Dismissal Of An Employee On Misconduct Bordering On Crime: The Correct Position Of The Law

Ajabor Ifeanyi & Ovreme, O. Aforkoghene

Department of Arts and Humanities,
School of General Studies,
Delta State Polytechnic, Ozoro, Nigeria

ABSTRACT
Dismissal is another mode of terminating, or bringing a contract of employment between an employer and employee to an end. In Nigeria, incidents of dismissal of employee by the employer on misconduct bordering on crime without a formal conviction by the regular court, is a recurrent phenomenon both in the private and public sector. In most cases, the employee is left in a quandary as to the legality or otherwise of such dismissals. This paper therefore examines the correct position of the law on dismissal of an employee bordering on crime without the employer first reporting the matter to the police and securing conviction. To achieve the aim of this work, the doctrinal method of research was employed as different judicial decisions and pronouncements of the superior courts of records in Nigeria such as the Court Appeal and the Supreme Court on the subject matter were examined. Through the various decisions and pronouncements of the courts, this paper has been able to lay to rest the confusion on the subject matter; while necessary recommendations were however made to guide stakeholders.

Keywords: Dismissal, Employee, Misconduct, Crime, Law

INTRODUCTION
It is undisputed that an employer has the right to terminate an employee’s employment, under the legal principle that the court will not force a willing employee on an unwilling employer. However, in cases where gross misconduct bordering on criminality is alleged and for which summary dismissal is the punishment, an employer’s right to terminate the employee is circumscribed by the need to take certain steps to justify the dismissal legally, as dismissal carries a stigma which may attach to the employee for a long time.

Previously, before dismissing an employee who was accused of criminal acts, it was crucial to apply the constitutional provision that presumes a person to be innocent until convicted by a court of law. The employer was required to report the alleged crime to the police and secure a conviction before summarily dismissing the employee. However, the courts have significantly shifted the law, as shown in a number of decisions in which they have held that an employer need not report to the police and await a conviction before it can dismiss an employee for gross misconduct, even where the alleged acts committed by the employee are of a criminal nature provided that the employee had an opportunity to explain or respond to the accusations.

Termination and Dismissal
Dismissal is another mode of terminating, or bringing a contract of employment to an end. However, dismissal and termination are not the same. Ordinarily, termination gives a party the right to determine the contract of employment by giving the prescribed period of notice. In the case of dismissal, it is a disciplinary measure available only to the employer, and not entitling the employee to any notice, or benefits.1

Pat Acholonu JCA, in *Jombo v. Petroleum Equalization Fund Management Board*, ² made a distinction between termination and dismissal:

Termination 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 benefits under the contract of employment. The right to terminate, or bring an employment to an end is mutual in that either party may exercise it, dismissal on the other hand, is punitive and depending on the contract of employment very often entails a loss of terminal benefits. It also carries an unflattering opprobrium to the employee.

The grounds for dismissal in both the public and private employment are legion. They include breach of terms of the contract of employment including implied terms, disobedience, insubordination, dishonesty, incompetence, negligence, absenteeism, infidelity, whistle blowing, corruption, drunkenness, etc.³ These acts are no doubt referred to as misconduct.⁴

**Dismissal on Misconduct Bordering on Crime**

There are many acts of misconduct like stealing, fraud, rioting, forgery, assault, etc. for which an employee can be dismissed. These acts of misconduct are criminal acts which are punishable by the criminal code.⁵

The Supreme Court of Nigeria pursuant to constitutional provisions of the previous constitutions of Nigeria now entrenched in the 1999 Constitution,⁶ had in the past held that where a person is accused of misconduct which borders on criminality and the person denies the allegation, the aforesaid constitutional provision must be complied with by trying him and adjudging him guilty in the regular court before he can be dismissed. The non compliance with the above constitutional provisions particularly the failure of the employer to charge the employee to the regular courts in acts of misconducts which borders on criminality made the Supreme Court of Nigeria to nullify the dismissal of some employees in the past. For instance, in *Sofeku v. Akinyemi*,⁷ the appellant, a physician in a government hospital, was alleged to have indecently assaulted an 18 years old female patient in the pretext of conducting a clinical examination on her. A domestic panel found him guilty of the charge and he was dismissed from the civil service.

The Supreme Court held that the charge was a crime and by section 22 (2) of the 1963 Constitution, only a court could try the appellant, the panel was not seized with the jurisdiction to charge, try, or find him guilty of a misconduct that is criminal in nature.

Again, in *Federal Civil Service Commission v. Laoye*,⁸ the respondent an employee of the Federal Ministry of External Affairs, was alleged to have defrauded the Federal Government of a huge sum of money. The matter was reported to the police who interrogated the respondent without more. After the ministry’s panel of investigation conducted a hearing, the appellant dismissed him for misconduct. The Supreme Court held the dismissal invalid on the ground that the jurisdiction of the ordinary courts to try any allegation of crime is a radical and fundamental tenet of the rule of law and the cornerstone of democracy, and that if the executive branch is allowed to operate through tribunals and executive investigative panels, that surely, will be a very dangerous development. Eso JSC, who read the lead judgment, said where in the course of investigation, an employee admits guilt; the employer can proceed to dismiss, or terminate his appointment without further ado.

---

⁴ Ibid.
⁵ Gartside v. Outram (1856) 26 L.J.C.H 113 per Wood V.C.
⁷ (1980) 5-6 S.C 1.
⁸ (1989) 2 N.W.L.R (pt. 106) 652, 685 per Nnamani JSC.
In Garba and others v. University of Maiduguri where the senate of the school dismissed the appellants on allegation of arson, looting, stealing and indecent assault, the Supreme Court reprimanded the school authorities for purporting to clothe itself with authority and assuming jurisdiction of the court to mete out punishment in a matter where commission of criminal offences was involved.

**The Correct Position of the Law**

In recent times, the Court of Appeal and the Supreme Court itself took contrary view in subsequent decisions that an employer can summarily dismiss an employee upon an allegation of crime without the employee being tried first in a regular court.

At first, these contradictory decisions left both the employers of labour and lawyers alike in a quandary. Thus in Bamgboye v. University of Ilorin, the appellant was dismissed for altering scores on a student’s examination script. He contended that this was a crime and the Laoye’s Principle should be applied, that the domestic panel that inquired into the misconduct and recommended his dismissal had no jurisdiction. The Supreme Court rejected the contention and held that the gross misconduct can be proved without the need to find an employee guilty of acts amounting to a criminal offence; that a tribunal conducting disciplinary proceedings cannot rightly be held to be trying a criminal charge.

In Federal College of Education, Okene v. Anyanwu, the respondent was dismissed for unlawfully having in his possession the video camera belonging to his employer. He was issued a query and he later appeared before a panel which found him guilty of gross misconduct and negligence of duty. Before the court of appeal, he argued that he ought to have been tried for stealing before dismissal. Dismissing his contention, the court held that he was found guilty of gross misconduct and negligence of duty. These are not crimes in law; the tribunal was therefore not a court trying the respondent for a crime.

In Okeme v. Civil Service Commission, Edo State, the appellant was alleged to have issued receipts which was less than the sum paid to him as a revenue staff of the state government. He was issued with a query. His reply was unconvincing and he was therefore dismissed from the civil service. In his action for unlawful dismissal, he contended that he should first have been charged to the court and criminally prosecuted prior to his dismissal. Both the trial court and the Court of Appeal dismissed his contention. Akinton JCA reasoned:

> The question then is whether what took place during the investigations conducted by the secretary...was in fact a trial of the appellant for the offence of fraud. I have no doubt in holding that the answer to that question is negative. This is because the concern of the top officials of the ministry...was to find out what happened and after finding out what happened to take necessary administrative action if need be against any of the officials found wanting. I also believe that whatever actions they took to this end could not be regarded as a bar to any possible prosecution for any criminal offence that might have been committed by any of the officials.

He further held:

> It is clear that (1) it is not mandatory that disciplinary action could not be taken against an offender wherever any aspect of his conduct involved commission of any crime and (2) that not all matters involving commission of crime need be handed over to the law enforcement officers for criminal prosecution in a court of law. Thus in the instant case, fraud, that is issuing far less than the amount collected... these are definitely not very serious criminal act like arson, destruction of property. The appellant employers therefore had discretion either to deal with the matter internally and/or hand over the appellant to the law enforcement officers for prosecution.

---

9 (1985) 2 N.W.L.R 599


11 (1997) 4 N.W.L.R (pt. 501) 533, 552 per Orah JCA.

In Yusuf v. Union Bank of Nigeria Ltd,\textsuperscript{13} Wali JSC attempted to get round the Laoye principle by stating that under the common law, all an employer needs to do is to afford his employee an opportunity of being heard before exercising his power of dismissal, even where the allegation for which the employee is being dismissed involve accusation of crime. According to him, it is not a requirement under section 33 of the 1979 Constitution now section 36 of the 1999 Constitution that before an employer summarily dismisses an employee from his services under the common law, the employee must be tried before a court of law where the accusation against the employee is for gross misconduct involving dishonesty bordering on criminality.

In Arinze v. First Bank of Nigeria Ltd,\textsuperscript{14} the issue was whether the appellants constitutional right of fair hearing was breached by the respondent who on its own found appellant guilty/liable, and proceeded to summarily dismiss him, without more, when the appellant did not admit the alleged acts of gross misconduct against him which bordered on criminal offences, and whether the court below was correct to have held that the dismissal met the requirement of fair hearing.

The facts of the case were that the appellant who was an employee of the respondent was dismissed from the employment of the respondent on allegation of insubordination, absenteeism and fraudulent claim of overtime. He was not prosecuted in a court of law but was given opportunity to defend the allegation against him in reply to enquiries by the respondent. The appellant contended at the trial court that his dismissal on allegations bordering on criminality without a trial in court of law amounted to a breach of his fundamental right to fair hearing. The trial court dismissed his case. On appeal, the Court of Appeal dismissed the appeal. On further appeal to the Supreme Court, it was unanimously held by all the Justices that the appellant had a fair hearing and went further to emphasize that in statutory employment as well as in private employment, the employer can dismiss an employee of gross misconduct bordering on criminality and in such a case, it is not necessary nor is it required under section 36 (1) of the 1999 Constitution that employee must first be tried in a court of law. It was therefore erroneous as contended by the appellant that once a crime is detected the employer cannot dismiss the employee unless he is tried and convicted first.

The court further held that in cases of misconduct bordering on criminality, all that is required of an employer before summarily dismissing the employee is to give him fair hearing by confronting him with the accusation made against him and requiring him to defend himself. In other words, to satisfy the rule of natural justice and fair hearing, a person likely to be affected directly by disciplinary proceeding must be given adequate notice of the allegation against him to afford him opportunity for representation in his own defence. In this case, the appellant was given opportunity to explain himself and that the contention that he was denied fair hearing was therefore not tenable.

**OBSERVATION/ CONCLUSION**

In course of this work it has been observed that the Supreme Court has departed from its previous position that where a person is accused of misconduct which borders on criminality and where such person denies the allegation, he has to be tried and convicted by a regular court that has jurisdiction as enshrined in section 36 of the 1999 Constitution before such person can be dismissed from service. This is probably because the previous position is not enduring as it could elevate indiscipline and act as a clog in the administrative machinery of the various institutions.

Again, where an employee who obviously commits a misconduct that borders on criminality is charged to court and he is eventually discharged and acquitted by the Court on technical grounds, such development could create bad blood and industrial disharmony between the aggrieved employer and the employee. The current position of the Supreme Court deserves commendation otherwise, if an employee walks up to his employer and assault him without any just cause, should the employer wait for the police investigation and court verdict before proceeding to dismiss the employee? What if the police refuses to prosecute the


\textsuperscript{14} (2000) N.W.L.R (pt. 639) 78,97,98.
culprit, or where the culprit is discharged on technical ground? And what if the police are unable to procure witnesses to testify in court, and the culprit is discharged for lack of diligent prosecution?

RECOMMENDATION
It is humbly submitted that where an employee is accused of an act of misconduct which borders on crime the employee should be given fair hearing, and the rules of natural justice observed by confronting him with the allegation and allowing him to defend himself, cross examine the witnesses called, or investigative panel set up to investigate the misconduct. Again, if the employee is indicted having been given fair hearing, the employer can go ahead to dismiss him where such act attracts dismissal and refer such act to the police for investigation and possible prosecution. If after his trial, the employee is discharged and acquitted on the merit, the employer should be made to re-absolve the employee and pay him all his entitlements during the period of the trial.

REFERENCES
Books

Cases Cited

Statutes
Labour Act, Cap L 1, L.F.N, 2010

Unpublished Materials