THE NATIONAL INDUSTRIAL COURT OF NIGERIA AND THE APPLICATION OF FAIR HEARING IN MASTER-SERVANT EMPLOYMENT DISPUTES: A CRITIQUE

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Abstract

One aspect of employment disputes which constantly calls for attention is the common law rule that an employee in a purely master-servant employment relationship is not entitled to fair hearing in the determination of his contract of employment. This work aims to critique of the jurisdiction of the National Industrial Court of Nigeria (NICN) in the application of principles of fair hearing in the determination of employment disputes in a purely master-servant employment relationship. The work adopts doctrinal legal research methodology with a critical and analytical approach using statutory instruments, case law, journal articles, published texts and unpublished works. The paper concludes that although Nigeria has not ratified the ILO Convention 158 of 1982 that makes provisions for the application of fair hearing in the determination of contracts of employment in its article 7, Section 254 (c) (1) F & Hof the Constitution of the Federal Republic of Nigeria (Third Attention) Act, 2010 confers the NICN with the jurisdiction to apply article 7 of ILO Convention 158 of 1982 as proof of international best practices in labour. The NICN exercises this jurisdiction to apply fair hearing by insisting that an employer seeking to terminate the employment of its employee must first afford the employee sought to be removed an opportunity of defending him or herself. By applying article 7 of ILO Convention 158 of 1982 in Nigerian labor jurisprudence, the common law rule that an employee in master-servant relationship is not entitled to fair hearing will be eroded and a fairer system of termination of employees will become entrenched in Nigeria.

Keywords: Termination of Master-Servant Relationship, Application of Fair Hearing, International Labour Convention, Jurisdiction of National Industrial Court of Nigeria.

1.0 Introduction

Contracts of employment are generally categorized into three, namely: the purely master-servant relationship, otherwise known as contract of personal service, servants who hold their office at the pleasure of the employer and contracts with statutory flavor. The above categorization was given judicial vent in the case of *Mobil Producing (Nig.) UnLtd v.*

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Johnson.[1] The scope of this work is not to appraise these different categories of contact of employment that are prevalent in Nigeria and their attendant legal consequences but rather to critically analyze the jurisdiction of the National Industrial Court of Nigeria in the application of principles of fair hearing in disputes pertaining to determination of purely master-servant employment relationship. In a contract with statutory flavor, there is a modicum of the application of fair hearing in that the courts insists that an employer seeking to terminate such a contract of employment must observe all the statutory prescriptions in the statutes most of which are fair hearing provisions. However, in a master-servant employment relationship there is no requirement for fair hearing as the common law position hitherto prevalent in Nigeria is that an employer can terminate the employment of his employee in master and servant relationship with good, bad or no reason at all.

When then is a contract of employment deemed to be with statutory flavor so as to ascribe to it the benefit of the principles of fair hearing? A contract of employment enjoys statutory flavor where its conditions are governed by statutes or regulations made pursuant to a statutory provision. In *Board of Management, F.M.C. Makurdi v. Abakume*[2] the Court of Appeal Makurdi Division held that:

> A contract of employment enjoys statutory flavor where its conditions are governed by the provision of statute or regulations derived from statute. It invests an employee with a status higher than the ordinary master and servant. The status of employments with statutory flavor, in its own rights guarantees an employee's right to fair hearing before termination of his employment[3].

The above decision of the Court of Appeal buttresses the point earlier made in this paper to the effect that contract of employment clothed with statutory flavor offers the employee sought to be removed with the opportunity of first being heard before his removal from the employment. This is in contradiction with ordinary master and servant relationship. In *Obanye v. UBN Plc*[4], the Supreme Court held on the principles governing termination of contract of employment in ordinary master and servant relationship thus:

> Ordinarily; a master has the right to terminate his servants' employment for good, bad or no reason at all. The basic principle considered normally in the resolution of a dispute between a master and his servant where the former determines the latter's appointment is the determination of

[1] (2018) 14 NWLR (Pt. 1639) 329SC at 342; see also *Longe v. FBN Plc* (2010) 6 NWLR (Pt. 1189) 1, *Comptroller General of Customs v. Gusau* (2017) 18 NWLR (Pt. 1598) 353 at (p. 367 paras A-B; D).

[2] (2016) 10 NWLR (Pt. 1521) 536 at 547.

[3] See also *Olaniyan v. Unilag* (1985) 9 NWLR (Pt. 9) 599; *Oloruntoba-oju v. Abdul-Raheem*(2009) 13 NWLR (Pt. 1157) 83, *PHCN Plc v. Offoelo* (2013) 4 NWLR (Pt. 1344) 380; *Iderima v. R.S.C.S.C* (2005) 16 NWLR (Pt. 951) 378

[4] (2018) 17 NWLR (Pt. 1648) 375Sc at 378 – 389 (paras F - G)

> whether the contract of service between the two of them is one with statutory flavour.

Conversely, for termination of employment with statutory flavor, the court held that:

> Where a servant is removed in a contract with statutory flavor, the first question the court would ask is: has the servant's employment been determined in accordance with the way and manner prescribed by statute. Or, is the contract governed by an agreement of the parties and not under any statute? Thus, where the servant is sought to be removed in a contract with statutory flavor, that is, a contract of employment wherein the procedures for employment and discipline, including dismissal, are clearly spelt out in the relevant statute, such a contract must be terminated in the way and manner prescribed by the statute. Any other manner of termination, which is inconsistent with the relevant statute is void and has no effect. In other words, in an employment with statutory flavor, the employer must comply strictly with its provisions in terminating the employment or in dismissing the employee. Any other manner of terminating the employment, which is inconsistent with the statute is null and void and of no effect[5].

This is different from the case of a master and servant employment relationship which is not regulated by statute but regulated by agreement of the parties in which case it is the terms and conditions in the agreement of the parties that must be complied with. In cases governed only by agreement of the parties and not by statute, removal of a servant by termination or dismissal would be in the form agreed to. Any other form of dismissal or termination connotes only wrongful termination or dismissal. It therefore, does not warrant a declaration of such dismissal as void. Without any reason, the employer can terminate the employment of his servant and render himself liable to pay damages and such other entitlements of the employee that accrued at the time of the termination only[6]. The crux of this work as has been emphasized earlier is the critique of the jurisdiction of the National Industrial Court of Nigeria to apply ILO Convention on fair hearing in purely master and servant contract of employment as against contract with statutory flavor pursuant to the provisions of the Constitution of the Federal Republic of Nigeria.[7] It is obvious from the foregoing position of the common law rule governing the determination of ordinary master and servant employment relationship, that there is no requirement for the employer to afford the employee whose employment is sought to be determined any opportunity to be heard or any of the limbs or pillars of natural justice

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[5] See *Bamgboye v. Unilorn* (1999) 10 NWLR (Pt. 622) 290*; Olatunbosun v. N.I.S.E.R. Council* (1988) 3 NWLR (Pt. 80) 25; *Comptroller General of Customs v. Gusau (*2017) 18 NWLR (Pt. 1598) 353 referred to] (Pp. 389, paras. G-H; 392. Paras. F-G)

[6] *Obanye v. UBN Plc supra,* (Pp. 390, paras. A-B; 392, paras. G-H)

[7] (Third Alteration) Act, 2010 Section 254(1) F, and 254 (2)

which are expressed in the Latin maxims*audi alteram partem* and *memo judex* in *causa sua*[8]. In other words, an employee in a master-servant relationship cannot base his claim for wrongful determination of contract of employment on a denial of fair hearing under the common law rule, rather he will be approaching a court in an attempt to recover damages and not a possibility of remedy of reinstatement. This is one of the consequences of absence of right to fair hearing in a master-servant employment relationship. This is however subject to the subsequent analysis of the jurisdiction of the National Industrial Court of Nigeria to apply the principle of fair hearing in ILO Convention on termination of contract of employment[9]

2.0 The Concept of Fair Hearing

Fair hearing encompasses the twin pillars of natural justice which are expressed in the Latin maxims of*audi alteram partem* and *nemo judex in causa sua* meaning in ordinary parlance hear the other side and a man should not be a judge in his own case. The relevance of these twin pillars of natural justice in the determination of contract of employment presupposes that when an employee is sought to be removed from his employment, he should be furnished with the grounds or reasons for his removal and he should be given ample opportunity to make a representation of his defence over the allegations against him. It also presupposes that the person making the allegation against the employee should not be the person hearing the allegation or determining whether the allegation is true or not. The principle of fair hearing is constitutionally entrenched in section 36 (1) of the Constitution[10]which provides that:

> In the determination of his civil rights and obligations, including any question or determination by or against any government or authority, a person shall be entitled to fair hearing within a reasonable time by a court or other tribunal established by law and constituted in such manner as to secure its independence and impartiality.

The above quote is the constitutional bedrock of the principle of fair hearing in Nigeria legal system which labour and employment jurisprudence is one. This is what the ILO has now made part of their Convention and creating obligations on member countries to ratify and apply same.

In the case of *Board of Management, F.M.C. Makurdi v. Abakume*[11] the Court of Appeal Makurdi Division held that:

> The ancient doctrine of fair hearing is of divine genesis. It has been a common law concept which had since metamorphosed into Nigerian Jurisprudence and is entrenched in section 36 (1) of the 1999

[8] Which means that a party must be given an opportunity to be heard in any allegation affecting his rights and obligations and that a person should not be a judge in his own case.

[9] Convention No. 158 of 1982

[10] Constitution of Federal Republic of Nigeria, 1999 as amended.

[11]*Supra*, 536 at 547

> Constitution, (as amended), which gives citizens the right to ventilate their grievances on the altar of the twin concrete pillars of natural justice, to wit: *audi alteram partem* (hear the other side) and *nemo judex in causa sua* (no one should be a judge in his own cause). The whole essence of fair hearing, which is co-terminus with fair trial, connotes giving parties to any proceedings, be it judicial or otherwise, the opportunity to present their case. It is divorced from correctness of a decision. It centers on the inviolable principle that a fair-minded person who watched the proceedings should conclude that the court or body was fair in dishing out justice to parties. Where a person's right to fair hearing is eroded, no matter the quantum of dexterity, artistry, objectivity and fair-mindedness invested in such proceeding, it will maroon in a nullity. This is a confluence point where want of fair hearing and jurisdiction embrace themselves to vitiate proceedings.

The court went further to hold that:

> One of the tenets or hallmarks of fair hearing is that a person should be given the chance to proffer his evidence and cross-examine his adverse witnesses in order to exculpate himself from the allegations against him. In the instant case, the respondent's inviolable right to fair hearing was treated with contempt and disdain by the Committee[12].

It is worthy to be noted here that the employment in the above case is one with statutory flavor where a statute provides for fair hearing, ILO Convention[13] and the Constitution of Federal Republic of Nigeria (Third Alteration) Act, 2010 will provide the requisite legal backing for the application of principles of fair hearing. A juxtaposition of the above decisions of the court on fair hearing with the crux of this paper shows an urge to the National Industrial Court of Nigeria as well as every other stakeholder in labour and employment jurisprudence to ensure that application of fair hearing becomes part and parcel of every proceeding or step leading to any form of determination of a contract of employment. This is because of the all-important benefits and relevance of fair hearing in judicial and quasi-judicial bodies as adumbrated above.

3.0 The Position of ILO on Fair Hearing in Determination of Master and Servant Relationship

The ILO in its efforts to set standards of practice in the workplace particularly as it relates to the security of tenure of employment fashioned out recommendations concerning termination of employment and subsequently, a Convention on Termination Employment.[14]Article 2 of the Convention[15] provides that: "the Convention applies to all branches of economic, activities

[12]*Board of Management, F.M.C. Makurdi v. Abakume, Supra,* (Pp. 577 paras. B-D)
[13] 158 of 1982
[14] ILO Convention 158 of 1982 on Termination of Employment Replaced ILO Recommendation of 1963 *Ibid.*
[15]*Ibid.,*

and to all employed persons". By the above provision of article 2, the provisions of the Convention apply to employees in purely master-servant relationships just as much as they apply to employees whose contracts of employment are backed by statutes. This general application is in contrast to the Nigerian labour and industrial law jurisprudence[16]where a clear-cut distinction exists between master-servant relationships and employment relationships protected by statutes or regulations made pursuant to a statutory provision. Such distinction in Nigeria can be seen in the work of Animashaun,[17] when he stated that:

> The status and implication of employment with statutory flavour in contra-distinction with master-servant relationship was fully explored by Karibi Whyte in *Imoloane v WAEC* where he said that it is now accepted that where a contract of service is governed by the provisions of a statute or where the conditions of service are contained in regulations derived from statutory provisions, they invest the employee with legal status higher than the ordinary one of master-servant relationship. They accordingly enjoy statutory flavour.

The implication is that since no distinction exists in the ILO convention on termination of contract of employment, the distinction with respect to application of fair hearing in determination of master-servant contracts of employment in Nigeria becomes *non-sequitur*. The appropriate authority to determine the fairness or otherwise of the termination can make any order that is appropriate in the light of the facts and circumstances of a particular case.

The application of fair hearing in the ILO convention is made manifest in the provision of Article 7 of the Convention.[18]Article 7 provides that the employment of a worker shall not be terminated for reasons related to the worker's conduct or performance before he is provided an opportunity to defend himself against the allegations made, unless the employer cannot be reasonably expected to provide this opportunity.[19] The provision of the article reiterates the fundamental principles of fair hearing in the determination of contract of employment[20].

This creates an obligation on a member state who intends to exclude the provision of the Convention to certain employed persons to afford such persons the protections equivalent to the protections afforded them under the Convention. This is indeed an international entrenchment of the application of fair hearing in the determination of all categories of

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[16] See B, Atilola, 'Legal Redress for Wrongful Termination of Contract of Employment: What Lawyers Must Note' *NJLIR*, Vol. 5 No 2 (2011) p. 12

[17] O, Animashaun, 'Foisting A Willing Employee on an unwilling Employer: The Remedy of Re-instatement Revisited' *NJLIR* Vol. 3 No 2 (2009) p. 5 see also *Olatunbosun v NISER Council* [1988]3NWLR (pt. 8) 25 at p.40*; Eperokun v Unilag* [1986]4NWLR (Pt 34)162 at p.201.

[18]*Op cit*. cited in www.Ilo.org.com accessed on 2/9/2013.

[19]*Ibid;* However, this Convention did not highlight circumstances under which the employer cannot be reasonably expected to provide an opportunity to an employee who is to be removed from employment.

[20]*Ibid,* Article 7

employment.

It is important to state at this juncture, that though Nigeria had not ratified ILO Convention 158 of 1982 which makes provisions for the application of fair hearing in the determination of contracts of employment generally (that is, both in contracts with statutory flavor and purely master-servant relationships), the Constitution of the Federal Republic of Nigeria (Third Attention) Act, 2010 had given the NICN the jurisdiction to apply ILO Conventions ratified by Nigeria directly and also apply unratified conventions as proof of international best practices in labour. The NICN has in so many cases applied article 4 ad 5 this unratified convention 158 of 1982 to the effect that every employer is under obligation to proffer valid reason for terminating the employment of his employee so application of article 7 of the convention which provides for fair hearing should not be different. Since the National Industrial Court of Nigeria exercises its jurisdiction to apply international best practices by insisting that an employer seeking to terminate the employment of his employee must first provide the employee with the reason for terminating the employment, it can also insist that an employee whose employments is sought to be terminated be afforded an opportunity to defend him or herself. When article 7 of ILO Convention 158 of 1982 is applied in Nigeria, the common law rule that an employee in master-servant relationship is not entitled to fair hearing will be eroded.

4.0 The National Industrial Court of Nigeria in the application of Fair Hearing in Master and Servant Relationship

The Constitution of the Federal Republic of Nigeria[21] is one of the legal impediments to a vivid implementation of international labour standards in Nigeria. This hindrance can be found in section 12(1) which reads that 'No treaty between the Federation and any other country shall have the force of law except to the extent to which any such treaty has been enacted into law by the National Assembly.' What the above means is that ratified but undomesticated treaties and conventions cannot be legally enforced in Nigeria. This position of the Constitution of the Federal Republic of Nigeria explains why a country such as Nigeria will enter into international agreements but may not fulfill the obligation to implement it within the state.[22] The Constitution of the Federal Republic of Nigeria expressly provides that treaties can only be enforced after it has been enacted into law by the national legislature.[23]

The next question that calls for examination is at what hierarchy is a treaty, once ratified and domesticated in relation to other municipal legislation? In some countries, a treaty is given

[21] Constitution of Federal Republic of Nigeria, 1999 as amended.
[22] A B, Ahmad, 'Ratification and Domestication of Treaties: The Role of the Legislature' Being a Paper Presented at The Africa Legislative summit at the International Conference Centre Abuja, 2013.
[23] *Ibid.*

constitutional status superior to national legislation.[24]However, in Nigeria, the priority of domesticated labour standards just like other treaties does not extend to the provisions of the Constitution which is Nigeria's grundnorm. What this then means is that where there is a conflict between a provision of the Constitution and a provision of a treaty, the Constitution shall prevail over that of a domesticated treaty. The Supreme Court in the case of *Abacha v Fawehinmi*[25] established these two knotty issues; that domestication by the National Assembly is required as crucial for a treaty to become enforceable at the municipal level and that once domesticated, the legislation incorporating the treaty does not enjoy superior hierarchy over non-treaty legislation. According to the Court[26]:

Before its enactment into law by the National Assembly, an international treaty has no such force of law as to make its provisions justiciable in our courts. Where, however, the treaty is enacted into law by the National Assembly, as was the case with the African Charter which is incorporated into our municipal (i.e. domestic law by the African Charter on Human and People's Rights (Ratification and Enforcement) Act,[27] It becomes binding and our courts must give effect to it like all other laws falling within the judicial powers of the court.

In the same case of *Abacha v Fawehinmi,*[28] their Lordships considering the provision of section 12(1) of the Constitution of Federal Republic of Nigeria held as follows:

It is therefore manifest that no matter how beneficial to the country or the citizenryan international treaty to which Nigeria has become a signatory may be; it remains unenforceable if it is not enacted into the law of the country by the National Assembly.[29]

Also in *Oshevire's case,*[30] His Lordship Ejiwunmi JSC stated:

> An international treaty… is an expression of agreed, compromised principles by contracting states and is generally autonomous of the municipal laws of contracting states as regards its application and construction.

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[24] The Basic Law of the Federal Republic of Germany, Article 25; Dutch Constitution, Article 65 and Constitution of Italy 1947, Article 10.

[25] (2001) 4 S.C.N.J. 400

[26] *Abacha v Fawehinmi,* [2000] 6 NWLR (Pt. 660) 228.

[27] Cap A9 LFN, 2004.

[28] *Supra.* P. 400

[29] This Position has been reiterated in a plethora cases like *Oshevire v British Caledonian Airways Ltd* [1990]7 NWLR (pt. 163) 507, Constitutional Rights Project v The President, Judgment delivered by the Hon. Justice M O, Onalaja of the then Lagos High Court unreported in Suit No. M/M/102/93 of May 5, 1993; *ChimaUbani v Director of SSS* [1999]11 NWLR (pt. 625) 129; *Comptroller, Nigerian Prison Service v Adekanya& 27 Ors* [1999]10 NWLR (Pt 623) 400.

[30] *Supra* P. 507 'see also *Nnaji v NFA* [2010]11 NWLR (pt. 1206) 443; *JFS Inv. Ltd v Brawal Line Ltd* [2010] 18NWLR (Pt 1225) P. 508*; UAC (Nig) Ltd v Global Transport S.A.* [1996] 5NWLR (pt. 448) 291*; M.V. Caroline Maersk v Nokoy Inv. Ltd* {2002] 12NWLR (pt. 782) 472; *Ibidapo v Lufthansa Airlines* [1997]4 NWLR (pt. 498) 124, *Harka Air Services Ltd v Keazor* [2006]1NWLR (pt. 960) 165

However, what seems to be a move away from the constitutional impediment in the implementation of labour treaties is now introduced in the Third Alteration to the Constitution[31] which vests the National Industrial Court with jurisdiction to entertain matters relating to, concerned with or pertaining to the application or interpretation of international labour standards[32]. The unanswered question at this juncture is whether in the light of the above provision of the third Alteration to the Constitution[33], there is a way of making the provisions of ILO conventions particularly ILO Termination of Employment Convention[34] applicable in Nigeria other than through the requirement of domestication by the National Assembly under section 12 of the Constitution. According to Agomo[35] the argument here is that provisions of ratified ILO conventions can be applied by the National Industrial Court without domestication. This view is supported by Amucheazi and Abba[36].

Agomo butresses her position when she states that section 7(6) of the National Industrial Court Act[37] provides a legal ground for the contention that non-domesticated conventions can be applied as examples of international best practice. The application of ILO conventions by way of international best practice seemed to be supported by the view expressed by an eminent and erudite Jurist in the law of labour, employment and industrial relations, His Lordship Kanyip when he opined that:

> Section 7(6) of the National Industrial Court provides an avenue for Nigeria, as a member of the international community, and as a member of International Labour Organisation, to take advantage of international labour jurisprudence in the resolution of domestic issues[38].

Credence was also given to the above by Adejumo[39]. According to the above authors, any interpretation of the Constitution which is intended to defeat the above position on the applicability of ILO Convention is a narrow interpretation of the Constitution and should not be used to defeat the fulfillment of international obligations voluntarily entered into and ratified by Nigeria more so when it concerned ILO convention[40].

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[31] Constitution of Federal Republic of Nigeria Third Alteration Act, 2010.
[32] *Ibi*d, Section 254 (c) (1) F & H.
[33] *Ibid.*
[34] *Op cit*.
[35] C K, Agomo, *Nigerian Employment and Labour Relations Law and Practice,* (Lagos: Concept Publications Limited, 2011) p. 103.
[36] O D, Amucheazi, and P U, Abba, *The National Industrial Court of Nigeria: Law, Practice and Procedure* (UK: Wildlife publishing House, 2013) p. 294.
[37] NICN Act 2006.
[38] B B, Kanyip, 'Current Issues in Labour-Dispute Resolution in Nigeria' Paper Presented at the All Judges Conference, Organized by the National Judicial Institute, Abuja, November, 2009.
[39] B A, Adejumo, 'Towards Achieving Industrial Harmony in Universities: The National Industrial Court Approach', Lecture delivered at a National Workshop Organized by UNIFECS Nigeria Ltd, May, 2010.
[40] C K, Agomo, *Nigerian Employment and Labour Relations, Law and Practice Op. Cit* P. 103-104.

Section 254 C (1)F & H of the Constitution of Federal Republic of Nigeria Third Alteration Act, gives the National Industrial Court exclusive jurisdiction in matters relating to, or connected with unfair labour practices or international best practices in labour, employment and industrial relations matters[41]. Section 254 C (2) of the Constitution of Federal Republic of Nigeria[42] also provides:

> Notwithstanding anything to the contrary in this Constitution, the National Industrial Court shall have the exclusive jurisdiction to deal with any matter connected with or pertaining to the application of any international convention, treaty or protocol of which Nigeria has ratified relating to labour, employment, workplace, industrial relations or matters connected therewith[43].

The opening paragraph of the provision above suggests a constitutional exclusion of the operation of any other provision of the Constitution and to that effect gives superiority to the provisions of section 254C (1) F, & H and 254(2) over the provision of section 12(1) which has a restraining effect on the applicability of international treaties not yet domesticated. This priority seems to make the provision of section 12 subservient to section 254C (1) & 2. Also, it is a common principle that where there is a conflict between two provisions of law, the latter provision will prevail as the earlier provision will be taken as having been impliedly repealed.

The National Industrial Court of Nigeria is at present emboldened to apply international convention ratified by Nigeria directly or apply International Labour Convention as international best practices in Labour. The Court of Nigeria per Hon. Justice B.B. Kanyip[44] had this to say in *Aero Contractors Co. of Nigeria Limited vs. National Association of Aircrafts Pilots and Engineers (NAAPE), Air Transport Services Senior Staff Association of Nigeria (ATSSSAN), National Union of Air Transport Employees (NUATE)*:[45]

There are two ways of approaching the issue at hand. The first is the question whether the Constitution (Third Alteration) Act 2010, which inserted section 254C (1)(f) and (h) and especially (2) is not the domestication demanded by 12 of the 1999 Constitution itself. I think it is. The Constitution (Third Alteration) Act 2010 amended the 1999 Constitution. Before it was passed and assented to by the President of the country, it was sent to all the 'Houses of Assembly in the Federation' and was ratified by majority of the Houses f Assembly, hence the alteration of the 1999 Constitution itself. This effectively means that the requirements of section 12 of the 1999 Constitution were and have been met when Section

[41] *Ibid,* P. 104.
[42] *Op. cit.*
[43] *Ibid.*
[44] Now President of the National Industrial Court of Nigeria
[45] Suit No: NICN/LA/120/2013

254C (1)(f) and (h) and (2) was enacted as per the Constitution (Third Alteration) Act 2010.

The court went further to hold that:

> Even if the first approach were not to be the case, the second approach at treating the issue is that both subsections (1) and (2) of section 254C of the 1999 Constitution as amended, commence with the word 'Notwithstanding'. In subsection (1) it is 'Notwithstanding the provisions of sections 251, 257, 272 and anything contained in this Constitution and in subsection (2), it is notwithstanding anything to the contrary in this Constitution. 'Section 12 qualifies as both anything contained in this Constitution in subsection (1) and anything in this Constitution in subsection (2). The use of the word 'notwithstanding' in any statutory instrument has been judicially considered by the Supreme Court.

In *Peter Obi vs. INEC*&Ors[46], the Supreme Court cited *NDIC vs. Koen Ltd and anor*[47] with approval where it held as follows:

When the term 'notwithstanding' is used in a section of a statute it is meant to exclude an impinging or impending effect of any other provision of the statute or other subordinate legislation so that the said section may fulfill itself.

In like manner, the use of the word 'notwithstanding' in section 254C (1)(f) and (h) and (2) of the 1999 Constitution, as amended, is meant to exclude the impending effect of section 12 or any other section of the 1999 Constitution. It follows that as used in section 254C (1)(f) and (h) and (2) of the 1999 Constitution, as amended, no provision of the Constitution shall be capable of undermining the said section 254C (1)(f) and (h) and (2); and I so find and hold.

His Lordship held further that:

> So, whichever of the two approaches is adopted (or even if both approaches are adopted). I have no hesitation whatsoever in finding and holding that this Court has the jurisdiction and power to apply 'any international convention, treaty or protocol of which Nigeria has ratified'; and ILO jurisprudence that goes with them can be so applied in view of their ratification by Nigeria. A look at the website of the ILO[48] will show that Nigeria on 17th October 1960 ratified both the Freedom of Association and Protection of the Right to organize Convention, 1948 (No. 87) and the Right to Organize and Collective Bargaining Convention, 1949 (No. 98); and both Conventions are in force in terms of Nigeria's membership of the ILO. The argument of the claimant in the instant case that this Court cannot apply the said ILO Conventions and the

[46][2007] 11NWLR (Pt. 1046) 565 at 636 '634 per Aderemi, JSC
[47][2004] 10 NWLR (Pt. 880) 107 at 182/182
[48] Available at www.ilo.org/dyn/normlex/en/fp=1000:11200:0:NO:11200:P11200_COUNTRY_ID:103259.

> jurisprudence that goes with them is consequently untenable and so is hereby rejected and hence discountenanced.

In *Aloysius vs. Diamond Bank Plc,*[49] The National Industrial Court of Nigeria relied on Article 4 of ILO Termination of Employment Convention[50] and Recommendation[51] to hold that the employment of the claimant was wrongfully terminated since the employer did not give a valid reason for terminating the employment of the claimant.
In *Bello Ibrahim vs. Eco Bank Plc*[52], Hon. Justice Sanusi Kado relied also on Article 4 of ILO Termination of Employment Convention[53] to declare the termination of employment of the claimant wrongful and ordered the reinstatement of the claimant. The court above applied the ILO Convention[54] as international best practice in Labour since the convention has not been ratified by Nigeria. The National Industrial Court of Nigeria had applied ratified ILO Conventions dealing with gender issues in employment. In *Ejieke Maduka vs. Microsoft Nigeria, Microsoft Corporation, Emmanuel Onyele*[55]. The National Industrial Court relied on the Convention on Elimination of all Forms of Discrimination against Women (CEDAW), ILO Discrimination (Employment and Occupation) Convention[56] in arriving at the meaning of sexual harassment at workplace.

The Court of Appeal which has jurisdiction over the decision of the National Industrial Court of Nigeria affirmed the decision of the National Industrial Court of Nigeria which relied on the above Conventions ratified by Nigeria but not domesticated in arriving at the definition of sexual harassment in the case of *Ferdinand Dapaah & Anor vs. Stella Ayamodeh.*[57] The point made through the above cases is that the National Industrial Court has applied ILO Convention ratified by Nigeria directly[58]as well as ILO Conventions not ratified in line international best practice in Labour.[59]It is of no moment where the international best practice or convention relied on is not pleaded but raised for the first time in the final address of

[49] [2015] 58 NLLR (Pt. 199) 92.
[50] 158 of 1982.
[51] No. 166 of 1982.
[52] Suit No: NICN/ABJ/144/2018
[53]*Op.cit.,*
[54]*Supra*
[55] [2014] N.L.L.R (Pt. 125) 67, see also
[56] No.111 of 1958. See also *Pastor (Mrs.) Ambibola Patricia Yakubu vs. Financial Reporting Council of Nigeria & Anor* Suit NO: NICN/LA/673/2013 delivered on 24/11/2016.
[57] [2019] 16 ACELR 154 at 181-182.
[58] See *Ineh Monday Mgbeti vs. Unity Bank Plc*. Suit No: delivered, *Non-Academic Staff Union of Educational and Associated Institutions (NASU) vs. Vice-Chancellor University of Agriculture Abeokuta*, Unreported Suit No: NICAN/LA/15/2011.
[59]*Pst. (Mrs.) Ambibola Yakubu vs. Financial Reporting Council of Nigeria, Supra*; *EjiekeMaduka vs. Microsoft Nigeria, Supra.*

counsel.[60]

5.0 Conclusion

In the end, the paper concludes that though Nigeria had not ratified International Labour Organisation Convention 158 of 1982 that makes provisions for the application of fair hearing in the determination of contract of employment, Section 254 (c) (1) F & Hof the Constitution of the Federal Republic of Nigeria (Third Attention) Act, 2010 has given the National Industrial Court of Nigeria the jurisdiction to apply article 7 of ILO Convention 158 of 1982 as proof of international best practices in labour. The National Industrial Court of Nigeria exercises this constitutional jurisdiction to apply article 7 of ILO Convention 158 of 1982 on fair hearing by insisting that an employer seeking to terminate the employment of his employee must first afford the employee sought to be removed an opportunity of defending him or herself against any reason relied upon by the employer. When article 7 of ILO Convention 158 of 1982 is applied in Nigeria, the common law rule that an employee in master-servant relationship is not entitled to fair hearing will be eroded.

6.0 Recommendations

The paper, therefore, recommends the following as the way forward towards achieving the application of fair hearing in master and servant relationship in Nigeria which will lead to a policy of fair termination in Nigeria:

Need for Nigeria to Enact Unfair Dismissal Act: The Unfair Dismissal Act to be enacted for purposes of regulating unfair dismissal situations in Nigeria with respect to any kind of determination of contract of employment without reason should also have provision for fair hearing. This fair hearing provision should be available to all categories of employees.

Fair Hearing Provision in the Proposed Unfair Dismissal Act: The Act should make provisions which will ensure justification for termination of contracts of employment in purely master and servant relationship.

Need for Appointment of Judges with Specialization in Labour and Employment Matters into Court of Appeal of Nigeria: This will achieve the utmost aim of the provisions of the Constitution on jurisdiction of the National Industrial Court. With this, the seeming legislative lapse in the provision of the Constitution will be obviated and the implementation of the International Labour Organization Convention on fair hearing by Nigeria will be achieved without the necessity of domestication.

[60]*Paul Okpashi vs. Prada* Unreported Suit No: NICN/LA/514/2015 delivered on 21/06/2019.