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**EMPLOYEE'S RIGHT TO RESIGN *VERSUS* PAYMENT
OF SALARY IN LIEU OF NOTICE: AN EXAMINATION
OF *DR. BEN CHUKWUMAH V. SHELL PETROLEUM
DEVELOPMENT COMPANY OF NIGERIA LIMITED***

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ABSTRACT

In a contract of employment, both the employer and the employee have certain rights. One of such rights is the right to terminate or resign the employment. The employer has the right to terminate the employment of the employee. At the same time, the employee has the right to resign from his employment. Most contracts of employment are usually specific on the type of notice to be given before an employer can terminate the employment or before the employee resigns and it is to the effect that a notice must be given or salary must be paid in lieu of notice. The main objective of this paper was to analyse the right of an employee to resign with a view to determining whether the right to pay salary in lieu of notice can be rejected by the employer on the basis that the salary in lieu of notice must be paid simultaneously with the letter of resignation. Arguments abound on whether the payment of salary in lieu of notice must be done simultaneously with the termination. The Supreme Court in the case of *Chukwumah v. Shell* put this argument to rest when it held that payment of salary in lieu of notice must be done at the time of termination of the

employment. This paper adopts a doctrinal research methodology and both case law and statutory provisions were referenced in arguing that payment in lieu of salary needs not be done simultaneous with termination once it is not expressly stated in the contract of employment. It has been found that the employee's right to resign is an absolute right and the employer has no discretion on whether or not to accept the resignation. If this is the case, then the Supreme Court need to reconsider its position in *Chukwumah v. Shell*, otherwise great injustice will bedevil the employee's right to resign.

1.0 INTRODUCTION

The right of an employee to resign from his employment is an absolute right which is exercisable anytime. This right has been upheld by the court and it has been held that an employee has an absolute right to resign from his employment and the employer does not have discretion on whether to accept or reject the resignation.³¹² Before a resignation can be valid, however, the employee must have given notice of resignation in accordance with the stipulated length of notice in his contract of service or pay salary in lieu of notice.

The issue of the time when the payment of salary in lieu of notice is due for payment has, however, created a lot of controversies considering the fact that it is the terms of contract of employment that usually determine the time when salary in lieu of notice must be made.

The Supreme Court has, however, put this issue to rest in the case of *Dr. Ben Chukwumah v. Shell Petroleum Development Company of Nigeria Limited*³¹³ where the court held that payment of salary in lieu of notice must be made at the time of termination

³¹² *Abekhe v. Alpha Merchant Bank Plc & Ors* (2017) ALL FWLR (Pt. 914) 971, 1003.

³¹³ (1993) 4 NWLR (Pt. 289) 512, 536 para H.

of a contract of service i.e. simultaneously with the termination of employment.

This paper examines the right of an employee to resign his appointment by paying salary in lieu of notice. It particularly examines the decision of the Supreme Court in *Chukwumah v Shell Petroleum* (supra) to determine whether the Supreme Court can rightly hold that payment of salary in lieu of notice must be made at the time of termination of a contract of service even when same is not expressly stated in the contract of service.

This paper concludes that the Supreme Court was wrong to have decided the way it did and that payment of salary in lieu of notice can be made anytime.

2.0 CONTRACT OF EMPLOYMENT

Before defining what a contract of employment is, it is important to understand the term 'contract' and 'employment'. There is no universally acceptable definition of contract. However, several authors have defined the term from different perspectives. Thus, a contract has been defined as 'a legally binding agreement between two or more persons by which rights are acquired by one party in return for acts or forbearance on the part of the other.'³¹⁴ A contract has also been defined as an agreement between two or more persons which creates an obligation to do or not to do a particular thing. For a contract to be binding, between the parties, there must be a meeting of the mind i.e. *consensus ad idem*. This relates to an offer and acceptance.³¹⁵

³¹⁴ *Best (Nigeria) Ltd v Blackwood Hodge Nig (Ltd) & 2 Ors.* (2011) 5 NWLR (Pt. 1239) 95, 127, per Adekeye, JSC. See also *Amana suits Hotels Ltd v People's Democratic Party* (2007) 6 NWLR (Pt. 1031) 456, 476; *Socete Generale Bank (Nig) Ltd v. Safa Steel & Chemical Manufacturing Ltd* (1998) 5 NWLR (Pt. 548) 168 cited in Okpara V.N. *Contract Law A New Approach* (Fourth Dimension Publishing Co Ltd, Enugu 2013) P.1.

³¹⁵ *Bilante International Ltd v. NDIC* (2011) LPELR-781 SC.

Employment, on the other hand, is a relationship that exists between a master and a servant.³¹⁶ It has equally been defined as an agreement between an employer and an employee that the employee will provide certain services on the job.³¹⁷

A contract of employment can therefore be defined as an oral or written, express or implied agreement specifying terms and conditions under which a person consents to perform certain duties as directed and controlled by an employer in return for an agreed wage or salary.³¹⁸

The Labour Act defines a contract of employment as any agreement, whether oral or written, express or implied, whereby one person agrees to employ another as a worker and that other person agrees to serve the employer as a worker.³¹⁹ It therefore means that a contract of employment can be entered into orally without the requirement of writing. Whether it is stated in the contract or not, the employer and the employee owe each other a duty of mutual confidence and trust and to make only lawful and reasonable demands on each other.³²⁰ An employee is under an obligation to carry out all the assigned duties by the employer. The employer, on the other hand, is under an obligation to protect the employee from harm or injury, and make reasonable compensation for any loss or damage resulting from any job related accident.³²¹

³¹⁶ A. Garner, *Black's Law Dictionary* (8th Edn, St. Paul Minn: West Pub. Co, 2004) p. 566.

³¹⁷ 'What is an employment' <https://www.thebalancecareers.com/what-is-employment-1918114> accessed on 27 February, 2019.

³¹⁸ 'Contract of employment' www.businessdictionary.com/definition/contract-of-employment.html accessed on 27 February, 2019.

³¹⁹ Section 91 Labour Act, *Cap. L1 Laws of the Federation of Nigeria 2004*.

³²⁰ 'Contract of Employment' www.businessdictionary.com/definition/contract-of-employment.html accessed on 27 February, 2019.

³²¹ *Ibid.*

the case of *Shena Security Co Ltd v Afrapak (Nig)*³²², a contract of employment was defined as any agreement, whether written, express or implied, whereby one person agrees to employ another as a worker and that other person agrees to serve the employer as a worker.

A contract of employment was also given a judicial definition in the case of *Ogundipe v Telecomm. Ltd*³²³ as an agreement or contract between an employer and employee in which the terms and conditions of employment of the employee are provided.

CATEGORIES OF CONTRACT OF EMPLOYMENT

A contract of employment falls under three categories and they are:

- employment under a master/servant relationship;
- employment under which a servant holds office at pleasure; and
- employment governed by statute.

The above mentioned categories of a contract of employment are given judicial recognition in the case of *Ogundipe v Telecomm. Ltd*³²⁴ where it was held that:

...There are roughly three categories of a contract of employment. They are:

- (a) Those regarded as purely master and servant;
- (b) Those where a servant holds office at the pleasure of the employer and;
- (c) Those where the employment is regulated or governed by statute, otherwise known as having statutory flavour: *Olaniyan v University of Lagos* (1985) 2 NWLR (Pt.9) 599.

³²²(2008) 18 NWLR (Pt 1118) 77,84.

³²³(2016) ALL FWLR (Pt. 817) 613, 630.

³²⁴(2016) ALL FWLR (Pt. 817) 613 @ 634 paras G.

In employment under a master/servant relationship, a master has the power to hire and fire his employees and he may refuse to give his reasons for terminating his employee's appointment provided he complies with the terms of the employee's engagement and he could only be compensated in damages even if the employer fails to comply with the terms.³²⁵

Under employment under which a servant holds office at pleasure, an employee holds an office at the pleasure of his employer. The employment of this kind of employee is at the discretion of the employer as it can be terminated any time. An example is a Minister appointed by the President. The minister holds office at the pleasure of the President. It has been argued that a major disadvantage of this kind of employment is that the loyalty of the employee lies with the employer not with the general wellbeing of the masses or the business as the employee will dance to the tunes of the employer so as not to get fired.³²⁶

An employment governed by statute, otherwise known as employment with statutory flavour, occurs when the appointment and termination is protected by statute or laid down regulations made to govern the procedure for employment of an employee.³²⁷ The employee under this employment is usually employed by an employer who is a creation of the statute.³²⁸ The effect of this class of employment is that the statute creating the employer protects the term of the employment of its employees by making statutory

³²⁵ *Chuks v. Comptroller Nigerian Prison Service & Ors* (2008) ALLFWR (Pt 944) 737 @ 773.

³²⁶ Ekpenyong E, and Igwe U, 'An appraisal of types of employment and the means of their effective termination under the Nigerian law' (2017) www.mondaq.com/Nigeria/x/622226/employee+rights+labour+relations/An+Appraisal+Of+Types+Of+Employment+And+The+Means+Of+Thier+Effective+Termination+Under+The+Nigerian+Law accessed on 27 February, 2019.

³²⁷ Ibid.

³²⁸ Izuchukwu A.M, 'Termination of Contracts of Employment and the Applicability of International Labour Organisation Standards on Unfair Dismissal In Nigeria' (LLM Dissertation, NnamdiAzikwe University Akwa, 2014) P.54.

prescriptions which must be followed before any employee of that undertaken can be removed from his employment.³²⁹

On the meaning and nature of employment with statutory flavour, the court in the case of *Imaseun v. University of Benin* (2011) ALL FWLR (Pt. 572) 1791@ 1810 held as follows:

When an office or employment has a statutory flavor in the sense that its conditions of service are provided for by the statute or regulations made thereunder, any person in that office or employment enjoys a special statutes (sic) over and above the ordinary master and servant relationship. In the matter of discipline of such employee, the procedure laid down by such statute must be fully complied with. If not, any decision affecting the right or reputation or tenure of office of that employee will be declared null and void..."

It is not enough that an employee claims his employment is coated with statutory flavor. And before an employee can challenge the validity of the termination of his employment such employee must show that the employment:³³⁰

- i. has statutory reinforcement or at any rate, be regarded as mandatory;
- ii. be within the meaning of the relevant statute and directly applicable to the employee or persons of his cadre; and
- iii. has been breached in the course of determining the employment

³²⁹ Ibid.

³³⁰ Ekpenyong E, and Igwe U. 'An appraisal of types of employment and the means of their effective termination under the Nigerian law' (2017) www.mondaq.com/Nigeria/x/622226/employee+rights+labour+relations/An+Appraisal+Of+Types+Of+Employment+And+The+Means+Of+Thier+Effective+Termination+Under+The+Nigerian+Law accessed 27 February, 2019

The inference one can draw from the above discussion on contract with statutory flavour is that for an employment to be regulated by statute or a regulation, it must be made pursuant to a power granted by a statute or a regulation made pursuant to a power derived from the statute. It is also important to note that if the employment is regulated by a regulation made pursuant to a power derived from a statute, the said regulation will have the same force of law as the enabling statute under which it was made, provided it does not conflict with the provisions of the enabling statute.³³¹

4.0 DETERMINATION OF A CONTRACT OF EMPLOYMENT

A contract of employment can be terminate in three ways:

- a. By operation of law,
- b. By intention of parties, and
- c. By unilateral act of one of the parties.³³²

- **Termination by operation of law**

Ordinarily, an employment is determined either by effluxion of time if it is for a fixed period³³³ or by notice if it is not for a fixed time.³³⁴ However, there are circumstances where a contract of employment will come to an end because the law regards such contract as determined.³³⁵ This is termination by operation of law. This can arise in the case of death of one of the parties to a contract of employment, frustration or serious and prolonged

³³¹ *Osadebay v A.-G., Bendel State* (1991) NWLR (pt 169) 525. Cited in Izuchukwu A.M, 'Termination Of Contracts of Employment and the Applicability of International Labour Organisation Standards on Unfair Dismissal in Nigeria' (LLM Dissertation, Nnamdi Azikwe University Awka, 2014) P.54.

³³² A, Emiola, *Nigerian Labour Law*, Op cit. p. 128.

³³³ Ibid.

³³⁴ Labour Act. S. 9(7) C.

³³⁵ Ibid, S. 9(7) 6. See also *Mazin Engineering Ltd v Tower Aluminum (Nig.) Ltd* (1993) 5 NWLR (pt. 295) 526.

illness.³³⁶ Therefore, any action which has accrued to either party before the death remains enforceable.³³⁷

A contract of employment can also be deemed terminated by operation of law as a result of frustration. This occurs when the performance of contractual obligation is rendered impossible. Frustration of contract occurs when an agreement lawfully entered into by parties is prematurely determined due to an intervening change or a fundamental change during its operation. This is regarded by law as striking at the root of the agreement and as entirely beyond what was contemplated by the parties when they entered into the agreement.³³⁸ Supervening events that may frustrate a contract of employment includes: war, destruction of subject matter, serious illness etc.³³⁹

• Termination by Intention of the Parties

This termination usually arises from the terms of the parties' agreement or from the conduct of the parties.³⁴⁰ Where it is a contract for a fixed period, it is determined by expiration of the period and no formal notice is required to terminate it.³⁴¹ Employment for life lasts until the retiring age, subject to good performance and behaviour. If it is protected by statute, it can be terminated for good cause. Where it cannot be deduced, however, that it is an employment for life, the presumption is that the contract can be determined by reasonable notice. At common law, the length of notice required, in a particular circumstance, is that set out in the contract. But it has been held that the question of

³³⁶ *Southern Foundries Ltd v Shirlaw* (1940) AC 701 at p. 721.

³³⁷ Section 9(8) Labour Act Cap L1, LFN 2004.

³³⁸ *Mazin Engineering Ltd v Tower Aluminum (Nig.) Ltd* (Supra) P. 534; *Warner & Warner International Associates v Federal Housing Authority* (1993) 6 NWLR (pt. 298) 148.

³³⁹ Izuchukwu A.M. 'Termination of Contracts of Employment and the Applicability of International Labour Organisation Standards on Unfair Dismissal in Nigeria' (LLM Dissertation, Nnamdi Azikwe University Akwa, 2014) P.80.

³⁴⁰ *Orient Bank (Nig) Plc v Bilante International* (1997) 8 NWLR (pt. 515) 37.

³⁴¹ Labour Act, S. 9(7). *Adegbite v Unilag* [1970] NC.L.R. 346.

length of notice would arise only after the termination of the employment had been established.³⁴² Where the contract of employment makes no provision as to notice, the length of notice required will be that implied by custom or considered reasonable notice depending on the facts and circumstances of individual cases.³⁴³ These facts and circumstances can be deduced by making recourse to the position of the employee, the duration of service put in by the employee and the salary of the employee.

- **Termination by Unilateral Act of One of the Parties**

This termination can be at the instance of the employer or the employee. Notice at the instance of the employee otherwise referred to as 'resignation' can also terminate employment. Dismissal, on the other hand, is termination at the instance of the employer. Dismissal at common law refers to all cases where an employee is relieved of his duties by a positive, unilateral act of his employer.³⁴⁴ Summary dismissal applies to cases where an employee is relieved of his employment as a result of breach of a term of the contract. The authority of the employer to summarily dismiss his employee was first recognized in the case of *Spain v. Arnott*.³⁴⁵ Emiola³⁴⁶ also noted that the employer has a right to dismiss his employee summarily, stating that 'the right to dismiss a delinquent worker is believed to be implied in a contract of employment, but it is also possible to view it as a power to rescind a contract upon a serious breach of contract committed by the employee.'

³⁴² *African Continental Bank Ltd v Ewarami* (1978) ALL NLR 114.

³⁴³ *Daniel v. Shell-BP Petroleum Development (Nig) Ltd* (1962) ALLNLR, 19.

³⁴⁴ Chianu, E, *Employment Law* (BemicovPublishers Nigeria Ltd, Akure, 2004).p 289
Cited in Izuchukwu A.M, 'Termination of Contracts of Employment and the Applicability of International Labour Organisation Standards on Unfair Dismissal in Nigeria' (LLM Dissertation, NnamdiAzikwe University Akwa. 2014) p.81.

³⁴⁵ (1817) 171 ER 638 cited by E Chianu, *Employment Law. Ibid.*

³⁴⁶ Chianu E. *Employment Law* (BemicovPublishers Nigeria Ltd. Akure, 2004) p.164.

the right to summarily dismiss an employee is however exercisable whether the contract is for a fixed period or for an specified term³⁴⁷

RIGHT OF AN EMPLOYEE TO RESIGN

An employee has a right to resign his employment anytime. This can be done by giving notice to resign or pay salary in lieu of notice. If the employee elects to give notice, the notice must be specific and unequivocal and time begins to run when the notice is served on the employer³⁴⁸. On the right of an employee to resign, the court in the case of *Solomon Abekhe v Alpha Merchant Bank Plc & Ors*³⁴⁹ held that:

... every employee has the right to resign from his employment/appointment whenever he desires and the resignation takes effect as indicated in the notice of resignation or as may be stipulated in the terms and conditions of the employment. In law, the resignation would take effect even when the employer did not expressly accept it since there is no need for the employer to reply to the letter of resignation before it becomes effective. See *Benson v. Onitiri* (1960) SCNJ (Sic) 177, (1950-60) NSC 52, (1960) 5 FSC 69

Being an exercise of a right under the terms and conditions of the contract of employment between him and the 1st respondent, the issuance of the letter of resignation by the appellant to the 1st respondent automatically ended the employment/appointment from

³⁴⁷ *Maja v Stacey* (1965) 1 ALL NLR 141, 151. *Co-operative and Commerce Bank (Nig) Ltd v Nwankwo* (1993) 4 NWLR (pt 288) 90, cited in *Uzochukwu A M. Termination of Contracts of Employment and the Applicability of International Labour Organisation Standards on Unfair Dismissal in Nigeria* (LLM Dissertation, Nnamdi Azikiwe University, Awka 2014) p 87

³⁴⁸ *Morion Sundour Fabrics Ltd v Shaw* (1996) 2 KLR 1 (DC) cited in *Emiola A. Nigerian Labour Law* (4th ed. AMFELLP, Edo 2008) p 144

³⁴⁹ (2017) ALL FWLR (Pt 514) 971 w 1003

the stated date of 20December, 1993. See *Faponle v. University of Ilorin Teaching Hospitals Mgt. Board* (1991) 4 NWLR (Pt. 183), *Benson v Onitiri* (Supra).

Flowing from the above, it is clear that an employee has a right to resign his appointment and when an employee exercises his right to resign, the issue is: is it legally essential for the employer to accept his resignation before it becomes effective?

There are a lot of judicial authorities on this issue and most of them unanimously agree that a formal acceptance of a notice of resignation is not necessary. Thus, once a notice of resignation has been tendered and received, the resignation becomes effective. In *Dr. MurtadaBusair Ahmad v. Kwara State University & 3 Ors*,³⁵⁰ describing the word 'resignation', the right of employee to resign and when letter of resignation becomes effective, O. O. Oyewumi J. held unequivocally that:

Now, the word resignation is commonly described as a situation where an employee no longer wishes or desires to continue in the services of his/her employee (sic: employer) for any reason or no reason at all. It is settled principle of law that every employee has the right to resign from his employment whenever he so desires. See the cases of *University of Calabar Teaching Hospital and Anor v. Bassey* [2008] LPELR-8553 (CA), *Liman v. Access Bank* [2014] 45 NLLR (146) 626 NIC, page 657, para E. It is conveyed by this latin maxim: *Resignation est juris propriis pontanea refutation.*

The law is long settled and without any equivocation that resignation is effective in law immediately the same is communicated to the employer, even when the employer does not expressly accept it. There is also no need for the employer to reply to the letter of resignation before it

³⁵⁰ (Unreported) Suit No. NICN/IL/12/2017 delivered on 9th May, 2019, per O. O. Oyewumi J. at page 9

becomes effective. It is ordinarily effective on the date the letter of resignation is received by the employer.

In *The West African Examination Council v Felix Iwarue Oshionebo*³⁵¹ the court held that:

I here pause to discuss the law relating to notice of resignation. The law is that a notice of resignation is effective not from the date of the letter, not from the date of any purported acceptance, but from the date on which the letter was received by the employer or his agent. Tendering of a letter of resignation carries with it the right to leave the services automatically without any benefit subject to his paying any of his indebtedness to his employer.

The principle that an employee has a right to resign and once a notice of resignation is tendered, it becomes effective was further enunciated by Ademola CJ in the case of *T.O.S Benson v Samuel Onitiri*³⁵² when he stated that:

there is (an) absolute power (i.e right) to resign and (there is) no discretion (in the other party) to refuse to accept (the) notice of resignation...I am of the view that a notice of resignation to either (a board or a minister) is good, nor do I think that it is necessary for the board or anybody else to reply that the resignation is accepted.

This decision in *Benson v Onitiri* was re-affirmed in *Professor T.M Yesufu v. Governor of Edo State & Ors*³⁵³ and the court held that resignation needs not be formally accepted by the employer before it can take effect.

³⁵¹ (2006) 12 NWLR (Pt. 994) 258 @ 272 para A-B. See also *Dr. Murtada Busair Ahmad v. Kwara State University & 3 Ors* (Supra).

³⁵² (1960) 5 F. S. C. 69, 81-82.

³⁵³ (2001) 26 WRN 121, 133.

It is important to note that the rationale behind the principle that a notice of resignation once tendered becomes effective is that the court would not be willing to force an unwilling employee on a willing employer and vice versa. Thus, in *The West African Examination Council v Felix Iwarue Oshionebo*³⁵⁴, it was held that:

The law regulating the relationship between an employer and an employee is very well settled. First and foremost, no court, generally, can force an employer to retain the services of an employee. See *UBN Plc v. Ogbor* (1995) 2 NWLR (Pt. 380) 647. Where there is a written contract of employment between a master and a servant, the court is under a duty to determine the rights of the parties under the contract.

6.0 PAYMENT OF SALARY IN LIEU OF NOTICE

A contract for employment is usually determined by giving notice. However, a person may waive his right to notice by paying salary in lieu of notice. This has been given statutory recognition by the Labour Act³⁵⁵ which provides that either party to a contract of employment may waive his right to notice on any occasion or accept a payment in lieu of notice. Thus, in the case of *Dudusola v. Nigeria Gas Coy, Ltd.*³⁵⁶ the Supreme court held that where parties to a contract mutually agree that the condition for termination is the giving of notice or payment of salary in lieu of notice, the only valid way to discharge a party from his obligations under the notice stipulated is the payment of the equivalent salary for the period of the notice.

Flowing from the above, therefore, where a party decides to terminate a contract of employment and elects to pay salary in

³⁵⁴ (2006) 12 NWLR (Pt. 994) 258 @ 272 para B-C.

³⁵⁵ Section 11(6) *Cap L1, Laws of the Federation of Nigeria 2004*.

³⁵⁶ (2014) ALL FWLR (Pt. 713) 1902 S.C @1912 para G-H.

Acts empower the Commissions, to freeze and seize proceeds of corruption and instrumentalities of corruption.⁵⁶⁵ Also, there are provisions for forfeiture of proceeds of corruption.

International Cooperation Efforts

This measure is relevant to the other measures above particularly with respect to transnational corruption. Nigeria is regulated by the Mutual Legal Assistance Act⁵⁶⁶ and Mutual Legal Assistance Guidelines issued by the Central Authority Unit of the Attorney General's Office. Also, the A-G has entered into a Memorandum of Understanding with other States to facilitate the return of recovered assets.⁵⁶⁷ As a member of Egmont Group of Financial Intelligence Units (FIUs) and Interpol, and the use of MLA and mutual assistance, Nigerian FIU cooperates with other States in tracing, identification, seizing or freezing and repatriation of illicit assets.⁵⁶⁸ Also, through extradition arrangement, an absconding corrupt person can be repatriated to the requesting state.

In spite of the identified existing efforts in Nigeria, the anti-corruption fight is largely ineffective. Nigeria is still rated as one of the most corrupt with high level of poverty and corruption remains unabated. A 2017 report of National Bureau of Statistics (NBS) in collaboration with the United Nations Office on Drugs and Crime (UNODC) on Corruption in Nigeria from June 2015 to

⁵⁶⁵ Section 6(d) of EFCC Act.

⁵⁶⁶ Mutual Legal Assistance in Criminal Matters within the Commonwealth (Enactment and Enforcement) Act, 1998 Cap M24 LFN 2004 (MLA Act).

⁵⁶⁷ Nigeria signed an MoU with the UK on 16 August 2016.

⁵⁶⁸ The birth of the Egmont Group of FIUs was in recognition of the importance of international cooperation in the fight against money laundering and financing of terrorism. This motivated a meeting of a group of Financial Intelligence Units (FIUs) at the Egmont Arenberg Palace in Brussels, Belgium, where a decision to establish an informal network of FIUs for the stimulation of international co-operation was reached. Egmont Group FIUs meet regularly to find ways to promote the development of FIUs and to cooperate, especially in the areas of information exchange, training and the sharing of expertise. See <www.egmontgroup.org/> 5 October 2016.

The effect of the above, therefore, is that where payment in lieu of salary is accepted, it will operate to determine the relationship between the employer and employee.

7.0 DR. BEN O. CHUKWUMAH V. SHELL PETROLEUM DEVELOPMENT COMPANY OF NIGERIA LIMITED:³⁵⁸THE FACTS AND FINDINGS

In October, 1975, the Appellant, a medical practitioner was offered employment by the respondent. The appointment was confirmed subsequently and the appellant became a member of the respondent's Contributory Pension Fund. He was also entitled to other benefits enjoyed by the employees of the respondent. The respondent also provided the appellant and his family with a house and the appellant resided in the premises during his employment with the respondent.

By a letter dated 18th August, 1981 the appellant's employment was terminated with effect from the date of the letter and he was also given a month's notice to vacate the premises belonging to the respondent. In the letter with which the appellant was offered employment it was stated in paragraph 11 thereof that both the respondent and the appellant have the right to terminate the employment anytime provided that a notice of not less than one month is given or payment of one month's salary in lieu of notice. And on confirmation of appointment, the period of notice shall be two months or payment of two months' salary in lieu of notice while on completion of five years of service, the length of notice shall be 3 months or payment of 3 months' salary in lieu of notice.

In the letter by which the appellant's employment was terminated, it was stated that the appellant shall be paid two months basic salary in lieu of notice, his entitlement in Shell Petroleum Development Company of Nigeria Limited Non-

³⁵⁸ (1993) 4 NWLR (Pt. 289) 512.

Contributory Pension Fund and Pro-rated end-of-year- bonus. The salary in lieu of notice was however not made to the appellant until 3 months after the termination of his employment. The appellant, being aggrieved by the termination of his employment and ejection from the respondent's premises, sued the respondent at the High Court in Warri, seeking the following:

1. A declaration that the defendants' letter dated 18th August 1981 addressed by the defendants' branch at Warri to the plaintiff at Warri by which the defendants purported to terminate the employment of the plaintiff with the defendant company is actuated by malice and bad faith, is grossly unreasonable and capricious and is ineffective to terminate the plaintiff's said employment.
2. The plaintiff claims in the alternative from the defendants the sum of N385,529.00 (Three Hundred and Eighty Five Thousand, Five Hundred and Twenty Nine Naira) only being compensation for the loss caused to the plaintiff by the defendants by reason of their so acting maliciously, capriciously, grossly unreasonably and in bad faith to the detriment of the plaintiff.
3. The plaintiff also claims the sum of N100,000.00 (One Hundred Thousand Naira) only being damages for trespass against the defendants when they invaded the plaintiff's residence at the time it was occupied and in possession of the plaintiff.
4. An injunction restraining the defendants, their servants and/or agents from disturbing the possession of the plaintiff of the said premises.

The trial court dismissed the action but held that the appellant was entitled to 2 months salary in lieu of notice as well as the other reliefs stated in his termination letter. The Appellant's appeal to the Court of Appeal was also dismissed and the judgment of the trial

court was affirmed. Being aggrieved, the appellant appealed to the Supreme Court and the appeal was allowed in part.

The issues before the Supreme Court were:

- Whether the exercise of the right to terminate a contractual employment can be questioned on the ground that such right was exercised out of malice, bad faith or improper motive.
- Whether a contract of employment which is determinable by notice or payment of salary in lieu of notice is lawfully determined where neither the appropriate notice is given nor actual payment of salary in lieu of notice at time of determination.

OR

- Whether payment of salary in lieu of notice must be done simultaneously with the termination of the contract of employment when same is not expressly stated in the contract between the parties

In determining issue one, the Supreme Court, per Ogundare (JSC) while quoting the learned trial judge stated that:

That being so the matter of the termination of appointment certainly resolves itself upon contractual relationship in law as the plaintiff's employment was governed by the contract into which he entered at the time of his appointment. The plaintiff himself said it all when he was confronted with the relevant documents. The circumstances in which the employment was terminated the injured feelings of the plaintiff or the inconvenience he may have suffered cannot be taken into consideration so long as the termination is in accordance with the terms of the contract.³⁵⁹

It was held further that:

³⁵⁹ *Chukwumah v. Shell Petroleum* (supra) at 534 para H.

.....Both in his pleadings and evidence the plaintiff concentrated so much on his allegations of bad faith, hatred, malice etc; but all these are of no consequence in determining whether or not his contract of employment was lawfully terminated by the defendant, considering that no reason was given for the termination.³⁶⁰

In determining issue two, the Supreme Court, per Ogundare JSC, held that:

...In my respectful view, where a contract of service gives a party a right of termination of the contract by either giving a particular length of notice or payment of salary in lieu of the length of notice and the latter course is chosen, the party seeking to put an end to the contract must pay to the other party the salary in lieu of notice at the time of termination of the contract. It is not enough that in the letter of termination he offers to pay salary in lieu of notice. Thus in the case on hand, the defendant having terminated plaintiff's employment without giving him the required notice, must pay at the termination, salary in lieu of notice. Payment made three months after the termination cannot be in fulfillment of defendant's obligation under clause 11...³⁶¹

8.0 A CRITIQUE OF THE SUPREME COURT'S DECISION IN *CHUKWUMA V. SHELL PETROLEUM*

In the instant case, the appellant sought for a declaration that the termination of his employment by the respondent was actuated by malice and bad faith, and therefore the termination was ineffective. The Supreme Court held that the allegations of bad faith, hatred and malice etc are of no consequence in determining whether or not his contract of employment was lawfully terminated by the respondent even when no reason was given for the determination. There is a general presumption that parties

³⁶⁰ At 535 para A

³⁶¹ At 536-537 para H-A.

have a right to terminate a contract of employment regardless of the motive for doing so. In fact, a party needs not give any reason for the termination. However, the termination must be lawful. In order for the determination of a contract of employment to be valid, three conditions must be present, viz: the termination must be for one or all the conditions stipulated or implied in the contractual agreement; the party seeking to terminate the contract must have given proper notice; and the agreed method for termination must be followed.³⁶² Once all these conditions are present, a party can terminate the contract of employment without stating the motive for the termination.

In the case of a master-servant relationship, the employer or employee can terminate the contract without stating the reason for termination once the terms and conditions in the contract have been complied with. While in the case of a contract with statutory flavour, once the termination complies with the statutory requirement for terminating a contract of employment by the statute, there is no need to state the motive behind the termination of the employment. The above has been given judicial recognition in the case of *Momoh v. CBN*³⁶³ where the court held that:

Ordinarily at common law, a master is entitled to dismiss his servant from his employment for good or bad reason or for no reason at all. In consonance with this principle, the courts rarely order specific performance of contract of employment so as not to create a situation whereby a willing employee will be foisted upon an unwilling employer, just as no employer could be allowed to prevent an employee from seeking employment elsewhere. However, where there is a written contract of employment, statutory provisions and regulatory conditions of employment or service, equity

³⁶²Emiola A. *Nigerian Labour Law* (4th ed. AMFITOP, Edo 2008) p.137.

³⁶³[2007]14 NWLR (pt 1055) 508.

demands that the courts should hold the parties bound by the terms of the employment agreement. Furthermore, in the case of *NEPA v Eboigbe*³⁶⁴ the court held that:

A private limited company or any employer of labour does not have any obligation to retain the services of any unwanted employee and may terminate the appointment of the employee without any reason given. In other words, an employer of labour is not bound to be saddled with an unwarranted staff and may terminate the services of such an employee without any reason for the termination. However, where an employer states a reason for the termination, such reason must be plausible to justify such termination.

From the above authorities, it is clear that once the termination of a contract is in consonance with the terms of the contract, the injured feelings of the employer/employee or the inconveniences he may have suffered will not be put into consideration. The rationale behind this principle is that a court cannot foist an unwilling employee on a willing employer and vice-versa. This has been upheld in the case of *The West African Examination Council v. Felix Iwarue Oshionebo* (2006) 12 NWLR (Pt. 994) 258 @ 274 paras B-C and it was stated that:

The law regulating the relationship between an employer and an employee is very well settled. First and foremost, no court, generally, can force an employer to retain the services of an employee. See *UBN Plc v. Ogbor* (1995) 2 NWLR (Pt. 380) 647. Where there is a written contract of employment between a master and a servant, the

³⁶⁴(2009) 8 NWLR (pt. 1142) 152. See also *Angel Spinning & Dyeing Ltd v Ajah* (2000) 13 NWLR (pt. 685) 532, *Obe v Niger Sol Const. Co. Ltd* (1972) 2 ULLR (pt. 11) 121.

court is under a duty to determine the rights of the parties under the contract.

One of the ways by which a contract of employment can be determined is by giving notice or payment of salary in lieu of notice. The essence of a notice is to make the other party aware that the contract is about to come to an end. Usually a party seeking to terminate the contract is required to give a certain length of notice - it could be 2 months or 3 months' notice depending on the terms of the contract. It is important to note that a party may elect to pay salary in lieu of notice. This is given statutory recognition under section 11(6) of the Labour Act³⁶⁵ which provides that nothing shall prevent either party to a contract from waiving his right to notice on any occasion, or from accepting a payment in lieu of notice.

It follows therefore that a party can elect to pay salary in lieu of notice. The crucial issue however is the mode or manner of payment of the salary in lieu of notice. Must the salary in lieu of notice be paid at the time of termination of the employment i.e. must it be paid simultaneously with the termination? Or can it be paid after the termination of the contract of employment?

The Supreme Court has held that salary in lieu of notice must be paid at the time of termination of the contract of employment. The court stated thus:³⁶⁶

...In my respectful view, where a contract of service gives a party a right of termination of the contract by either giving a particular length of notice or payment of salary in lieu of the length of notice and the latter course is chosen, the party seeking to put an end to the contract must pay to the other party the salary in lieu of notice at the time of termination of the contract.

The effect of the above decision, therefore, is that where a party elects to pay salary in lieu of notice, such salary must be paid at the time of termination of the contract.

³⁶⁵Cap. L1 Laws of Federation of Nigeria 2004.

³⁶⁶*Chukwumah v. Shell Petroleum* (supra) at 536 para H.

Can the Supreme Court's holding that payment of salary in lieu of notice must be made simultaneously with the termination of employment when same is not expressly stated in the contract of service binding the parties?

In answering this question, the contract of service between the parties will be considered.

Clause 11 of the contract of service regulates the termination of the employment of the appellant and the said clause states thus:

You, or we, shall have the right at any time to terminate your employment under this letter by giving to the other not less than one month's notice in writing, or by paying one month's salary in lieu of notice. On the confirmation of your appointment, the period of the notice shall be two months, or two months' salary in lieu of notice and on completion of five years of service, the period of notice shall be three months, or three months' salary in lieu of notice.

From the foregoing, it can be deduced that either of the parties can terminate the contract at anytime by giving notice or pay salary in lieu of notice. This provision is clear without any ambiguity. Where a document is clear and unambiguous, the court has been enjoined to employ the plain and ordinary meaning in the course of its interpretation. The case of *Nigerian Ports Authority v Ahmed*³⁶⁷ is instructive to this where the court held that:

Firstly, where the words of a document are clear and unambiguous, the law compels the courts to accord them their plain and ordinary meanings, see *Dalek (Nig) Ltd, v. OMPADEC* (2007) ALL FWLR (Pt. 364) 204, (2007) 7 NWLR (Pt.1037) 402; *Cotecna Int'l Ltd v. Churchgate (Nig) Ltd* (2010) 18 NWLR (Pt. 1225) 346..."

In applying the plain and ordinary meaning to the interpretation of clause 11 of the contract of service, where a party intends to

³⁶⁷ (2017) ALL. FWLR (Pt. 892) 1059 at 1079 para G.

terminate the contract of service and has elected to pay salary in lieu of notice, the salary can be paid anytime not necessarily at the time of the termination. There is nothing in the clause which stipulates the time when the payment in lieu of salary must be made. Therefore the payment of the salary in lieu of notice three months after the termination by the respondent cannot be in violation of the terms of the contract. At any rate, the other party is entitled to claim the amount of salary in lieu of notice as damages, if the party initiating the termination fails to fulfil his obligation by failing to pay the salary in lieu of notice. This position is *in tandem* with the reasoning that even where no notice of termination is given by the employer before an employment is terminated, the employee is entitled salary in lieu of notice.³⁶⁸ Thus, in *Gboboh v. British Airways Plc*,³⁶⁹ it was held that:

.....therefore, if the appellant was given two (2) months notice or paid 2 months' salary in lieu of notice, he would have had nothing as damages. But since the appellant was not given the required notice, he is entitled to the 2 months salary in lieu of notice as rightly determined by the Lower Court.

The failure to so pay either simultaneously with the letter of resignation or otherwise cannot, and should not, invalidate the resignation. After all, an unwilling employee cannot be foisted on a willing employer and vice versa.

Furthermore, the Labour Act³⁷⁰ is clear and applying the plain and ordinary meaning, where a party elects to pay salary in lieu of notice, such salary can be paid anytime.

³⁶⁸ *Dr. MurtadaBusair Ahmad v. Kwara State University & 3 Ors* (Unreported) Suit No. NICN/IL/12/2017 delivered on 9th May, 2019, per O. O. Oyewumi J. at pages 12 and 14.

³⁶⁹ (2017) All FWLR (Pt 908) 1913 at 1934 Paras B – C. See also *Esogwa v. Zenith Bank Plc* (Unreported) Suit No. NICN/LA/37/2013 delivered on 24th September 2015, Per O.O. Oyewumi J. where, having found as a fact that the claimant never gave the requisite one month's notice or one month's salary in lieu of notice, the Court still held that the Defendant (employer) is entitled to be paid one month salary in lieu of notice by the claimant (employee) in damages.

³⁷⁰ Section 11(6) Labour Act, LFN 2004

When the Court of Appeal was faced with a not too dissimilar issue with the one at hand, the Court held that where a contract does not specify a particular mode by which salary in lieu of notice should be paid, once there is an indication that the salary has been paid, it will be deemed that that part of the contract has been complied with. This was the position of the court in the case of *Gateway Bank of Nig Plc v. Abosede*³⁷¹ where the court held that:

The respondent's salary in lieu of notice was paid into his salary account according to DW1 vide pages 56 lines 18 and 19. I believe DW1 that the salary in lieu of notice was paid into the salary account of the respondent. It is noteworthy that neither the letter of appointment, Exhibit A, or the Staff Manual (Exhibit D) specified a particular pattern, mode or manner by which the one month's salary in lieu of notice shall be paid. That part of the contract will be deemed to have been executed if there is an indication by the employer that the amount had been paid. In this case there is an indication that the appellant followed the pattern of payment of his salaries and allowances. This, in my view is enough to meet the terms of the contract and I hold there was no breach of contract in terminating the contract necessitating the award of damages.

From the foregoing, it is clear that where the contract of employment is not express on the manner in which payment of salary in lieu of notice must be made, where there is an indication that the payment of salary was actually made, that part of the contract will be deemed to have been executed.

In *Chukwuma v. Shell Petroleum* under consideration, evidence showed that the respondent paid the two months' salary in lieu of notice to the appellant three months after the termination of the employment i.e on the 25th November, 1981.³⁷² The provision of clause 11 of the contract of service did not specify a particular

³⁷¹ (2001) ALL F.W.L.R (Pt. 79) 1316 at 1336 para F-G.

³⁷² See page 537 para A of the judgment.

pattern, mode or manner by which the two months' salary in lieu of notice should be paid. The effect therefore is that the respondent has complied with clause 11 of the contract of service since it is in evidence that the respondent paid the two months' salary in lieu of notice.

The Supreme Court per Ogundare, JSC in *Chukwumah v. Shell Petroleum*,³⁷³ allowing the appeal in part, held that:

...In my respectful view, where a contract of service gives a party a right of termination of the contract by either giving a particular length of notice or payment of salary in lieu of the length of notice and the latter course is chosen, the party seeking to put an end to the contract must pay to the other party the salary in lieu of notice at the time of termination of the contract.

Other Justices of the Court, Bello CJN, Karibi-Whyte, JSC, Olatawura, JSC and Kawu, JSC concurred with Ogundare, JSC. The propriety or otherwise of the decision of the Court needs to be reconsidered in view of the fact that the contract of service between the parties did not expressly provide for payment of salary in lieu of notice at the time of termination of employment. The contract of service, particularly clause 11 thereof, provides for the termination of the employment by either parties subject to the giving of notice or payment of salary in lieu of notice. There is nowhere in the said clause 11 or the contract as a whole where the mode or manner of the payment of the salary in lieu of notice is stated. How then did the Supreme Court arrive at the decision that payment in lieu of notice must be made at the time of termination of the employment. The courts have been enjoined to employ the plain and ordinary meaning when interpreting documents. This was the position in the case of *Nigerian Ports Authority v Ahmed*³⁷⁴. The provision of clause 11 of the contract of service is very clear and unambiguous which should be accorded its plain and ordinary meaning by the Supreme Court.

³⁷³ (1993) 4 NWLR (Pt. 289) 512 @ 536 para H

³⁷⁴ (2017) ALL FWLR (Pt. 892) 1059 @ 1079 para G.

The holding of the court that the payment of salary in lieu of notice must be made at the time of termination of the employment has completely altered the clause.

It is important to also note that the express mention of one thing is to the exclusion of all others. This is expressed in the Latin maxim *expressiouniusest exclusion alterius*.³⁷⁵ It follows, therefore, that since it was not expressly mentioned in clause 11 or any other clause of the contract of service between the parties that payment in lieu of notice must be made at the time of termination of the employment, there is no basis for the Supreme Court to hold that payment of salary in lieu of notice must be made at the time of termination of employment.

Unfortunately, the Supreme Court did not give justification or reason for its holding that payment in lieu of notice must be made at the time of termination of employment. It is not enough that a court make specific findings - the court must state how it arrived at the findings and the reasoning behind it. This has been upheld in the case of *Sa'idu v. State*³⁷⁶ where it was held that:

Like in every trial, the court or tribunal charged with the performance of judicial function is by law required not only to review and evaluate the evidence adduced at trial before deciding on any matter, but also to make specific findings therefrom to enable an appeal court to which an appeal lies, decide whether the finding was, on the evidence before it, valid. *HaliluMohamman v I.G.P.* (1970) NNLR 98; *Stephen v.State* (1986) NWLR (Pt. 46) 978. This is also the only way the court will be seen to have given open and even handed justice as against arbitrariness. Otherwise, parties will be left to grope in

³⁷⁵See *Opia v. INEC* (2014) ALL FWLR (Pt. 739) 1045 @1072 paras F-G; *Prestige Assurance Plc &Ors v. Sara Products Limited* (2016) ALLFWLR (Pt 818) 799 @ 829 Paras G-H; *The Honourable Attorney-General, Lagos State v. The hon. Attorney-General of the Federation* (2014) ALLFWLR (pt 740) 1296 @1348-1349 Paras H-B; *Mahmud AliyuShinkafi & Anor v. AbdulazeezAbubakarYari* (2016) ALLFWLR (pt 862) 1399 @ 1439 para a.

³⁷⁶(2016) ALL FWLR (Pt. 849) 899 @ 926 para E-G

darkness as to how the court arrived at its decision. Thus to allow courts to decide without clearly stating the reasons for their decision is to send an open invitation to arbitrariness which may lead to judicial anarchy. *Agbanelo v. U.B.A Ltd* (2000) FWLR (Pt.13) 2197.

A careful perusal of the judgment will reveal that there is nowhere the Supreme Court per Ogundare (JSC) gave the reason or basis for deciding that a party seeking to put an end to a contract of service by paying salary in lieu of notice must do so at the time of the termination of the employment,³⁷⁷ moreso when the contract of service did not expressly state that payment in lieu of salary must be paid at the time of termination of the employment. The effect therefore as rightly stated from the above cited case is that the Supreme Court is sending an open invitation to arbitrariness which may lead to judicial anarchy.

9.0 CONCLUSION

This work has considered the employee's right to resign and determination of employment by payment of salary in lieu of notice. Focus was placed on the case of *Chukwumah v Shell Petroleum* because of the holding of the Supreme Court that payment of salary in lieu of notice must be made at the time of termination of employment. The Supreme Court held that the payment of salary to the appellant 3months after the termination of his employment is a violation of clause 11 of the contract of service. The said clause 11 of the contract of service however did not expressly provide for the time, mode and manner in which the payment of salary in lieu of notice should be made. The Supreme Court did not give any justification as to how it arrived at that decision despite the fact that the courts have been enjoined to give reason for their decision. The effect therefore is that this decision of the Supreme Court may cause injustice to parties as it has the tendency of altering the terms of the contract between parties to include what is not stated therein. This, apparently, will prejudice

³⁷⁷ See page 536 -537 of the judgment

the right of an employee to exercise his right to terminate his employment at any given time

It is the hope that when a similar case comes before the Supreme Court, the position of the court in *Chukwumah v Shell* will be reconsidered and reviewed.



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