



## **A Comparison of Reinstatement of the Employee in the Public and Private Sector in Nigeria**

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### **ABSTRACT**

Reinstatement simply means to replace a person or employee to the exact position in which he was before his employment was terminated, or to restore somebody to a previous position. In some cases, the employee is suspended indefinitely without any hope of recall or reinstatement. The relief of reinstatement has been sought by an employee particularly those in the private sector whose contract of employment is wrongfully terminated through declaration that no termination has taken place and so, the employee remains in the employer's service but without much success. This paper therefore examines the success of the relief of reinstatement in cases of wrongful termination of contract of employment of the employee both in the public and private sector in Nigeria. To achieve the aim of this work, the researcher employed the tool of analytical comparison of different judicial decisions on the subject matter. It is realized that the prevailing attitude of Nigeria judges is that the relief of reinstatement in the event of wrongful termination of contract of employment is only available for confirmed, pensionable and public employees whose contract is spiced with statutory flavour and not employees in the private sector. Necessary recommendations were however made on the need to extend the relief to the employee in the private sector.

**Keywords:** Reinstatement, Employee, Suspension, Termination

### **INTRODUCTION**

Security of tenure in employment is important to every employee as he has an economic interest to remain in the job as long as he is capable of doing his job, or until he attains retirement age. The issue of wrongful or unfair termination of contract of employment is at an increasing rate, and its damaging effect permeating every society to the nation at large while little, or no consideration is given to it. The ideal of social values, capacity utilization, effective human resource development, economic and commercial activities, as well as, *per capita* and national gross income is mitigated; while the modern contract of employment is governed by the general law of contract, only few seek redress in the context of breach of the contract, or wrongful termination of contract of employment. The prevailing view among Nigerian judges is that the relief of reinstatement is available for confirmed, pensionable and public employees whose contract is spiced with statutory flavour; for them the relief is automatic. For employees in the private sector, they are willing to order reinstatement only where the employee is able to prove that special circumstances exist for the relief. Yet, no known Nigerian judge has made effort to come within hailing distance of identifying which circumstances would make it possible to award reinstatement in private employment, or for unconfirmed employees whose contract do not have the so-called statutory flavour. The impression Nigerian judges give is that reinstatement in its technical sense is an alien relief for persons in private employment.

However, the fact that the matter is the subject of debate should give impetus to challenge the present strict rule against reinstatement. There is no rationale or justification for treating the employees in the public and private sectors differently. The researcher concludes by recommending the enactment of Unfair Dismissal Act as obtained in other jurisdictions to regulate the employment of all categories of employees whether in

the private or public sector and a new judicial attitude that would come to the rescue of the employees in the private sector amongst others.

### **The Relief of Reinstatement**

Reinstatement is used in broad term here to indicate all cases where an employee seeks to be reinstated to his employment, to be re-employed, to restrain his employer from removing him from service until he is given proper notice or until he is accorded procedural fairness either in accord with the contract of employment, rules of natural justice or constitutional provisions.<sup>1</sup>

### **Public Sector**

In general terms, the public sector consists of governments and all publicly controlled, or publicly funded agencies, enterprises, and other entities that deliver public programmes, goods, or services.<sup>2</sup>

### **Private Sector**

The term private sector refers to the segment of the economy that is not directly controlled, or operated by government-run agencies and organizations. In other words, it is the part of an economy in which goods and services are produced and distributed by individuals and organizations that are not part of the government, or state bureaucracy. The private sector which is also referred to as the citizen sector, is made up of companies that operate to make profit.<sup>3</sup>

### **The Relief of Reinstatement in the Public Sector**

The prevailing view among Nigerian judges is that the relief of reinstatement is available for confirmed, pensionable and public employees whose contract is spiced with statutory flavor; for them the relief is automatic once it is established that their dismissal was unlawful or wrongful.<sup>4</sup>

In *Odiase v. Auchi Polytechnic, Auchi*<sup>5</sup> the Court of Appeal held that where a civil servant employment is not terminated in accordance with the procedure laid down in the relevant laws and regulations, he would be entitled to reinstatement.

Again, in *Shitta-Bey v. Federal Public Service Commission*,<sup>6</sup> the appellant was a legal adviser in the Federal Ministry of Justice. One Iyabo Olorunkoya was found with Indian hemp at London Airport and was subsequently jailed for attempting to export dangerous substances into the United Kingdom. In the course of investigation into the offence, she was found to have in her possession a letter written by the appellant asking her to "send details as she arrived in London". The appellant was by a letter from the Solicitor General sent on leave pending investigation into his alleged involvement in the criminal case in England against Iyabo Olorunkoya. A further letter followed from the same source informing the appellant that he was suspended from the service without pay pending the outcome of the inquiry. At the end of the inquiry, the appellant was informed by a letter from the secretary of the Respondent Commission that his written representation submitted to the commission having been found unsatisfactory; he had been retired from service in the public interest under the Civil Service Rules with full retiring benefits. The Appellant on receipt of the letter of retirement, instituted court proceedings in the High Court claiming a declaration that his suspension without pay and his purported retirement respectively were irregular, null and void.

The High Court (Bada. J), gave judgment in favour of the appellant and declared both acts of the Respondent Commission null and void. The Respondent did not appeal from the decision, neither did it respond to the judgment nor to the persistent request of the appellant to be reinstated. It was at this stage that the appellant instituted the proceedings in the High Court asking for an order of mandamus to compel the Respondent to discharge its duty by issuing the necessary directive to enable the Applicant report for

<sup>1</sup> Chianu E. Employment Law (Akure Bemicov Publishers Nig. Ltd; 2004) p.518

<sup>2</sup> Retrieved from [www.uslegalsupport.com](http://www.uslegalsupport.com) on the 13/09/17 at 2:00pm

<sup>3</sup> Ibid.

<sup>4</sup> *Chukuma v. Shell Petroleum Dev. Co of Nig Ltd* (1993) 4 N.W.L.R (pt. 289) 512, 539, *Afriland Nig Plc v. Nwanze* (1998) 6 N.W.L.R (pt. 533) 283, 296.

<sup>5</sup> (1998) 4 N.W.L.R (pt. 546) p. 477

<sup>6</sup> (1981) 1 S.C 40.

duty, or in the alternative, to compel the Respondent to exercise its discretion to give effect to the judgment of Bada J.

The Appellant appealed to the Supreme Court. It was contended for the Respondent *inter alia* that (1) mandamus could not be issued to enforce a personal, or private right (ii) the appellant should have sought a positive declaratory relief rather than an order of mandamus and (iii) mandamus could not issue to enforce a personal, or private right such as that the appellant sought to enforce.

It was held by the Supreme Court that:

1. *The principle of law which precludes mandamus from issuing against the Crown has historical justification in English legal history and there is no basis for its application in this country (a Republic) in respect of the respondent who being a creation of statute, can sue and be sued there being no provision to the contrary, express or implied in any enactment in our statute books.*
2. *Since there is no bases for such application in this country, and since a public servant in the established and pensionable cadre of the Federal Public Service has a legal status and, ex-hypothesis, a right to remain in service until properly removed in accordance with the Civil Service Rules applicable to him, then by virtue of the decision of Bada. J, the purported acts of the Respondent were illegal, null and void by reason of their non-compliance with the rules, the Applicant had a legal right to be properly reinstated and the Respondent has the correlative duty to see that he is duly reinstated. The High Court had the power to issue mandamus.*
3. *Public servant in the established and pensionable cadre of the Federal Government Service are not employed at the pleasure of the Federal Government. The Civil Service Rules vests in a public servant a legal status and they can be properly or legally removed only as provided by the said rules. These rules, by virtue of the fact that they are made pursuant to the powers conferred on the Respondent commission by virtue of constitutional provisions in the 1963 Constitution have constitutional force thus conferring on a public servant a status which makes his relations with the Respondent and Government One beyond the ordinary or mere master and servant relationship.<sup>7</sup>*

Since the Supreme Court decision in *Shitta-Bey v. Federal Public Service Commission*, we have had other recent cases where public and civil servants have been protected under the rules governing their contracts of employment such as *Olaniyan and ors v. University of Lagos*<sup>8</sup> and *Tionsha v. The Judicial Service Committee of Benue State*.<sup>9</sup>

Considering the decision of the Supreme Court in the foregoing cases and viewing the law regulating the contract of employment in Nigeria, the public servants in Nigeria are obviously protected than employees in the private sector. Thus bearing this in mind, Emiola, has rightly argued that there is no rationale or justification for treating the employees in the public and private sectors differently. There is a need for unfair dismissal Act as in England to regulate the employment of all categories of employees whether in the private or public sector. The remedies of specific performance, injunction and declaration which normally have the effect of reinstatement are granted to employees in the public sector whose contracts of employment have statutory flavour. These remedies should be extended to other categories of employees like those in the private sector.<sup>10</sup>

#### **The Relief of Reinstatement in the Private Sector**

The preponderance of Nigerian judgments withhold the relief of reinstatement on the ground that the relationship between and employee and his employer is personal and confidential and since an order of

<sup>7</sup>. Ibid.

<sup>8</sup>. (1985) 2 N.W.L.R (pt. 9) p. 599.

<sup>9</sup>. (1997) 6 N.W.L.R (pt. 508) p. 302.

<sup>10</sup>.Emiola A Nigerian Labour Law, (3<sup>rd</sup> ed. Ogbomoso: Emiola Publishers, 2002) p. 233.

dismissal, or termination indicates a rupture of that relationship, no order of reinstatement would be made. A writer says, in contracts of personal service, personal pride, personal feelings, personal confidence and confidentiality may all be involved and all these make it undesirable to impose a willing employee on an unwilling employer.<sup>11</sup> *The locus classicus* on this proposition is the judgment of Fry, L.J in *De Francesco v. Barnum*.<sup>12</sup>

*For my own part, I should be very unwilling to extend decisions the effect of which is to compel persons who are not desirous of maintaining continuous personal relations with one another to continue those personal relations. I have a strong impression and a strong feeling that it is not in the interest of making that the rule of specific performance should be extended to such cases. I think the courts are bound to be jealous, lest they should turn contracts of service into contracts of slavery; and therefore, speaking for myself, I should lean against the extension of the doctrine of specific performance and injunction in such a manner.*

One shortcoming in this line of reasoning is that in some cases, there may be absence of friction in the workplace. The fact that the employer is a large organization, employing many people in different departments should be a factor to consider in deciding whether or not to order reinstatement. Indeed, Ipaye suggests that where the employer is an incorporated company or a partnership where the real employers are far removed from day to day running of the undertaken, the courts should be willing to order reinstatement in cases where the mutual confidence between the parties remain unimpaired.<sup>13</sup>

The researcher wishes to add that it is not enough that the employer is an incorporated company, or partnership, but that it should be one that retains many employees, a large employer of labour. The greater the size of units of employment, increasing collectivization of employment and wider acceptance of conflict model of industrial relations, the more judges should reduce their essentially individualistic view of the contract of employment and the more emphasis should be placed on the need for subsisting confidence between employer and employee.<sup>14</sup>

In the nineteenth century when *De Francesco's* case was decided, contracts of service were chiefly between a farmer, or the master of a small workshop and his servant involving confidence and intimacy. Why should ideas that correspond to the social realities of two centuries ago continue to dominate legal thinking today? Should the rule not be confined to confidential relationships properly so-called? While, in *Powell v. London Borough of Brent*,<sup>15</sup> the English Court of Appeal granted an interlocutory injunction when, in effect, the employer sought to change its mind over promoting the plaintiff. The Court took into account the fact that the employer was a large organization, employing many people in different departments.

A second reason that may be gathered from Fry L.J's objection to an order of reinstatement is that it would enslave the employer who is compelled to retain an employee he does not want to see. Contrary to this fear, the order does not ensure lifetime employment, but rather it restrains the removal of an employee in breach of contract. The order may be until the employee has been given fair hearing. The hearing may inculcate him, thereby affording the employer ground to dismiss him.<sup>16</sup>

Another ground for judge's hesitation to reinstate private employees is that it would require them to continually supervise the order to ensure that the employee performs his obligations. But this fear is merely speculative. An employee who seeks reinstatement would most likely give his best in his employer's service. The argument is premised on the assumption that an employee is being compelled to serve and so needs supervision to perform his duties. Of course, where an employee fails to perform his obligations

<sup>11</sup> Chianu, op. cit., p. 523.

<sup>12</sup> . (1890) 45 Ch. D 430, 438.

<sup>13</sup> . Ipaye. A, "The Suspended Employee Under Nigerian Law" (1992) vol.3 Nos. 1&2, *Justice* p. 62.

<sup>14</sup> . Benedictus R, "Repudiation of Employment Contracts" (1979) 95 *Law Quarterly Review* 14, 17

<sup>15</sup> . (1987) I.R.L.R 466.

<sup>16</sup> Chianu, op.cit., p. 524.66

dutifully, the employer retains the authority to dismiss him. An avid advocate of reinstatement states that we should not lose sight of the fact that the general public is awed by court decisions and generally defer to them. Second, a judge can wield the weapon of contempt for disobedience of his orders as it is the practice in U.S courts<sup>17</sup>.

A fourth line of reasoning is that an order of reinstatement would foist an employee on an unwilling employer. By reaching this conclusion, the courts show an inclination to protect management. The courts second guess the employer on a major disciplinary issue going to the root of the so-called managerial prerogative to hire and fire and are thus unwilling to add to the employer's burden by formally recommending reinstatement.<sup>18</sup> Indeed, if the facts gathered from law reports are anything to go by, there is avalanche of evidence to show that some employers rescind their decision to dismiss on being pressured by trade unions and employee's legal practitioners.

In *Afribank (Nig) Plc v. Nwanze*,<sup>19</sup> the respondent's appointment was terminated in July 1986. For reasons not disclosed in the law report, but presumably as a result of his appeal to a higher body, he was called upon to appear before the appellant's disciplinary committee in October 1987. In substance, the employer acknowledged that he remained their employee more than one year later, else how would they exercise jurisdiction over him in a disciplinary committee. In *Coker v. National Bank of Nigeria Ltd*<sup>20</sup> in 1969, as a result of police investigation into a criminal complaint involving the plaintiff and other employees of the defendant, plaintiff was interdicted. While the case was in court, he was summarily dismissed.

He claimed damages for wrongful dismissal. While this case was in court the criminal case was decided in plaintiff's favour; he was acquitted. Thereupon the plaintiff was reinstated in 1971. In *Ezaga v. Embechem Ltd*,<sup>21</sup> a female employee's appointment was terminated. She wrote to management protesting her termination and copied the National Union of Chemical and Non-Metallic Workers. The Union took up the matter, threatened strike action and urged management to reinstate the employee. Management reinstated the employee, transferred her to another department, and set up a panel to investigate the allegation of sexual harassment made against the personnel manager (the plaintiff in this case) who terminated the employee. The panel concluded that the plaintiff was a sex mania and his appointment was terminated. His claim for wrongful termination failed.

If the practice of ordering reinstatement after dismissal exists as the cases in the preceding paragraphs show, it may indicate that not only are employers not as firmly and universally against reinstatement as is sometimes asserted or imagined, but that a move to allow courts to order what they now object to would not meet with implacable opposition.

The remedies of specific performance, injunction and declaration which normally have the effect of reinstatement are granted to employees in the public sector whose contracts of employment have statutory flavour. These remedies should be extended to other categories of employees like those in the private sector.<sup>22</sup>

### **OBSERVATION /CONCLUSION**

In course of this work, it was observed that the reinstatement of an employee in the public sector particularly confirmed employees whose employment is wrongfully terminated is automatic; while the relief is alien to his counterpart in the private sector. This practice is discriminatory and should therefore be discouraged.

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<sup>17</sup> Ibid

<sup>18</sup> Ibid.

<sup>19</sup> (1998) 6 N.W.L.R (pt. 553) 283.

<sup>20</sup> (1975) 9 C.C.H.C.J 1357

<sup>21</sup> (1981) 1-3 C.C.H.C.J 119.

<sup>22</sup> Emiola, op.cit., p. 233.

It was also observed that the preponderance of Nigerian judgments withhold the relief of reinstatement on the ground that the relationship between an employer and his employee is personal and confidential and since an order of dismissal or termination indicate a rupture of that relationship no order of reinstatement would be made. But the judges forget that there are some large organizations where the employer may not even know his employees.

It was contended that the reinstatement of the employee in the private sector would foist such an employee on an unwilling employer or rather enslave the employer who is compelled to retain an employee he does not want to see. However contrary to this view, the order of reinstatement does not imply lifetime employment, but rather it restrains the removal of the employee in breach of the contract.

It was also observed that the reason while judges decline reinstatement of employees in the private sector is that it would require them to continually supervise the order to ensure the employee performs his obligations. However, this fear is speculative as the judge can wield the weapon of contempt for disobedience of his orders.

### **RECOMMENDATION**

A new judicial attitude that would constitute a new leaf in our courts is recommended. The violation of the means of livelihood of a large number of people who are poor, in a socially and economically disadvantaged position should not go unnoticed or un-redressed. The judicial process can be a veritable tool in the task of reforming the social and economic system which is the root cause of social injustice. The National Industrial Court should come to the rescue of employees in the private sector in cases of wrongful dismissal.

There is need for the enactment of Unfair Dismissal Act as in England to regulate the employment of all categories of employees whether in the private or public sector with the same terms and conditions of reinstatement.

The issue whether an employee's reinstatement would offend an employer should be considered by our judges as a matter of fact and not law. The employer should be made to adduce evidence of possible friction the reinstatement would occasion, or the absence of vacancies in his organization or establishment.

We need a more liberal application and interpretation of our laws as it affects the employee given the fact that the contract of employment between the employee and the employer is an unmitigated submission and subordination by the employee to the employer as a result of the weak economic position of the employee.

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