

SUPREME COURT OF NIGERIA

26th JANUARY, 2007 SC. 183/2001

**CORAM:- I. L. KUTIGI, U. A. KALGO, G. A. OGUNTADE,
M. MOHAMMED, I. F. OGBUAGU, JJSC**

PATRICK ZIIDEEH PLAINTIFF/APPELLANT
AND
RIVERS STATE CIVIL
SERVICE COMMISSION DEFENDANT/RESPONDENT

APPEALS - Issues - Newness of - Pleadings - Where issues were joined between the parties - On a subject vide their pleadings - Preliminary objection that the issue is new - Will be overruled (H1)

CONSTITUTIONAL LAW - Fair hearing - Fundamental nature of - Guaranteed under s. 33(1) 1979 Constitution - It cannot be waived nor be taken away by a statute - And it entails observance - Of the twin pillars of the rules of natural justice (H2)

TRIBUNALS - Fair hearing - Respondent being a domestic tribunal - Is bound to observe rules of natural justice - And breach of s. 33(1) 1979 Constitution - Will make decision reached a nullity (H3)

MASTER & SERVANT - Termination - Fair hearing - Where appellant's appointment was terminated - Vide a letter giving him notice - Fair hearing is not denied - Though Board of Inquiry's recommendation - Was not followed (H4)

MASTER & SERVANT - Wrongful termination - Proof - Fair hearing - Where an employee complains - That he was wrongfully terminated - Onus of proof rests on him - And appellant failed to discharge that burden (H5)

APPEALS - Pleadings - Civil Service Rules - As both parties pleaded

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facts - Related thereto - Court of Appeal was wrong - In holding that plaintiff never pleaded it (H6)

MASTER & SERVANT - Judicial precedents - Civil Service Rules - Iderima case - That dealt with dismissal - Is not on all fours with present case - That is based on termination (H7)

APPEALS - Concurrent findings - Exceptional circumstances - Where not shown by appellant - The findings will not be disturbed (H8)

FACTS

The plaintiff/appellant was a civil servant under the employment of the defendant/respondent in the Ministry of Commerce and Industry Port Harcourt as a Store Assistant. In 1977, it was discovered that 120 bales of stockfish worth N20,000.00 were missing in the store where appellant was serving. Appellant was interdicted and placed on half salary, was charged to a Magistrate's court for theft of the stockfish. He was discharged and acquitted on 1-11-1978. In 1984, a Board of Inquiry was instituted to investigate loss of the stockfish. The Board found appellant grossly negligent in causing loss of the stockfish, but recommended his reinstatement to his post in the civil service. Respondent however refused to act on this recommendation and proceeded to terminate appellant's appointment vide a letter dated 1-6-1984.

Being unhappy, appellant filed an action before the High Court. He claimed inter alia, that his termination was null and void. Appellant testified, tendered the letter of termination and the Report of the Board of Inquiry which were received in evidence as exhibits "A" and "B", respectively. One witness testified for the respondent. The appellant's action was dismissed by the trial court. His appeal to Court of Appeal was also dismissed. Still dissatisfied, appellant has further appealed to the Supreme Court.

ISSUES FOR DETERMINATION

"1. Whether the appellant was given a fair hearing as far as the several offences referred to in Exhibit A (the letter of termination) are

concerned.

2. *Whether the Court of Appeal was right in holding that the appellant never pleaded the Civil Service Rules.*

3. *Whether the Court of Appeal was right in holding that the appellant did not plead that his appointment was one with statutory flavour.”*

HELD (Unanimously dismissing the appeal per **MOHAMMED JSC**)

APPEALS - Issues - Newness of

1. There is no doubt whatsoever from these paragraphs of pleadings, that issues were joined between the parties on whether the appointment of the appellant was terminated in compliance with the specific Civil Service Rules and whether the appellant was given a fair hearing in the exercise. These same issues were raised by the parties at the court below and subsequently in this court. The issue of whether the Civil Service Rules were complied with in the termination of the appellant’s appointment by the respondent not being a new or fresh issue between the parties, was rightly raised by the appellant in this appeal. This takes care of the appellant’s preliminary objection. (p. 144 D)

Fair hearing - Fundamental nature of

2. The right of a person to a fair hearing is so fundamental to our concept of justice that it can neither be waived nor taken away by a statute, whether expressly or by implication. Fair hearing is not only a common law right but also a Constitutional right. Thus, by virtue of section 33(1) of the Constitution of the Federal Republic of Nigeria, 1979, relied upon in the present case, in the determination of his civil rights and obligations, a person is entitled to a fair hearing within a reasonable time by a court or other tribunal established by law. The requirement of this provision of the Constitution entails the observance of the twin pillars of the rules of natural justice, namely *audi alteram partem* and *nemo judex in causa sua*. (p. 145 G)

TRIBUNALS - Fair hearing

3. There is no doubt that the respondent which is a domestic tribunal

with quasi judicial jurisdiction, is bound to observe the rules of natural justice enshrined in section 33(1) of the 1979 Constitution. It is also well settled that the consequence of a breach of the rules of natural Justice as contained in section 33(1) of the 1979 Constitution of the Federal Republic of Nigeria is that the decision reached thereby is a nullity and liable to be set aside. (p. 146 E)

MASTER & SERVANT - Termination - Fair hearing

C 4. The question is whether in the instant case the appellant has established that the respondent had acted in breach of the rules of natural justice in terminating his appointment. The stand of the respondent on the appellant's claim is that it is not bound to accept the report of the Board of Inquiry to reinstate the appellant particularly when the same D report found the appellant grossly negligent in causing the loss of 120 bales of stockfish from the store where the appellant was serving to his employer. On those rather undisputed facts, it is difficult to see where the appellant's complaint of denial of fair hearing can be rooted. The E relevant part of the letter Exhibit 'A' which forms the basis of the appellant's complaint in this issue in paragraph one reads -

"TERMINATION OF APPOINTMENT

F In consideration of the fact that your records submitted to the commission have been found to be stained with several offences which show that you are not amenable to discipline in the spirit of the present regime, your services are no longer required. Consequently, the Commission has decided that your appointment should be terminated with effect from 1st July, 1984."

G Taking into consideration that this letter is dated 1st June, 1984, while the termination of the appellant's appointment was to take effect from 1st July, 1984, it means that the appellant was given one month's notice before the termination of appointment. Since the appellant is not H complaining of the termination of appointment with inadequate notice, his complaint of inadequate explanation of the nature of the offences mentioned in the letter as reasons for the termination of his appointment is quite irrelevant. (p. 146 G)

Wrongful termination - Proof

5. It has been firmly established that when an employee complains that his employment has been wrongfully terminated, he has the onus (a) to place before the court the terms of the contract of employment and (b) to prove in what manner the said terms were breached by the employer. The law is that it is not the duty of the employer as a defendant in an action brought by the employee to prove any of these facts. Thus, in the absence of even the appellant's letter of appointment into the Civil Service of Rivers State stating the terms of his employment and the right of the appellant or the respondent to terminate the same, the appellant has failed to prove that the termination of his appointment by Exhibit 'A' was a breach of his right of fair hearing resulting in that termination being null and void and of no effect as claimed by him. This issue is therefore determined against the appellant. (p. 147 F)

Pleadings - Civil Service Rules

6. The next issue for determination is whether the Court of Appeal was right in holding that the appellant never pleaded the Civil Service Rules. This issue has been partially resolved earlier in this judgment where the preliminary objection of the respondent on ground 2 of the grounds of appeal and issue 2 raised in the appellant's brief now under consideration. Having found that both parties pleaded facts relying on the Civil Service Rules at the trial court, the present issue must be resolved that the lower court was indeed wrong in holding that the appellant never pleaded the Civil Service Rules. (p. 148 A)

Judicial precedents - Civil Service Rules - Iderima case

7. The recent decision of this court in *Iderima v. Rivers State Civil Service Commission* (2005) 16 NWLR (pt. 951) 378 at 392-393 which the appellant claimed is on all fours with the present case was cited and relied upon. Unfortunately, that case of *Iderima v. RSCSC* (supra) is not on all fours with the present case as claimed by the appellant. This is because in that case, the Civil Service Rule 04107 relied upon by the

appellant exclusively dealt with the procedure to be observed in the dismissal of a civil servant. In that case this court in allowing the appellant's appeal, held that the dismissal of the plaintiff/appellant not having been made in compliance with the procedure laid down under Civil Service Rule 04107, was null and void leading to the setting aside of the concurrent judgments of the trial court and the Court of Appeal. However in the instant case, the appellant cannot take the advantage of that decision because he was not dismissed from the service of the respondent under Civil Service Rule 04107. While at the trial court on pleadings and evidence the appellant cited and relied on Civil Service Rule 04201, the terms of which were not disclosed at the trial court, the Court of Appeal or at the hearing of the appeal in this court, the appellant shifted the basis of his claim to Civil Service Rule 04107 dealing with procedure for dismissal and the case of *Iderima* (supra). In the present case the appellant's appointment was merely terminated in Exhibit 'A' by giving him one month's notice. Therefore, since dismissal from service does not form part of the case of the appellant in this appeal, he cannot expect to reap the benefit of the interpretation and application of the provisions of Civil Service Rule 04107 in *Iderima*'s case (supra) to justify the setting aside of the decisions of the trial court and the Court of Appeal in the present appeal. (p. 148 D)

Concurrent findings

8. Finally, the attitude of this court to concurrent findings of fact is well settled. Where there are concurrent findings of fact by the Court of Appeal and the trial court against the appellant, such findings can only be interfered with by this court when exceptional circumstances have been shown by the appellant. The appellant in the instant case not having shown by any cogent argument the existence of such exceptional circumstances to disturb these concurrent judgments, this appeal cannot succeed. (p. 149 E)

NOTABLE POINTS OF INTEREST
OGUNTADE JSC

1. Paucity of averments in Statement of Claim - A great undoing

The appellant would appear to have overlooked the fact that his employer, the Respondent, had not dismissed him as was the case in *Iderima v. Rivers State Civil Service Commission* [2005] 16 NWLR (Pt.951) 378, which he so tenaciously relied upon in his counsel's arguments before B us. This was an employment brought to an end with the requisite notice. That aside, the one remarkable thing with this case, was the paucity of averments in the appellant's statement of claim. One needed to squeeze tightly the averments pleaded to be able to determine the true nature of C appellant's case. This was his greatest undoing. (p. 150 F)

OGBUAGUJSC

2. Court cannot impose an employee on an employer

The Respondent, was not obliged to accept or implement any of the D recommendations of the Board of Inquiry including the re-instatement of the Appellant. This is because and this is settled, that a court, cannot impose or foist an employee on an unwilling employer. The remedy, is E always, an award of damages where the termination is held to be wrongful. But certainly, not a declaration that the termination (if wrongful), is null and void as appear in claims Nos. 1 and 2 of the Appellant. This is why, there cannot be relief for specific performance like an order for re-instatement. (p. 156 A) F

3. Some principles of law that guide master & servant relationship

I note that the Rule 04107 referred to in *Ideremi v. Rivers State Civil Service Commission* (supra), dealt with the procedure to be followed in G the dismissal of a Civil Servant and not with termination as in the instant case leading to this appeal. In any case, the case of *Ridge v. Baldwin* (1964) A.C. 40 @ 65 - per Lord Read, is an authority for the proposition that the failure to follow an agreed procedure before an employee's contract of service is terminated by his employer, only makes the employer, H liable in damages for the breach of the contract and no more.

Thirdly, in the Appellant's Brief in paragraph 5.30, it is stated that the Respondent is a creation of statute at all material times by the 1979

Constitution. I take it that this means that the Appellant's employment, has statutory flavour. If learned counsel for the Appellant, had realized that it is now firmly settled that in statutory employment, just as in private employment, an employer, can, summarily dismiss the servant in all cases of gross misconduct provided of course, the employee, is given the opportunity of fair hearing, I believe that he may not have made that contention. (p. 156 E)

REPRESENTATION

S. J. Ofoluwa for Plaintiff/Appellant.

A. M. Macarthy Oriye (Mrs.) (Senior State Counsel, Rivers State Ministry of Justice) for Defendant/Respondent.

CASES REFERRED TO

Ntukidem v. Oko (1986) 5 NWLR (pt.45) 909

UNTHMB v. Nnoli (1994) 8 NWLR (pt.363) 376

Bamgboye v. University of Ilorin (1999) 10 NWLR (pt.622) 290

Katto v. Central Bank of Nigeria (1999) 6 NWLR (pt.607) 390 at 405

Amon v. Amodu (1990) 5 NWLR (pt. 150) 356 at 370

Lengbe v. Imade (1959) SCNLR 640

Omoborinola II v. Military Government of Ondo State (1998) 14 NWLR (pt.584) 89

Ridge v. Baldwin (1964) A.C. 40 @ 65

Adimora v. Ajufo (1988) 3 NWLR (pt.80) 1

Idundun v. Okumagba (1976) 1 NMLR 200

Okorie Echi & Ors v. Joseph Nnamani & Ors (2000) 8 NWLR (pt.667)

1 at 12

Iderima v. Rivers State Civil Service Commission (2005) 16 NWLR (pt. 951) 378 at 392-393

Union Bank of Nigeria Ltd. V. Ogbob (1995) 2 NWLR (Pt.380) 649 @ 664; (1995) 2 SCNJ. 1

Imolome v. WAEC (1992) 9 NWLR (Pt. 265) 303 @ 318; (1992) 11-12 SCNJ. 121

Dr. Chukwumah v. Shell Petroleum Development Co. of Nigeria Ltd.

(1993) 4 NWLR (Pt.289) 512 @ 560; (1993) 5 SCNJ. 1

Francis v. Municipal Councillor of Kuala Lumpur (1962) 3 All E.R. 633;
(1962) 1 WLR 141

Bankole v. N.B.C (1968) 2 All NLR 372

Francis Arinze v. First Bank of Nig. Ltd. (2004) 12 NWLR (Pt.888) 663; B
(2004) 5 SCNJ. 183; (2004) 5 S.C. (Pt.1) 160; (2004) 5 S.CM 35

STATUTE REFERRED TO

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

C

LEAD JUDGMENT BY MOHAMMED JSC

This appeal is against the judgment of the Port Harcourt Division of the Court of Appeal delivered on 7-12-2000, dismissing the appellant's appeal against the judgment of the Ahoada trial High Court of Justice Rivers State of 29-11-1990 dismissing the appellant's action against the respondent. D

The appellant was a civil servant under the employment of the respondent in the Ministry of Commerce and Industry Port Harcourt as a Store Assistant. In 1977, it was discovered in the store where the appellant was serving that 120 bales of stockfish worth N20,000.00 were missing. The appellant who was interdicted and placed on half salary, was charged to a Magistrate Court for the theft of the bales of stockfish. F After the trial, the appellant was discharged and acquitted on 1-11-1978. However, in 1984, a Board of Inquiry was instituted to investigate the loss of the 120 bales of stockfish from the appellant's store. The appellant was invited to give evidence and testified before the Board of Inquiry which in its report, though found the appellant grossly negligent in causing the loss of the 120 bales of stockfish to his employers, recommended his reinstatement to his post in the civil service. The respondent however refused to act on this recommendation and proceeded to terminate the appointment of the appellant by a letter dated 1-6-1984. The appellant H who was not happy with this step taken by the respondent in spite of the recommendation of the Board of Inquiry, filed his action at the trial High Court and claimed the following reliefs against the respondent as the

defendant -

“(1) A declaration that the termination of the plaintiff by the Defendant is null and void and of no effect whatsoever.

(2) A declaration that the plaintiff is still a member of Rivers State Civil Service holding the post of Store Assistant thereof and is therefore entitled to be paid all his salaries and entitlements with effect from January, 1978 by virtue of the said employment.

(3) Plaintiff’s entitlements from January 1978 to December, 31st 1985 is N11,560.29k.”

At the hearing of the case on pleadings, the appellant as plaintiff testified in support of his claims and in the course of his evidence tendered the letter of termination of his appointment and the Report of the Board of Inquiry which were received in evidence as exhibits ‘A’ and ‘B’ respectively. Only one witness testified for the Defendant. In the judgment dated 29-11-1990 but delivered on 4-12-1990, the appellant’s action was dismissed by the learned trial judge. The appellant’s subsequent appeal against this judgment to the Court of Appeal was also dismissed on 7-12-2000. Still dissatisfied with the outcome of his appeal, the appellant has now further appealed to this court.

The appellant in his brief of argument raised three issues for the determination of the appeal from the three grounds of appeal filed by him. The issues read-

“1. Whether the appellant was given a fair hearing as far as the several offences referred to in Exhibit A (the letter of termination) are concerned.

2. Whether the Court of Appeal was right in holding that the appellant never pleaded the Civil Service Rules.

3. Whether the Court of Appeal was right in holding that the appellant did not plead that his appointment was one with statutory flavour.”

In the respondent’s brief however, the following two issues were identified.

“1. Whether the plaintiff/appellant was given fair hearing before his employment was terminated.

2. Was the Court of Appeal right in striking out issues 2 and 3

before it on the ground that the facts referred to therein were not pleaded and were being raised for the first time.”

In addition to the issues raised in the respondent’s brief, the respondent also raised a preliminary objection to ground 2 and issue 2, arising from it in the appellant’s brief as not having arisen from the decision of the court below because neither that court nor the trial court pronounced a decision on whether or not the Civil Service Rules were applicable to the case. Thus, being a fresh issue, leave was required to raise it in the appeal before this court in line with the decisions in *Rockonoh Property Co. Ltd v. NITEL Plc* (2001) 4 NWLR (pt.733) 468 and *Incar (Nig) Plc v. Bolex Ent. (Nig)* (2001) 12 NWLR (pt.728) 646.

The appellant however maintained that the issue relating to the application of the Civil Service Rules in this case was pleaded in paragraph 8 of the statement of claim while the respondent also responded in paragraph 5(b) of the statement of defence before the parties gave evidence in support thereof.

Looking at the pleadings of the parties at pages 4, 5, 27 and 28 of the record, particularly paragraph 8 of the statement of claim and paragraph 5 of the amended statement of defence, issue relating to the application of the Civil Service Rules was indeed pleaded. Paragraph 8 of the statement of claim reads -

“8. Surprisingly, rather than act on the report, the defendant by their letter of 1st June, 1984, purported to terminate the appointment of the plaintiff. The letter bore reference No. CPSC/240/S.5/53.

(b) Several offences referred to in the said letter of 1st June, 1984 were never made known to the plaintiff.

(c) Plaintiff was never given the opportunity to defend, answer, admit or deny the alleged offences; in short, plaintiff was not given a fair hearing.

(d) Plaintiff was never told he was to be dismissed or terminated in accordance with the Civil Service Rules.”

In reaction to the above paragraph, the respondent as defendant averred in paragraph 5 of the amended statement of defence the following facts-

“5. The Defendant does not admit paragraphs 8 and 9 of the plaintiff’s statement of claim and will at the trial contend as follows:

(a) That the defendant acted on the report of the Board of Enquiry which found a case of negligence resulting in loss of government funds against the plaintiff.

(b) That the defendant was not obliged to accept the recommendation of the Board of Enquiry that the plaintiff should be re-instated, since under Rule 04201 of the Civil Service Rules, negligence leading to loss of government funds is a very serious offence.

(c) The plaintiff was given a fair hearing in that he appeared and gave evidence before the Board of loss of the 120 bales of stockfish occurred.

(d) That under the 1979 Constitution of the Federal Republic of Nigeria, it is only the defendant that has the legal competence to terminate the plaintiff’s appointment.”

There is no doubt whatsoever from these paragraphs of pleadings, that issues were joined between the parties on whether the appointment of the appellant was terminated in compliance with the specific Civil Service Rules and whether the appellant was given a fair hearing in the exercise. These same issues were raised by the parties at the court below and subsequently in this court. The issue of whether the Civil Service Rules were complied with in the termination of the appellant’s appointment by the respondent not being a new or fresh issue between the parties, was rightly raised by the appellant in this appeal. This takes care of the appellant’s preliminary objection.

Going to the appeal, the first issue is whether the appellant was given a fair hearing as far as the several offences referred to in Exhibit A (the letter of termination) are concerned. Learned counsel to the appellant citing and relying on section 33(1) of the 1979 Constitution had submitted that the appellant not having been given the opportunity to defend himself on the various allegations of offences referred to in Exhibit A, the letter terminating his appointment, was served on him in breach of his right of fair hearing. Learned counsel explained that the appellant

had no quarrel with the report of the Board of Inquiry Exhibit 'B' on which both the trial court and the court below relied in dismissing his case. Citing a number of cases including *F.C.D.A. v. Naibi* (1990) 3 NWLR (Pt.138) 270 and *International Drilling Coy Nigeria Ltd v. Moses Eyemofe Ajijala* (1976) 2 SC 115 at 118-119, learned counsel concluded B that the appellant's appointment having been terminated by Exhibit 'A' in breach of his right of fair hearing, must be declared null and void in accordance with the law to restore the appellant to his post in the Civil Service.

For the respondent however, it was argued that since the trial C court and the court below were satisfied that the procedure adopted by the respondent in terminating the appointment of the appellant was in order, for the appellant to succeed in this appeal, he has to show that the decisions in the two courts below contravened the rules of natural justice D enshrined in section 33(1) of the 1979 Constitution, which the appellant had failed to do. Respondent's counsel observed that for an employer to dispense with services of his employee, all he needs to do is to afford the employee an opportunity of being heard before exercising his power of E summary dismissal even where the allegation for which the employee is being dismissed involves accusation of crime as was decided in *Jirgbagh v. U.B.N. plc* (2001) 2 NWLR (pt.696) 11. Counsel finally submitted that the appellant having failed to give cogent reasons why this court should F set aside two concurrent judgments of the two lower courts, this issue must be resolved against the appellant.

In this issue, the complaint of the appellant is that he was not afforded right of fair hearing before his appointment was terminated by G the respondent. **The right of a person to a fair hearing is so fundamental to our concept of justice that it can neither be waived nor taken away by a statute, whether expressly or by implication. Fair hearing is not only a common law right but also a Constitutional right. Thus, by virtue of section 33(1) of the Constitution of the Federal Republic of Nigeria, 1979, relied upon in the present case, in the determination of his civil rights and obligations, a person is entitled to a fair hearing within a reasonable time by a court or** H

other tribunal established by law. The requirement of this provision of the Constitution entails the observance of the twin pillars of the rules of natural justice, namely *audi alteram partem* and *nemo judex in causa sua*. See *Ntukidem v. Oko* (1986) 5 NWLR (pt.45) 909; *UNTHMB v. Nnoli* (1994) 8 NWLR (pt.363) 376 and *Bamgboye v. University of Ilorin* (1999) 10 NWLR (pt.622) 290.

In the present case, the appellant has no quarrel whatsoever with the steps taken by the respondent for interdicting him from service on account of his role in the loss of 120 bales of stockfish from the store where the appellant was serving as a store assistant, the setting up of a Board of Inquiry to investigate the loss in the store, the appearance of the appellant before the Board of inquiry to give evidence and the report of the Board of Inquiry a copy of which was given to the appellant. The complaint of the appellant is with the contents of Exhibit 'A', the letter terminating his appointment without giving him a fair hearing particularly when Exhibit 'A' came after the receipt of the Report of the Board of Inquiry Exhibit 'B' which recommended the reinstatement of the appellant to his post in the service of the respondent. **There is no doubt that the respondent which is a domestic tribunal with quasi judicial jurisdiction, is bound to observe the rules of natural justice enshrined in section 33(1) of the 1979 Constitution.** See *Wilson v. A-G Bendel State* (1985) 1 NWLR (pt.4) 572 and *Ex-parte, Olakunrin* (1985) 1 NWLR (pt.4) 652. **It is also well settled that the consequence of a breach of the rules of natural Justice as contained in section 33(1) of the 1979 Constitution of the Federal Republic of Nigeria is that the decision reached thereby is a nullity and liable to be set aside.** See *Adigun v. A-G of Oyo State* (1987) 1 NWLR (pt. 53) 678; *Olatunbosun v. NISER* (1988) 3 NWLR (pt.80) 25; and *Federal Civil Service Commission v. Laoye* (1987) 2 NWLR (pt.106) 652 at 699. **The question is whether in the instant case the appellant has established that the respondent had acted in breach of the rules of natural justice in terminating his appointment. The stand of the respondent on the appellant's claim is that it is not bound to accept the report of the Board of Inquiry to reinstate the appellant particularly when the**

same report found the appellant grossly negligent in causing the loss of 120 bales of stockfish from the store where the appellant was serving to his employer. On those rather undisputed facts, it is difficult to see where the appellant's complaint of denial of fair hearing can be rooted. The relevant part of the letter Exhibit 'A' which forms the basis of the appellant's complaint in this issue in paragraph one reads -

“TERMINATION OF APPOINTMENT

In consideration of the fact that your records submitted to the commission have been found to be stained with several offences which show that you are not amenable to discipline in the spirit of the present regime, your services are no longer required. Consequently, the Commission has decided that your appointment should be terminated with effect from 1st July, 1984.”

Taking into consideration that this letter is dated 1st June, 1984, while the termination of the appellant's appointment was to take effect from 1st July, 1984, it means that the appellant was given one month's notice before the termination of appointment. Since the appellant is not complaining of the termination of appointment with inadequate notice, his complaint of inadequate explanation of the nature of the offences mentioned in the letter as reasons for the termination of his appointment is quite irrelevant. This is because it has been firmly established that when an employee complains that his employment has been wrongfully terminated, he has the onus (a) to place before the court the terms of the contract of employment and (b) to prove in what manner the said terms were breached by the employer. The law is that it is not the duty of the employer as a defendant in an action brought by the employee to prove any of these facts. See *Katto v. Central Bank of Nigeria* (1999) 6 NWLR (pt.607) 390 at 405 and *Amon v. Amodu* (1990) 5 NWLR (pt. 150) 356 at 370. Thus, in the absence of even the appellant's letter of appointment into the Civil Service of Rivers State stating the terms of his employment and the right of the appellant or the respondent to terminate the same, the appellant

has failed to prove that the termination of his appointment by Exhibit ‘A’ was a breach of his right of fair hearing resulting in that termination being null and void and of no effect as claimed by him. This issue is therefore determined against the appellant.

B The next issue for determination is whether the Court of Appeal was right in holding that the appellant never pleaded the Civil Service Rules. This issue has been partially resolved earlier in this judgment where the preliminary objection of the respondent on ground 2 of the grounds of appeal and issue 2 raised in the appellant’s brief now under consideration. Having found that both parties pleaded facts relying on the Civil Service Rules at the trial court, the present issue must be resolved that the lower court was indeed wrong in holding that the appellant never pleaded the Civil Service Rules. What remains to be determined now is whether the point raised by the appellant in this appeal that his appointment not having been determined in accordance with the procedure laid down under Civil Service Rule 04107, is null and void and of no effect. The recent decision of this court in *Iderima v. Rivers State Civil Service Commission* (2005) 16 NWLR (pt. 951) 378 at 392-393 which the appellant claimed is on all fours with the present case was cited and relied upon. Unfortunately, that case of *Iderima v. RSCSC* (supra) is not on all fours with the present case as claimed by the appellant. This is because in that case, the Civil Service Rule 04107 relied upon by the appellant exclusively dealt with the procedure to be observed in the dismissal of a civil servant. In that case this court in allowing the appellant’s appeal, held that the dismissal of the plaintiff/appellant not having been made in compliance with the procedure laid down under Civil Service Rule 04107, was null and void leading to the setting aside of the concurrent judgments of the trial court and the Court of Appeal. However in the instant case, the appellant cannot take the advantage of that decision because he was not dismissed from the service of the respondent under Civil Service Rule 04107. While at the trial court on pleadings and evidence the appellant cited and relied on Civil Service Rule 04201, the terms of which

were not disclosed at the trial court, the Court of Appeal or at the hearing of the appeal in this court, the appellant shifted the basis of his claim to Civil Service Rule 04107 dealing with procedure for dismissal and the case of *Iderima* (supra). In the present case the appellant's appointment was merely terminated in Exhibit 'A' by giving him one month's notice. Therefore, since dismissal from service does not form part of the case of the appellant in this appeal, he cannot expect to reap the benefit of the interpretation and application of the provisions of Civil Service Rule 04107 in *Iderima's* case (supra) to justify the setting aside of the decisions of the trial court and the Court of Appeal in the present appeal. With this conclusion on the failure of the appellant to bring his case within the provision of Civil Service Rule 04107 to warrant the declaration of the termination of his appointment null and void, the need to look into the third issue in the appellant's brief as to whether or not the court below was right in holding that the appellant did not plead that his appointment was one with statutory flavour does not arise.

Finally, the attitude of this court to concurrent findings of fact is well settled. Where there are concurrent findings of fact by the Court of Appeal and the trial court against the appellant, such findings can only be interfered with by this court when exceptional circumstances have been shown by the appellant. The appellant in the instant case not having shown by any cogent argument the existence of such exceptional circumstances to disturb these concurrent judgments, this appeal cannot succeed. See *Lengbe v. Imade* (1959) SCNLR 640; *Omoborinola II v. Military Government of Ondo State* (1998) 14 NWLR (pt.584) 89; *Adimora v. Ajufo* (1988) 3 NWLR (pt.80) 1; *Idundun v. Okumagba* (1976) 1 NMLR 200 and *Okorie Echi & Ors v. Joseph Nnamani & Ors* (2000) 8 NWLR (pt.667) 1 at 12.

In the result this appeal fails and it is accordingly hereby dismissed. The judgment of the court below affirming the judgment of the trial court dismissing the appellant's action, is hereby affirmed.

There shall be N10,000.00 costs against the appellant in favour of the respondent.

KUTIGI JSC

I read in advance the judgment just delivered by my learned brother
B Mohammed, JSC. I agree with his reasoning and conclusions. The ap-
pointment of the Appellant was regularly and properly terminated by the
Respondent. The trial High Court therefore rightly dismissed Appellant's
claims and which decision was affirmed by the Court of Appeal. The
C appeal must therefore fail. It is accordingly dismissed with N10,000.00
costs in favour of the Respondent.

KALGO JSC

D I have read in advance the judgment just delivered by my learned
brother Mohammed JSC. I entirely agree with his findings and conclu-
sions in this matter and have nothing useful to add thereto. I also find no
merit in the appeal and I accordingly dismiss it with N10,000.00 costs in
E favour of the respondent.

OGUNTADE JSC

F I have had the advantage of reading in draft a copy of the lead
judgment of my learned brother Mohammed JSC. The appellant would
appear to have overlooked the fact that his employer, the Respondent,
had not dismissed him as was the case in *Iderima v. Rivers State Civil*
Service Commission [2005] 16 NWLR (Pt.951) 378, which he so tena-
G ciously relied upon in his counsel's arguments before us. This was an
employment brought to an end with the requisite notice. That aside, the
one remarkable thing with this case, was the paucity of averments in the
appellant's statement of claim. One needed to squeeze tightly the aver-
H ments pleaded to be able to determine the true nature of appellant's case.
This was his greatest undoing.

I would also dismiss this appeal with N10,000.00 costs against
the appellant as in the lead judgment of my learned brother Mohammed

OGBUAGU JSC

This is an appeal against the decision of the Court of Appeal, Port-Harcourt Division delivered on 7th December, 2000, dismissing the appeal of the Appellant and affirming the decision of the High Court Ahoada Judicial Division, formerly in the Rivers State presided over by St. Sagbe, J. delivered on 29th November, 1990. I note that in the Appellant's Brief under "INTRODUCTION" in paragraph 1.01, the date of the judgment of the Court of Appeal (hereinafter called "the court below"), is stated to be "the 2nd day of December, 2000". But at page 2 paragraph 2.05 thereof, the proper date is stated. It is unfortunate to say the least, that the learned counsel for the Appellant, did not vet the Appellant's Brief before signing and filing the same.

Dissatisfied with the said decision, the Appellant, has appealed to this Court on three (3) Grounds of Appeal. Without the particulars, they read as follows:

GROUND 1:

"The Court of Appeal erred in law in holding that the Appellant was given a fair hearing in so far as he appeared before the Board of Inquiry that investigated the missing 120 bales of stockfish and he (Appellant) was heard in respect thereof."

GROUND 2:

"The Court of Appeal erred in law in striking out Appellant's Issue No. 2 argued in the lower court on the ground that the Appellant did not plead non-compliance with the Civil Service Rules before his appointment was terminated".

GROUND 3:

"The Court of Appeal erred in law in striking out Appellant's issue No. 3 after holding that:

"Again there is no pleading to the effect that the appointment of the Appellant is an appointment with statutory flavour.

Having not pleading it, an issue cannot be formulated from it as I

said earlier in the same vein this issue and all the arguments based on it are accordingly struck out”.

The Appellant has formulated three (3) issues for determination, namely,

B “1. *Whether the Appellant was given a fair hearing as far as the several offences referred to in Exhibit A (the letter of termination) are concerned.*

C 2. *Whether the Court of Appeal was right in holding that Appellant never pleaded the Civil Service Rules.*

3. *Whether the Court of Appeal was right in holding that Appellant did not plead that his appointment was one with statutory flavour”.*

The Respondent on its own part, has formulated two (2) issues for determination, namely,

D “(1) *Whether the Plaintiff/Appellant was given fair hearing before the employment was terminated.*

E (2) *Was the Court of Appeal right in striking out issues 2 and 3 before it on the ground that the facts referred to therein were not pleaded and were being raised for the first time”.*

As far as I am concerned, the case of the Appellant, is that his termination is null and void and that the Respondent, did not comply with the procedure contained in the Civil Service Rules No. 04107 which he F maintains, was pleaded in his Statement of Claim, before his employment was terminated. This is the crux of the Preliminary Objection in respect of Issue 2 of the Appellant. This is borne out in the Reply to the Preliminary Objection filed on 4th October, 2006 and the reliance of the Appellant, on his Additional Authority dated 20th September, 2006 and filed on G the same 4th October, 2006. The case is E.P. Iderima v. Rivers State Civil Service Commission (2005) 16 NWLR (Pt.951) 378 also referred to by the learned counsel to the Appellant during the oral hearing of this appeal on 31st October, 2006. (it is also reported in (2005) 7 S.C (Pt. 111) 135 H and (2005) 7 SCNJ. 493). As rightly stated in the Appellant’s Brief, this was the basis on which the case was partly fought in the two (2) lower courts. What is however, not clear to me, is the submission in paragraph 2.02 that -

“if the Civil Service Commission (i.e. the Respondent) did not employ the Appellant they cannot terminate him for the power to employ also includes the power to terminate. See Longe v. First Bank of Nigeria PLC 1 (2006) All FWLR Pt.313 P.46”.

So, I or one may ask, why sue the Respondent? Then surprisingly, the following is stated:

“Above being the case the Respondent must comply with the Civil Service Rules before the Appellant can properly be terminated”.

I will therefore, deal with the said objection as to the jurisdiction of this Court to entertain Issue No. 2 of the Appellant in his Brief. The ground for the objection, is *“incompetent issues (fresh issues) raised without leave of the Appeal Court”.*

I note however, that in the Brief of the Respondent, the ground for the objection, is couched as follows:

“1. that issue 2 “whether the Court of Appeal was right is (sic) (meaning in) that the Appellant never pleaded the Civil Service Rules, does not arise from the judgment of the lower court or the grounds of appeal filed.

2. that it is a fresh issue and leave to raise it was not sought”.

For the objection, the cases of Rockonoh Property Co. Ltd. v. NITEL PLC. & anor. (2001) 4 NWLR (Pt.733) 468 (it is also reported in 2001) 7 SCNJ. 225) and Incar & anor. v. Bolex Enterprises (Nig.) (2001) ? NWLR (Pt.728) 646 (it is also reported in (2001) 5 SCNJ. 460). are cited and relied on. It is further submitted that Ground 2 of the Grounds of Appeal not covered by issues for determination, be deemed abandoned and that it should be struck out. The case of Sparkling Breweries Ltd. & ors. v. U.B.N. Ltd. (2001) 15 NWLR (Pt.737) 539 (it is also reported in (2001) 7 SCNJ. 321) is cited and relied on.

With the greatest respect to the learned counsel for the Respondent, this objection and the ground for the objection, are completely misconceived and boil down, to time wasting by the learned counsel and of this Court. This is because, the issue of Civil Service Rules and non-compliance with the procedure therein (which was pleaded in paragraph 8(d) of the Statement of Claim and replied to in paragraph 5(b) of the

Amended Statement of Defence at pages 25 and 26 of the Records), is Ground 3 of the Grounds of Appeal at the court below at page 66 of the Records. It was also raised as Issue (ii) for determination at page 82 of the Records. The court below at page 98 thereof, dealt with the issue and stated that Rule No. 04107 argued in the Appellant's Brief, was not made part of the Appellant's case at the trial. The said Issue 2 of the Appellant, is distilled from his Ground 2 of the Grounds of Appeal. To say therefore, as has been done in the Respondent's Preliminary Objection, that the issue does not arise from the judgment of the court below or in the Grounds of Appeal filed and that it is a fresh issue for which no leave was sought, with respect, is not an honest and a serious objection. I therefore, dismiss the said objection as being utterly frivolous.

Now, coming to the merits of this appeal, which deal with Master and Servant relationship, the complaint of lack of fair hearing, was also raised in the court below. The fact that the Appellant was in-charge of a store from where there was a loss of (120) one hundred and twenty bales of stockfish or which "disappeared". That as a result, the Appellant was charged to court, tried and later discharged and acquitted. That a Board of Inquiry was set up and that the Appellant testified along with other witnesses. The Board submitted its Report - Exh. "B" where it made certain recommendations which included that the Appellant, be re-instated. That the Respondent, however, terminated the employment of the Appellant hence the suit eventually leading to the instant appeal. All these are not in dispute.

The complaint by the Appellant therefore, that he was not given a fair hearing, in my respectful view, is baseless and I so hold. This is also because, at page 47 of the Records, the learned trial Judge stated inter alia, as follows:

"So that where a Board of Inquiry is set-up to enquire into a matter in which the plaintiff is alleged to have been involved and testified before such a Board and was given a copy of the report of the Board amounts in my view to a fair hearing. The plaintiff in his evidence said he knew the Board of Inquiry was set up solely for the purpose of enquiring into the loss of the 120 bales of stockfish. He also

agreed that the report of the Board was made available to him. That he read it and even made a copy for the C.S.C. (i.e. the Report). The plaintiff cannot therefore say that he was denied a fair hearing. He was heard. He also had the opportunity of commenting on the recommendations of the report. He read the report. I am not persuaded in the least therefore with the submission of learned counsel for the plaintiff that the plaintiff was not given a fair hearing”. B

See also page 51 of the Records lines 21 to 30 of the Records.

The court below was in full agreement with the said findings which it partly reproduced at page 101 of the Records. It stated that the finding is unimpeachable. I also agree. C

If Exhibit “A” - the letter of termination, stated that the records of the Appellant “*have been found to be stained with several offences which show that you are not amenable to discipline*”, it is now firmly established in a number of decided authorities, that under the common law, a master can dispense with the services of his employee with or without any reason whatsoever i.e. for bad or good reason or no reason at all. See the cases of Olaniyan & 2 ors. v. University of Lagos & anor. (1985) 2 NWLR (Pt.9) 599 @ 612; (1985) All NLR 363 - per Oputa, JSC; Nigerian Oil Mills Ltd. V. Daura (1996) 8 NWLR (Pt. 468) 601 C.A. and Isuevwore v. NEPA (2002) 13 NWLR (Pt.784) 417 @ 434; (2002) 7 SCNJ. 323 @ 331 - per Onu, JSC, citing Shitta-Bey v. Federal Public Service Commission (1981) 1 S.C. 40 @ 56 and many others. D E F

I note that the Appellant, at the trial court, did not plead, produce or tender, the terms and conditions of the contract of his service for employment. The court is therefore, unable to find, in what manner, the said terms, were breached by the Respondent. It is now firmly established that where an employee complains that his employment has been wrongly terminated, he has the onus, to prove how and in what manner, by the production of the terms and conditions of the contract of service. See Mrs. Fakuade v. Obafemi Awolowo University Teaching Hospital H Complex Management Board (1993) 5 NWLR (Pt.291) 42 @ 57 – 58; (1993) 6 SCNJ. 35; Ijeonyenani v. A.C.B. Ltd (1997) 6 NWLR (Pt.508) 340 & 346 C.A. and Federal Mortgage Finance Ltd. V. Hope O. Ekpo G

(2004) 12 NWLR (Pt.856) 100 @ 119-120 C.A. just to mention but a few.

I wish at this stage firstly, to state that the Respondent, was not obliged to accept or implement any of the recommendations of the Board of Inquiry including the re-instatement of the Appellant. This is because and this is settled, that a court, cannot impose or foist an employee on an unwilling employer. See *Union Bank of Nigeria Ltd. V. Ogboh* (1995) 2 NWLR (Pt.380) 649 @ 664; (1995) 2 SCNJ. 1; *Imolome v. WAEC* (1992) 9 NWLR (Pt. 265) 303 @ 318; (1992) 11-12 SCNJ. 121 and *Dr. Chukwumah v. Shell Petroleum Development Co. of Nigeria Ltd.* (1993) 4 NWLR (Pt.289) 512 @ 560; (1993) 5 SCNJ. 1 and many others. The remedy, is always, an award of damages where the termination is held to be wrongful. But certainly, not a declaration that the termination (if wrongful), is null and void as appear in claims Nos. 1 and 2 of the Appellant. This is why, there cannot be relief for specific performance like an order for re-instatement. See the cases of *Francis v. Municipal Councillor of Kuala Lumpur* (1962) 3 All E.R. 633; (1962) 1 WLR 141 and *Bankole v. N.B.C* (1968) 2 All NLR 372.

Secondly, I note that the Rule 04107 referred to in *Ideremi v. Rivers State Civil Service Commission* (supra), dealt with the procedure to be followed in the dismissal of a Civil Servant and not with termination as in the instant case leading to this appeal. In any case, the case of *Ridge v. Baldwin* (1964) A.C. 40 @ 65 - per Lord Read, is an authority for the proposition that the failure to follow an agreed procedure before an employee's contract of service is terminated by his employer, only makes the employer, liable in damages for the breach of the contract and no more.

Thirdly, in the Appellant's Brief in paragraph 5.30, it is stated that the Respondent is a creation of statute at all material times by the 1979 Constitution. I take it that this means that the Appellant's employment, has statutory flavour. If learned counsel for the Appellant, had realized that it is now firmly settled that in statutory employment, just as in private employment, an employer, can, summarily dismiss the servant in all cases of gross misconduct provided of course, the employee, is given

the opportunity of fair hearing, I believe that he may not have made that contention. See the recent case of Francis Arinze v. First Bank of Nig. Ltd. (2004) 12 NWLR (Pt.888) 663; (2004) 5 SCNJ. 183; (2004) 5 S.C. (Pt.1) 160; (2004) 5 S.CM 35.

Fourthly, there is also the concurrent findings of the two lower courts which have not been stated by the Appellant, to be perverse. In the circumstance, this Court, cannot interfere. See the cases of Abidoye v. Alawode (2001) 6 NWLR (Pt.709) 463; (2001) 3 SCNJ. 40; Obusoham v. Omarodior (2001) 13 NWLR (Pt.729) 206; (2001) 7 SCNJ. 168; Ojengbede v. Esan (2001) 18 NWLR (Pt.746) 771; (2001) 12 SCNJ. 41 and so many others.

In conclusion, on the state of the law, with respect, the three (3) issues of the Appellant, are hollow, unimpressive, uninspiring and lack substance. It is from the foregoing and the more detailed lead Judgment of my learned brother, Mohammed, JSC, that I find no merit in this appeal which fails. I also dismiss it with costs as assessed in the said lead judgment.

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