

## A CRITIQUE OF THE LEGAL FRAMEWORK AND IMPLICATIONS OF FAIR HEARING ON THE DETERMINATION OF STATUTORILY FLAVOURED EMPLOYMENT CONTRACTS IN NIGERIA\*

### Abstract

*This paper employs the doctrinal research method to evaluate the legal parameters for determining contracts of employment with statutory flavor vide termination of appointment or summary dismissal of employee as well as the implications of due process and fair hearing in ensuring validity. This paper concludes that in contracts with statutory flavour, the employer must exercise his legal right to discipline and disengage an employee in accordance with statutorily defined procedures and due observance of fair hearing to ensure validity. It is further concluded that the courts will usually frown at and declare as ultra vires, null and void the termination of appointment or dismissal of an employee where the process for doing so prescribed by the governing statute or regulation is either not complied with at all, or is partially complied with. It is recommended that employers or management should comply strictly to lay down procedures and the principles of natural justice in terminating or dismissing an employee to prevent nullification and reversal by the courts.*

**Keywords:** Legal Framework, Determination, Contracts, Statutory Flavour

### 1. Introduction

The legal framework for determination of all forms of contracts of employment is usually predicated upon the terms and conditions agreed by the parties at the onset, as well as statutory and case laws explication of these terms. The statutory definition of the concept is provided for in the Labour Act<sup>1</sup> which defines a contract of employment as an agreement whereby the employer agrees to engage the employee as a worker, and the employee agrees to work for the employer as his worker on agreed terms and conditions<sup>2</sup>. The validity of employment contracts are usually determined by the existence of the usual constituent elements which include, offer, acceptance and consideration.<sup>3</sup> Uvieghara<sup>4</sup> posits that for a valid contract of employment to exist, there must be an offer, and unqualified acceptance, and the parties thereto must be *ad idem* as to the terms and conditions of the contract. A contract of employment is therefore construed and explained as ‘an agreement freely entered into by legally competent employer and employee on terms and conditions agreeable to both parties within legal ambit’.<sup>5</sup> A contract of employment whether governed by statute or by master/servant relationship, may be validly terminated or brought to an end in a number of ways which include giving of notice in accordance with the contract of employment or laid down statute or summary dismissal.<sup>6</sup> Where there is no prescribed period in the contract, provisions of the Labour Act will apply.<sup>7</sup> In addition, where the employer does not give notice but pays wages in lieu of the period of notice, the employment is determined from the date the wages are paid and accepted by the employee<sup>8</sup>. This paper examines the legal parameters for termination of contract or dismissal of employees in employment contract with statutory flavor as well as the legal effects and implications of fair hearing on the processes and ensuing decisions.

### 2. Meaning of Employment with Statutory Flavour

Generally, a contract with statutory flavour is a contract of employment whose terms, duties and obligations are governed or regulated by a statute or laid down rules and regulations made pursuant to a statute. This type of employment contract differs from the other type of employment contract in

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<sup>1</sup>Labour Act Cap L1 LFN 2004 s91

<sup>2</sup>Ibid

<sup>3</sup>*Ashakacem Plc v Mubashshurun Inv. Ltd* (2019) 77 NSCQR 109 (SC)

<sup>4</sup>Uvieghara, E.E *Labour Law in Nigeria* (Lagos, Malthouse Press 2001)

<sup>5</sup>Atsenuwa K.B, *Industrial Relations: Theory and Practice* (Port Harcourt, Tomlupa Publishers 2005)

<sup>6</sup>Wright M, *Labour Law* (Plymouth; Macdonald & Evans 1979 P. 92)

<sup>7</sup>Labour Act 2004 s11

<sup>8</sup>*Lees v Arthur Greaves (Lees) Ltd* (1973) I.C.R 90

Nigeria which is: employment contract predicated on master/servant relationship. In the case of *Central Bank of Nigeria Ltd v Igwilllo*,<sup>9</sup> the Supreme Court per Akintan JSC stated the meaning of employment contract with statutory flavour thus: 'An employment is said to have statutory flavour when the employment is protected by statute or laid down regulations made to govern the procedure for employment and discipline of an employee....'<sup>10</sup> From the foregoing, it is argued that a contract of employment that has statutory flavour will usually have the following characteristics: first, employment as well as employer/employee relationship is usually governed by the applicable statute or rules and regulations paid by the appropriate authority pursuant to the statute; second, the tenure of employment of the employee is usually guaranteed and protected by the enabling statute which governs the method to be applied in terminating same; and third, the procedure for employment, discipline and disengagement of employee is usually prescribed by statute or subsidiary rules and regulations which must be strictly adhered to.

### **Categories of Employment with Statutory Flavour**

Employees whose employment are statutorily flavoured include Civil Servants/Public Servants at Federal and State level, employees of statutory Federal and State commissions and bodies created by the Constitution of the Federal Republic of Nigeria 1999<sup>11</sup> as well as employees of other statutory bodies created by an Act of the National Assembly or Law of a State House of Assembly.<sup>12</sup> It is the statutory protection of such employment by the constitution or statute underlines the nomenclature, 'contract with statutory flavour'.<sup>13</sup> Also in this category are the employees of several Universities, Tertiary Institutions and government owned agencies that are established statute in which there are clear stipulations/regulations as to the procedure for the employment and discipline of staff.<sup>14</sup> The question that may arise here is: what is the legal position of public service and public servants in Nigeria? The answer to this question was aptly provided by the Supreme Court of Nigeria in the case of *CBN v Igwilllo*<sup>15</sup> (2007) 30.2 NSCQR 671, where it held per Akintan JSC thus.

It is that public servants in the established and pensionable cadres of the Federal Government Service do not hold their offices at the pleasure of the Federal Government rather, their appointments are based upon rules and regulations, statutes or memoranda of appointment....<sup>16</sup>

Also, in *Olaniyan v. University of Lagos*,<sup>17</sup> it was held that 'the University of Lagos, and the University Council, both being creations of statute, cannot act except within and under the powers conferred on them by the relevant statute'.<sup>18</sup> From the above, it is evident that the courts have enforced the protection that avail public servants or other employees of government institutions established by statute as well as agencies established by statute in the manner defined by and prescribed in the enabling statute.

### **Legal Implication of Employment With Statutory Flavour**

Having provided an explanation on the concept of contract with statutory flavour, it is imperative here to assess the legal implication of contracts of employment with statutory flavour in Nigeria. It is well established principle of law that once a contract of employment is governed by statute or laid down regulations, the organization involved or officials of such agencies or institutions must operate within and under the laid down rules and regulations. Restating the position of the law on the legal implication of contract with statutory flavour, the Supreme Court per Akintan JSC in *CBN v. Igwilllo*<sup>19</sup> stated:

The first appellant is a Federal Financial Institution created by statute. It follows therefore that both the bank and officials acting on its behalf cannot act except within

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<sup>9</sup>*Central Bank of Nigeria Ltd v Igwilllo*(2007) 30.2 NSCQR 671 (SC)

<sup>10</sup>*Ibid*

<sup>11</sup>CFRN 1999 ss153 &207

<sup>12</sup>See for instance University of Benin Act 2004; Delta State Polytechnic Ogwashi-Uku Law 2006

<sup>13</sup>*CBN v Igwilllo* (n9)

<sup>14</sup>*Ibid*

<sup>15</sup>*CBN v Igwilllo* (n9)

<sup>16</sup>*Ibid*

<sup>17</sup>*Olaniyan v. University of Lagos*, (1985) 2 NWLR pt 599 1 (SC)

<sup>18</sup>*Ibid*

<sup>19</sup>*CBN v Igwilllo* (n9)

and under the power conferred on them by the statute. Any action taken outside the powers conferred by the statute or regulations made thereof will be ultra vires, null and void'.<sup>20</sup>

Adumbrating the position of the law further, the eminent jurist posited:

The first appellant is a Federal Institution created by statute. It follows therefore that it must carry out its activities in line with its governing laws. The laws regulating the appointment and discipline of its workers must be complied with strictly as their employments are with statutory flavour-every action taken on behalf of the 1<sup>st</sup> appellant is therefore expected to be done in good faith, free from bias or nepotism. Similarly, every provision of the Bank's Staff Manual (EXHIBIT U) must be strictly complied with by the bank when dealing with every member of its staff<sup>21</sup>.

From the foregoing, the legal implications of contract of employment with statutory flavour can be highlighted thus:

- i. The employment is created by statute or regulations made thereof.
- ii. The statute or regulations usually lucidly state the procedure for employment and discipline of workers engaged in pursuance thereto.
- iii. Organizations or an institution created by statute or its officials cannot carry any action except within and under the powers conferred upon it by the governing statute.
- iv. The law regulating the employment and discipline of its workers must be complied with strictly.
- v. All action taken on behalf of the organization by officials are expected to be done in good faith, free from bias and in accordance with the principles of fair hearing.
- vi. Every action taken by the organization or officials outside the powers conferred by the statutory or regulations made thereof will be declared ultra vires, null and void.

### 3. Termination of Employment Contract with Statutory Flavour

In spite of the protections provided for employees in contract with statutory flavour, it is settled law that like other employment contracts, contracts with statutory flavour can validly be terminated by either party providing the notice prescribed by the enabling statute or payment of prescribed wages in lieu of notice.<sup>22</sup>In the Ziideh's case, the Supreme Court of Nigeria roundly stated the current and correct position of the law in this regard when it held that even in statutory employment, the employer can validly terminate the employment of a public servant by giving the appropriate notice prescribed by law or making the appropriate payment in lieu of notice.<sup>23</sup> However, where the law creating the institution specifies the procedure to be followed in terminating the employment of an employee under statutory employment, such procedure must be fully and strictly complied with as failure to do so will lead to such termination being declared null and void by the courts.<sup>24</sup>In the case of *Oloruntoba-Oju v Abdul-Raheem*,<sup>25</sup>the Appellants who were Plaintiffs at the trial court were executive members of the Academic Staff Union of Universities (ASUU) University of Ilorin Chapter who were alleged to have engaged in a strike action that purportedly disrupted the semester examinations of the university. Soon after the strike, their appointments were terminated by the university vide a letter titled 'Cessation of Employment' They filed a suit challenging their termination at the Federal High Court in which they contended that they are permanent and pensionable staff of the university, and that by the virtue of Section 15 (1) of the University of Ilorin Act, their appointments could not be validly terminated except for disciplinary purposes; the trial court found for the plaintiffs and nullified their purported termination. On further appeal to the Supreme Court, their termination of appointment was declared null and void and of no effect by the Apex court which further held that failure of the university to comply with the

<sup>20</sup>Ibid

<sup>21</sup>Ibid

<sup>22</sup>*Ziideh v Rivers State Civil Service Commission* (2007) 29 NSCQR 701 (SC)

<sup>23</sup>Ibid

<sup>24</sup>*Oloruntoba-Oju v Abdul-Raheem* (2009) 39 NSCQR 105 (SC)

<sup>25</sup>Ibid

procedure laid down in the governing law, rendered the termination a complete nullity.<sup>26</sup> Providing further insight and judicial clarity on how an employment with statutory flavour may be validly terminated, the Supreme Court again held in the case of *Olufeagba v. Addul-Raheem*<sup>27</sup> per Adekeye, JSC thus:

... An avalanche of court decisions have pronounced that where contract of service enjoys statutory protection, it can only be terminated in the manner prescribed by the governing statutory provision, a breach of which renders the act ultra vires and void. The contract cannot be discharged on the agreement of parties without compliance with the enabling statutory provision. There is a presumption that when the legislature confers a power on an authority, to make a termination, it intends that the power shall be executed in accordance with the rules of natural justice....<sup>28</sup>

Flowing from careful analysis of the above, it is submitted that a contract of employment with statutory flavour may be validly terminated as stated hereunder:

- i. The termination must be in accordance with the stipulation of the statute governing the employment, or the rules made thereof.
- ii. The procedure laid down in the statute or rules must be fully and strictly followed and complied with, and the law is settled that the parties to such contracts cannot, by agreement, vary or alter the procedures set out by the governing law.
- iii. The principles of natural justice and fair hearing must also be strictly adhered to.
- iv. Terminating the employment of an employee outside the powers conferred on the authority by the enabling statute will be ultra vires and void.
- v. Partial compliance with the procedure for termination by the authority is same as non compliance. It is the law that compliance must be full and total.

#### **4. Dismissal of an Employee in Employment with Statutory Flavour**

Employers are empowered by law to summarily dismiss their employees for gross misconduct. This situation applies to both employment governed by master/servant relationship, as well as employment with statutory flavour.<sup>29</sup> The only distinction in the legal requirement is that in employment with statutory flavour, procedure laid down by the governing statute or regulations made thereto must be strictly complied with. In *Ziideh v. Rivers State Civil Service Commission*,<sup>30</sup> the Supreme Court stated this principle of law thus: 'It is now firmly settled that in statutory employment, just as in private employment, an employer can summarily dismiss the servant in all cases of gross misconduct provided, of course, the employee is given the opportunity of fair hearing'<sup>31</sup>

#### **Concept of Dismissal**

Dismissal is a situation where the contract of employment of an employee is brought to an abrupt end without notice or payment of any terminal benefits due to gross misconduct on the part of the employee.<sup>32</sup> Dismissal also grants the employer a legal right to bring to an end a contract of employment without being obligated to provide the appropriate legal notices or pay the appropriate entitlements required to terminate a contract of employment.<sup>33</sup> Black's Law Dictionary,<sup>34</sup> defines the term dismissal as: '*to release or discharge (a person) from employment*'. From these definitions it is posited that dismissal from a legal view point means the premature or unceremonious disengagement of an employee from work usually for disciplinary reasons emanating from gross misconduct. It is argued that summary dismissal entails the unceremonious, premature and abrupt bringing to an end the employment contract of an employee for disciplinary reasons arising from proven gross misconduct.

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<sup>26</sup>Ibid

<sup>27</sup>*Olufeagba v. Abdul-Raheem* (2009) 40 NSCQR 700 (SC)

<sup>28</sup>Ibid

<sup>29</sup>Wright M (n6 above)

<sup>30</sup>Ziideh (n22 above)

<sup>31</sup>Ibid

<sup>32</sup>Wright M (n6 above)

<sup>33</sup>Ibid

<sup>34</sup>*Black's Law Dictionary Eight Edition*

### Concept of Gross Misconduct

Various interpretations have been given in various rules, laws and regulations as to what constitutes gross misconduct. These interpretations or meanings also vary from one sector to the other. In this discourse, emphasis will be placed on the legal/judicial definition of the concept. In the case of *Eze v. Spring Bank Plc*,<sup>35</sup> the Supreme Court of Nigeria per Mohammed JSC stated the judicial meaning of gross misconduct thus:

Gross misconduct has been identified as a conduct that is of gross and weighty character as to undermine the confidence which should exist between an employee and the employer. So too, working against the deep interest of the employer amounts to gross misconduct, entitling an employer to summarily dismiss the employee.<sup>36</sup>

From the judicial meaning stated above, the following can be said about the meaning of ‘gross misconduct’: first, it is misconduct of serious and weighty nature; second, it is of a nature that puts a great gulf in the confidence that an employer should have in his employee to ensure effective employer/employee relationship; third, it usually undermines or works against the deep interest of the employer; and finally, it entitles the employer to summarily dismiss the employee provided laid down procedures are followed, and the employee is given opportunity of fair hearing.

### When Dismissal can be said to be Unlawful

It is a cardinal principle of Nigerian jurisprudence that where, in an employment with statutory flavour, an employer summarily dismisses an employee without complying fully with the procedure for doing so as laid down in the governing statute or regulations, such a dismissal would ordinarily be declared unlawful by the courts. In the case of *Eze v. Spring Bank Plc*,<sup>37</sup> the Supreme Court restated the position of the law in this regard as follows:

Now, to determine whether the dismissal of an employee was correct or wrong, the terms of employment of the aggrieved employee must be examined to see whether the correct procedure was followed. Where there is departure from the prescribed procedure, or violation of the elementary rule of natural justice, then the dismissal is unlawful.<sup>38</sup>

From the above, dismissal of an employee can be said to be unlawful when the procedure adopted does not conform strictly with the procedure stated in the employee’s terms of contract of employment or in the enabling statute or regulations governing the employment of the employee; the employee is not given an opportunity of fair hearing, or there is bias or nepotism in the process; or where in a contract with statutory flavour, the organization established by statute or its officials act outside the strict confines of the power conferred on them by the enabling statute.

### Remedies for Unlawful Determination of Employment with Statutory Flavour

It is settled law that once the employment of employee whose employment has statutory flavour, is unlawfully terminated, the appropriate remedy that the courts have applied in an avalanche of decided cases is reinstatement in addition to damages. This position of the law is predicated upon the principle that, once the dismissal is declared ultra vires and void, it means that, *ab initio*, the purported dismissal never happened and that the employee is still in the employment of the employer from the duration of the purported dismissal to when judgment was given in his favour and beyond. In the case of *Iderima v. Rivers State Civil Service Commission*,<sup>39</sup> the Supreme Court of Nigeria per Oguntade, JSC stated this principle of law as follow: ‘...The Plaintiff/Appellant not having been properly dismissed from the Rivers State Public Service, must be deemed to be still in Service. A Public Servant can only be validly removed from service if the procedure prescribed by law was followed’.<sup>40</sup> This principle of law was

<sup>35</sup>*Eze v. Spring Bank Plc* (2011) 48 NSCQR 129 (SC)

<sup>36</sup>*Ibid*

<sup>37</sup>*Eze v. Spring Bank Plc* (n35 above)

<sup>38</sup>*Ibid*

<sup>39</sup>*Iderima v. Rivers State Civil Service Commission* (2005) 24 NSCQR 67 (SC)

<sup>40</sup>*Ibid*

restated by Edozie, JSC in his concurring judgement in the Iderima's case thus: 'It is settled law that once the dismissal of a civil servant is declared null and void, the effect of such a pronouncement is that the civil servant was always and still is a Civil Servant'.<sup>41</sup> Also, In the case of *CBN v. Igiwillo*,<sup>42</sup> the Supreme Court of Nigeria per Akintan JSC reemphasized the remedies available for wrongful termination/dismissal of employment with statutory flavour as follows: 'Where an employee's service is protected by statute and the employment is wrongfully terminated, he would be entitled to reinstatement in his office, and in addition, damages representing his salaries during the period of his purported dismissal'.<sup>43</sup> Another issue that arises here is: that what is the position of the law if during the period of challenging his purported dismissal/termination in court, the employee in an employment with statutory flavour secures another employment; is he deemed by law to have waived his right to his previous employment for which he has a pending action in court? The Supreme Court per Adekeye JSC succinctly answered this question in *Olufeagba v. Abdul Raheem*,<sup>44</sup> when it held: '... The remedy to unlawful termination of employment is reinstatement. The mere facts that the employees have secured another gainful employment or have been replaced are not factors to prevent the court from making the requisite orders.'<sup>45</sup>

From the foregoing, the following can be gleaned as the present position of the law in this regard: firstly, the most appropriate legal remedy for unlawful termination of a contract with statutory flavour is reinstatement in addition to damages which usually represents the salaries and allowances the employee ought to have earned from the time his appointment was unlawfully terminated to the time he was reinstated to his job; secondly, even where the purportedly dismissed employee has been replaced, or has secured another gainful employment, the courts will still order his reinstatement; in addition, the employee is not deemed to have waived his right to his employment by necessary conduct if he secures another gainful employment during the pendency of the action challenging his unlawful dismissal in court. It is posited that reinstatement of an unlawfully terminated employee may not be feasible in all instances, as in the case where the employee is dismissed at the verge of his retirement from service, and reinstating him will mean compelling the employer to extend his years of service in contravention of the governing law. The question that arises is: what remedy other than reinstatement is available to an employee whose employment is unlawfully terminated, or who is unlawfully dismissed in the circumstances? It will appear from recent decisions of the supreme court that where an employee in statutory employment is unlawfully disengaged, and where it is not feasible to order reinstatement, the courts will usually convert such unlawful termination to retirement and order payment of retirement entitlements to the employee in accordance with the terms of employment as contained in the governing statute or regulation. This settled principle of Nigeria jurisprudence was emphasized by the Supreme Court in the case of *Nwoye v Federal Airports Authority of Nigeria*<sup>46</sup> where it restated the law in this regard as follows:

it is in maintaining the balance of the right of an aggrieved disengaged employee who ought to be heard and who has established certain rights as against the right of the employer who cannot be forced to keep an employee that employer wants off its employment that the option open to the court as arbiter is recognize that the employment has come to an end but the employee has to be treated as though retiring and granted retirement benefits in line with the conditions of service.<sup>47</sup>

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<sup>41</sup>Ibid

<sup>42</sup>*CBN v Igiwillo* (n9 above)

<sup>43</sup>Ibid

<sup>44</sup>*Olufeagba v. Abdul Raheem* (n27 above)

<sup>45</sup>Ibid

<sup>46</sup>*Nwoye v Federal Airports Authority of Nigeria* (2019) 77 NSCQR 215 (SC)

<sup>47</sup>Ibid

## 5. Legal Implication of Fair Hearing in the Termination/Dismissal in Contracts with Statutory Flavour

The right to fair hearing is an inalienable right enshrined in and guaranteed by the Constitution of the Federal Republic of Nigeria 1999.<sup>48</sup>This right is central and pivotal to all judicial and administrative proceedings, and non-compliance or partial compliance with the principles renders any proceedings and decisions arrived at a nullity.<sup>49</sup> It is also a cardinal principle of Nigeria law that a hearing cannot be said to be fair where any of the parties is refused a hearing or denied the opportunity to be heard or present his case or call evidence.<sup>50</sup>The right to fair hearing is substantially being provided the opportunity of being heard and lies mainly in the procedure followed in the determination of a case and not in the correctness of the decision arrived at in a case<sup>51</sup>

### Elements of Fair Hearing

Fair hearing is a settled principle of legal and administrative procedure anchored on the principles of Natural Justice and guaranteed by the Constitution of the Federal Republic of Nigeria 1999(as amended)<sup>52</sup> as amended. The essential elements of fair hearing are founded on the twin pillars of the principles of natural justice which are: *Audi Alteram Partem*; which means hear the other side; and *Nemo Judex in Causa sua*, which means you cannot be a judge in your own cause.<sup>53</sup>

### *Audi Alteram Partem*

This principle is anchored on a pillar of the principles of natural justice and is to the effect that in any proceedings inclusive of proceedings related to employee discipline in contracts governed by statute, the employee must be given fair and adequate opportunity to be heard and to defend himself before the employer can validly and lawfully determine his employment.<sup>54</sup>This principle had thousands of years ago been stated by our Lord Jesus Christ in the Holy Bible where He said: ‘in the laws we operate in this land, can a man be judged when he has not been heard?’<sup>55</sup> In the case of *Rear Admiral Francis Echie Agbiti v Nigerian Army*,<sup>56</sup> Agbiti, a former officer in the Nigerian Army was tried by a General Court Martial on a four count charge. At the commencement of the court martial Agbiti raised an objection about the composition of the panel and the likelihood of bias. His objection was overruled by the President of the Panel after consulting in private with one other member of the panel. Admiral Agbiti was not given opportunity to provide evidence to substantiate his objection and the panel did not give reasons for overruling his objection. The court martial delivered its judgment at the end of the trial on 5<sup>th</sup> January 2005 and sentenced Admiral Agbiti to dismissal from the Armed forces in each of the three courts and on a fourth court to reduction in rank from Rear Admiral to Commodore. Admiral Agbiti being dissatisfied appealed to the Court of Appeal which affirmed the decision of the court martial and being further dissatisfied appealed to the Supreme Court of Nigeria. In its considered judgment, the Apex Court held inter alia that failure of the general court martial to allow Admiral Agbiti to provide evidence in support of his objection at the trial before being overruled was a breach of the principle of fair hearing especially *Audi Alteram Partem*. The court therefore declared the entire proceedings of the general court martial, the conviction thereat as well as dismissal of the appellant from the Nigeria Navy a nullity.<sup>57</sup>

### *Nemo Judex in Causa Sua*

The principle of *Nemo Judex in Causa Sua* is one of the pillars of the principles of natural justice which is predicated upon the age-old principle of fairness is to the effect that in order to ensure fairness and an unbiased outcome in any proceedings, the accuser should not be a member of the body set up to

<sup>48</sup>CFRN 1999 (as amended) s36

<sup>49</sup>*Olorunfoba –Oju v Abdul-Raheem* (n24 above)

<sup>50</sup>*All Progressives Congress v George Nduul and Ors* (2017) 70 NSCQR 994 (SC)

<sup>51</sup>*Ibid*

<sup>52</sup>CFRN 1999 (as amended) s36(1)

<sup>53</sup>*Francis Echie Agbiti v Nigerian Army* (2011) 45 NSCQR 388 (SC)

<sup>54</sup>*Olufeagba v. Abdul Raheem* (n27 above)

<sup>55</sup>*Holy Bible, King James Version*, John 7v54

<sup>56</sup>*Agbiti v Nigerian Army* (n53 above)

<sup>57</sup>*Ibid*

investigate, prosecute or try the offender. In the case of *Fawehinmi v LPDC*,<sup>58</sup> where the Attorney General of the Federation who was the accuser was also the chairman of the legal practitioners Disciplinary Committee LPDC that tried and found Chief Gani Fawehinmi guilty of professional misconduct. On appeal to the Supreme Court of Nigeria, it was held by the Apex Court to be in breach of the principles of fair hearing, and the whole proceedings by the LPDC and the decision reached thereat was declared a nullity. Also, in the case of *Garba v University of Maiduguri*,<sup>59</sup> the Supreme Court also nullified the expulsion of Garba and some other students from the university and held that the fact that some principal officers of the university who were personally affected by the ensuing arson and destruction that ensued from the riot were also members of the panel set up by the university senate to investigate the matter and on whose recommendation the students were expelled meant that the members were both complaint/accuser and judge which was in breach of fair hearing especially *Nemo Judex in Causa Sua*. The court further held that failure of the panel to invite the affected students to defend themselves and cross examine witnesses that testified against them at the panel was also a denial of fair hearing.

However, in the case of *Esiaga v University of Calabar*,<sup>60</sup> the appellant was suspended by the University authorities on allegations of cult membership and cult activities. The University notified Esiaga that a panel of investigation will be set up where he is expected to present his side of the matter. Rather than wait to present his own case, he filed a suit at the trial court contending that he was not heard before he was suspended. On appeal to the Supreme Court, it was held that suspension did not connote expulsion. Distinguishing this case from the case of *Garba v University of Maiduguri*, the Supreme Court held that, in the *Garba's* case, there was an outright expulsion of the students before being heard, whereas in the instant case, an investigative body was to be set up to enable the appellant put his own side of the case but the appellant chose to be clever and rushed prematurely to the court to circumvent the process. The Apex court therefore held that the appellant was not denied fair hearing.<sup>61</sup>

### **Legal Consequences of Denial of Fair Hearing**

The legal effect of proceedings carried out in breach of the principles of fair hearing inclusive of disciplinary proceedings of employees is that the courts would ordinarily invalidate such proceeding and the decisions as *ultra vires*.<sup>62</sup> This position of the law is anchored on the fact that fair hearing encompasses not only the principle of natural justice in the narrow technical sense, but in the wider sense of what is right and fair to all concerned and is seen to be so.<sup>63</sup> In the case of *FRN v Maishanu*,<sup>64</sup> the Supreme Court of Nigeria held on the preeminent position and effect of non-adherence to fair hearing in any proceedings as follows:

My Lords, the point needs to be reiterated again and again that the cardinal principle of fair hearing whether in relation to a civil or criminal matter is so sacrosanct. The Latin Maxim puts it this way: 'Audi Alterem Partem' i.e. let the other party be heard. It simply means hear the other side(s) in a dispute before reaching a conclusion. It is a constitutional requirement (section 36 Constitution of the Federal Republic of Nigeria 1999 as amended)... the principle of fair hearing has it that a man cannot be condemned without being heard.<sup>65</sup>

Also, in the case of *Patience Jonathan v Federal Republic of Nigeria*,<sup>66</sup> the Supreme Court held that where in any proceedings the twin pillars of the principles of natural justice and fair hearing are not observed, the whole proceedings including any decision arrived at will be declared a nullity.<sup>67</sup> The court

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<sup>58</sup>*Fawehinmi v LPDC* (1985) 2 NWLR (pt. 7) 300 (SC)

<sup>59</sup>*Garba v University of Maiduguri* (1986) NWLR (Pt 18) 550 (SC)

<sup>60</sup>*Esiaga v University of Calabar* (2004) 18 NSCQR 1 (SC)

<sup>61</sup>*Ibid*

<sup>62</sup>*Arije v Arije* (2018) 74 NSCQR 568 (SC)

<sup>63</sup>*Ibid*

<sup>64</sup>*FRN v Maishanu* (2019) 77 NSCQR 60 (SC)

<sup>65</sup>*Ibid*

<sup>66</sup>*Patience Jonathan v Federal Republic of Nigeria* (2019) 77 NSCQR 1 (SC)

<sup>67</sup>*Ibid*



further held in this regard that any law enacted by any legislative authority that infringes upon the right to fair hearing will be in conflict with the clear provisions of section 36 of the 1999 constitution and will in furtherance of the inconsistency provisions of section 1 (3) of the same constitution be declared null and void. However, where an employee has been given fair hearing and provided ample opportunity to present his own side of the case or to defend himself and fails, refuses or neglects to take advantage of this, such an employee cannot turn around to complain of denial of fair hearing.<sup>68</sup> The Supreme Court held that where a person is given an opportunity to present his case and fails to do so, such a person by so doing loses the right to complain of denial of fair hearing.

## **6. Conclusion and Recommendations**

Employment with statutory flavour is governed by the stipulations of the enabling statutes or regulations and employees under such contracts enjoy security of tenure of employment as well as pensionable post. Disciplinary procedures of employees as well as termination/dismissal of employees under such contracts must be done in strict and full compliance with the procedures laid down by the enabling law to ensure its validity. Termination of employment as well as dismissal of employees in statutorily flavoured employment can be validly done where all procedures laid down are complied with. Partial compliance with laid down procedures is construed in law as equivalent to non compliance. It is a fundamental requirement that employers must in all disciplinary procedures prior to termination/dismissal of employees adhere to the principles of natural justice and the requirement of fair hearing enshrined in the 1999 Nigeria Constitution. Non compliance or partial compliance with the requirements of fair hearing renders the entire proceedings and termination/dismissal of an employee a nullity. Employers can summarily and validly dismiss an employee for gross misconduct in statutorily flavoured employment contracts provided laid down procedure is followed. Where an employee is dismissed or his employment terminated without due process and fair hearing, the courts will usually nullify such dismissal/termination and declare same as unlawful. Where the dismissal/termination of a statutorily flavoured employment is declared unlawful, the courts will normally order his reinstatement as well as damages covering the salaries he would have earned from the time he was purportedly dismissed to when he is reinstated. Where the termination/dismissal is unlawfully terminated and it is impossible for the employee to be reinstated, the court usually order the conversion of such termination/dismissal to retirement and also order the payment of all his retirement benefits/entitlement.

This paper makes the following pertinent recommendations. The requisite authorities in statutory bodies and institutions should at all material times, ensure that they fully and strictly comply with statutory provisions for discipline and dismissal of staff to avoid the legal consequence of their disengagement being declared a nullity. The appropriate authorities must ensure that they adhere to the principles of natural justice and fair hearing in discipline of staff to prevent the ensuing disengagement or dismissal from being declared a nullity. To succeed in their case, employees who were unlawfully dismissed in a contract with statutory flavour must plead and provide evidence on non compliance with procedure and the principles of fair hearing than in the incorrectness of the decision.

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<sup>68</sup>*Akiti v Oyekunle*(2018) 73 NSCQR 415 (SC); *ENL Consortium Ltd v Shambilat Shelter*(2018) 73 NSCQR 277 (SC)