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From Contract Status: Unfair Dismissal Law

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Abstract

The economic effect of the lingering global Covid.19 pandemic has forced employers to downgrade employees from high-valued human resource assets to low-valued expendable personnel. The result is a large number of layoffs and dismissals. Although the major objective of the employer is to increase flexibility, efficiency and profit-margins, there are other pertinent conflicting interests that must be taken into consideration, and balanced. The employment relationship is a bargained exchange between different stakeholders and the interest of all stakeholders must be considered and balanced among the other competing interests. Termination of an employment relationship is one of such interest. Often done at the initiative of the employer, termination of employment has been predominantly based on Common Law rules which that affirm an employer's power to hire and fire at will, for good, bad or no reason at all. This power has brought about great injustice and an alarming rate of unfair labour practices. Consequently, legislations were enacted to cure the defects of the Common Law Rules. Hence, this paper focuses on unfair dismissal laws of Nigeria, showing the trajectory from contract to status in a quest for ensuring job security. The methodology adopted is the qualitative method.

Keywords: Labour Law, Job Security, Termination, Unfair dismissal, Performance Management

Introduction: The Rudiments of Fairness in Workplace Dismissals

The past four decades have experienced a growing private sector, which has the largest number of employment relationships, but the relationship between employers and employees in this sector continues to be a turbulent one and a source of unending ligation in Nigeria. This has led to the examination of the issue of fairness in dismissals in order to curtail unfair practices and help harmonize the employment relationship. Generally, fairness implies an elimination of one's own feelings, prejudices and desires so as to achieve a proper balance of conflicting interests.[1] Fairness is a concept that revolves around what is right and equal, which is usually hard to interpret. One of the most

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[1] Webster's Ninth New Collegiate Dictionary (1991)

intricate and difficult challenges in the labour jurisprudence is to strike an appropriate balance between the interpretations, and perceptions, of the concept of fairness held by employers, employees and the state.[2] However, there exists a link between equality and unfair dismissal. The absence of equality indicates the presence of discrimination. Underpinning the concept of equality is the emphasis on dignity.[3]

Equality is a simple concept, yet there exists divergent opinions as to what equality is and how it should be incorporated into the society.[4]To promote fairness in dismissal in relation to equality in the workplace, there are two approaches--formal and substantive. For the purpose of this work, the formal approach is better suited based on 'neutral' law, practice, or criterion, which applies equally to employees at work. This brings about procedural justice because when people are in similar situations, treating them in a different manner invariably perpetuates, rather than eradicate, injustices. Fairness in the work place with respect to dismissal is best achieved through the content of legislation,[5] ensuring compliance with the applicable legislative measures and codes. Not only must all legal requirements be adhered to, but the employer must also comply with his own set of workplace rules, which are often contained in a disciplinary code and have strong documentation on issues arising from managing employee relations. Thus, a simple dismissal for misconduct may require a consideration of such matters as the nature and degree of misconduct, the employee's previous records, the procedures adopted by the employer, the employer's treatment of previous cases and the size and requirements of the business.

Under the Nigerian labour law, there is a world of difference between dismissal and termination of employment, even though they both end the contractual employment relationship. The apex court has lucidly enunciated this distinction in the case of *Jombo v P. E. F. MGT. Board*,[6] where Katsina-Alu, JSC stated, thus:-

> ''Termination'' and or ''Dismissal'' of an employee by the employer translates into bringing the employment to an end. Under a termination of appointment, the employee is enabled to receive the terminal benefit under the contract of employment. ''Dismissal'' on the other hand is punitive and, depending on the contract of employment, very often entails a loss of

[2]The *Sidumo& another v Rustenburg Platinum Mines Ltd & others* [2007] 12 *BLLR* 1097 (CC)
[3]Fredman, S. 2002. *Discrimination Law.* Retrieved 19th January, 2017 from www.oxford.co.za
[4]Holtmaat, R. 2004. The Concept of Discrimination. *Academy of European Law Conference Paper*. Retrieved 19th November 2016 from www.era.int; MaLachlin, B. 2001. Equality: The Most Difficult Right. *The Supreme Court Law Review*. 14.1:2-15.
[5]Gleason S. and Roberts K.1993. Worker Perceptions of Procedural Justice in Workers' Compensation Claims: Do Unions Make a Difference? *Journal of Social Psychology 97.*133:429-434
[6]*Jombo V P. E. F. MGT. Board* (2005) 7 SC PT.II 30 @ 43/44 PARAS 40-45

> terminal benefits. It also carries an unflattering opprobrium to the employee.[7]

However, both terms will be used interchangeably because they both signify termination by the employer.

Unfair dismissal laws seek to extend basic ideas of fairness and justice to determination of the working relationship, and have made it possible to restrict the unfettered discretionary power of the employer over dismissal.[8]Unfair dismissal legislation involves balancing two public interests: substantial and procedural fairness in the determination of employment and commercial freedom.[9] This provides employment with a human face[10] which is a productive and efficient employment relationship that also fulfils the standards of human rights.[11] It prohibits employers and unions from engaging in specified acts, which constitute unfair labour practice,[12] and establishes obligations for both parties to engage in collective bargaining.

The basis of unfair dismissal law in governing subordinate employment is the need to protect the workers who are legally and socially the weaker party with respect to bargaining position.[13] Another rationale for unfair dismissal law is to follow international labour best practice and avoid the harshness that is characteristic of common law's employment at will[14] while providing better protection for employees and promoting "the

[7]*Ibid*, see also *CBN &anor v. Mrs Agness M. Igwillo* [2007] LPELR-835(SC); [2007] 14 NWLR (Pt. 1054) 393; [2007] 4-5 SC 158 at 200; His Lordship Ogbuinya, JCA *in Alhaji M. K. v. First Bank of Nigeria Plc*&anor [2011] LPELR-8971(CA):

[8]Yemin, E. 1976.Job Security: Influence of ILO Standards and Recent Trends. *International Labour Review* 113:17.

[9]Honor, F. Unfair Dismissal: The New Laws http://www.essexprimaryheads.co.uk/sites.pdf accessed at 9:15am on 23rd May, 2013.

[10]*Ibid,* Kaufman, B. E. 2008, Managing the Human Factor: The Early Years of Human Resource Management in
American Industry, p. 278.

[11]Budd J. W. 2004, *Employment with a Human Face: Balancing Efficiency, Equity, and Voice,* p.2.

[12]*CCB (Nig.) Ltd v. Okonkwo* [2001] 15 NWLR (Pt. 735) 114; 262; *Aghata N. Onuorah v. Access Bank Plc* [2015] 55 NLLR (Pt. 186) 17; Samson KehindeAkindoyin v. UBN Plc [2015] 62 NLLR (Pt. 217) 259 and *Mr. Valentine Ikechukwu Chiazor v. Union Bank of Nigeria Plc* unreported Suit No. NICN/LA/122/2014, the judgment of which was delivered on 12th July 2016), *Ineh Monday Mgbeti v. Unity Bank Plc* unreported Suit No. NICN/LA/98/2014,

[13]Diego, F. and Kuddo, A. 2010.Key Characteristics of Employment Regulation in the Middle East and North Africa, SP. *Discussion Paper.* 1006. P. 21-22.

[14]*Ajuzi v. FBN Plc* [2016] LPELR-40459(CA) and *Oniga v. Government of Cross River State &anor*[2016] LPELR-40112(CA); *National Electric Power Authority V. John OjoAdeyemi* (2007) 3 NWLR (pt. 1021) 315

'rule of law' in what was seen to be an embattled field.[15] Due to this, unfair dismissal law is mirrored in the light of the conduct of the employer.[16] However, in other to have a wholesome perspective, employer's right must be juxtaposed with that of the employee.[17] On the part of the employer, the departure of a worker in most circumstances rarely constitutes more than a mere inconvenience or distraction. However, on the part of an employee, a job loss could lead to unpleasant situations,[18] such as insecurity, psychiatric disorders, depression, physiological ailments and poverty, not only for the employee, but also for his dependants.[19] Thus, the position is no confirmed employees should lose their jobs except for a valid reason[20] given at the time which is connected with the capacity or conduct of the employee, or based on the operational requirements of the employment concerned. This simply means the employer will have to be more careful in dealing with the employee. The employer must keep proper records in order to show the trail of events leading to the termination of contract of service when called upon.[21]

Despite all these, defaulting employees can have their employment terminated, or suffer dismissal, but only after the employer has followed due process of the law. Thus, the disciplinary rules and penalties adopted by an employer should create certainty and consistency in application. This will help protect employees from arbitrary actions. Performance problem, where necessary in the workplace must be well documented and the procedure stipulated in the company's performance manual must be followed.[22] The purpose of documentation is not only to protect employer against a law suit but to also show steps taken to help the employee to be successful. Good documentation creates credibility for the employer by showing that employees are treated in a fair and consistent manner.[23]

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[15]Agomo, C.K. 1997. Natural Justice and Individual Employment in Nigeria, in I.O. Agbede and E.O. Akanki (eds), *Current Themes in Law*, University of Lagos Press, 95-117 at 101.Mordsley B. and Wall S. 1983. *Cornell International Law Journal*. 16:1- 47.

[16] The orthodoxy has always been to view employment/labour law from the prism of employee rights, in the light of trying to level up the employee's bargaining power with that of the employer

[17] See Rao, E. 2008. *Industrial Jurisprudence: A Critical Commentary.* India, New Delhi: LexisNexis Butterworths. p. 271 – 336 on right of employer.

[18]Oyewunmi, A.O., Job Security and Nigeria Labour Law: Imperatives for Law Reform, p. 28.

[19] See Ferrie, J., Shipley M., Stanfield S., et al., 2002. *Effects of Chronic Job Security and Change in Job Security on Self-Reported Health, Minor Psychiatric Morbidity, Physiological Measures and Health Related Behaviours in British Civil Servants: the Whitehall II Study,* p. 451.

[20]Article 4, of the Convention concerning Termination of Employment at the Initiative of the Employer (C158), entry into force 1985, adoption: Geneva, 68th ILC session 1982

[21]*Ibid*

[22]*Clement AbayomiOnitiju v. Lekki Concession Company Limited* unreported Suit No. NICN/LA/130/2011, the judgment of which was delivered on 11th December 2018.

[23]*Mr. AdewaleAina v. Wema Bank Plc &anor*unreported Suit No. NICN/LA/162/2012 the judgment of which was delivered on January 28, 2016

Documentation of discipline or termination must be supported by evidence of employee's misconduct, or the lack of capacity, and the employee's defence to the queries.[24] Following the laid down organisational procedure shows procedural justice. For example, where an employer conducts a management performance evaluation on an employee and scores him low contrary to the normal procedure of evaluating performance, it shows arbitrariness. Where performance review procedure is not followed and the employee is dismissed based on the reliance of such appraisal, it shall amount to unfair dismissal.[25] [26] Consequently, the employers must follow due process, and once an employer gives a reason for terminating or dismissing an employee, the burden lies with the employer to justify the said reason.[27]

The test of unfair dismissal underlies the values of the right to dignity of a person, and personal autonomy.[28] The law that governs cessation of a contract of employment occupies a position of considerable importance in any developing society. Before the third alteration to the Nigerian Constitution,[29] cessation of contracts of employment was left to reside within the private law sphere, which entrenched the freedom of contract with the spirit of free enterprise translated into the employer's right to hire and fire at will. The right of a workman to work was reduced to his right to be given notice of the termination of the contract or to payment of the agreed wage or salary in lieu of notice without any other consideration. The decision to dismiss fell within the complete hold of management through management–initiated programs to determine when, how and why a contract of employment shall cease. The motive for cessation of the contract was of no relevance to the Nigerian labour law; while the playing field upon which distributive conflict between the employer and the employee strives was left in the private sphere and treated as immutable by the Nigerian labour law. However, total reliance on management-initiated programs to determine cessation of an employment contract has not been so reliable.

[24]*Bello Ibrahim v. Eco Bank*, unreported case, Suit No. NICN/ABJ/144/2018 the judgment of which was delivered 17th December, 2019 by Honourable. Justice SanusiKado

[25]*Mr. Gabriel Ologun V. Benaiz Health Care Limited*, unreported case, suit no. NICN/LA/379/2013, judgement delivered on 2016-03-18 by Hon. Justice OyewumiOyebiola O

[26]*Ibid*

[27] See *Angel Shipping & Dyeing Ltd v. Ajah* [2000] 13 NWLR (Pt.685) 551 CA.*Institute of Health ABU Hospital Management Board v. Mrs Jummai R. I. Anyip* [2011] LPELR-1517(SC); *George Abomeli v. Nigerian Railway Corporation* [1995] 1 NWLR (Pt. 372) 451, *Ogunsanmi v. C. F. Furniture (W.A.) Co. Ltd* [1961] 1 All NLR 224 and *Mr. KunleOsisanya v. Afribank Nigeria Plc* [2007] All FWLR (Pt. 360) 1480 SC at 1491; [2007] 1 – 2 SC 317.

[28] Howe, J. 2017. Rethinking Job Security: A Comparative Analysis of Unfair Dismissal Law in the UK, Australia and the USA. p. 8

[29] The Constitution of the Federal Republic of Nigeria, 1999 Third Alteration Act, 2010

What is unfair dismissal? *Unfair dismissal* is the cessation of a contract of employment by the employer without good reason or unfair or inadmissible reasons, or the employer fails to follow the laid down procedure or follows a procedure contrary to the country's specific legislation. The Nigerian constitution does not define what unfair dismissal is, but the African Charter on Human and Peoples Rights (Ratification) Act makes provision for the right to work under equitable and satisfactory conditions.[30] This right impliedly tends to ensure the fairness in workplace dismissal even though it does not expressly state "fairness in workplace dismissal". However, this provision is not enforceable in the sense that a citizen cannot insist that he must be found a suitable job but surely, those who have suitable jobs must be protected from losing them. It may be argued that this position is a clear invitation to employees, once confirmed, to do as they please and that employers shall be forced to keep undeserving employees on their payroll. However, this argument cannot hold. The right interpretation is that no confirmed employee shall lose his job except for a valid reason given at the time which is connected with capacity or conduct of the employee or based on the operational requirements of the employment concerned. This simply means that employers will have to be more careful in dealing with their employees and they will have to keep better records; but bad employees will still have to go after due process is followed.[31]

Unfair dismissal has a wide-ranging effect on labour relations at the work place. It runs through the policies, processes and procedures an employer employs i.e. in resolving misconducts, performance management process, the terms on which he offers employment, transfer, training or other benefits, and dismissal. There are two categories of unfair dismissal, which are the dismissal based on an unfair reason, and dismissal based on procedural unfairness. Dismissal based on an unfair reason is where an employer dismisses an employee for a reason that does not fall within the valid reasons for dismissal connected with capacity or conduct of the employee or based on the operational requirements of the employment concerned. While dismissal based on procedural unfairness is simply the blatant failure to follow the company's laid down procedure or treats an employee less favourably than others leading to a dismissal or failure to follow the principle of fair hearing in resolving misconduct. The procedural steps should be transparent and employee affected by the decision emerging from a panel or performance management process should have the opportunity to scrutinize the basis upon which decisions were made.

[30] The provisions of the African Charter on Human and Peoples Rights (African Charter), which has been ratified and domesticated, making the charter part of Nigeria's domestic laws, see Article 15 African Charter on Human and Peoples Rights (Ratification and Enforcement) Act Cap A10LFN 2004.

[31] *Babatunde Olusegun Fehintola v International Medical Corps unreported* case Suit NICN/ABJ/221/2017, delivered 6th May 2020

2.0 From Contract to Status: In a Quest for Equity

Employment law deals majorly with the contract of employment which is the basis of the relationship between the employer and his employee. The contract of employment, which lays the foundation of this relationship, is a product of the Industrial Revolution and the 19th century laissez-faire.[32]The principle of laissez faire assumes freedom of contract, sanctity of contract and equality of bargaining power between employers and employees.[33]Under common law, the principle of laissez faire was upheld and the freedom of contract was as far as possible to be left unimpaired, guaranteeing freedom for the employer and the employee to mould the relationship as they see fit, except in so far as they are hamstrung by illegality and public policy.[34] However, it presupposes equality between the parties but tends to ignore other social and economic considerations which may make this equality and its underlying freedom an illusion, fictitious and hollow.[35]

The employer's predominant interest in entering into an employment relationship is efficiency--the productive, profit-maximising, and effective use of labour to promote economic prosperity-- grounded on property right. Property right is the right of the employer to use its property as the employer sees fit. The major way that society has come to agree on the rules of property started was with the growth of common law.[36] On the other hand, the employee's predominant interest in entering into an employment relationship revolves around two factors: equity and voice; equity and voice stem from concern about the treatment and rights of employees as human beings. Equity is the rights of the worker as a seller of his or her labour power, hence, the rise in the agitation for a combination of rights in fairness in the distribution of economic rewards, the administration of employment policies, and the provision of employee security leading to fair wages, fair condition of work and treatment, non-discriminatory environment, and having fair labour standards.[37] Voice is the power of bargaining, self-determination, grievance procedures and co-determination, which create an enabling environment for employees to have a voice, or input and influence, in the affairs of their work.

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[32] See Adeogun A.1986. From Contract to Status in Quest for Security. *University of Lagos Inaugural Lecture Series.* University of Lagos Press. P.8; Chianu, E. 2003. Laissez Faire in Nigerian Contract Law: Historical Perspective. *Journal of Private and Property Law* 23: 50-70. p.58; Smith, A. 1776. *An Inquiry into the Nature and Causes of the Wealth of Nations.* 1st ed. p.21.

[33] Pound, R. 1909. Liberty of Contract. *The Yale Law Journal*. 18.7: 454 – 487.

[34]*Supra* see note 37, Bentham J.

[35]*Supra* see Adeogun A. 1986; *Ridge v Baldwin* [1964] AC 40, 65; Lord Reid repeated the same principle in *Malloch v Aberdeen Corporation* [1971] 2; *Olanrewaju v Afribank plc*; (2001) 72 FWLR 2008

[36] Bentham J. 1952. *Economic Writings*. Ed. Stack. London. P.129

[37] Budd, J. W. 2004. Employment with a Human Face: Balancing Efficiency, Equity, and Voice. Ithaca, New York: ILR Press.

The law still remains that the relationship between an employer and his employee is a contractual one and it is governed and regulated by the terms and conditions of the contract between them.[38] The law is also settled that the rights, obligations and liabilities of the parties to such a contract, are to be determined on the basis of the terms and conditions to which they have freely and voluntarily agreed to govern and regulate the relationship between them.[39] In addition, the law does not permit a court to alter, by subtraction or addition, or re-write the terms and conditions of a contract entered into by the parties, on the pretext of exercising a judicial discretion that completely ignores the sanctity of their agreement.[40]

However, there arose the gradual movement from the concept of freedom of contract to the concept of status, where the court is duly clothed with power to apply international labour best practices based on the facts presented by the party seeking to enjoy the benefit of the international best practice irrespective of the contract.[41] Thus, the right of employees in regard to termination by the initiative of the employer has become a matter not of contract but of status. This simply means it is feasible to have the concept of "status" in a relationship initially brought about by agreement of the parties. Thus, the parties enter into a contract based on their own terms but regulated by law as to its substance and termination.

In other words, the substance and termination of the relationship are determined by legal norms withdrawn from the parties' contractual freedom. According to Bronstein, the goal of labour law is to ensure that no employer can be allowed to impose and no worker can be allowed to accept conditions of work which fall below what is understood to be a decent threshold in a given society at a given time.[42] Labour law is not just a means of regulating the exchange between labour and capital as civil or commercial law does with respect to civil or commercial contracts; rather, it is a means (indeed it is the principal means) to set in motion what the International Labour Organization (ILO) defines as 'decent work', which, in addition to protecting the worker, calls for the respect of democracy in overall labour relations, including at the work-place. Of course, the concept

[38] In *Oak Pensions Ltd v. Olayinka* [2017] LEPLR-43207(CA); [2018] 12 ACELR 85, *NEPA v. Adesaaji* (2002) 17 NWLR (797) 578; *Momoh v. CBN* (2007) 14 NWLR (1055) 504*; Osakwe v. Nig. Paper Mill Ltd* (1998) 10 NWLR (568) 1; *PAN v. Oje* (1997) 11 NWLR (530) 625

[39]*S. S. Co. Ltd v. Afropek Nig. Ltd* (2008) 18 NWLR (1118) 77; *Calabar Cement Co. Ltd v. Daniel* (1991) 4 NWLR (188) 750; *Katto v. CBN* (1999) 6 NWLR (607) 390.

[40]*Owoniboys Technical Services Limited v. UBN Limited* (2003) 15 NWLR (844) 545; *Mazin Engineering Limited v. Tower Aluminum* (1993) 5 NWLR (295) 526; *Dalek Nigeria Limited v. OMPADEC* (2007) 7 NWLR (1033) 402; *Nwobosi v. ACB Limited* (1995) 6 NWLR (404) 658 @ 674; *Simon Ansambe v. Bank of the North Ltd [*2005] 8 NWLR (Pt. 928) 650

[41]*Mr. Peter EnemonaAdejo V Arksego Nigeria Limited* unreported case, suit no. NICN/ABJ/354/2017, judgement delivered on 20th May 2020 by Hon. Justice SanusiKado

[42]Bronstein A. 2009. *International and Comparative Labour Law: Current Challenges.* Palgrave Macmillan, pp.1, 2

of decent pay and decent compensation are all embedded in that of decent work.[43] Consequently, this depicts the gradual movement towards status of employment, a realisation that guarantees the rights of employees and ousts the outmoded conceptual framework of "employment at will." These point to the importance of state intervention ensuring that labour law regulates and facilitates employment relationship by balancing unequal bargaining power.

3.0 Letters of the Law v. the Spirit of the Law on Unfair Dismissal

As business models become more complex, the employment relationship keeps on evolving. We are faced with a situation where the practice of having a labour law is being replaced with the spirit of the law. The trend is simply moving away from hard and fast laws to laws that give more flexibility thereby leaving an expectation that the employer needs to own its risk based on its conduct and manage its affair in a prescribed manner taking into consideration international best practices. This is because international best practices in labour or industrial relations are almost always mirrored in the light of the conduct of the employer. The actions (or inaction) of the employee are seldom, if ever, the subject of consideration in this regard.[44] The letter of the law on unfair dismissal can be categorised into international labour law, regional labour law and the national laws on unfair dismissal.

(a) International Labour Law on Unfair Dismissal

The ILO has been in the frontline of settling, recommending and prescribing international labour standards for member nations of the United Nations, which Nigeria is a member. The ILO adopts both conventions and recommendations in setting standards. Conventions are designed to create legal obligations for the States which ratify them, while recommendations have no mandatory force but are essentially guides to national action.[45] The ILO Convention Concerning Termination of Employment at the Initiative of the Employer[46] ("Convention") has its genesis in an ILO Recommendation on Termination of Employment adopted in 1963. On 2nd June 1982, the Governing Body of the International Labour Office met for the 68th time in Geneva and adopted the Convention, which regulates termination of employment at the initiative of the employer.[47]

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[43]*Ibid*

[44]See *James AdekunleOwulade v. Nigeria Agip Oil Company Limited* unreported Suit No. NICN/LA/41/2012 the judgment of which was delivered on 12th July 2016.

[45] See Jenks, W. 1935. Some Characteristics of International Labour Conventions'. *Canadian Bar Review* XIII: 448; Cordova, J. 1993. Some Reflections on the Overproduction of International Labour Standards. *Comparative Labor Law Journal*. 14.2:57

[46]*Supra see* (the ILO Convention (C158))note 20.

[47]Mahomed, A. 2002. Harsh Manner of dismissal: A Worker's Remedy at Common Law and Statute in Selected Countries. *Journal of Malaysian Bar 3*.31:2

Examining some pertinent provisions of the Convention, Article 4 provides that the employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service.[48] This removes the possibility of the employer to unilaterally end an employment relationship of indeterminate duration by providing for requirement of issuing notice or compensation in lieu thereof. This simple statement as outlined in Article 4 grants employees a guarantee to substantive fairness at the workplace. Thus, the employer may dismiss the employee, but not arbitrarily or capriciously. This undermines the employment at will doctrine. Article 5 provides that a number of reasons shall not constitute valid grounds for termination. Included in the list, which is not exhaustive are union membership; acting in the capacity of a workers' representative, race, colour, sex, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin, temporary illness or injury of a worker and absence from work during maternity leave.[49]Article 6 broaches on the issue of absence from one's place of employment due to temporary illness and provides that such "shall not constitute a valid reason for dismissal." Article 6 refrains, however, from stipulating how long an employer must keep a job open for an ill employee; rather, the Article leaves it to the various countries to determine by their national law and practice on the specific of this particular area of protection. A critical examination of these provisions shows that there is equilibrium with the letter of the rules and the spirit of the rules. The Convention states explicitly what the rule is and its intendment (the spirit of the rule).

(b) Regional Labour Law on Unfair Dismissal

The African Charter on Human and Peoples Rights (also known as the Banjul Charter) is a regional human right instrument that promotes and protects human rights and basic freedoms in the African Continent. The African Charter on Human and Peoples' Rights (African Charter) establishes a system or mechanism for the promotion and protection of human rights in Africa within the framework of the African Union. The African Charter promotes a range of human rights such as civil and political, socio-economic and cultural, individual and collective rights. The African Charter is the first regional mechanism to incorporate the different classes of human rights in a single document.

Examining the pertinent provision of the African Charter in relation to unfair dismissal; the Charter provides that every individual shall have the right to work under equitable and satisfactory conditions, and shall receive equal pay for equal work.[50] This provision does not expressly refer to unfair dismissal but can be inferred from the guarantee of the right to work. The provision does not also state or list the equitable or satisfactory condition of

[48]*Supra* note 20
[49]Article 6, *ibid*
[50]*Supra* note 30 (Article 15)

work. The Charter shows the trend of moving away from hard and fast laws to laws that give more flexibility, principle-based rules and judgement-based rules; with more emphasis on the conduct of the employer.

(c) National Laws on Unfair Dismissal

The Nigerian Labour Act[51]makes provision for the cessation of an employment relationship but the Act is seemingly still a relic of the received English law as at 1900, which holds firmly to tenets of employment at will. The Labour Act states that either party to a contract may terminate the contract on the expiration of notice given by the other party of his intention to do so. However, the Act is silent on the provision of giving a valid reason.[52] The motive of exercising the right does not render the exercise of the right ineffective.[53] This upholds the position of common law whereby the employer can terminate an employment for reason (good or bad) or no reason at all.[54]

The African Charter has been ratified and domesticated, thus, making it part of Nigeria's domestic laws.[55] Article 15 provides that every individual shall have the right to work under equitable and satisfactory conditions, and shall receive equal pay for equal work.[56]

The Third Alteration to the 1999 Constitution[57]and the National Industrial Court (NIC) Act[58]also brought about some significant changes with respect to unfair dismissal. Section 254C (1), (f)[59] and (2)[60] provide that

> … the National Industrial Court shall have and exercise jurisdiction to the exclusion of any other court in civil causes and matters -
> (*f)* relating to or connected with unfair labour practice or international best practices in labour, employment and industrial relation matters.
>
> (*h*) relating to, connected with or pertaining to the application or interpretation of international labour standards;

[51] Labour Act, Cap L1 Laws of the Federation of Nigeria, 2004.
[52]*Mr. AkinniyiWaheedOlayiwola Vs Multiverse Mining And Exploration Plc,* unreported case no. NICN/IB/28/2016 delivered by Justice J. D. Peters, 6th June 2019, para 7. *AlhassanMaikano v Abuja Electric Distribution Company Plc,* unreported case no NICN/ABJ/338/2017 delivered by Justice Sanusi. *Ajuzi v. FBN Plc* [2016] LPELR-40459(CA) and *Oniga v. Government of Cross River State &anor*[2016] LPELR- 40112(CA).
[53]See *AlhassanMaikano v Abuja Electric Distribution Company Plc,* unreported case no NICN/ABJ/338/2017 delivered by Justice Sanusi
Kado, April 29th 2019, para 6
[54] See *Ajuzi v. FBN Plc* [2016] LPELR-40459(CA) and *Oniga v. Government of Cross River State &anor*[2016] LPELR- 40112(CA).
[55]*Supra* see note 30
[56]*Ibid*
[57]*Supra* see note 29
[58]Section 7 of the NICAct, 2006
[59]Section 254C (1) (f), *supra* note 29
[60]*Ibid*

> (2) Notwithstanding anything to the contrary in this Constitution, the National Industrial Court shall have the jurisdiction and power to deal with any matter connected with or pertaining to the application of any international convention, treaty or protocol of which Nigeria has ratified relating to labour, employment, workplace, industrial relations or matters connected therewith.

The NICN Act also provides that the issue of good or international best practice in labour and industrial relations is a question of fact to be pleaded and proved satisfactorily by a Claimant before the Court.[61] Thus, it is clear that though parties are bound by the contractual agreement,[62] by the provisions of section 254C[63] and section 7(6)[64], the court is duly clothed with power to apply international best practices based on the facts presented by the party seeking to enjoy the benefit of the international best practice.[65]

A critical evaluation of the African Charter,[66] the Constitution of the Federal Republic of Nigeria (Third Alteration) Act and the NICN Act, which are the crux of unfair dismissal law in Nigeria, shows the flexibility of the interpretation to employment dismissals. It is without doubt from the foregoing provisions of the Constitution and statutes that the court has power to, in appropriate circumstances, apply and enforce international best practices in employment disputes brought before the National Industrial Court for adjudication. Article 4 of the ILO Convention[67] and Recommendation,[68] clearly makes provisions deprecating determination of contract of employment without giving any valid justifiable reason. The two instruments,[69] establish minimum international measures against unfair dismissal or termination in order to safeguard employment security. The standards established by the ILO constitute the minimum criteria to use in terminating or dismissing employees. For employment to be validly terminated, an employer must provide a valid and justifiable reason for taking such action.

The National laws do not expressly outlaw unfair dismissal nor do they provide a right against unfair dismissal. However, as a result of 'juridification' of the 1999 Constitution as amended by the Third Alteration Act[70] and the guarantee of the right to work under

[61]*Supra* see note 58
[62]*Nwobosi v. ACB Limited* (1995) 6 NWLR (404) 658 @ 674, *Amodu v. Amode* (1990) 5 NWLR (150) 356.
[63]*Supra* see note 60
[64]NIC Act 2006
[65]*Andrew Monye v. Ecobank Nigeria Plc* unreported Suit No. NIC/LA/06/2010, the judgement of which was delivered on October 6, 2011; *Aloysius v. Diamond Bank Plc* [2015] 58 NLLR (Pt. 199) 92 at 134.
[66]*Supra* see note 30
[67]Article of 4 of ILO Convention of 1982 No. 158
[68] ILO Recommendation of 1982 No 166
[69]ILO Convention no 158 and Recommendation 166
[70]*Supra* see note 29

equitable and satisfactory conditions,[71]the NICN has begun to recognise the status of the employee in termination cases and thereby restricting the right of the employer to terminate the employment of an employee without reason.[72] Consequently, the court has taken a firm stand on the issue,[73]holding that an employer is required to give "valid reason" for terminating the employment of an employee, failing which the termination would be wrongful and unfair. The court relies on the ILO Convention in arriving at this decision.[74]

This implies that an unfair dismissal is a breach of the right to work and an unfair labour practice.[75]The employer is also enjoined to observe the rules of natural justice towards the employee and collective bargaining with relation to termination based on reasons of conduct and capacity. Thus, where the employer with a discretionary power to terminate the tenure or contract of employment for reasons of capacity is about to exercise such power, it must be exercised based on a valid reason. If the exercise of such power is also based on a condition precedent (performance review procedure) such condition must be satisfied.[76] Where the power is being exercised upon a particular point of conduct, which involves investigating some matter relating to misconduct, such power must be exercised in accordance with the principles of fair hearing upon which the other party ought in fairness to be heard or to be allowed to give his explanation or put up a case.[77] Inferring from this position one can say the area of administrative law and private law (individual employment law) appears to converge even though they do not form a perfect match.

Consequently, the labour laws do not provide for the step by step procedure in safeguarding against unfair dismissal but provide for length of notice to which the claimant is entitled for the purpose of measuring the quantum of damages.[78] However, the stipulated length of notice in a contract of employment is a specie of a limiting clause, and the effect of upholding this limiting clause is to hoist employers above the common law. Where an employer terminates an employee's contract in an unfair manner, he should not be allowed to rely on the contractually stipulated length of notice. If an

[71]*Supra* see note 30

[72] See *Petroleum and Natural Gas Senior Staff Association of Nigeria (PENGASSAN) v. Schlumberger Anadrill Nigeria Limited* [2008] 11 NLLR (Pt. 29)

[73]*Andrew Monye v. Ecobank NigeriaPlc* unreported Suit No. NIC/LA/06/2010, the judgment of which was delivered on October 6, 2011

[74]*Supra* note 20 and ILO Recommendation No. 166.

[75]*AfolayanAderonke v. Skye Bank* unreported Suit No. NICN/IB/08/2015, the judgement of which was delivered on 17 May 2017, *Mr EbereOnyekachi Aloysius v. Diamond Bank Plc* [2015] 58 NLLR 92, relying on the ILO Convention 1982 (No. 158) and Recommendation No. 166.

[76]*Mr. Gabriel Ologun v. Benaiz Health Care Limited*, unreported case, suit no. NICN/LA/379/2013, judgement delivered on 2016-03-18 by Hon. Justice OyewumiOyebiola O

[77] See also *Mrs Ngozi Alex Illoakonam Vs Nigerian Tourism Development Corporation*, unreported case, suit no. NICN/ABJ/CS/295/2017, delivered on 2020-02-06 by Justice SanusiKado

[78]*Supra* note 51 (See Section 11 Labour Act)

employer has been dishonest or dishonourable in his treatment of an employee, the Court should turn him away from relying on the limiting clause.[79]Olagunju, JCA echoed the foregoing view when he asserted:

> "Self-limiting of liability in a contractual obligation implied by exclusion is an arrangement of uberrima fides that can only thrive on good faith where the appellant is shown to have discharged her duty by exercising utmost care to execute the contract but failure of which equity may interpose to correct inequalities and adjust matters according to the plain intention of the parties."[80]

Thus, the Courts are giving more flexibility to determining such cases and making the rules principle-based and judgement-based. This principle and judgement based rules are hinged on international best labour practices if they are pleaded and proven as facts,[81] making them open ended. International labour best practice can either be international laws[82] or foreign laws that have been accepted as international best practice. Employers need to understand and keep up with international labour best practice because it creates and set a standard as a benchmark against which labour and industrial relations in Nigeria are to be measured.[83]

The position of the Courts tilts toward the realization of substantial justice based on the spirit of the law as opposed to technical justice. According to Hon. Justice J. D. Peters, technical justice is no justice.[84] If it is at all, then it a justice with question marks. Another name for technical justice is simply injustice. The Court of law is no longer disposed towards technical justice.[85] The point was aptly and succinctly made by *Abiru JCA in Usman v. Tamadena & Co, Limited &Ors*.[86] in the following words -

> "The Courts have shifted away from the orthodox method of narrow technical approach to justice and the weight of judicial opinion is now predominantly in favour of the Court doing substantial justice, as opposed to technical justice. This is because technical justice, in reality, is not

[79]See dictum of Scutton, LJ in *Gibaud v. Great Eastern Ry* [1921] 2 KB 510 at 535
[80]*International Messengers (Nigeria) Ltd v. Pegofor Industries Ltd* [2000] 4 NWLR (Pt. 651) 242 at 249
[81]*Supra* see note 58
[82]*AfolayanAderonke v. Skye Bank* unreported Suit No. NICN/IB/08/2015, the judgement of which was delivered on 17 May 2017, *Mr EbereOnyekachi Aloysius v. Diamond Bank Plc* [2015] 58 NLLR 92,
[83]See *James AdekunleOwulade v. Nigeria Agip Oil Company Limited* unreported Suit No. NICN/LA/41/2012 the judgment of which was delivered on 12th July 2016.
[84]*Mr. Dike Ukpabi vOke-Ado Hospital & 2 Ors.* Unreported Case No. NICN/IB/06/2016 delivered by Hon. Justice J. D. Peters on the 23rd January 2020
[85]*Ibid*
[86]*Abiru JCA in Usman v. Tamadena& Co, Limited &Ors.* (2015) LPELR-40376 (CA), see also Oputa, JSC *in Bello v. Oyo State* (1986) 5 NWLR (Pt 45) 826 at 886; *Boniface EbereOkezie& 3 Ors. v. Central Bank of Nigeria & 5 Ors*. (2020) 15 NWLR (Pt.1747) 181

> justice but a caricature of it. It is justice in inverted commas and not justice synonymous with the principles of equity and fair play".

The position adopted by the Labour Court tends to be given impetus by the National Industrial Court Act.[87] Section 12(2) allows the court to depart from the rules of evidence as provided by the Evidence Act in the interest of justice.[88] While Section 15 empowers the court to follow the rules of equity where there is any conflict or variance between the rules of equity and the rules of common law with reference to the same matter.[89]

4.0 Conclusion

The current labour regime in the country with respect to unfair dismissal and unfair labour practices is gradually moving away from rigid traditional laws to laws that give more flexibility, based on rules based principles and judgment endowing the court with powers to deal with issues of international best practices. This clearly demonstrated the resolve of the legislature to modify the traditional common law doctrine giving employers power to perpetrate unfair termination. Therefore, the general common law rule of the employer's right to terminate with no reason and the court not ordering specific performance in master and servant relationship has been demystified. The implication of this new jurisdiction of the court is the paradigm shift in the law of termination from contract to status. However, the status is not as of right but more of a guarantee if only international labour best practice is pleaded and proven as fact. Thus, labour lawyers and employers need to understand, the spirit and letter of the provisions as well as the intendment of the law. Even though the unfair dismissal law is still relatively new in guaranteeing status, there is still a need to amend the Labour Act to expressly outlaw termination by the employer without a valid justifiable reason. The requirement of valid justifiable reason for termination is a procedural safeguard to guard against mischief thereby clothing employees with cloak of status.

[87]The NIC Act 2006

[88] *Ibid*

[89]*Ibid*, see Adewumi A. 2013. The Rules Of Justice And The Justice Of The Rules – Appraisal Of Rules Of Court In The Dispensation Of Justice In Nigeria. The Justice Journal: A Journal of Contemporary Legal Issues. 5: 119-140, on rules of court and procedural justice.