RE-INSTATING A WRONGFULLY DISMISSED EMPLOYEE*

Abstract
The readily available redress or remedy available to a wrongfully dismissed employee is the common law remedy of damages. The court has persistently shown their disfavour or dislike of reinstating a wrongfully dismissed employee where there is, in existence, a master-servant relationship between them. Some of the reasons the court has given for taken this stance ranges from difficulty of enforcing such an order to public policy consideration. Only in a few special circumstances or exceptional cases – for instance, those with statutory or legal flavour and recently, dismissal that is based on trade union victimisation - is the court ready and willing to reinstate a wrongfully dismissed employee. Using doctrinal research methodology, this research work set out to see some of those special circumstances that will tilt the court towards ordering the employer to reinstate such an employee. The researcher strongly belief that this equitable remedy is essential to workers as it helps to ensure the security of the employee's employment as it stops arbitrary and nepotistic dismissal of an employee. Considering the level of tribalism and nepotism in Nigeria and the scarcity of employment in the country, this work recommends that this equitable remedy should be extended beyond hitherto contract of employment with legal or statutory flavour and, recently, master-servant employment relationship where dismissal is on account of trade union activities to cover also those in juicy employment and those who have put in many years into the job.

Introduction
As the popular saying goes, most things that have a beginning will normally or usually have an end. This is so as regards contract of employment: it must, one day, come to an end. Its termination may be because (a) it has run its course, that is, it has been performed, or (b) at the expiration of a given time – where the contract of employment is for a fixed or pre-determined duration, or (c) the performance of the obligations of contract of employment or its continuation is made impossible or frustrated, or (d) either of the parties to the contract of employment gives notice of his/her intention to bring the contract of employment to an end to the other party, or (e) the contract of employment is terminated summarily by the employer either due to the employee's gross misconduct, or gross negligence or gross incompetence.
Thus, when a contract of employment offered and accepted is described as for life, permanent or pensionable, this neither means that it is indeterminable nor that the employment must run up to the employee's retiring age. It rather means:

> No more than that the employer cannot, in the absence of agreement to that effect, tell the employee to stop work forthwith at will and without notice or compensation in lieu of notice. But, does not mean, without more, that the employer is bound to retain the employee in employment for life.[1]

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[1] *Abukogba v AT & P Ltd* [1966] 1 All NLR 89, at p 90, per Ekeruche J. See also *Porter v Nestle Products Nig Ltd* [1968] NMLR 459, at 41, where Adefarasin J puts it this way: such an expression "does not in itself normally create a promise of life employment or disentitle the employer from terminating the employee's contract of service on reasonable notice. See also *David-Osuagwu v AG Anambra State* (1993) 4 NWLR 285, at pp 21 and 23.

When an employee's contract of employment is wrongfully terminated either because he/she was given insufficient notice or no notice at all, or by the employer's failure to justify the employee's summary dismissal, the employee is entitled to certain remedies. Commonest amongst them is the common law remedy of damages which is readily available in a master-servant employment relationship.[2] In exceptional cases, he/she may ask for equitable remedy of specific performance which, if successful, will translate into re-instatement of the wrongfully dismissed employee, which, in the eyes of the law, the said employee's contract of employment has been subsisting as the purported dismissal is null and void, having no effects whatsoever. The purpose of this research work is to find out the circumstances under which this 'special' remedy may be called in and avail an employee. This becomes necessary as the general principle of (common) law is that he who hires can fire[3] and to ensure that this said remedy is not going against this age-long principle of law of contract of employment and also the time-honoured desire of the court not to encourage servitude by imposing a willing employee on an unwilling employer as there is a "well settled principle of common law not to force a master to accept the services of a servant which he has determined, even unlawfully"[4] and to see how these anachronistic stand of common law can still stand side by side with the pro-activeness of the National Industrial Court (NIC) which has opened a new regime for remedies for wrongful termination in master-servant employment relationship. This work will proceed by considering briefly they various ways of bringing a contract of employment to an end and will, thereafter, treat the remedies that will avail an employee when his/her contract of employment has been brought to an end wrongfully, dwelling mostly on the equitable remedy of specific performance.

Ways of Terminating a Contract of Employment

As can be gathered from the above introduction, there are about five ways a contract of employment can be brought to an end, that is, terminated. They are by:

(i) Performance or on the happening of a specific event;
(ii) Agreement;
(iii) Notice;
(iv) Frustration and
(v) Summary dismissal of the employee.

Before treating each of this means of determining a contract of employment, we have to note that normally, the duration of a contract of employment can be gathered from the express or implied terms of the contract of employment. The instances of the former include – where it is expressly stated in the contract of employment that it is to run, for example, for a period of one year. In such a case, unless there is a subsequent agreement extending the duration of the contract, it comes to an end at the expiration of the one year period. Similarly, the parties may agree that either of them can bring the contract of employment to an end by furnishing the other party with notice of his intention to terminate it. This intention may be required to be communicated to the other party for a specified period of time, for example, three months notice.

Let us now treat each of the five ways of terminating a contract of employment, starting with contracts which terminates or expires by performance.

(i) Determination by Performance:

[2] E.A Oji and O.C Amucheazi (2015) *Employment and Labour Law in Nigeria*, Lagos: Mbeyi & Associates Nigeria Ltd, at p 364.

[3] See the Supreme Court in *Isheno v Julius Berger Nigeria Plc* [2012] 2 NLLR (pt. 41) 127 and Court of Appeal decision in BCC Plc v Ager Anor [2010] 21NLLR (pt 59) 256, at p 273, paras. B-C.

[4] *Bashir Alade Shitta-Bay v The Federal Public Service Commission* [1981] 2 PLR 202.

Majority of contracts of employment comes to a successful and happy end when the employment has run its course, that is, upon the retirement of the employee. Under this heading, we may also look at contracts of employment for a fixed term.

Contract for a Fixed Term:

Simply put, this is a contract of employment where the period or term or duration of the employment is pre-determined at the commencement of the employment relationship. Such a contract of employment comes to an end upon the expiration of the fixed or stipulated period[5] or upon the contractual completion of the job unless it is terminated earlier. Such earlier termination could be by breach, agreement, frustration, or under the terms of the contract, if there is any such a provision.

A party will be in breach if he/she wrongfully determines a fixed-term contract of employment. Thus, in *Swiss Nigeria Wood Industries Ltd v Bogo*,[6] the respondent was employed for a fixed period of two years. He was dismissed after ten months of service for no justifiable reason. The Supreme Court (SC) held that the company is liable to pay the respondent the full salary he would have earned for the unexpired period of 14 months.

It is noteworthy however, that a probationary period which is stated to be for a fixed or definite period of time after which the contract may be confirmed does not mean that the employment cannot be determined within the probationary period. Thus, in *Ihezukwu v University of Jos*,[7] it was provided in the contract of employment that the employee's engagement will be for a probationary period of two years in the first instance after which, if confirmed, it will be to the retiring age of 60. This said provision, the SC held, did not disentitle the employer from terminating the employment within the two-year probationary period.

Where an employee who alleges or contends that his/her employment has been wrongfully determined but went ahead to accept the terminal benefits he would, otherwise, be entitled to if the employment were lawfully terminated, the employment would be held to have been validly and properly determined. His action for re-instatement would thus be rejected as there would be no employment contract to enforce.[8]

(ii) Determination by (Mutual) Agreement:

Generally, just like any other contractual relationship, a contract of employment can, at any time, be brought to an end by mutual agreement of the parties thereto. This can be done either in accordance with the terms of the contract of employment or otherwise. This is so, that is, it does not matter whether the contract is for a definite or indefinite period.

(iii) Determination by Frustration:

Frustration can bring any contract of employment to an end. In the words of Viscount Simon LC in *Joseph Constantine Steamship Ltd v Imperial Smelting Corporation*, the effect of frustration is that it "kills the contract and discharges both parties automatically."[9]

Frustration occurs and thus brings a contract of employment to an end when there are changes in the circumstances of the employment which either render further performance of the contract impossible or where the obligations undertaking by the parties have become radically different.

The conditions necessary for the application of the doctrine of frustration was stated by Lord Brandon in *Paul Wilson & Co v Partenreederel Hannah Blumenthal*[10] thus:

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[5] A typical example is the employment contract of football club coaches or technical advisers.
[6] (1970) 1 UILR 337; (1970) NCLR 423.
[7] [1990] 4NWLR 598.
[8] *Guinness (Nig) Ltd v Agoma* [1992] 7 NWLR 728; *Onolaja v African Petroleum Ltd* [1991] 7 NWLR 691.
[9] [1942] AC 154. See also *Bank Line Ltd v Arthur Capel & Co* [1919] AC 435.
[10] [1980] 1 AC 854, at p 909.

> There are two essential factors which must be present in order to frustrate a contract. the first essential factor is that there must be some outside event or extraneous change in situation, not foreseen or provided by the parties at the time of contracting, which either makes it impossible for the contract to be performed at all, or, at least, renders its performance something radically different from what the parties contemplated when they entered into it. The second essential factor is that the outside event or extraneous change of situation concerned, and the consequences of either in relation to the performance of the contract, must have occurred outside the fault or the default of either party to the contract.[11]

Examples of frustrating events which can put a contract of employment to an end include death of either of the parties,[12] illness of the employee, imprisonment of the employee,[13] outbreak of war[14] and a change in the law. It is well established that an order for winding up a company is a notice of discharge to all the employees of the company.[15] Just as in the case of involuntary winding up of the company (that is, winding up on the order of the court), the sale of a company in Nigeria determines the employment of all the employees of the company.[16]

(iv) Determination by Notice:

Generally, every party to a contract of employment has a common law right to terminate it by giving notice of his/her intention to do so to the other party.

The period or duration of notice to be given may be expressly stipulated in the terms of the contract of employment agreed upon by the parties. Where there is no such express provision as to length or duration of notice, it can be implied into the contract. To do so, recourse or regard is normally had to the evidence of custom and/or trade usage of the employment or company concerned.[17] Thus, in *Foxall v International Land Credit Company*,[18] the employers led evidence to prove a custom in their type of employment of giving three months' notice to determine an employment.

Where no express period or length of notice is stipulated and no proof or evidence of custom and trade usage is adduced, it is a settled law that reasonable notice shall be implied into the contract of employment.[19]

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[11] The requirement of absence of fault or blame from any of the parties to the contract was stressed by Lord Summer in *Bank Line Ltd v Arthur Capel & Co* (above, n 6).

[12] See *Farrow v Wilson* (1869) LR 4 P 744. Here, the plaintiff who worked as a farm bailiff for his employer was dismissed upon his employer's death. It was held that the personal representative of the deceased employer was not bound to retain the plaintiff. Wills J said: "Generally speaking, contracts bind the executor or administrator, though not named. Where however, personal considerations are of the foundation of the contract, as in cases of principal and agent and master and servant, the death of either party puts an end to the relation; and, in respect of service after the death, the contract is dissolved, unless there is a stipulation express or implied to the contrary. It is obvious, in this case, if the servant had died, his master could not have compelled his representatives to perform the service in his stead, or pay damages, and equally, by the death of the master, the servant is discharged of his service, not in breach of contract, but by implied conditions."

[13] *Hare v Murphy Brothers Ltd* [1974] 3 All E.R 940.

[14] See *Marshall v Glanville* [1917] 22 KB 87. A number of cases arose out of the Nigerian Civil War especially as a result of the blockade of the then Eastern Region. See cases like *Brown v Haco Ltd* [1970] 22 All NLR 47; *Johnson v UAC* [1975] NCLR 87. In these and other similar cases, it was held that the employee's contract of employment was frustrated by the war.

[15] *Re General Rolling Stock Company, Chapman's Case* (1866) LR 1 Eq 346; *Re Oriental Bank Corporation, MacDowall's* Case [1886] 32 Ch.D 366.

[16] See *Re Foster Clark Indenture Trusts* [1966] 1 All ER 43.

[17] See *Metzner v Bolton* (1854) 9 Ex 518; *Fairman v Oakford* (1860) 5 H & N 635.

[18] (1857) 6 TLR 637.

[19] Thus, in *De Stempel v Dunkels* [1938] 1 All ER238, at p 247, Greer LJ said ".....I think that there must be implied in the contract .....a term to the effect that the plaintiff's employment should be determined only by a reasonable notice."

In some cases, the contract of employment do provide expressly for the length of notice that should be given by either of the parties to validly terminate it. When that is the case, the length of notice must be given for the contract to be validly determined. Such period of notice expressly stipulated is always deemed or taken to be reasonable. Of course, where, the agreed or stipulated period of notice is given, the party to whom it is given cannot be heard to complain.[20] In *Ikekhinde v Lagos University Teaching Hospital Mgt Board*,[21] the contract of employment stipulated one month's notice. An action for damages brought for wrongful dismissal by the plaintiff who was given the stipulated one month's notice failed. Similarly, in *Maiza v Taylor Woodrow of Nigeria Ltd*, the plaintiff who had been with the company for about 20 years was dismissed by a month's notice as stipulated in the employment contract. His dismissal was upheld as valid.

As said above, where a contract of employment is silent as to the length of notice required to put an end to the contract, it is a settled principle of law that reasonable notice shall be given.[22] What then is a reasonable notice in such cases? This is a question of fact. As such, each case is thus treated or dealt with based on its own facts and circumstances.[23] Thus, in *Sonika Sawmill*,[24] Adio JCA said that all the circumstances of the case, such as the type of employment, the intervals at which remuneration is paid, among other things, should be put into consideration. In other words, there is no one solution fits all here. Each case has to be considered based on its peculiar facts and circumstances. As such, previous decisions or precedents serve merely as a guide as each case depends on its own circumstances.[25]

It is not enough for the employee to allege or contend that the notice given to him is not reasonable. He must furnish evidence of what he considered to be reasonable.[26]

It is crucial to note that in terminating a contract of employment by notice, the law does not require that reason(s) for doing so to be furnished or adduced.[27] In other words, the reason or motive for giving notice of determination of the employment contract is totally immaterial and irrelevant for any consideration of the wrongness or otherwise of a termination. What is material is whether or not the required notice has been given. The SC thus noted in *Ajayi v Texaco Nig Ltd*[28] that:

> Where, in the contract of employment, there exists a right to terminate the contract given to either party, the validity of the exercise of that right cannot be vitiated by the existence malice or improper motive. It is not the law that motive vitiates the validity of the exercise of a right to terminate validly an employment of the employee. There must be other considerations. The validity of the exercise is totally independent of the motive that prompted the exercise.

Similarly, the Court of Appeal said in *Calabar Cement Co Ltd v Daniels*[29] that "so long as the termination is lawful, the motive therefore is not relevant."[30]

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[20] See *Chiaze v UAC Ltd* [1956] 1 ERLR 28.
[21] CCHCJ/6/74 page 715.
[22] See *PZ & Co v ogedengbe* [1972] 1 All NLR 202; *Honika Sawmill (Nig) Ltd v Hoff* [1992] 4 NWLR 673.
[23] *Airaine (Nig) Ltd v Eshiett* [1977] 1 SC 89; *Sole v Mobil Oil Nig (Ltd)* [1968] NCLR 191.
[24] Above (n 19).
[25] Thus, in *PZ & Co* (above, n 19), the SC said "Upon the uncontroverted facts of this case, especially having regard to the status of the plaintiff in the employment of the defendant and the length of service already put in by her, we fail to see how the decision of the learned trial judge that three months' notice was reasonable could be successfully challenged."
[26] *Daniels v Shell BP Petroleum Company Nig Ltd* (1962) 1 All NLR 19.
[1962] 1 All NLR 19; *Gaiser v Cole* [1958] LLR 83.
[27] *Gilbert Grunitzky v ITT (Nig) Ltd* (1981) 2 PLR 25.
[28] (1987) 3 NWLR 577, at p 593, per Obaseki JSC. See also *Chukwuma v Shell Petroleum Development Company Nigeria* (1993) 5 KLR; 4 NWLR (pt) 289, 522.
[29] [1991] 4 NWLR 750, at p 758, per Kastina-Ala JCA.

The party who terminates the contract of employment, having given adequate notice agreed upon or prescribed under the contract, does not have to justify his action since he is not guilty of breach of contract.[31] In other words, the right of either of the parties to terminate the contract at will is conditioned only on compliance with the terms of the contract of employment. Motive may become an issue only where the termination is in breach of the terms of the contract or, where applicable, in violation of the principles of natural justice.

It appears to be settled that any employment may be determined by the payment of wages or salary in lieu of the required or requisite notice. Here, an employer may terminate an employee's contract without giving him any prior notice by paying him an amount equivalent to what he would have earned had he been given proper notice.

Sometimes, the contract may provide for termination either by notice or payment in lieu of notice. If that is the case, either of the options can be validly adopted by a party who wishes to determine the contract.[32] It is still not a wrongful termination where there is no express provision in the contract for termination by payment in lieu of notice and a party makes such a payment.

Where termination is by payment in lieu of notice, the payment must be actually made at the time of the termination. In *Chukwuma's* case,[33] payment was made three months after a letter of termination was given to the employee. The SC held that the termination was wrongful.

(v) Summary Dismissal:

Simply put, this is an instant dismissal of an employee by his employer without notice and without payment in lieu of notice either due to gross misconduct of the employee or his gross incompetence or gross negligence.

Generally, as already said above, an employer has "an undisputed right to dismiss or discharge his servant."[34] The only condition to this is that he has to act or do so in accordance with or compliance to the express or implied terms of the contract of employment, or where applicable, in compliance with the relevant statute(s).

An employer who intends to terminate the services of his employee will give him notice to that effect in accordance with the agreed terms and conditions of the contract. Where no provision as to length of notice is expressly made in the contract, reasonable length of notice is implied into the contract.

Of course, an employer can validly terminate the employment of an employee by making payment to him in lieu of notice. This is to be distinguished from a situation where a worker is dismissed summarily without notice on grounds which the employer perceived as misconduct. In this instant case, no payment is made in lieu of notice or is ever expected.[35]

It is a settled principle of law that there are certain grounds that may justify an employer to dismiss summarily his employee. As far back as in 1817, Lord Ellenborough concurred that an employer will be justified if he sacks an employee who persistently disobeys his lawful and proper orders.[36] He noted that after an employee's refusal to perform his work, the master

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[30] Justice Aguda said in *Don Edward Adejumo v UCH Board of Mgt* [1972] 2UILR 145, that "I should say that whether the action of the defendant in dismissing the plaintiff was as a result of malice against him conceived by the defendant or by any of the officers is of no moment once it is established that the procedure adopted was as laid down in the conditions of service governing the appointment of the plaintiff....."

[31] *Appiarr v Esso West Africa Inc* (1968) NCLR 32.

[32] See *Momah v Standard Bank Nigeria Ltd* 6 ESCLR 199, at p 206.

[33] (Above, n 28).

[34] *Ajayi v Texaco Nig Ltd* [1987] 3 NWLR 577. See also *Imoloame v WAEC* (1992) 9 NWLR (pt 265) 303.

[35] *New Nigeria Bank Ltd v Francis Obevudiri* (1986) 3 NWLR (pt 29) 387, at 401, CA. That is, in summary dismissal, the employer is not legally required to give any prior notice to the employee or pay him in lieu of notice. The dismissal is instant: that is the reason why it is referred to as 'summary' dismissal.

[36] *Spain v Arnott* (1817) 2 Starke 256. Similarly, in *Laws v London Chronicle Ltd* [1959] 2 All ER 285, at p 287, Lord Evershed MR said that "It is, no doubt, therefore, generally true that wilful disobedience of an order will

is not bound to keep him as a burdensome and useless employee. Again, the trial judge said in *Callo v Brouncher* that if there was any moral misconduct, either pecuniary or otherwise, wilful disobedience or habitual neglect, an employer should be at liberty to part with the employee.[37] Similarly, an employer had a common law right to dismiss an employee who is incompetent to carry out the work for which he is hired.[38] Thus, in *Harmer v Cornelius*,[39] the plaintiff who was employed as a scene-painter in response to a newspaper advertisement for "two first-rate panorama and scene painters" was dismissed on the 2nd day of his resumption of duty for incompetence. His dismissal was held justified by the court as it would be unreasonable to compel an employer to continue engaging/employing a worker who, having presented himself as competent, turns out to be incompetent. Willes J laid it down that when a skilled labourer, artisan, or artist is employed, there is, on his part, an implied warranty that he is of skill reasonably competent to the task he undertakes.[40]

Even unskilled employee owes a duty to exercise reasonable care in the performance of his contractual duties. Thus, in *Lister v Romford Ice & Cold Storage Co Ltd*,[41] the House of Lords held that it was an implied term of the contract of employment of a driver that he would perform his duties with proper care.

It is, of course, difficult and even unnecessary to list misconducts which may justify summary dismissal. This was noted in *Horten v McMurtry*[42] where it was said that

> Cases may be cited in which the courts have laid down certain criteria as to when a master is justified in discharging his servant; but if these decisions are examined it will be evident that they do not afford an exhaustive set of cases, but only a certain number.

It is good to stress that it is not necessary that the misconduct in question must be extremely grave or wicked. It is thus said in *Nunnick v Costain-Blaneevoort Dredging Ltd*[43] that "The sole question is whether there is justification for dismissal."

In *Laws v London Chronicle Ltd*,[44] Evershed MR said "……if summary dismissal is claimed to be justified, the question must be whether the conduct complained of is such as to show the servant to have disregarded the essential condition(s) of the contract of service."

A single act of misconduct may justify summary dismissal.[45] This is because misconduct, whether cumulative or single, is perceived in the same way. The major and difficult issue is determining whether an alleged misconduct evinces an intention to disregard an essential condition of the employment. Of course, it is not every misconduct amounts to a repudiatory misconduct. There is, however, no fixed rule of law which defines the degree of misconduct

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justify summary dismissal, since wilful disobedience of a lawful and reasonable order shows a disregard – a complete disregard – of a condition essential to the contract of service, namely, the condition that the servant must obey the proper orders of the master and that, unless he does so, the relationship is, so to speak, struck at fundamentally." See also *Pepper v Webb* [1969]. Here, it was said that "It has long been part of our law that a servant repudiates the contract of service if he wilfully disobeyed the lawful and reasonable orders of his master."

[37] (1831) ER 807.

[38] *Searle v Ridley* (1873) 28LT 411.

[39] (1858) 141 ER 94.

[40] Ibid, at p 98.

[41] [1959] 1 WLR 555. Here, Viscount Simonds said that "even in so-called unskilled operations, an exercise of care is necessary to the proper performance of duty." At p 573.

[42] (1860) 5 H & n 667, AT P 676.

[43] (1960) LLR 90, at p 94.

[44] [1959] 2 All ER 285.

[45] See *Boston Deep Sea Fishing & Ice Co Ltd v Ansell* (1888) 39 Ch. D. 339; *Oyedeji v Fasheun* (1976) 6 UILR 134; *Adiatu v Polythene Enterprises (Nig) Ltd* (1978) 5 CCHCJ 884; *Abati v Tourists Corporation of Nigeria* (1980) 1 PLR 437.

which amounts to a repudiation. Thus, Desalu J said in *Okoye v Nigeria Airways*[46] that "misconduct inconsistent with the due and faithful discharge by the servant of the duties for which he was engaged is good cause for the dismissal but there is no fixed rule of law defining *the degree of misconduct* which will justify dismissal.

It is worthy to note that the issue of what *degree of misconduct* will justify a dismissal is different and separate from the question of *a definition of misconduct*. It is the court that decides, as the final arbiter, whether the alleged misconduct is sufficient enough to justify dismissal. Consequently, the statement of the Court of Appeal in *Oyedele v Ife University Teaching Hospital Complex Management Board*[47] where it said that "under our law, there is no definition of what is misconduct anywhere. *Misconduct is what the employer considers to be misconduct*. In the instant case, the employers of the appellant considered the two allegations made against him to amount to 'misconduct' and so they retired him"[48] is misleading and out of the point.

Thus, in *British-American Insurance Company (Nig) Ltd v Omolaya*,[49] the Court of Appeal held that absence from work was gross misconduct which entitled the employer to dismiss summarily. In *Usen v Bank of West Africa*,[50] the summary dismissal of the plaintiff who had issued a false teller was upheld by the Supreme Court, despite his pleas that he had served the bank without blemish for 14 years. Again, in *New Nigerian Bank Ltd v Obevudiri*,[51] an accountant who verified forged signature on forged bank drafts and certified them as genuine was held to have committed "misconduct, gross enough to justify" summary dismissal. Similarly, in *Co-operative & Commerce Bank (Nig) Ltd v Nwankwo*,[52] the Court of Appeal upheld the summary dismissal of a bank employee who was alleged to have cashed crossed cheque across the counter, over-lent money and engaged in private practice. These allegations, which were established/proved were, in the court's view, gross enough and thus justified his dismissal as they undermine the confidence which should exist between a bank manager and his employer. In *Oyekunle v Prestrest (Nig) Ltd*,[53] the dismissal of the plaintiff whose duties included the checking of the payroll and the certification of its correctness was held to be justified upon discovery that for over a period of 80 weeks, the weekly figures were inflated. When the plaintiff was issued with a query, he refused to accept, but slammed the door in the MD's face. In *Nwobosi v ACB Ltd*,[54] the SC upheld the summary dismissal of an employee who had, in utter defiance and disregard to an express instruction, granted loans and overdrafts.

Where incompetence is alleged to be the ground for the dismissal, the onus is on the employer not only to establish the incompetence but also to prove that it justifies summary dismissal of the employee.[55] Employer's failure to discharge this onus would lead the court to hold the dismissal to be wrongful.[56]

Misconduct which is committed outside working hours will justify dismissal only if it is proved to be harmful to the employer's business or that it reflects on the employee's capacity

[46] [1979] 3 LRN 82, at p 96; (1979) 1-3 CCHCJ 339. See also *Akinbule v UBA* [1980] 1-3 CCHCJ 363; *Clouston & Co Ltd v Corry* [1909] AC 122, at 129.
[47] [1990] 6 NWLR 194, at p 199.
[48] Emphasis added.
[49] [1991] 2 NWLR 721.
[50] [1965] 1 All NLR 244.
[51] [1986] 3 NWLR 387.
[52] [1993] 4 NWLR 159.
[53] (1979) OGSLR 69.
[54] [1995] 6 NWLR 658.
[55] *AT & P (Nig) Ltd v Gbagu* [1966) NCLR 56; *Akinbule v UBA Ltd* (1980) 1-3 CCHCJ363.
[56] *Nunnick v Costain Blaneevoort Dredging Ltd* (1960 LLR 90; *Garabed v Asaad Jamakani* [1961] 1 all NLR 177.

to perform his duties in accordance with the contractual terms, express or implied.[57] We will now look at the remedies available to an employee who has been wrongfully dismissed from his/her employment.

Remedies for Wrongful Termination[58]:

Remedies available to an employee who feels that his contract of employment has been wrongfully determined either because he was given insufficient notice or no notice at all, or by failure to justify his summary dismissal. He may ask for any one of those remedies normally available for breach of contract. They include: specific performance and damages.

We are now going to look at some of them as they apply to wrongful termination of contract of employment.

Specific Performance:

Originally, the court refused to accept the applicability of the equitable remedy of specific performance[59] to a master-servant employment relationship.[60] There were varieties of reasons for this refusal. The reasons include, *inter alia*, difficulty in enforcing such an order and public policy consideration (i.e., it may amount to encouraging servitude/slavery). For instance, in *Clarke v Price*,[61] Lord Chancellor Eldon refused to make an order compelling an employee to continue to carry out his duties on the ground that the court had no means of compelling him to do so. He pointed out that it was the common law remedy of damages that was available to the plaintiff in that particular case. The court followed this decision in *Baldwin v Society for the Diffusion of Useful Knowledge*.[62] Here, the court refused to grant an injunction restraining the employer from terminating the employee's contract of employment. The court based its decision on the ground of its inability to compel specific performance of the contract. In *Johnson v The Shrewsbury and Birmingham Railway Co*,[63] the court refused to grant an injunction on the basis that damages would be a sufficient remedy.

Eventually, the court based their refusal on public policy consideration – the need not to decree servitude. Thus, Fry L.J said in *De Francisco v Barmun* that:

> For my own part, I should be 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 mankind that the rule of specific performance should be extended to such cases. I think the courts are bound to be

[57] *Clouston & Co Ltd v Corry* [1909] AS 122; *Thomson v Alloa Motor Company Ltd* [1983] 1 RLR 403.

[58] According to the Court of Appeal in *FBN Plc v Chinyere* [2012] 2 NLLR (pt 41) 62, "an employment can only be said to have been wrongfully terminated if it was done contrary to the conditions governing the particular contract of service or in a manner not contemplated by the stipulations in the condition of service, etc."

[59] Simply put, specific performance is an equitable order of the court which compels a party to the suit/contract to execute or perform specifically his own part of the bargain or obligation in the contract.

[60] See *Whitwood Chemical Company v Hardman* [1891] 2 Ch 416. The Nigerian Supreme Court has persistently maintained this position that only damages can be awarded to an employee in that kind of employment relationship. See for instance, *Olanrewaju v Afribank Nigeria Plc* [2001] 13 NWLR (pt 7310 691; Obanye v UBN Plc (2018) LPELR 44702 (SC). In *Patrick Ziideeh v River State Civil Service Commission* [2007] 3 NWLR (pt 1220 554, the court said that it "will not enforce specific performance of a mere contract of service or employment under the common law." It has even threatened to award cost personally against any legal practitioner who seeks reinstatement in such an employment relationship, per Ogbuagu JSC in *Osisanya v Afribank Plc* (2007) 4 MJSC128, at p 147 where he said that ".....if in future, any counsel who is aware or ought to know about these firmly established law on master and servant relationship and who brings this type of frivolous appeal up to this court may expose himself to the court awarding cost personally against such counsel....."

[61] 37 ER 20, 273.

[62] (1838) 9 Simons 393.

[63] (1853) De MG & G 914.

> 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.[64]

Similarly, a declaration has been refused on the ground that its effect would be that the wrongfully terminated contract will still be subsisting.[65]

In *Thomas v Local Government Service Board*,[66] the court, per Ademola J, said:

> Where there has been a purported termination of a contract of service, a declaration to the effect that the contract of service still subsisted would rarely be made and would not be made in the absence of special circumstances, because of the principle that the courts will not grant specific performance of contract of service.

From the above, it becomes clear that declaratory judgment will be available or ordered by the court only when there are special circumstances. Thus, where special circumstances exist, an order of *certiorari*,[67] *mandamus*[68] *etc* may be ordered even though its effect will be to enforce specific performance. The question now is: what circumstance amounts to a special circumstance? According to the Supreme Court in *Chukwuma v Shell Petroleum Development Company of Nigeria Ltd*,[69] "Such special circumstances have been held to arise when the contract of employment has a legal or statutory flavour[70] thus putting it over and above the ordinary master and servant relationship." When does this happen? A contract of employment is with a statutory flavour where its terms and condition, including procedure for its determination, is regulated either directly by statute or by rules or regulations made under or by virtue of statutory power.[71] Explaining this, Uwaifo JCA said that "It is now well established that when an office or employment has a statutory flavour in the sense that its conditions of service are provided for by statute or regulations made thereunder, any person in that office or employment enjoys a special status over and above the ordinary master and servant relationship."[72]

It should be noted that it is not enough that the employer is a statutory body. That is, the mere fact that the employer is a statutory body does not necessarily mean that the conditions of service of its employees must be of a special character ruling out the relationship of master and servant.[73] In the words of Uwaifo JCA:

> It is untenable to conclude that simply because the defendant is a statutory body the conditions of service of its employees must be presumed to be of a special character making it necessary to rule out the relationship of mere master and servant between the defendant and its employees. It must be ascertained, that is to say, through

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[64] There were, however, some "exceptional cases" where injunction was granted. See for instance, *Hill v C.A Parsons Ltd* [1972] 1 Ch 305.

[65] *Sofola v Mbadiwe, Sodipo & WAAC Ltd* unreported, suit No. LD/115/64 High Court of Lagos.

[66] Unreported, Suit No. (WN), 1/169/64. See also *NNPC v Idoniboye* [1996] 1 NWLR 665.

[67] *Adedeji v Police Service Commission* [1967] 1 All NLR 67.

[68] *Shitta-Bey v Federal Civil Service Commission* [1981] 1 SC 40.

[69] [1993] 5 KLR 93, at p 111. In this case, the SC held that the only remedy available to the employee in a master-servant employment relationship whose employment was wrongfully determined is damages.

[70] In the words of Eyongndi and Oyagiri, a statutory flavoured employment is one in which the terms and conditions of employment is regulated by statutes or regulations made pursuant to a statute. D.A Eyongndi and B.I Oyagiri (2019) "Paradigm Shift on Remedies for Wrongful Termination of Master-Servant Employment in Nigeria" IRlJ 1(3), p 40. See also B Atilola (2011) "Legal Remedies for Wrongful Termination of Contract of Employment: What Lawyers Must Note" 5(2) NJLIR, at p 12

[71] See Uvieghara, E.E (2001), *Labour Law in Nigeria*, Ikeja: Malthouse Press Ltd, at p 83. See also Karibi White JSC in *Imoloame v WAEC* (1992) 3 NSCC 374, at p 383.

[72] *University of Nigeria Teaching Hospital Mgt Board v Nnoli* [1992] 6 NWLR 752, at p 768. This was affirmed by the Supreme Court [1994] 8 NWLR 376.

[73] Kutigi, JSC, in *Fakuade v OAUTH* [1993] 5NWLR 47, at p 57.

> evidence adduced, that there are rules and regulations which govern the employment to give it a status of a particular tenure.[74]

The English Court of Appeal held a similar view in *R v East Berkshire Health Authority, Ex parte Walsh*[75] that whether a dismissal from employment is subject to public or administrative law remedies or only to the common law remedies for breach of contract depends, not merely, on employment by a public authority but on whether there are statutory restrictions on the power to dismiss. "Parliament can underpin the position of the public authority employees by directly restricting the freedom of the public authority to dismiss, thus giving the employee public law rights and at least making him a potential candidate for administrative law remedies."[76]

An employee who claims that his employment is regulated by statute or rules or regulations made under and by virtue of a statute has a duty (i.e., an onus) to establish/prove that. Thus, in *Sule v Nigerian Cotton Board*,[77] the SC held that the onus was on the employee of a statutory body to show that his contract of service included the civil service rules made under constitutional power.

It should be noted that it is not enough to show that the rules and regulations were made under or by virtue of statutory power. It must be established that they were made to offer protection to the employee(s). That is, the rules and regulations which the plaintiff employee is claiming to avail him must be made with the intention of granting or affording him the security of his job. Thus, in *Oguche v Kano State Public Service Commission*,[78] Wheeler J said:

> Now it is common ground in the present case that the Public Service Commission Regulations ..... regulate the procedure of the Public Service Commission of Kano State ..... Reading these regulations, *I am satisfied that they fetter the right of the State to dismiss its servants at will*.[79]

Continuing, he noted that:

> In the ordinary case of master and servant, the general rule is that a declaration that the servant's dismissal was null and void will not be made by the courts as that would be indirectly granting specific performance of a contract of personal services. The law is otherwise, however, in the case of the holder of an office which is the position of the plaintiff here.

Again, in *Adeyemo v Oyo State Public Service Commission*,[80] in declaring the purported termination of the plaintiff civil servant's employment null and void, the trial judge said:

> This country has a great reputation that its civil servants can enjoy tenure of office to their retiring age from their probationary period if they are efficient and have good character and are not incapacitated to discharge the functions of their office by any physical or mental infirmity. It is sheer administrative lawlessness for a Public Service Commission to terminate the appointment of a civil servant – probationary or pensionable – without any just cause and without complying with the relevant provisions of the General Orders and Regulations.

The Court of Appeal said in *Okosun v CBN*[81] that

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[74] *Udemah v Nigeria Coal Corpn* [1991] 3 NWLR 477, at p 489.
[75] [1984] 3 ER 425. Again, in *R v Crown Prosecution Service, Ex parte Hogg*, The Times Law Report, April 14 [1994] , the English Court of Appeal held that the appointment of a Crown Prosecutor under statute was not underpinned by the statute as it did not impose a code or restrictions on his dismissal.
[76] *Ibid*., at p 431.
[77] [1985] 2 NWLR 17; (1986) 2 QLRN 102.
[78] [1974] 1 NMLR 128, at p 135.
[79] Emphasis added.
[80] [1979] 1 FNR 28, at p 38.

> Where the conditions for appointment or the determination of a contract of service are governed by the preconditions of an enabling statute so that a valid determination of appointment is predicated on satisfying such statutory provisions such contract is one with statutory flavour. The contract is determinable not by parties, but only by statutory pre-conditions governing its determination.

Similarly, in *Oguike v Nigerian Steel Development Authority*,[82] the plaintiff, who was employed by a statutory body was dismissed by payment of one month's salary in lieu of notice, contended that his removal was wrongful as it was in breach of the rules of natural justice. The trial judge held that although he was employed by a statutory body, the clause in the contract of employment which the plaintiff relied on did not offer him any protection because it contemplates "the Authority being entitled to terminate the employment of a permanent and confirmed member of staff on notice or with salary in lieu of notice."

Where there is statutory intervention or restriction[83] on the employer's right to dismiss, failure to follow the laid down procedure amounts to wrongful removal and which could be declared null and void[84] – the contract will be treated as still subsisting; in which case specific performance, that is, re-instatement will be ordered.[85] Thus, the CA said in *University of Calabar v Inyang*[86] that "It is settled law that once the removal of a public servant is declared null and void, the effect of such pronouncement is that such public servant was always and still is a public servant."

Similarly, in *Adedeji v Police Service Commission*,[87] the plaintiff sought for an order of certiorari to quash the decision of the Police Service Commission dismissing him from the police service for misconduct. It was alleged that he took bribe so as to issue certificates of road worthiness in respect of a motor cycle and a car. His contention was that the dismissal was wrongful as the Commission did not comply with certain provisions of the rules in the General Order which required that he be given full opportunity to exonerate or exculpate himself, and also that no documentary evidence be used against him unless he had previously been supplied with a copy of it or given access to it. The SC found that these rules were, indeed, breach. It therefore declared the dismissal "inoperative, void and of no effect."[88] The SC equally held, in two decisions, the dismissal of two professors and a registrar of the University of Lagos to be null and void as the purported dismissal did not comply with the statutory procedure stipulated for such removal.[89]

On the other hand, in a statutorily flavoured employment, if the laid down procedure is adopted in removing an employee, he cannot successfully challenge the removal.[90] Again, a re-instated employee can subsequently be dismissed or removed by due process, or by proper notice.[91]

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[81][1996] 2 NWLR 77, at p 84. See also *NITEL v Jattau* [1996] NWLR 392.
[82] [1976] NWLR 125.
[83] That is, contract of service with statutory flavour.
[84] See *Oboi v CBN* [1993] 9 SCNJ 268; *Essien v University of Calabar* [1990] 3 NWLR 605; *Adewuyi v Kaduna Local Authority* [971] 2 NCLR 279.
[85] That is, re-instatement is the consequence of such a declaration. See *Olufeagba v Abdul-Raheem* [2009] 18 NWLR (pt 1173) 384.
[86] [1993] 5 NWLR 100, at p 118.
[87] [1967] 1 All NLR 67; MNLR 102.
[88] See also *Bendel State Civil Service Commission v Buzube* [1984] NSCC 505; *Oguche v Kano State Public Service Commission* [1974] 1 NMLR 128, especially at p 135; *Shitta-Bey v The Federal Public Service Commssion* (above n 68).
[89] *Olaniyan v University of Lagos* [1985] 2 NWLR 599; *Eperokun v University of Lagos* [1986] 4 NWLR 162.
[90] *Nwagbara v Nigeria produce Marketing Co Ltd* [1966] NCLR 196; *Soborale v Statutory Corporations Service Commission* CCHCJ /9/74, p 1449; [1974] NCLR 221.
[91] See *Eyutchae v Nigerian Television Authority* [1986] 5 NWLR 395.

It is worthy of note that the National Industrial Court (NIC) has pro-actively ordered reinstatement in cases of ordinary master and servant relationship which was hitherto governed by common law remedy of damages. This is so where the employer's reason for the termination of the employee's employment contract is based on the employee's involvement in trade unionism, that is, victimisation based on employee's trade union activities. Thus, in *NASCO Foods Nigeria Ltd v FBTSSA*,[92] the appellant determined the employment of some members of the respondent association as a result of their trade union activities. The Industrial Arbitration Panel (IAP) declared the termination wrongful and ordered reinstatement. This was upheld by NIC. The NIC held that

> The tribunal believes that the termination of the appointment of the union executives was not in good faith, but because of their union activities which constitute an infringement of section 9(6) of the Labour Act, Cap. 198, Laws of the Federation of Nigeria, 1990 which provides that 'no contract shall cause the dismissal or otherwise prejudice a worker because of trade union activities outside working hours or with the consent of the employer within working hours.

Similarly, in *Mix and Bake Flour Mill Industries Ltd v FBTSSA*[93] where the employments of four union members were terminated for their involvement in trade unionism, the NIC declared the purported termination null and void and ordered reinstatement. The court said:

> This court in a line of authorities has held that there are two instances were reinstatement can be ordered. The first is instance is where the employment is statutory; and the second is where the worker was disengaged for embarking on trade union activities-the authority for this being the combined effect of section 9(6) (ii) of the Labour Act and section 43(1) (b) of the Trade Disputes Act 2004..... an employer cannot, under the pretext of the right to hire and fire at will, trample on the union right of workers especially the right to associate freely and unhindered. Where this happens, the remedy should be reinstatement.

It is worthy of note, also that the traditional position of the common law that he who hires can fire for any reason or for no reason in a master-servant employment relationship, that is, that in a private contract, the employer can fire an employee without furnishing any reason whatsoever, except in cases of summary dismissal, is becoming unacceptable by the NIC as the court is currently requiring the employer to give reason(s) for dismissing an employee.[94] And, in a master-servant employment relationship, the only valid, acceptable or justifiable reasons for a valid termination as far as NIC is concerned are gross incompetence or poor performance, gross misconduct and redundancy.

However, as already discussed, traditionally, in such a contract, employer's motive for sacking an employee is immaterial provided he complies with their agreed procedure or terms and conditions for termination.[95] Thus, in *Isheno v Julius Berger Nig Plc*,[96] the SC held that:

> An employer who hires an employee under the common law has the corresponding right to fire him at anytime even without assigning any reason for so doing. He must, however, fire him within the four walls of the contract between them. Where the employer fires an employee in compliance with the terms and conditions of their contract of employment, there is nothing the court can do as sc termination is valid in the eyes of the law. It is only where the

[92] Suit No. NIC/6/2003. Judgment was delivered on 16/7/2007.
[93] [2004] 1 NLLR (pt 2) 247.
[94] See *Ebere Aloysius v Diamond Bank Plc* (2015) 58 NLLR (pt. 199); *PENGASSAN v Schlumberger Anadril Nig Ltd* (2008) 11 NLLR (pt 29) 164.
[95] *Chukwuma v Shell* (above, n 69) is one of the popular cases where this principle was established. See also *FBN Plc v Chinyere* [2012] 2 NLLR (pt 41) 62.
[96] [2012] 2 NLLR (pt 41) 127.

> employer, in terminating or disengaging the services of an employee, does so without due regard to the terms and conditions of the contract of employment between the parties that problem arises as such a termination is usually not tolerated by the courts and are, without hesitation, usually declared wrongful and appropriate measures of damages awarded to the plaintiff.[97]

DAMAGES:

As a general rule, a common law remedy which is normally available to an employee who is wrongfully dismissed – either by a summary dismissal which has not been justified or by giving no or insufficient notice to him – is damages. As we have already discussed, reinstatement is not available except in special cases/circumstances, that is, in cases of employment with legal or statutory flavour. Thus, in *Co-oporative & Commerce Bank (Nig) Ltd v Nwankwo*,[98] the CA said:

> ....the remedy for breach of contract of personal service, save in exceptional circumstances ..... is damages. It is not open to the respondent to proceed on the basis that his contract of employment was still subsisting and a claim for loss of salary and other perquisites of his employment for the period he did not work. This is in consequence of the general principle of law that the court will not grant specific performance of contract of service.

Measure of Damages Payable:

Common law remedy of damages is awarded to compensate or indemnify an employee for the actual financial/pecuniary loss he has suffered as a result of the loss of his job. It is not, therefore, a profit-making or garnering venture for the wrongly removed employee.

As a general rule, therefore, the measure of damages is the amount the employee would have earned under the contract of employment for the period until the employer could validly have determined it, minus/less the amount the employee could reasonably be expected to earn in other suitable employment. Of course, like every other innocent party, following a breach of contract by the other party, the dismissed employee must take steps to minimise his loss. This accords with another rule of the common law that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, as per damages, as if the contract had been performed.[99]

It has long been established that the major head of damages is the salary or wages which the wrongfully removed employee would have earned up to the earliest time at which the employer could validly have terminated the employment contract.[100] Thus, in *Hartley v Harman*,[101] the plaintiff was employed under a contract of employment which gave either of the parties an option to determine it by one month's notice. The plaintiff was, however, dismissed without notice. It was held that a month's wages must be seen as stipulated damages. Similarly, in *Baker v Denkera Ashanti Mining Corpn Ltd*,[102] the plaintiff was engaged to work in Ghana. It was stipulated in the contract of employment that the employers could determine it by giving two months' notice in writing or two months' salaries in lieu of such notice. He was dismissed without notice or salary in lieu of notice. It was held that the defendants were not liable for more than two months' salary. The trial judge said that the

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[97] The SC maintained this position – that employers does not need to justify his reason for determining the employee's contract in ordinary master-servant relationship in *Obanye v Union Bank of Nig Plc* (2018) LPELR-44702.

[98] [1993] 4 NWLR 159, at p 174, per Onu JCA.

[99] See Park B in *Robinson v Harman* (1848) 1 Exch. 850, at p 855.

[100] See *French v Brookes* (1830) 6 Bing 354.

[101] (1840) 11 A & E 798.

[102] (1903) 20 TLR 37. See also *Western Nigeria Development Corpn v Abimbola* [1961] 1 All R 159, per Ajegbo JSC; *Beredugo v College of Science & Technology* [1991] 4 NWLR 651, CA.

defendants could not be made liable for more damages simply because they had no good reason for dismissing the plaintiff.[103]

In other words, the award of damages should not be used as a means of meting out additional punishment on an employer who has, though wrongly, exercised his common law right of terminating the employment of his employee. Thus, where an employment contract expressly provides that it is determinable by either of the parties by giving a stipulated period of notice to the other party; in an event of non-compliance to this provision, the damages recoverable is the amount of wages or salary the employee would have earned during the stipulated period.[104] If, for example, as in the instance case above, an employment contract provides for two months' notice, then in the event of the employer's failure to give any notice at all or make payment in lieu of notice, the employee will ordinarily be entitled to the stipulated two months' salaries. Thus, in *Western Nigeria Development Corpn v Abimbola*,[105] the contract stipulated for its determination by either of the parties by giving one month's notice in writing. The employee was dismissed without any notice. The SC held that all he could recover as damages was one month's salaries.

Where the contract of employment is silent on the issue of length of notice that should be given to bring it to an end, reasonable notice will be implied. That is, the question of damages is determined by a consideration of the length of notice that would have been reasonable, from the facts and circumstances of the employment in question, to terminate it. The opinion of Akpabio JCA in *Onalaja v African Petroleum Ltd*[106] is instructive here. He summed up the law on notice and damages thus:

> I think the most important thing to emphasise in this judgment is that in cases of wrongful dismissal, the amount of damages recoverable by a plaintiff must be geared to the period of notice given by the employer as stipulated in the contract of employment. If it is six months' notice, then six months' salaries must be paid; if it is one month's notice, then one month's salary must be paid. If no period of notice was prescribed, then the common law rule will apply, namely that a reasonable period would be given, usually one month or three months, depending on the category of staff being dismissed.

It appears, however, that where an employer's right to determine an employment by notice is expressly excluded by the terms of the contract, a wrongfully dismissed employee will be entitled to damages calculated on the basis of the salary he would have earned up to his retirement. A good example is *NBC v Adeyemi*.[107] Here, under a clause of the contract, only the plaintiff employee had the power to terminate the contract - once he attains the age of 45 years - by given notice to that effect to the defendant employer. His retirement age was 55. He was wrongfully removed at 51. The trial court awarded him damages made up of his salaries until his retiring age of 55. The SC affirmed the award.

Similarly, where a fixed-term employment, i.e., employment for a fixed or predetermined period is wrongfully determined before the end of the fixed term of the employment, the plaintiff would recover, as damages, his wages or salaries for the unexpired period of the

[103] Ibid, at p 38.

[104] *Nigerian Produce Marketing Board v Adewunmi* [1972] 1 All NLR (pt 2) 433; [1972] 11 SC 111; *International Drilling Co (Nig) Ltd v Ajibola* [1976] 2 SC 115; *Soyemi v Federal Housing Authority* [1982] CCHCJI; *Fasesan v NPA*, Judgment of the Federal Court of Appeal, Lagos, 1984, p 281.

[105] [1966] 1 All NLR 159; 1966 NCLR 157; [1966] NMLR 381. See also *Chukwumah v Shell BP* (above, n 69); *Obot v CBN* (1993) 9 SCNJ 368.

[106] [1991] NWLR 691, at p 698.

[107] (1969) 1 ALR Coo 107.

employment.[108] Explaining this principle, Akintan JCA said in *David – Osuagwu v A-G Anambra State*[109] that:

> The position in law is that where a contract of employment is for a specific period and the employee was wrongfully dismissed or removed from office, then an award of damages in the full amount of salary, allowances and other entitlements which the employee would have earned, if the contract of service had run up full course, is the maximum amount that is recoverable except that the amount may be reduced slightly in respect of being payable immediately instead of the due dates.

Again, in *Afrotec Technical Service Ltd v Huns*,[110] the plaintiff employee was employed in the defendant company for a two year term certain but renewable thereafter by mutual consent. There was no provision in the contract for terminating it before the two years term. The plaintiff was wrongfully dismissed after just six months. The court held that the plaintiff was entitled to damages made up of his salary for the unexpired 18 months which the contract would have run. This decision was affirmed by the Court of Appeal.

Other heads of damages include all monetary losses occasioned by the wrongful termination of the employment. These include any entitlement under pension or gratuity scheme,[111] commission where payable under the contract, leave allowance where leave is already earned, house or quarters allowances.

Note, however, that there is no ground or basis for an award of general damages being a breach of contract,[112] or for injured or ruffled feelings as a result of the loss of job,[113] or for any difficulty in finding another job.[114]

As already noted, a wrongfully removed employee is expected to take reasonable steps to mitigate his losses by obtaining another suitable job. And, if he secures another employment, whatever he earns therefrom will be deducted from the damages otherwise recoverable.

Again, damages recoverable may be reduced by a small sum so as to take account of the advantage of immediate or upfront payment as against payment in the future due dates.[115]

Conclusion:

The equitable remedy of specific performance which, with respect to contract of employment, translates to reinstatement of a wrongfully dismissed employee is very vital and useful to employees in Nigeria for a number of reasons, most of which have been discussed above. Principally, it offers job security to workers in Nigeria as it stops or prevents the employers from dismissing the workers arbitrarily without complying with the statutorily stipulated due process. No doubt, nepotism abounds in Nigeria, especially in the area of employment. Some juicy jobs appear to be reserved solely for the political class, their children, relations and associates. If not because of the said equitable remedy and some statutory stipulations restricting the employers' right to dismiss, some tribal, religious, ethnic or political bigots, in their bid to favour and employ their chosen ones, would have simply or arbitrarily dismissed their workers especially in civil service by giving them just the stipulated notice or pay them in lieu of notice and replace them with their own chosen people. This is so as the common law permits the hirer to fire at will, insofar as it a master-servant employment relationship. The only condition attached to this common law right is that the employer must give the

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[108] See *Oransaye v ECN* [1969] NCLR 93; *Mandridas v Tangalakis* (1932) 11 NLR 62.
[109] [1993] 4 NWLR 13, at p 45.
[110] [1981] 4 CA 222.
[111] *Obot v CBN* [1993] 9 SCNJ 268**;** *NBC v Adeyemi* (1969) 1 ALR Coo 107**.**
[112] *Western Nigeria Development Corpn v Abimbola* [1961] 1 All R 159**;** *NBC v Adeyemi*, ibid**.**
[113] *Nigeria-Arab Bank Ltd v Shuaib* [1991] 4 NWLR 450, *Baba v Nigerian Civil Aviation Training Centre* [1986] 5 NWLR 515.
[114] *Lawal v Christleb (Nig) Ltd* CCHCJ/9/73, p 139.
[115] *David – Osuagwu v A–G Anambra State* [1993] 4 NWLR 13, at p 45**,** at p 45.

employee the expressly or impliedly stipulated period of notice. As already discussed above, apart from the current innovative and commendable stance of NIC, the motive or reason for such a dismissal is immaterial as an employer can dismiss for any reason whatsoever or for no reason at all. This makes the employee's employment position very insecure and precarious – as they are nothing order than cheap commodities which can be discarded anytime. Under the common law, even when the dismissal is proven to be wrongful, the only remedy available to the affected employee is damages – monetary compensation for the period of time he would have worked and paid for until he is rightfully dismissed. As common law remedy of damages is not used as a punitive measure or punishment to the employer for exercising his common law right, most times, the amount of damages paid to the worker is very small, barely enough to cover his legal cost. This discourages a number of workers from instituting legal action, though fully convinced that his dismissal is wrongful.
Considering the degree of scarcity of jobs in Nigeria and the difficulty those who lost their jobs face in the country – a number of then ends up not being gainfully employed again, this equitable remedy is very vital as it secures the job and gives employment stability and confidence to the workers. It is therefore recommended that it should not only be applicable to those employments with statutory flavour but be extended by all courts, as NIC has already done, to master-servant employment relationship where the reason for the dismissal is because of the employee's involvement in trade union activities. It should also be extended to every worker who has put in certain number of years of service to/in the employment, say, 15 years. This recommendation has become necessary to ensure job security of workers in Nigeria and it is also in compliant with the international best practices and standard in labour relations, even though doing so may amount to a curtailment of the common law right of an employer to hire and fire.