

# **LABOUR & EMPLOYMENT LAW**

*A Practitioner's Guide*

## **POST RESIGNATION DISCOVERY OF GROSS MISCONDUCTS**



# POST RESIGNATION DISCOVERY OF GROSS MISCONDUCTS

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## INTRODUCTION

Inherent in employer-employee relationships is the power of an employer to discipline its erring employees. Every employer has disciplinary powers over its employees while the employee remains in its service. The disciplinary sanctions that may be meted to an erring employee are often defined in the company's disciplinary policy and sanction grid. These may include warnings, disciplinary suspensions, terminations and dismissals in the event of gross misconducts. There have been cases where employers discover gross misconducts on the part of their employees, weeks or months after their resignations from the service of the company. What are the options, if any, open to the employer in this circumstance? This work answers this question with the aid of decided cases.

## POST RESIGNATION DISCOVERY OF GROSS MISCONDUCTS

Either party to a contract of employment customarily reserves the right to terminate the contract by giving the requisite notice or by making payment in lieu of notice. There have been cases where gross misconducts on the part of the employees are discovered weeks or months after leaving the service of the company. This sometime happens following an audit of the company's processes and books.

More interesting cases are situations where the alleged gross misconducts are discovered after the employee's resignation has taken effect but while the payment of the in-house terminal benefits such as gratuity is still being processed. It often happens that the allegedly discovered gross misconducts are grave and weighty which would have earned such employee a summary dismissal with attendant loss of terminal benefits if he was still in the service of the company. In such cases, there is temptation on the part of employers to find a way to punish such alleged misconducts. There have been instances where some employers chose to deny such employees of their earned terminal benefits while some record the alleged infractions in the employee's file and issue adverse references to prospective employers in future.

## SOME LEGAL ANALYSIS

As noted earlier, the law is trite that every employer has disciplinary powers over its employees while they are still in the service of the employer. This is, however, where it ends. The disciplinary powers of an employer over its employees cease immediately the employee leaves the service of the employer. Consequently, an employer has no power to issue a query to an ex-employee and likewise has no power to invite him/her to an investigative or disciplinary panel set up by it. In **Jumbo v PEFMB**<sup>1</sup>, the Supreme Court held that an employee cannot be dismissed from an employment that had ceased to exist, and consequently, any attempt to exercise any form of disciplinary power over an ex-staff is an exercise in futility.

Employers of labour may, however, validly exercise disciplinary powers over an employee who has tendered his letter of resignation but before the resignation takes effect. This is because such employees are still deemed to be in employment until the resignation takes effect. That is, an employee 'working out' his notice of resignation period is still deemed to be in employment and under the disciplinary jurisdiction of his employer. Thus, in **Gabriel Oniya v International Breweries**<sup>2</sup>, the claimant tendered his letter of resignation dated the 22<sup>nd</sup> of August, 2019 but expressed to take effect on the 23<sup>rd</sup> October, 2019.

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<sup>1</sup> (2005) 14 NWLR (pt. 945)

The claimant was dismissed by his employer on the 22nd October, 2019 after a query and disciplinary proceedings which the claimant attended. The Court held that the claimant was validly dismissed. The court further noted that during a notice period, an employee remains under the administrative and disciplinary powers of his/her employer. Similarly, in **Ibama v Shell Petroleum Development Limited**<sup>3</sup>, the Supreme Court of Nigeria held that a prior notification of an employee of his pending retirement at a later date does not prevent the employer from terminating his contract of employment. However, where an employee resigns with immediate effect, by making payment in lieu of notice for instance, the employer immediately loses its disciplinary powers over such employee<sup>4</sup>.

- **Employers Liability for False and Inaccurate References**

As noted earlier, an employer cannot validly exercise disciplinary powers over an employee whose resignation has become effective. Similarly, alleged misconducts of an employee discovered after the employee's resignation has taken effect cannot also be documented in the employee's file for reference purposes. This is because such employee would not have been afforded fair hearing on the said alleged misconducts. An employee whose resignation has taken effect cannot be validly issued a query or invited to the employer's Disciplinary Panel. No employee may be indicted of a misconduct at workplace without a fair hearing which may take the form of a query or invitation to a Disciplinary Panel or both<sup>5</sup>. Thus, where an employer keeps in its record or issues an adverse reference about such employee to another prospective employer or any third party based on an allegation of misconducts allegedly discovered after the employee has effectively left its service, such an employer will be liable in damages for defamation and injurious reference. Caselaw is replete with instances where employers have been held liable for false, misleading or inaccurate references<sup>6</sup>.

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<sup>2</sup> **SUIT NO. NICN/ABJ/19/2020 Judgment delivered on 28th February, 2022. See also Peter Ocheja v Ventures & Trust Ltd Suit No. NICN/LA/532/2016 Judgement delivered on February 11, 2019.**

<sup>3</sup> **(2005) 17 NWLR (Pt. 954) 364. See also Abalogun v Shell Petroleum Development Company Ltd (2003) 13 NWLR 9 (pt. 837) 308.**

- **Discovery of Misconducts Having Criminal Elements**

Alleged misconducts at a workplace may also have criminal elements, the commonest being alleged cases of fraud, stealing, misappropriation of funds, or forgery. Where alleged misconducts having criminal elements are discovered at anytime after the exit of an employee, the employer is at liberty to lay complaints or petition to the law enforcement agencies for investigation, and it may press for charges against any such employee where a prima facie case of crime is established.

## **CONCLUSION**

Every employer has disciplinary powers over its employees but the power ceases upon the cessation of employment relationship between the parties. The disciplinary powers of an employer, however, continue to be potent until the resignation of an employee takes effect. However, where the alleged misconducts have criminal elements, the employer may lay a complaint before the law enforcement agencies even years after the exit of the employee from the service of the employer.

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**4 See WAEC v Oshionebo (2006) 12 NWLR (1994) 258.**

**5 See Eigbe v N.U.T (2011) 22 NLLR (Pt. 62) 227, Osumah v Edo Broadcasting Service & Anor (2011) 23 NLLR (Pt. 65), Imonikhe v Unity Bank Plc (2011) LPELR- 1503 (SC).**

**6 See Imarsel Chemical v National Bank of Ngeria Ltd (1974) 4 ECSLR 355, Banmeke v Union Bank (1982) 3 F.N.R 151.**