



*to which the increments applied.*

**MASTER & SERVANT** - *Misconduct - Alleged remission of misconduct in a particular year by salary increment - Cannot stop the employer from dismissing the servant - For his misconduct in another service year.*

**MASTER & SERVANT** - *Criminal allegation - Summary dismissal - Fair hearing - Failure to prosecute appellant before dismissal - Does not amount to denial of fair hearing in all cases - Appellant was given the opportunity - To challenge each allegation against him.*

### **FACTS**

Before the High Court Onitsha plaintiff/appellant sued the defendant respondent for wrongful dismissal from office as a clerk, claiming the sum of N250,000 as special and general damages. Appellant was employed by the respondent bank on 2-10-79 as a clerk on probation and posted to the main branch office of the bank at Onitsha. His appointment was confirmed on 1-4-80 when he was transferred to the permanent cadre of the staff of the bank on an enhanced career platform. Between February 1981 and January 1983, there were complaints about the conduct of the appellant by various officers of the bank responsible for the supervision of the appellant's work. This led to queries and sometimes counselling to him. In January 1983, by a letter from the bank's head office dated 19-1-83, appellant was summarily dismissed with effect from the date of that letter though he did not receive the letter until 9-2-83. The contract of employment between the parties is governed by the Collective Agreement between 'The Nigeria Employers' Association of Bankers, Insurance and Allied Institutions' and 'The National Union of Bankers, Insurance and Financial Institutions Employees' (The Collective Agreement).

The appellant's case before the trial Court was that as no reason was given for his dismissal that decision was without just cause or excuse. The respondent denied the claim and asserted that the appellant was dismissed for gross misconduct which reason she was not bound to

state in the letter of dismissal. The trial judge found that on the evidence, the dismissal for gross misconduct was justified in law. The appellant's action was dismissed. Being aggrieved, appellant has now appealed to the Court of Appeal.

### **ISSUES FOR DETERMINATION**

*"1. Having regard to the provisions of Article 5 (c) of the main Collective Agreement tendered as Exhibit 'C' in the proceedings and evidence led whether the learned trial judge was correct to hold that the appellant's summary dismissal was proper and or valid.*

*2. Whether the learned trial judge was right in failing to extend to the appellant the benefit of the defence of estoppel by conduct as against the respondent having regard to the evidence before the Court that for the year (1981-1982) for which appellant was alleged to have misconducted himself (as per Exhibits E to A 1) he was granted salary increment which can only be extended to an employee whose conduct was found satisfactory for the period under reference as per part II of section 2 of Article 1 of the Exhibit 'C'.*

*3. Whether in dismissing appellant's case the learned trial judge was correct in partly relying on documents to wit Exhibit 'T' to 'A1' tendered through DW1 and evidence in court of which was that they were not received by the appellant.*

*4. Whether the learned trial judge was correct in holding that proven cases listed under paragraph (i) of Article 5 (c) of Exhibit 'C' means that the accusation must have been proven by the Employer or through the Employee's acceptance."*

**HELD** (Unanimously dismissing the appeal per lead judgment of **OLAGUNJU JCA**)

### ***Documents - Admissibility and weight***

1. With respect to the learned counsel, his argument appears woolly for not drawing a line between admissibility of those documents and the weight to be attached to them that call for different considerations. True enough, objection was taken to the admission of one of those documents when it was proffered through the appellant under cross-examination

predicating that a similar objection would be taken to the 6 other documents when each was shown to the witness. Yet when the same documents were tendered through the 1DW, no objection was raised by the learned counsel. That is a strange reaction suggesting that the basis of the objection to the admissibility of those documents must have been removed or no longer tenable. (p. 444 C)

***Documents that are not inadmissible per se***

2. In any case, the law is that where a document is not inadmissible per se but its admissibility is subject to the conditions that had not been fulfilled when it was tendered its admission in evidence without objection constitutes a waiver of the unfulfilled conditions: see Okeke v. Obidife, (1965) 1 All NLR. 50, 52-53; Applying that principle to the facts of this case, the question of weight to be attached to those documents - to the first of which the reservations by the learned counsel do not apply - may be relevant but the documents having been admitted without any demur by learned counsel for the appellant and not being the class of documents that are intrinsically inadmissible they are legal evidence which admissibility could not have been reopened in the counsel's final address before the trial court nor can it be attacked on appeal. Thus Issue Three in the Appellant's Brief of Argument which was argued as a preface to Issue One thereof is misconceived. (p. 444 E)

***Contracts - Waiver***

3. The word 'waiver', has been defined as 'the intentional and voluntary surrender or relinquishment of a known privilege and or right' which 'implies a dispensation or abandonment by the party waiving a right or privilege which, at his option, he could have insisted upon': see Ariori v. Elemo, (1983) 1 S.C. 13, page 18. From the definition of that word it is implied that the waiving of a right or privilege must be voluntary which rules out any imposition by a sly interpretation grafted upon the letters of the rules. It seems also that waiver can be inferred from the conduct of the person against whom the disability stands to operate. (p. 448 B)

***Summary dismissal - Waiver***

4. However that may be, having found that there was no delay in reaching a decision on the disciplinary deliberations that culminated in the summary dismissal of the appellant there is no foundation for the argument canvassed in Issue one formulated in the Appellant's Brief that because of the dilatory process of decision-making on the matter the bank had waived her right of summary dismissal under Article 5 (c) of Appendix 'C' to the Collective Agreement. Accordingly, I will resolve that Issue against the appellant by holding that the summary dismissal of the appellant by the bank conforms with Article 5 (c) of Appendix 'C' to the Collective Agreement. (p. 449 H)

***Issue - Not raised in any of the grounds***

5. Firstly, annual leave as a relevant point would not appear to be part of Issue Two. This is because the question of annual leave being granted to the appellant in 1981 and 1982 or in any of his service years with the bank is not raised in any of the five grounds of appeal, most especially in the second ground of appeal where the question of condonation of misconduct was taken up. It is trite that issue must arise from a ground of appeal or from a combination of grounds of appeal. Consequently, issue framed or argument canvassed on a point not arising from a ground of appeal is worthless for the purpose of deliberations on the appeal and should be disregarded. (p. 451 A)

***Master & Servant - Increments in salary***

6. From the above analysis, it follows that the ascription by learned counsel for the appellant of the years 1981 and 1982 to the increments awarded to the appellant in the letters dated 12/1/81 and 8/3/82, respectively, is erroneous. Rather, interpreting those two documents with reference to the controlling provision of Article 1(i) of part II of section 2 of the collective Agreement I hold that the awards of increment made in Exhibits 'B' and 'B1' were for the service years 1980 and 1981, respectively. With the foregoing clarifications the arguments of the learned counsel on both sides must be recast as if the relevant grant made to the appellant as

appropriate to the defence of estoppel by conduct was only the annual salary increment for the year 1981. (p. 453 C)

***Misconducts - Alleged remission in a particular year***

- B 7. Because of the difference between acts of misconduct in 1981 and 1982 coupled with the fact that no act of indulgence was given by the bank in respect of 1982 service year, i.e. granting of annual increment, to provide occasion for speculation about remission of misconduct the defence of estoppel by conduct does not rub on the acts of misconduct by C the appellant for 1982 service year. Therefore, the bank reserved the absolute right to dismiss the appellant summarily for a just cause regardless of whether similar acts of misconduct were condoned during the previous service years. That will be enough to settle Issue Two against D the appellant. (p. 455 G)

**Appeals - Pleadings - Leave**

- E 8. By his failure to plead and canvass the defence at the trial the appellant is precluded from raising it on appeal. Exceptionally, however, such a point may be raised where it involves a substantial question of law but with leave of the court sought and given in the manner explained by this court in Adamu v. Ikharo, (1988) 4 NWLR. (part 89) 474, 491 as complemented by the decision of the same court in Mallo v Buwace, (1988) 4 F NWLR. (part 89) 422, 429. The appellant did not seek leave of this court and no circumstances are apparent on the face of the record to justify this court raising it suo motu. (p. 456 H)

G **Criminal allegation - Summary dismissal**

- H 9. It seems to me from the perspective of the decisions on the powers of an Employer to dismiss summarily his Employee for gross misconduct that the propelling keystone is the preservation of the constitutional right of fair hearing. Whether the Employee was first prosecuted for the criminal offences arising from his acts of misconduct pales into insignificance once the court is satisfied that the Employee was given a fair hearing in the sense of being confronted with the allegation against him

and afforded the chance to make a representation in his own defence. In sum, contrary to the argument of learned counsel for the appellant the principle that where the act of misconduct by an Employee also amounts to a criminal offence the criminal offence must first be prosecuted before the Employer can exercise his power of summary dismissal of the Employee is not intended as law of the Medes and Persians. It is not an immutable principle.

The overwhelming evidence before the trial court that at every turn the appellant was given the opportunity to challenge each allegation justifies the conclusion of the learned trial judge that the respondent's decision to dismiss the appellant was fair and lawful. That conclusion is impeccable. Therefore, I will resolve Issue Four against the appellant holding in effect that the appellant having been given a fair hearing by the bank before dismissing him his dismissal is unassailable and it is immaterial that he was not prosecuted for the criminal offences which his acts of misconduct constituted. (p. 462 G)

## NOTABLE POINTS OF INTEREST

### OLAGUNJU JCA

#### *1. Contrast between Nicol's case and present case*

Faced with that dilemma I will be loath to put on the same pedestal the facts of the two cases. In Nicol's case the acts of misconduct given as the reason for the appellant's dismissal had occurred a few years back when he was acting as the secretary of the Corporation (the Employer) but the misconduct was not revisited until after the same employer had promoted him to the substantive position. That is a far cry from the case in hand where the appellant was granted annual salary increment while he was being probed for spiral acts of misconduct. The facts of Nicol's case which savour of malice on the part of the management of the corporation is a set-off with the facts of the present case where the appellant's employment record is shown to be a litany of perversion and recalcitrancy. (p. 457 F)

**FABIYI JCA**

*2. Need for trial judges to depict that the court is also one of equity*

To my mind, the Appellant belongs to the school of thought with the idea that the law is an ass atimes. It is gratifying to note that the learned Trial Judge, in his wisdom, made the appellant to realize the futility of his action by dismissing same in it's entirety. The Trial Judge clearly depicted that his court is not only one of law but that of equity as well. Equity must be employed to ameliorate the law as, and when, occasion demands same. I agree with my learned brother that the pragmatic, down to earth and balanced judgment of Ononiba, J. remains unassailable in all its ramification. (p. 468 A)

**REPRESENTATION**

D M. U. Ikem, Esq., for the Appellant  
Chief L. M. E. Ezeofor for the Respondent.

**CASES REFERRED TO**

E Federal Civil Service Commission v. Laoye (1989) 2 NWLR (Pt. 106) 652  
Yusuf v. Union Bank of Nigeria (1996) 6 SCNJ 203  
Garba v. The University of Maiduguri (1986) 1 NWLR (Pt. 18) 550  
F Adeko v. Ijebu Ode District Council, (1962) 1 All NLR. 220  
Omoregbee v. Lawani, (1980) 3-4 S.C. 108,117  
Odulaja v. Haddad, ( 1973) 11 S.C 35  
North Western Salt Co. Ltd. v. Electrolytic Alkali Co, Ltd., (1914) A.C. 461, 470  
G Anyaebosi v. Briscoe (Nigeria) Ltd., (1987) 6 SCNJ. 9, 32-33

**RULES REFERRED TO**

High Court (Civil Procedure) Rules of Anambra State 1988 O.9 r. 20  
H

**LEAD JUDGMENT BY OLAGUNJU JSC**

At the Onitsha Judicial Division of the Anambra State High Court the appellant as the plaintiff sued the respondent, his former employer,



for wrongful dismissal from the latter's service where he was employed as a clerk claiming as special and general damages the sum of N250,000. Out of that amount, N520 represents special damages made up of N150 leave allowance for 1983, a month's salary of N281 in lieu of notice and N89 as his unpaid salary for 1/2/83 to 9/2/83; included in the last two items are housing and transport allowances. B

The salient facts upon which the appellant's claims are founded can be gleaned from the material parts of the evidence before the trial court portraying the distinctive outline that the appellant was employed by the respondent, hereinafter called 'the bank', on 2/10/79 as a clerk on probation and posted to the Main Branch office of the bank at Onitsha. His appointment was confirmed on 1/4/80 when he was transferred to the permanent cadre of the staff of the bank on an enhanced career platform. He was given annual increment for each service year in 1980 and 1981. In addition to other entitlements he enjoyed free medical facilities from the medical establishments with which the bank had agreement to provide the services for her staff. On a number of occasions between February 1981 and January 1983 there were complaints about the conduct of the appellant by various officers of the bank responsible for the supervision of the appellants's work leading to queries and sometimes counselling to the appellant. In January 1983 things came to a head when by a letter from the bank's Head Office in Lagos dated 19/1/83 the appellant was informed that he had been dismissed summarily from the service of the bank from the date of that letter although he did not receive the letter in Onitsha until 9/2/83. D E F

On those facts the appellant's case before the trial court was that as no reason was given for his dismissal that decision was without just cause or excuse. The respondent denied the claims and asserted that the appellant was dismissed for gross misconduct which reason she was not bound to state in the letter of dismissal. However, it is common ground that the contract between the parties is governed by the Collective Agreement between 'The Nigeria Employers' Association of Bankers, Insurance and Allied Institutions' and 'The National Union of Bankers, Insurance and Financial Institutions Employees' which in succeeding refer- G H

ences will be abbreviated to 'The Collective Agreement'.

The issues were tried at the end of which the appellant's action was dismissed by the trial Judge who held that on the evidence before him the dismissal of the appellant by the bank for gross misconduct was justified in law. The appellant is challenging that decision on five grounds of appeal from which he formulated the following four issues in his Brief of Argument:

"1. Having regard to the provisions of Article 5 (c) of the main Collective Agreement tendered as Exhibit 'C' in the proceedings and evidence led whether the learned trial judge was correct to hold that the appellant's summary dismissal was proper and or valid.

2. Whether the learned trial judge was right in failing to extend to the appellant the benefit of the defence of estoppel by conduct as against the respondent having regard to the evidence before the Court that for the year (1981-1982) for which appellant was alleged to have misconducted himself (as per Exhibits E to A 1) he was granted salary increment which can only be extended to an employee whose conduct was found satisfactory for the period under reference as per part 11 of section 2 of Article 1 of the Exhibit 'C'.

3. Whether in dismissing appellant's case the learned trial judge was correct in partly relying on documents to wit Exhibit 'T' to 'A1' tendered through DW1 and evidence in court of which was that they were not received by the appellant.

4. Whether the learned trial judge was correct in holding that proven cases listed under paragraph (i) of Article 5 (c) of Exhibit 'C' means that the accusation must have been proven by the Employer or through the Employee's acceptance."

Two Issues were formulated for the respondent in her brief of Argument thus:

"1. Having regard to the totality of the evidence, was the learned trial judge right in holding that the plaintiff/appellant was properly dismissed in accordance with Exhibit 'C', the contract agreement? If not what is the measure of damages?

2. Whether the principle of estoppel by condonation applied,

*and if so, whether the failure of the learned trial judge to consider same, led to a miscarriage of justices?"*

Issues One and Two formulated by the appellant incorporate within their scope the two Issues framed by the respondent except the last sentence of Issue one by the respondent on damages which may not be necessary if the question raised in the first part is answered in the affirmative: See Nwobosi v. A. C. B. Ltd., (1995) 7 SCNJ. 92, 113. However, with the additional questions raised in the Third and Fourth Issues in the Appellant's Brief of Argument I will opt for the Issues formulated by the appellant which fully cover all the shades of the relevant points raised by the parties; they will be examined in order of combination adopted by learned counsel for the appellant.

Arguing Issues One and Three together, learned counsel for the appellant began with in reservations about certain documentary evidence which he submitted cannot sustain the allegations contained in them. These are Exhibits 'T', 'U', 'V', 'W', 'X', 'Y', 'Z' and 'A1' which are correspondence from the principal officers of the bank addressed to the appellant and drawing his attention to his shortcomings relating to absence from work, lateness in coming to work, leaving his duty post without permission, insubordination and uncooperative attitude to his superior officers and dereliction of duty. The 8 letters were written on various dates between 11/5/81 and 13/1/83.

Objection to those correspondence by learned counsel to the appellant stemmed from the way they were admitted in evidence. When the last of the letters, Exhibit 'A1', was to be tendered through the appellant under cross-examination the appellant told the court that he did not receive the letter. The court ruled against the admissibility of the letter but left it open to the respondent to tender it through her witness in due course when proper foundation for its admissibility would have been laid. None of the remaining 7 letters was offered for admission through the witness but each document except Exhibit 'T' was shown to him as copy of the letter written to him and he denied receiving each. However, all the 8 letters were later tendered through the respondent's witness, the 1DW, to the admission of each of which learned counsel for the appellant

said he had no objection.

It is the contention of learned counsel for the appellant before this court that the earlier denial by the appellant that he received those documents has tainted them to render them incapable of proving the matter for which they were offered citing in support of that argument Omoregbee v. Lawani, (1980) 3-4 S.C. 108, 117; Odulaja v. Haddad, (1973) 11 S.C 35; and the decision of the House of Lords in North Western Salt Co. Ltd. v. Electrolytic Alkali Co. Ltd., (1914) A.C. 461, 470.

With respect to the learned counsel, his argument appears woolly for not drawing a line between admissibility of those documents and the weight to be attached to them that call for different considerations. True enough, objection was taken to the admission of one of those documents when it was proffered through the appellant under cross-examination predicating that a similar objection would be taken to the 6 other documents when each was shown to the witness. Yet when the same documents were tendered through the 1DW. no objection was raised by the learned counsel. That is a strange reaction suggesting that the basis of the objection to the admissibility of those documents must have been removed or no longer tenable.

In any case, the law is that where a document is not inadmissible per se but its admissibility is subject to the conditions that had not been fulfilled when it was tendered its admission in evidence without objection constitutes a waiver of the unfulfilled conditions: see Okeke v. Obidife, (1965) 1 All NLR. 50, 52-53; Anyaebosei v. R.T. Briscoe (Nigeria) Ltd., (1987) 6 SCNJ. 9, 32-33; Oguma Associated Companies (Nigeria) Ltd., v. International Bank For West Africa Ltd., (1988) 3 SCNJ. (Part 1) 13, 22-23; and Attorney-General of Oyo State v. Fairlakes Hotel Ltd., (1989) 12 SCNJ. 1, 11.

Applying that principle to the facts of this case, the question of weight to be attached to those documents - to the first of which the reservations by the learned counsel do not apply - may be relevant but the documents having been admitted without any demur by learned counsel for the appellant and not being the class of

**documents that are intrinsically inadmissible they are legal evidence which admissibility could not have been reopened in the counsel's final address before the trial court nor can it be attacked on appeal. Thus Issue Three in the Appellant's Brief of Argument which was argued as a preface to Issue One thereof is misconceived.** B

Before examination of the remaining Issues some clarification is called for. The crux of the appeal around which the controversy revolves is the contract of service between the bank and the appellant which is governed by the collective Agreement, Exhibit 'C', Article 5 to Appendix 'C' of which is on Disciplinary Procedure. For the purpose of clarity, it is necessary to reproduce Article 5 (c) thereof on Summary Dismissal which is the hub of the disputation. It reads: C

*"The law provides that Employees may be summarily dismissed for certain offences covered by the broad headings of gross misconduct. Such offences include:* D

*(i) Proven cases of theft, fraud, dishonesty, defalcations and irregular practices in respect of cash, vouchers, records, returns or customer's account.* E

*(ii) Wilful disobedience of a lawful order or serious negligence.*

*(iii) Drunkenness or taking drugs other than for medical reasons, rendering the Employee unfit to carry out his or her duties.*

*(iv) Divulging confidential information in breach of Declaration of secrecy.* F

*(v) Conviction for a criminal offence.*

*(vi) Prolonged and/or frequent absence from work without leave or reasonable cause.*

*(vii) Fighting and assault or engaging in disorderly behaviour during working hours, or on the office premises or within its immediate surroundings.* G

*(viii) Deriving any benefit in the course of his/her official duties which places him/her in such a position that his/her personal interest and his duty to the Employer or to any customer of the Employer are in conflict.* H

*(ix) Failure to report promptly any irregularity on the part of any*

*other member of staff after having knowledge of such irregularity.*

*(x) Abusive or insulting language or behaviour to any client which is prejudicial to the business interests of the Employer.*

*(xi) Any other offences which may be agreed upon between the Employer and the Union from time to time. Where an offence has been committed which merits summary dismissal but where the member company does not exercise its prerogative of dismissal a 'first and last' or a 'second and last' warning letter may be issued and the fact that the warning is a final one will be made clear in the letter."*

For an appreciation of the full ramifications of the scope of the above part of the Collective Agreement, Exhibit 'C', it should be noted that in Nwobosi v. A.C.B., supra, at pages 115 to 116, a clause in another collective Agreement which is substantially similar to and, therefore, in pari materia, with the opening clause of Article 5 (c) above was interpreted as incorporating the English common law on master and servant which is a branch of the general law of contract. This follows from the import of the wording of that clause that the acts of gross misconduct therein enumerated are not exhaustive and by implication they include acts of gross misconduct under master and servant law. Therefore, on the principle of stare decisis, I am bound to follow the interpretation in Nwobosi v. A.C.B., supra, in examining the scope of Article 5 (c) of Exhibit 'C' reproduced above. See Clement v. Iwuanyawu, (1989) 20 NSCC. (Part 11) 234, 240-241; Adesokan v. Adetunji, (1994) 6 SCNJ. (Part 1) 123, 155-156; Nwobodo v. Onoh, (1984) 1 S.C. 1, 34-35; and University of Lagos v. Olaniyan, (1985) 16 NSCC. (part 1) 98, 106.

Against the background of the various acts particularized above as acts of gross misconduct the thrust of the argument of learned counsel for the appellant on Issue One revolves around the waiver by the bank of her right to dismiss the appellant summarily on any of the 11 specific grounds. The argument is bound up with the time-lag between the acts of misconduct that gave rise to the dismissal of the appellant and the time when the decision to dismiss him was taken.

According to the learned counsel, the main allegation for which the appellant was dismissed is that on 29/1/82 he forged the bank's de-

partmental Medical Form 'C', Exhibit 'L', used by the staff of the bank, When duly issued, for obtaining free medical treatment from any of the Medical centres with which the bank had an agreement. The learned counsel argued that as the decision to dismiss the appellant was not taken until 19/1/83, almost a year after the misconduct, the decision lacks spontaneity as it is not contemporaneous with the misconduct and the bank must be deemed to have waived her prerogative to dismiss the appellant summarily on any of the 11 specific grounds in Article 5 (c) of Appendix 'C' the collective Agreement. He submitted that the only option left for the bank is a recourse to the residual provision of Article 5 (c) of Appendix 'C' that provides a sanction of warning as an alternative to summary dismissal where, as in this case, the Employer has waived his prerogative to dismiss summarily.

To amplify the argument on the waiver by the bank of her right to exercise the power of summary dismissal of the appellant under the collective Agreement the learned counsel seized upon the delay by the bank in coming to a decision on another allegation that the appellant was absent from duty without permission for which he was queried on 18/10/82 in Exhibit 'G' and to which he promptly replied on 21/10/82 as per Exhibit 'G1'. He wondered why no decision was taken on the query up to the time the appellant was dismissed insinuating the dawdling as one instance of delay that is indicative of the desire to forgo the right to act.

The learned counsel contended that regardless of whether the appellant's dismissal was founded on the allegation of forgery of the bank's Medical Form 'C' alone or on any of the numerous allegations in the pile of correspondence, Exhibits 'E' to K1', the decision on the matter was characterized by inordinate delay that amounted to a waiver of the Employer's right of summary dismissal under Article 5 (c) of Appendix 'C' to the Collective Agreement. He submitted that the dismissal is thereby vitiated and, therefore, null and void.

There is no appreciable reaction to this point by learned counsel for the respondent beyond the note of dissension that runs through the tenor of his argument on the germane question of condonation of the misconduct canvassed in Issue Two of the Respondent's Brief of Argu-

ment. In any case, The word 'waiver' which is at the center of the argument of learned counsel for the appellant is not used in Article 5 (c) of Appendix 'C' to the collective Agreement though the phrase 'where the Member Company does not exercise its prerogative of dismissal' in the residual part of the Article can, in the context of that provision, be equated to the word waiver.

**The word 'waiver', has been defined as 'the intentional and voluntary surrender or relinquishment of a known privilege and or right' which 'implies a dispensation or abandonment by the party waiving a right or privilege which, at his option, he could have insisted upon': see Ariori v. Elemo, (1983) 1 S.C. 13, page 18. From the definition of that word it is implied that the waiving of a right or privilege must be voluntary which rules out any imposition by a sly interpretation grafted upon the letters of the rules. It seems also that waiver can be inferred from the conduct of the person against whom the disability stands to operate.** Therefore, from the facts of this case we must examine what evidence of waiver can be inferred from the act (which) includes omission) or conduct of the bank.

The argument of learned counsel for the appellant in support of a waiver of the Employer's right is based primarily on the allegation against the appellant of forgery of the bank's Medical Form 'C', Exhibit 'L', with failure to pursue further the query in Exhibit 'G' as another instance of delay in taking disciplinary action offered to buttress evidence of waiver. We must get the facts of the two incidents straight in order to see whether the inference advocated by the learned counsel can be justified.

The investigation of forgery began on 18/8/82 with the query addressed to the appellant, Exhibit 'H', which he answered by Exhibit 'H1' on 23/8/82. Because of the equivocation that is apparent from the reply it became necessary for the bank to make a further inquiry from BEX Memorial Hospital to which the appellant presented the forged Form 'C' for medical facility. A letter dated 18/1/83 from that hospital, Exhibit 'M', confirmed that the appellant presented the forged Form 'C' on 1/2/82 on the face of which he obtained treatment.



The forged Medical Form 'C', Exhibit 'L', is dated 29/1/82 with the endorsement that the appellant was treated on 1/2/82. The appellant was issued with a query as per Exhibit 'H' on 18/8/82 which in the absence of any evidence to the contrary must be taken as the date when the bank became aware of the fraud. That negated 29/1/82 being bandied B about by learned counsel for the appellant as the date when the bank knew about the forgery. Against that factual backdrop, if the appellant was dismissed on 19/1/83 just a day after the bank got the confirmation that the appellant uttered the forged document to BEX Memorial Hospital C any suggestion of a delay on the part of the bank in exercising her prerogative of summary dismissal under Article 5 (c) of Appendix 'C' of the Collective Agreement is colourable and a claptrap.

As regards the query of 18/10/82 issued to the appellant for absence from duty without permission which is offered as a buttress to D prop up evidence of a waiver the substratum of the argument alleging procrastination having collapsed there is no supportive role for which Exhibit 'G' is raked up to play. Besides, from the tenor of the query it does not appear that the writer posed seriously to pick bones about the E matter if the appellant's reply was found to be satisfactory. The material part reads:

*"We would therefore like to have your written explanations within 24 hours on receipt of this letter why disciplinary action should not be F taken against you for absenting yourself for (sic) duty without genuine excuse."*

From the import of that passage it will be precipitate to jump to the conclusion as learned counsel for the appellant did that there was delay in coming to a decision on the matter when there is a pointer to the G fact that taking any disciplinary action on the matter is contingent upon the appellant's reply. That apart, Exhibit 'T', a letter of caution written to the appellant on 19/7/82 by the Branch Manager against a gradual slide into chronic absenteeism, is an eye-opener as indicating that such corre- H spondence may have a role to play in future as an index of assessment of career prospect of an aberrant serving officer.

**However that may be, having found that there was no delay**

in reaching a decision on the disciplinary deliberations that culminated in the summary dismissal of the appellant there is no foundation for the argument canvassed in Issue one formulated in the Appellant's Brief that because of the dilatory process of decision-making on the matter the bank had waived her right of summary dismissal under Article 5 (c) of Appendix 'C' to the Collective Agreement. Accordingly, I will resolve that Issue against the appellant by holding that the summary dismissal of the appellant by the bank conforms with Article 5 (c) of Appendix 'C' to the Collective Agreement. Similarly, as I have earlier found, the argument canvassed in Issue three in the Appellant's Brief is hollow. I will also resolve that Issue against the appellant.

That brings me to Issue Two in the Appellant's Brief which is co-extensive with Issue Two in the Respondent's Brief. In it the appellant canvassed that the learned trial judge was in error in not considering the defence of estoppel by conduct that was open on the facts of the case. The contention is that the appellant against whom allegation of misconduct was being investigated for various acts done between 1981 and 1982 was granted both annual salary increment and leave for those two years, a gesture on the part of the bank which the learning counsel argued is evidence of satisfactory performance by the appellant of his duty during those two years. Granting the two types of benefit to an employee is likened to a tacit acknowledgment by the Employer that the conduct and performance of the Employee during that period were satisfactory, a practice which, it was agitated, is in keeping with Articles 1(i) and 4 of part 11 of section 2 of the collective Agreement which laid down the conditions for granting both annual increment and leave to the staff of the bank.

Before I proceed further with a review of the arguments of the learned counsel on this Issue there are preliminary observations on two material points on back-ground facts which must first be examined. They relate to the annual leave and annual salary increments that were granted to the appellant as the twin benefits in which the defence of estoppel by conduct raised herein is wrapped up.

Firstly, annual leave as a relevant point would not appear to be part of Issue Two. This is because the question of annual leave being granted to the appellant in 1981 and 1982 or in any of his service years with the bank is not raised in any of the five grounds of appeal, most especially in the second ground of appeal B where the question of condonation of misconduct was taken up.

It is trite that issue must arise from a ground of appeal or from a combination of grounds of appeal. Consequently, issue framed or argument canvassed on a point not arising from a ground C of appeal is worthless for the purpose of deliberations on the appeal and should be disregarded: see Oduntan v. General Oil Limited, (1995) 4 SCNJ. 145, 157; and Anigala v. Abeh, (1999) 7 NWLR. (part 611) 454, 463. Therefore, I will disregard the submissions on the fact that the appellant was granted annual leave in 1981 and 1982 made in support of D argument of condonation of misconduct by the bank.

Secondly, from the arguments of the learned counsel on both sides two-fold misapprehension emerged about the years of service to which the annual salary increments granted to the appellant by the bank E relate. The primary misunderstanding. While learned counsel for the appellant claimed in this appeal that the increment granted to the appellant was in respect of 1981 and 82 there is a 'suggestion' by learned counsel for the respondent, on page 12 of the Respondent's Brief of Argument, F that there was a notification of salary increment conveyed to the appellant in the bank's letter of 5/1/83. This is mysterious as there was no such letter produced by either party at the trial. However, contrary to the stand taken by learned counsel for the respondent the appellant gave G evidence that he was in fact granted increment twice in verification of which he tendered Exhibits 'B' and 'B'1, two letters on the matter written by the bank dated 12/1/81 and 8/3/82, respectively.

Learned counsel for the respondent did not pursue any further the offer of increment made by the bank in her letter of 5/1/83 as it H became obvious that he allowed himself to be led by the nose by the appellant through sheer mimicry of the latter who pleaded 3 annual increments the last of which was granted by the elusive letter but produced

only two letters. As a precaution against a repetition of such a faux pas learned counsel for the respondent would be well reminded of the commonplace but fundamental legal maxim that averment in a pleading on which no evidence is led goes to no issue a truism which is amply vindicated by a galaxy of authorities, notably, Njoku v. Eme, (1973) 5 S.C. 293, 300-302; Okagbue v. Romaine, (1982) 13 NSCC. 130, 136-138; Kate Enterprises Ltd. v. Daewoo Nigeria Ltd., (1985) 16 NSCC. (part 11) 942, 951; and Olabanji v. Ajiboye, (1992) 1 NWLR. (part 218) 473, 485-486. With that clarification the correct position is that the appellant was granted annual salary increment only twice, on 12/1/81 and 8/3/82.

That leads to the question of the years of service to which those increments relate. Learned counsel for the appellant argued that the conditions for granting annual increment are laid down by Article 1(i) of part 11 of section 2 of the collective Agreement. With that I am in complete agreement. But I defer in the interpretation of the years to which the increments granted in Exhibits 'B' and 'B1' relate given by the appellant as 1981 and 1982. Such an interpretation is at variance with the provision of Article 1(i) of part 11 of section 2 the material part of which reads:

*"Each year the Employee's conduct and progress will be reviewed and where conduct and performance through the year have been satisfactory, increment (s) within the appropriate grades will be awarded according to the scales from the 1st January next following the report (or the 1st of the month in the new accounting year as the case may be) ....."*  
(Underlining Mine)

It is clear from the provision of the Article reproduced above that increment is awarded on the basis of Employee's conduct and performance during the year preceding the award. That point is underscored by the phrase 'from the 1st January next following the report' therein and buttressed by the expression of the award in Exhibit 'B' which opened with the phrase 'following a satisfactory performance of your job during the year under review'. In a letter dated 12/1/81 the expression 'the year under review' must be construed as a reference to a complete year of service prior to the year in which the letter was written that had only run for 12 days out of that year. Construed with reference to the

conditions laid down in Article 1(i) above that is unmistakably a reference to the year 1980. Therefore, the increment approved in Exhibit 'B' dated 12/1/81 must, per force, be an increment for 1980 service year and correspondingly the award in Exhibit 'B1' dated 8/3/82 must be taken to denote increment for 1981 service year. B

In either case, the expression 'service year' in relation to annual salary increment signifies that the grant relates to and is a reward for the conduct and performance of the completed year preceding the award. The inherent nature of annual salary increment implies a gesture of appreciation for the past services rendered as a motivation for better performance in future which must be earned and, therefore, granted in arrears but not in advance of performance. C

**From the above analysis, it follows that the ascription by learned counsel for the appellant of the years 1981 and 1982 to the increments awarded to the appellant in the letters dated 12/1/81 and 8/3/82, respectively, is erroneous. Rather, interpreting those two documents with reference to the controlling provision of Article 1(i) of part II of section 2 of the collective Agreement I hold that the awards of increment made in Exhibits 'B' and 'B1' were for the service years 1980 and 1981, respectively. With the foregoing clarifications the arguments of the learned counsel on both sides must be recast as if the relevant grant made to the appellant as appropriate to the defence of estoppel by conduct was only the annual salary increment for the year 1981.** D E F

Coming back to a review of the arguments, learned counsel for the appellant contended that by granting salary increment to the appellant as of right during the pendency of investigation into misconduct involving him the Employer must be taken to warrant that any act of misconduct on the part of the appellant as a beneficiary during those years had been overlooked or condoned by the Employer and that the same act of misconduct cannot in law be made a ground for dismissal on a subsequent occasion, a proposition in support of which he cited the supreme Court's decision in E.C.N. v. Nicol, (1968) 1 All NLR. 201, and the decision of the English Court of Appeal in Beattie v. Farmenter, (1888- G H

89) 5 LTR. 396. On that premise, he submitted that the bank is estopped by her conduct from making the appellant's misconduct which she had condoned the ground for dismissing him.

Learned counsel for the respondent debunked the argument of  
 B learned counsel for the appellant contending that the appellant did not  
 plead condonation which is a condition of the mind and, therefore, a  
 special defence which must be specifically pleaded as enjoined by rule 20  
 of Order 9 of the Anambra State High Court Civil procedure Rules, 1988.  
 C He submitted that condonation cannot be established by drawing infer-  
 ences from the evidence. Being a special defence, he elaborated, it must  
 be expressly pleaded and proved in line with the principle laid down in  
Clay Industries Nigeria Ltd. v. Aina, (1997) 8 NWLR. (part 516) 208,  
 229.

D He canvassed that granting that the defence could not be raised  
 in the appellant's statement of claim because the reason for dismissing  
 the appellant was not stated in the letter of dismissal that fact cannot be a  
 valid excuse as it was still open to the appellant to do so by filing a reply  
 E to the statement of defence after the appellant had become fully apprised  
 of the reasons. This, he argued, is the expedient enunciated in Spasco  
Vehicle and Plant Hire Co. v Alrairie Ltd., (1995) 9 SCNJ. 288, 301;  
 (1995) 8 NWLR (part 416) 655, 670-671, and submitted that having  
 F failed to plead the defence of estoppel by conduct the appellant is pre-  
 cluded from raising the matter on appeal.

After the clarifications of the benefits granted to the appellant by  
 the bank which were urged as acts of condonation and the years to  
 which the benefits relate the argument of learned counsel for the appel-  
 G lant on Issue Two boiled down to the fact that the grant of annual salary  
 increment to the appellant for 1981 amounted to condonation by the bank  
 of the acts of misconduct committed by the appellant during that year.  
 There being no evidence that the appellant was granted annual salary  
 H increment for 1982 as the learned counsel had erroneously 'presumed'  
 the condonation by the bank, if indeed there was a condonation, must be  
 confined to the acts of misconduct for the year 1981 only.

That raises the question of whether the acts of misconduct com-

mitted by the appellant in 1981 are the same as those committed in 1982. If they are different, it is non sequitur. The acts of misconduct for the two years would have to be examined and treated separately and the consequence appropriated. I will begin by itemizing the acts of misconduct committed in each of the two years and follow by short commentaries on the limitations of the application of defence of estoppel by conduct for the year 1981.

In 1981 there were five allegations of acts of misconduct made against the appellant documented in Exhibits 'E', 'J', 'W', 'X' and 'Y'. They relate to lapses ranging from coming to work late, leaving the office without permission, distortion of record by cancellation to dereliction of duty. In 1982 there were also five prime allegations of misconduct made against the appellant described in Exhibits 'F', 'G', 'H', 'K' and 'T'. They alleged, severally, claiming overtime while on admission in the hospital or on sick leave, forging or uttering the bank's Medical form 'C', Authority to provide Medical Treatment for the bank's Employees, truancy and insubordination. These are in addition to queries and warnings issued in letters which the appellant told the court he did not receive copies of which were marked Exhibits 'U', 'V' and 'Z' relating to sundry shortcomings

Obviously, in variety and gravity the acts of misconduct committed by the appellant in 1982 are different from, more numerous and serious and than those committed by him in 1981. From the record of proceedings of the court below the highlights of the misconduct for which the appellant was dismissed are claiming overtime while on admission in the hospital or on sick leave and uttering forged document. The later allegation was the focus of Issue One.

**Because of the difference between acts of misconduct in 1981 and 1982 coupled with the fact that no act of indulgence was given by the bank in respect of 1982 service year, i.e. granting of annual increment, to provide occasion for speculation about remission of misconduct the defence of estoppel by conduct does not rub on the acts of misconduct by the appellant for 1982 service year. Therefore, the bank reserved the absolute right to dismiss the ap-**

**pellant summarily for a just cause regardless of whether similar acts of misconduct were condoned during the previous service years.**

**That will be enough to settle Issue Two against the appellant.** But

two questions call for passing observations so as to clarify the points of law raised by the learned counsel on the general application of the doctrine of estoppel by conduct as may be appropriate to acts of misconduct by the appellant for 1981 service year if those acts alone had been made the only grounds for dismissing the appellant.

Firstly, learned counsel for the respondent has argued that estoppel by conduct is a special defence which must be specifically pleaded and that failure of the appellant to plead it means that the defence cannot be taken up on appeal citing in support Clay Industries Nigeria Ltd., v. Aina, supra. The appellant who failed to raise the defence in his statement of claim neither filed a reply to the statement of defence where he could raise the defence. I find appropriate to the point the statement of the law in Odekilekun v. Hassan, (1997) 10 - 12 SCNJ. 114, where the supreme Court, per Iguh, JSC., at page 129, expounded that:

*"If it was the case of the appellant that the sale was invalid or ineffectual for whatever cause, the onus was on him to plead and adduce evidence of facts which would establish the alleged invalidity. Such is not the position in the present case.*

*It cannot be overstressed that save for a question such as jurisdiction, Courts of law must limit themselves to the issues raised by the parties in their pleadings. See Metalimpex v. A.G. Leventis & Co. Ltd., (1976) 2 S.C. 91; Kalio v. Kalio, (1977) 2 S.C. 15, Oriah v. Onyia, (1989) 1 NWLR. (part 99) 514, Shell B. P., Ltd., v. Abedi (1974) 1 All NLR. (part 1) 13; Alhaji Ogunlowo v. Prince Ogunbare (1993) 7 NWLR. (part 307) 610, at 624, etc. The appellant having failed to plead material facts relating to his present complaints cannot now be allowed to raise them belatedly."*

I agree with the submission of learned counsel for the respondent which is consistent with the above statement of the law. **By his failure to plead and canvass the defence at the trial the appellant is precluded from raising it on appeal. Exceptionally, however, such a**



point may be raised where it involves a substantial question of law but with leave of the court sought and given in the manner explained by this court in Adamu v. Ikharo, (1988) 4 NWLR. (part 89) 474, 491 as complemented by the decision of the same court in Mallo v Buwace, (1988) 4 NWLR. (part 89) 422, 429. The appellant **did not seek leave of this court and no circumstances are apparent on the face of the record to justify this court raising it suo motu:** see Din v. Attorney -General of the Federation, (1988) 4 NWLR. (part 87) 147, 183.

Secondly, whether within the principle of law enunciated in E.C.N. v. Nicol, supra, granting annual salary increment to an Employee who is being investigated for acts of misconduct by the Employer can be regarded as an act of condonation precluding the acts from being made grounds of dismissal. The matter is not free from debate for if one goes by the provision of Article 1(i) of part 11 of section 2 of the Collective Agreement granting annual salary increment is meant to be an assurance by the Employer that the conduct and performance of the Employee concerned during the service year had been satisfactory. But considering the fact that granting annual increment may not warrant the same level of probing of an Employee's working record as in promoting to the next higher grade with added responsibility calling for careful sifting of the past performance the equation between the two is one that is hard to draw.

Faced with that dilemma I will be loath to put on the same pedestal the facts of the two cases. In Nicol's case the acts of misconduct given as the reason for the appellant's dismissal had occurred a few years back when he was acting as the secretary of the Corporation (the Employer) but the misconduct was not revisited until after the same employer had promoted him to the substantive position. That is a far cry from the case in hand where the appellant was granted annual salary increment while he was being probed for spiral acts of misconduct. The facts of Nicol's case which savour of malice on the part of the management of the corporation is set-off with the facts of the present case where the appellant's employment record is shown to be a litany of per-

version and recalcitrancy.

I will regard the principle in E.C.N. v. Nicol, supra, as inapplicable to the case in hand on the ground that the rationale underlying the application of that principle contemplates a situation where there is a clear acknowledgment by the Employer of the misconduct of the Employee and an unequivocal act on the part of the Employer to overlook the misconduct. The principle does not apply where what is proffered as evidence of condonation is shrouded in technicality by facts that are spiced with quibbles. We must be wary of extending the principle in E.C.N. v. Nicol, supra, to encompass within its range a horde of specious cases on an emotional ground. The consequence can be far-reaching and unhealthy for good labour relationship where by sheer chicanery it may encourage workers of questionable character being imposed upon an Employer long after such workers have reached the limit of their occupational usefulness. For the foregoing reasoning I am of the view that on the facts of this case the principle in E.C.N. v. Nicol, supra, cannot be applied to the supportive gesture of annual increment grant to elevate it to an intended decision to remit wholesale the appellant's variegated acts of misconduct for 1981 service year.

That conclusion may be in excess of caution for having found that no annual salary increment was granted to the appellant for 1982 service year on which the excuse of condonation of misconduct by the bank for that year can be grafted there is no hiding place for the defence of estoppel by conduct in the proceedings of the court below with condonation as the life-line of that defence. On that note, I will resolve issue Two in favour of the respondent, that is to say, on the facts of this case, the defence of estoppel by conduct is not open to the appellant.

The theme of the Fourth and last Issue is breach of the appellant's constitutional right of fair hearing by dismissing him summarily on acts of gross misconduct which also amounted to crimes without prosecuting him in a court of law before the respondent came to a decision to dismiss him, a measure which, it is argued, violates the principle enunciated in Sofekun v. Akinyemi, (1980) 5-7 S.C.1. The complaint arose from the import of the acts of misconduct enumerated in paragraph (i) of

Article 5 (c) of Appendix 'C' to the collective Agreement to which the act of misconduct in paragraph (v) thereof is germane. The two paragraphs read:

*"(i) Proven cases of theft, fraud, dishonesty, defalcations and irregular practices in respect of cash, vouchers, records, returns or customer's account.*

*(v) Conviction for criminal offence."*

On the premise that certain acts of misconduct for which the appellant was dismissed were in contravention of paragraph (i) it was contended on behalf of the appellant that the learned trial judge was in error when he held that acts of misconduct which also constituted criminal offences under our law can be established by the Employer or can be regarded as established on admission of the acts by the erring Employee to justify his dismissal summarily without prosecuting him for the criminal offences. That opinion, the learned counsel submitted, amounts to a denial of the appellant's right of fair hearing under sub-sections 33(1), (4) and (5) of the constitution of the Federal Republic of Nigeria, 1979, and runs counter to the principle of the law that where the act of misconduct by an Employee also amounts to a crime no disciplinary action by the Employer can be taken against him until he is first prosecuted and convicted of the crime. In addition to the decision in Sofekun v. Akinyemi supra, the learned counsel also cited in support of his argument Denloye v. Medical and Dental Practitioners Disciplinary Committee, (1968) 1 All NLR. 306; Garba v. University of Maiduguri, (1986) 1 NWLR. (part 18) 550; Eperokun v. University of Lagos, (1986) 4 NWLR. (part 34) 162; and Olatubosun v. NISER., (1988) 3 NWLR. (part 80) 25.

On harmonization of the spheres of application of paragraphs (i) and (v) of Article 5(c) the learned counsel did not share the view of the learned trial judge that while acts of misconduct in paragraph (i) give an Employer the freedom, in clear cases, to dismiss an Employee summarily without a prior reference to the court of law paragraph (v) contemplates the variety of acts of criminal nature that are tried by the court of law culminating in conviction of an Employee regardless of whether the criminal acts leading to the conviction originated from within or outside the

employment of the accused. To the learned counsel to whom the doctrine of surplusage in interpretation of statute made no meaning he submitted that the two paragraphs are extension of each other and can be invoked indiscriminately as the need arises. He concluded that failure of the bank to refer the appellant to the law court for prosecution and conviction on the acts of misconduct that have elements of criminality before dismissing him vitiates his dismissal which he urged this court to declare null and void.

Replying learned counsel for the respondent contended that the argument that in all acts of misconduct in which crimes are disclosed the Employee must as an inflexible rule first be tried in a court of law and convicted before the Employer can exercise the right to dismiss him does not represent a correct statement of the law. He submitted that in clear cases where an act of gross misconduct can be established without a recourse to the law court an Employer is a liberty to dismiss the Employee summarily without a prior sanction by the court. The point, he argued, has been settled by the Supreme Court in Federal Civil Service Commission v. Laoye, (1989) 2 NWLR (part 106) 652, on which the learned trial judge relied and where in clarifying the position the Court, per Eso, JSC., expounded its earlier decision in Garba v. University of Maiduguri, supra, thus:

*".....the decision in Garba should not be taken as a prohibition of instituting disciplinary measures against civil servants where there has been a criminal charge or accusation. However, other considerations might enter for once such criminal allegations are involved, care must be taken that the provision of S. 33 (4) of the Constitution are adhered to.*

*It is not so difficult where the person so accused accepts his involvement in the acts complained of , and no proof of the criminal charges against him would be required. He has, in such a case, been confronted with the accusation and he admitted it. He could face discipline thereafter."* (Underlining Mine)

Applying the rationale of that dictum to the facts of this case the learned counsel canvassed that on each act of misconduct for which the appellant was found liable he was confronted with the allegation against

him by being given a query in defence of which he replied. He submitted that the Employer having done that it was within his powers to dismiss the appellant summarily because of the gravity of the misconduct without first having him prosecuted and convicted by a court of law on the precedent of Dongtoe v. Civil Service Commission, Plateau State, (1995) 7 NWLR (part 408) 457. He further Buttressed his argument with Adeko v. Ijebu Ode District Council, (1962) 1 All NLR. 220, as exemplifying the principle that the fact that the appellant was not first prosecuted and convicted would not render his summary dismissal wrongful. He urged me to discountenance the submission of learned counsel for the appellant to the contrary and to affirm the decision of the trial court that the dismissal of the appellant was lawful and valid

With the fuss and fury generated by the debate over where the line must be drawn between the administrative powers of an Employer to dismiss his Employee summarily and when the intervention of the court is made mandatory the drawback of the argument of learned counsel for the appellant is putting an undue premium on criminal prosecution of an Employee for every conceivable act of misconduct that has a saviour of criminality. The thread of the argument betrays singlemindedness that makes no allowance for the sphere of domestic or administrative measure and what objective it is set out to achieve that may not always coincide with the focus of criminal policy. By undue emphasis on enforcement of criminal law as a primary concern in the relationship of master and servant the argument has completely flown off at a tangent as regards the considerations underlying the judicial policy in so sensitive an area where the right of an Employee can be protected without the Employer being unduly hamstrung in order to harmonize the mutual interest and interdependence of the duo in employment matters.

It must be emphasized for the purpose of clarity that the focus of the decisions in Sofekun v. Akinyemi and FCSC. v. Laoye, supra, behind which are ranged a long line of landmark decisions of the same ilk is primarily the right of fair hearing rather than a vindictive exposure of the erring Employee to the punitive sledge of the criminal law. In pursuit of that ideal a line is drawn between cases that an Employer or the ma-

chinery at his disposal can handle and complex cases that may be more amenable to criminal trial so as to insulate them against the susceptibility to violation of the constitutional right of fair hearing. That objective rather than muscle-flexing for criminal prosecution as a precondition for the exercise of the right of summary dismissal by an Employer is the rationale underlying the crop of decisions on the contract of service which is an integral part of the general law of contract.

That the prosecution of an Employee before the law court is not a sine qua non to the exercise of the power of summary dismissal by an Employer for gross misconduct was brought out in bold relief by the Supreme Court in Yusuf v. Union Bank of Nigeria Ltd., (1996) 6 SCNJ. 203, a decision which turned upon the issue of fair hearing. In a unanimous decision dismissing the appeal the Court, per Wali, JSC., in the leading judgment, at pages 214-215, put the point lucidly and beyond any peradventure. The learned justice observed, inter alia, as follows:

*"It is not necessary, nor is it a requirement under S.33 of the 1979 Constitution that before an employer summarily dismisses his employee from his services under the common law, the employee must be tried before a court of law where the accusation against the employee is for gross misconduct involving dishonesty bordering on criminality....."*

*To satisfy the rule of natural justice and fair hearing a person likely to be affected directly by disciplinary proceeding must be given adequate notice of the allegation against him to enable him make a representation in his own defence. The complaint against him must not necessarily be drafted in the form of a formal charge. It is sufficient if the complaint as formulated conveys to him the nature of the accusation against him."*

That clinches any further argument on the matter. **It seems to me from the perspective of the decisions on the powers of an Employer to dismiss summarily his Employee for gross misconduct that the propelling keystone is the preservation of the constitutional right of fair hearing. Whether the Employee was first prosecuted for the criminal offences arising from his acts of miscon-**

duct pales into insignificance once the court is satisfied that the Employee was given a fair hearing in the sense of being confronted with the allegation against him and afforded the chance to make a representation in his own defence. In sum, contrary to the argument of learned counsel for the appellant the principle that where the act of misconduct by an Employee also amounts to a criminal offence the criminal offence must first be prosecuted before the Employer can exercise his power of summary dismissal of the Employee is not intended as law of the Medes and Persians. It is not an immutable principle. C

The overwhelming evidence before the trial court that at every turn the appellant was given the opportunity to challenge each allegation justifies the conclusion of the learned trial judge that the respondent's decision to dismiss the appellant was fair and lawful. That conclusion is impeccable. Therefore, I will resolve Issue Four against the appellant holding in effect that the appellant having been given a fair hearing by the bank before dismissing him his dismissal is unassailable and it is immaterial that he was not prosecuted for the criminal offences which his acts of misconduct constituted. D E

With the collapse of all the four Issues canvassed by the appellant it is fitting to recapitulate the cycle and salient features of the misconduct by the appellant with a panorama of the scenario of what led to his present scrapes as a mirror of the fairness of the respondent's decision to dismiss him. Here is an employee who for personal advantage falsified document in order to manipulate the employer's scheme of free medical facilities for her staff and who while he was sick and receiving free medical treatments at the expense of the bank fraudulently claimed and received overtime allowances for the work which he did not do. Here is a servant who is predisposed to formenting strifes and squabbles; a pugnacious freak with an uncommon proneness to malingery, truancy and insubordination. The traits depict the image of a chartered-libertine with an innate aversion to discipline and an irritant to a tranquil and orderly workforce. F G H

Therefore, on an overview of the merit of this appeal I can find no redeeming feature that holds out any hope for contrition by the appellant whose brief working career with the bank is shown from the evidence on the record to be an epitome of imprudence and bravadoes bordering on disdain for a constituted authority and whose profile betrays a nauseating level of delinquent streaks. Such a character cannot be the darling of business concern that puts a premium on rectitude and industry to which the exit of an incorrigible servant who does not share that value must come as a relief.

Everything considered, this appeal is without a shadow of merit. I affirm the judgment of the trial court and I dismiss the appeal with N2,000 costs for the respondent.

Appeal Dismissed.

D

### TOBI JCA

I agree entirely with the judgment of my learned brother, Olagunju, JCA. The law has almost repined into an aphorism or cliché if not totally so, that an employer who hires an employee has the corresponding right to fire him at any time. In so far as that is done within the four walls of the contract of service, the employee has no redress in law. The reverse position is also correct, and it is that an employee can at any time terminate or determine the contract of employment between him and his employer and so far as that is done within the terms of the employment, the employer has no remedy in law. The only situation where a party to a contract of employment can successfully seek remedy in a court of law is when the terms of employment are breached. The question here is whether such is the situation.

My learned brother has dealt with the issues involved in this appeal. I just want to add a few words of mine in respect of the submission of learned counsel for the appellant that the appellant ought to have been prosecuted and found guilty by a court of law before his dismissal. He cited a number of cases. In Dr. Denloye v. Medical and Dental Practitioners Disciplinary Committee (1968) 1 All NLR 306, the Supreme



court held that where the professional conduct of a practitioner amounts to a crime, it is a matter for the courts to deal with and once the court has found a practitioner guilty of an offence, if it comes within the type of cases referred to in section 13 (1) (b) of the Medical and Dental Practitioners Act, 1963, then the Tribunal may proceed to deal with him under the Act. In the case, the court held that the substance of the facts in each of the counts 2, 3, 4 and 5 were covered by various sections of the Criminal Code and the charges could have been laid under that code. Therefore the tribunal was wrong to have proceeded to try offences punishable under the Criminal Code and the proceedings in that respect were null and void.

In Sofekun v. Akinyemi and others (1980) 5-7 SC 1, another matter involving a medical practitioner, the Supreme Court held that since indecent assault of a female patient was an offence of a criminal nature, a panel of inquiry was not competent to try the doctor and dismissal based on such trial was wrong, untenable and void.

In Garba and others v. The University of Maiduguri (1986) 1 NWLR (Pt. 18) 550, the Supreme Court arrived at similar decision when the court held that by virtue of section 33 (1), (4) and (13) of the 1979 Constitution only a court of law or a judicial tribunal is competent to hear and determine a criminal charge against students of a University. Relying on the two cases I have considered above, Obaseki, JSC said at page 577:

*"A University student is a priceless asset and he is on the threshold of a world of useful service to the nation, we cannot afford to destroy him by stigmatizing him with guilt of offence unless proved guilty before a court."*

Applying the above three decisions of the Supreme Court, the position was that a person who committed criminal offences should be prosecuted by court of law before any dismissal. But that is not to be the position in all cases in the light of subsequent decisions which my learned brother referred to in his judgment.

*The case of Federal Civil Service Commission v. Laoye (1989) 2 NWLR (Pt. 106) 652 is one. The case of Yusuf v. Union Bank of*

Nigeria (1996) 6 SCNJ 203 is another.

In Laoye, Eso, JSC, said:

"... the decision in Garba should not be taken as a prohibition of instituting disciplinary measures against civil servants where there has been a criminal charge or accusation. However, other consideration might enter for once such criminal allegations are involved, care must be taken that the provision of S.33 (4) of the constitution are adhered to. It is not so difficult where the person so accused accepts his involvement in the acts complained of, and no proof of the criminal charges against him would be required. He has, in such a case, been confronted with the accusation and he admitted it. He would face discipline thereafter."

The exception placed on Garba by the Supreme court in Laoye does not apply to the instant appeal. This is because the appellant did not, in the words of Eso, JSC, "accept his involvement in the acts complained of." And so, Laoye is inapposite.

In Yusuf v. Union Bank of Nigeria Ltd supra, Wali, JSC said at pages 214 215;

"It is not necessary, nor is it a requirement under s. 33 of the 1979 Constitution that before an employer summarily dismisses his employee from his services under the common law, the employee must be tried before a court of law where the accusation against the employee is of gross misconduct involving dishonesty bordering on criminality... To satisfy the rule of natural justice and fair hearing a person likely to be affected directly by disciplinary proceeding must be given adequate notice of the allegation against representation in his own defence. The complaint against him must not necessarily be drafted in the form of a formal charge. It is sufficient if the complaint as formulated conveys to him the nature of the accusation against him"

I entirely agree with my learned brother that the above decision "Clinches any further argument on the matter". There is evidence that the appellant was issued a query on some of his lapses. It is not my understanding of the law that the constitutional provision of fair hearing and the common law principle of audi alteram partem can be satisfied only when a disciplinary body is constituted and the person heard on oral

evidence. In my humble view, the requirements of the law of fair hearing can be satisfied if the person is given an opportunity to defend himself in response to a query. And in such a situation, it does not matter whether the person refuses or fails to respond to the query. The important consideration is that the employer gave the employee an opportunity to defend himself of the allegations preferred against him. B

It is for the above reasons and the fuller reasons given in the judgment of my learned brother that I too dismiss the appeal and I do so by awarding N2,000.00 costs. C

### FABIYI JCA

I had a preview of the lead judgment just handed out by my learned brother, Olagunju, JCA. I completely agree with his reasons leading to the conclusion that this appeal lacks merit and should be dismissed. D

The cumulative negative behaviour of the Appellant which led to his deserved exit from the Respondent Bank's services reminds me of the saying in Shakespeare's Macbeth - "Once stepped in blood, never to wade any more." Appellant's self-inflicted misdeeds were legion. With reckless abandon, he consistently transgressed the rules, regulations and norms of the Respondent. His misconduct had no bound. Such included, inter alia, falsification of document to manipulate his employer's scheme for free medical treatment for her staff. While enjoying illicit, undeserved medical treatment, he claimed and received over-time allowance for work not done. He was a truant. Even when present at work, he would not stay at his beat. He was always insubordinate to his superior officers and clearly not amenable to discipline. He should the traits of one who is not a fit and proper person to continue working in the banking industry which should be a haven of honest and well behaved employees. E F G H

It is not a thing of astonishment to me that the Appellant was checked out of the Respondent's organization at the appropriate time so as not to infest other workers in his category. To my utter dismay,

however, he desired to have one-quarter of a million Naira (N250,000) into his kitty from the Respondent by attempting to pick holes in the law. Wonders may never end; it seems.

B To my mind, the Appellant belongs to the school of thought with the idea that the law is an ass atimes. It is gratifying to note that the learned Trial Judge, in his wisdom, made the appellant to realize the futility of his action by dismissing same in it's entirety.

C The Trial Judge clearly depicted that his court is not only one of law but that of equity as well. Equity must be employed to ameliorate the law as, and when, occasion demands same.

D I agree with my learned brother that the pragmatic, down to earth and balanced judgment of Ononiba, J. remains unassailable in all its ramification. I shall not tamper with it. No reasonable tribunal will find otherwise with the peculiar circumstances of the matter. For the reasons stated above and more especially those admirably adumbrated in the lead judgment, I also dismiss the appeal. As well, I endorse the order relating to costs in the lead judgment.

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