidence and the right of self-preservation will no doubt guide his evidence before the tribunal. It is necessary to bear in mind the verbatim report of the proceedings of 27th September, 1985. To understand what the lower Court per Awogu, J.C.A. called "turn-about" I reproduce the opening remarks of the Chairman:

"We are sorry we are starting all over again. You will recall at the last Council meeting. Council noticed that the deliberations of the Interview Panel for the selection of the Rector have leaked to the public and Council papers were attached to petitions circulated over the country; and this Panel was set up to find out the sources of this leakage and make recommendation to Council; and why we are calling you is the fact that you were the Secretary to that Panel; and we thought it is necessary to hear from you to throw light on what actually happened and if you have any useful information that may help this Panel in arriving at an objective decision. So I will call on you to give us the information as you know of it and then we may ask you one or two questions if necessary."

It appears to me that as at that stage there was no formal accusation or allegation against the appellant.

Mr. Sowemimo, the learned counsel for the respondent has tried to justify the procedure when in his brief he submitted thus:

"It is respectfully submitted that given the peculiar facts of this case, the appellant cannot reasonably be heard to say that he did not know that accusing fingers were being pointed at him in connection with the leakage. Further the fact of his role as Secretary was central to the inquiry and the appellant knew all along that he was being called upon to defend his role in the leakage of the interview Report. In fact when the Panel was being set up the appellant's remark had been that if there was a leakage, it was calculated to blackmail him. (See page 74 of the Record). His conduct in embarking on an internal inquiry on his own further attests to the fact that the appellant knew that he was the prime suspect, given the fact that he prepared the Report that leaked. The fact that the terms of reference of the Panel was framed in general terms did not detract from the fact that even before the panel was set up, the appellant has had reasonable cause to believe that he was the dramatis personae, in the unfolding events. He in fact had discovered that the leakage was traceable to his office. The Panel did not need to rely on the testimony of anyone else and thus the issue of his being allowed to contest the evidence of other witnesses was uncalled for."

It is amazing that the submission of the learned counsel appeared to have taken the evidence before the panel as an admission of an unknown offence or misconduct. Much was taken for granted by the learned counsel for the respondent when he contended, without any justification whatsoever that "the plea of a breach of natural justice should not be used as the last refuge of a claimant with a bad case; there must be some real prejudice to the complainant". The submission that calls for real flexibility must also take into consideration the honour, integrity and the entire career of a witness called to throw in some light in respect of an inquiry and who was suddenly turned to an accused person who must answer for his misconduct.

A man who appeared before a tribunal without any specific accusation of a misconduct and who was called as a witness cannot be said to have been given a fair hearing when at the end of the tribunal and subsequent findings he was found liable for a misconduct of which he was not specifically accused. The mere fact that the appellant who was a sectional head tried to find out how the leakage about the interview occurred shows a high sense of responsibility. Accepting responsibility for the acts done within one's department is one of the qualities of a leader, but finding a head guilty of a misconduct he was not specifically accused of is a breach

of fair hearing. To fall within this principle of fair hearing, the person who will be affected as a result of the inquiry must be informed in a plain language the accusations and or allegations against him and in addition be given adequate opportunity to defend himself. It was the submission of Mr. Sowemimo that:

"... Thus, the appellant must have realised that accusing fingers would be pointing at him and had in fact discovered that the leakage was occasioned by the lapses in his own office. In fact he was prepared to take responsibility for the negligence."

This overlooks the requirement in a matter of this nature that, when a disciplinary action is to be taken against the officer, he must first of all be informed of the allegations in a manner that will show that his conduct in respect of the matter concerned will be the subject of an inquiry. To point an accusing finger without real accusation of the charges and the denial of opportunity to defend falls far short of the principle of fair hearing and cannot and must not be a substitute for the accusation of the particular misconduct and explanation expected from the man accused of the misconduct. In a case where witnesses were merely called and the appellant had no opportunity to ask questions or opportunity to contradict them, the appellant was in fact and in law denied a fair hearing.

It appears to me plain and manifest that the appellant was not given the opportunity to know the accusation against him let alone to defend himself. See *Aiyetan v. The Nigeria Institute for Oil Palm Research* (1987) 3 NWLR (Pt.59) 48; (1987) 2 NSCC 277. *Adedeji v. Public Service Commission* (1968) NMLR 102. *Falomo v. Lagos State Public Service Commission* (1977) 5 S.C. 51; *Olaniyan v. University of Lagos* (1985) 2 NWLR (Pt.9) 599/623.

I now come to issue (iii) which deals with Section 12 of the Federal Polytechnics Act 1979. Section 12(1) of the Act provides:

- "12(1) If it appears to the Council that there are reasons for believing that any person employed as a member of the academic, administrative or technical staff of the polytechnic, other than the Rector, should be removed from office on the ground of misconduct or inability to perform the functions of his office, the Council shall:
- (a) give notice of those reasons to the person in question;
 - (b) afford him an opportunity of making representations in person on the matter to the Council;
 - (c) if he or any three members of the Council so request within the period of one month beginning with the date of the notice, make arrangements:

- (i) if he is an academic staff, for a joint committee of the Council and the Academic Board to investigate the matter and to report on it to the Council; or
 - (ii) for a committee of the Council to investigate the matter, where it relates to any other member of the staff of the polytechnic and to report on it to the Council; and
 - (iii) for the person in question to be afforded an opportunity of appearing before and being heard by the investigating committee with respect to the matter;
- and if the Council, after considering the report of the Investigating Committee, is satisfied that the person in question should be removed as aforesaid, the Council may so remove him by an instrument in writing signed on the directions of the Council.

Mr. Sowemimo in his brief has submitted whether the failure to follow the procedure in Section 12(1) of the Federal Polytechnics Act 1979 (hereinafter referred to as the 1979 Act) is tantamount to a breach of natural justice. Learned counsel repeated his earlier submission that the appellant "had due notice of the case he was to meet before the Investigation Panel and had ample time to prepare for the matter". Learned counsel further submitted:

"....that the provision of Section "12(1) cannot foist on the courts a rigid standard for the rules of natural justice."

Learned counsel, after appreciating that the requirement laid down by the 1979 Act must be followed, then submitted that the procedure cannot apply in all cases of misconduct. With due respect to learned counsel, there appears to me a confusion as to whether the requirement of a statute should be followed. Where a statute lays down the steps to be taken before an act can be done, anything done without the necessary steps laid down in the legislation makes the act invalid and void. It was not the submission of learned counsel that Section 12(1) of the 1979 Act is ambiguous. I agree with the submission of Chief Uwechue that the power of the respondent to terminate the appellant's appointment could not be exercised until the appellant was informed by the respondent of the grounds of his termination.

I believe S.12(1) of the 1979 Act is designed for the protection of the public officer whose conduct is to be investigated. Those charged with the responsibility of investigating why a disciplinary action should not be taken against erring officers must ensure that everything necessary to be done to give the officer a fair hearing or ensure fairness must be done and they should not in anyway be overzealous in the course of the investigation. Where a decision to accuse an officer of a misconduct is taken, the officer

must not be left in doubt that an allegation has been made against him.

It is for these reasons and the fuller reasons in the lead judgment of my learned brother Karibi-Whyte, J.S.C. that I have come to the inevitable conclusion that the retirement of the appellant is null and void. I will abide by the order for costs in the lead judgment.

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KUTIGI JSC

I read in advance the judgment of my learned brother Karibi-Whyte, J.S.C. just delivered. I agree with him that this appeal succeeds. There was no doubt whatsoever that the appellant was removed or compulsorily re- 10 tired contrary to the provisions of the law, the Federal Polytechnics Act. No. 33 of 1979, governing his appointment with the respondent. Non-compliance with the statutory provisions rendered the removal null and void (See: Olaniyan v. Unilag (1985) 2 NWLR (Pt. 9) 599, Olalunbosun v. NISER Council (1988) 3 NWLR (Pt. 80) 25, Shitta-Bey v. Federal Public Service 15 Commission (1981) 1 S.C. 40. Since the retirement was void, it could not have been validated merely by the act of the appellant requesting for, and receiving "three month's salary in lieu of notice plus earned salary increment". The appeal must be allowed and it is hereby allowed. I endorse the 20 order for costs contained in the lead judgment. Appeal allowed.

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