

# Avre v. Nipost: A Roadmap to Fair Hearing Under the Nigerian Constitution

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## Abstract

The sanctity of work dates back to the very creation of humanity and even has some divine origin too, so from time immemorial the human race had been destined to work and work well. Also, it has become an acceptable belief that there is dignity in labour and that work well done gives purpose to life. Obedience to constituted authority is another fundamental principle that is considered sacrosanct for any civilization to thrive. Consequent upon the foregoing, it is to be expected that shirking of work and disobedience to lawful order was bound to attract severe repercussions that exposes the offender to disciplinary actions and/or punishments. This case comment dissected the case of *Avre v. NIPOST* and appraised the penalty for insubordination as meted out on the appellant by the respondent and the position of the Nigerian courts with respect to abandoning official responsibilities without lawful excuse. It was ascertained that irrespective of the wide acceptance of diligence and dedication in the pursuit of official assignments as the hallmark of excellence, there were some who were hell-bent on enthrone mediocrity and shoddiness as acceptable practices, trying desperately to hide under technicalities like lack of fair hearing (where there was fair hearing) to mislead the court — a tactics the law clearly frowns at and the courts rightly discountenance. This work sought to even-out the responsibilities of employers and employees with the emphasis that the law will always be on the side of right, no matter whose ox is gored. The expectation to use the law as machinery to surreptitiously occasion injustice under the guise of being the under-dog was quickly discovered and justice decisively delivered accordingly. Indeed, he who comes to equity must come with clean hands.

**Keywords:** labour law, fair hearing, disciplinary action, dismissal from employment

## 1. Introduction

This case originated from an employee who was sacked by his employer as a consequence of absenting himself from his duty post for a long time without authorization or lawful excuse. The appellant is the employee and NIPOST is the employer. Sometime in October, 2002 he made a phone call to his boss in Yola and told him that he was sick. The excuses as proffered by the appellant were neither consistent nor convincing as adjudged by the respondent. In January, 2003 he was issued with a query asking him to explain why he left his duty post since 27th September, 2002 without permission, and that all efforts made to trace his whereabouts proved to naught. In the said query, he was asked to explain within seven days why disciplinary action should not be taken against him. His response to the query did not assuage the employer's aversion for his lackadaisical behaviour. In March 2003, the appellant employee was sacked by the respondent employer because he absented himself from his duty post for a long period of time without permission or lawful excuse. Aggrieved by the sack, the appellant took out an action against the respondent for unlawful dismissal, alleging amongst other things; lack of fair hearing and the suit was dismissed. Dissatisfied by the decision of the trial court, the appellant appealed to the Court of

Appeal which in turn dismissed the appeal. Further dissatisfied, the appellant appealed to the Supreme Court.

## 2. Facts of the Case

The appellant was an employee of the Nigerian Postal Service (NIPOST), the respondent, until March, 2003 when he was dismissed. He was transferred to the Yola office of the respondent and was initially given permission to travel to Lagos to collect his salary, and to see his family and return to his duty post within one week.

Sometime in October, 2002 he made a phone call to his boss in Yola and told him that he was sick. In January, 2003 he was issued with a query asking him to explain why he left his duty post since 27th September, 2002 without permission, and that all efforts made to trace his whereabouts proved to naught. In the said query, he was asked to explain within seven days why disciplinary action should not be taken against him.

Earlier, a letter dated 3rd December 2002 was also written to his wife enquiring from her, of the whereabouts of the appellant, because since the latter left his station (Yola) on 27th September 2002 he had not been seen or heard of.

Sequel to all those correspondences, the appellant, on 9/1/2003 replied to the query stating that on his way to Lagos, they were attacked by armed robbers leading to his running into the bush where he sustained injuries. He said on arriving at Lagos, he visited a private hospital and was later referred to Lagos State University Teaching Hospital as an out-patient which said hospital also issued him with medical report tendered at the hearing as exhibit "H". He did not, however, produce or tender the referral letter. His employers also sent a letter seeking verification from the hospital vide exhibit "S".

In the reply to the query, the appellant admitted that he was discharged from the private hospital on 7th October 2002 and from there he attended his father's final burial after which he went to the LASUTH on 22/11/2002 as an out-patient. This clearly indicated that the appellant failed to account for his absence from duty without permission right from 9th October 2002 through to 21st November, 2002. The respondent did not accept the excuse of the appellant and thereby dismissed him.

Aggrieved, the appellant took out an action against the respondent for unlawful dismissal. The action was dismissed.

Dissatisfied, the appellant appealed to the Court of Appeal which in turn dismissed the appeal.

Further dissatisfied, the appellant appealed to the Supreme Court.<sup>1</sup>

## 3. Case Review

Fair Hearing as a principle of natural justice presupposes that both parties ought to have legitimate reasons for any course of action and it is by providing an equally unbiased platform for the expression of their cases that the truth or justice of a situation will be realized. It is also true that 'it takes two to tango', so the two must (as a matter of necessity) agree to work together. This is essentially the reason in every association; there are terms of reference, job description, Memorandum of Understanding, Articles of Association, Rules of Engagement, Business Agreements and even a Constitution. All these are geared towards achieving that *consensus ad idem* that is fundamental for the successful engagement of any two or more people.

Where there is an understanding about the *modus operandi* of any enterprise and the means of arriving at any form of decision with respect to operation or direction of the enterprise, it becomes an acceptable and incontrovertible fact that there is an agreement binding the parties to the enterprise. Where there is an agreement binding on a group of people, breach of said agreement will naturally lead to consequences.

It also follows that where there is a meeting of the mind which creates a binding agreement on any group of people with respect to a given undertaking, no party will be able successfully to double back on the already established and binding agreement, flout the provisions of the agreement and walk away unscathed.

### 3.1 Statutory Flavour

Where an organization is created by a statute, the statute creating the organization may also regulate the employment of workers and staff of the organization thereby giving a statutory flavour to the employment just as there is statutory flavour to the establishment of the organization. In real sense statutory employments enjoy statutory flavour. In which case, the terms of employment of staff or employees is governed by the statute creating that organization. However, where the employment relationship is not governed by statute such employment is regarded as that of Master and servant.<sup>2</sup>

This statutory flavour (as it has come to be referred to) still operate within the confines of the principles of agreement such as offer and acceptance, *consensus ad idem* etc. and so has laid down rules and regulations binding on the parties.

According to J. O. E. Udentia<sup>3</sup>

In United States of America, Civil Service Commission became a reality (worth the appellation) following the Pendleton Act of 1883. As a result of this Act, the practice of examinations was introduced, launching a merit system of recruitment to a high degree devoid of any form of favouritism, nepotism or corruption. In Nigeria, Civil Service Commission as its mother — the Nigerian political system remains a colonial heritage, that is, part of her inheritance from Britain. The powers and position of the Civil Service in Nigeria are quite different from those of their counterparts in Britain and U.S.A. Whereas powers of the latter are limited to examinations, interviews and selection of candidates for appointments into civil service, those of the Civil Service Commissions in Nigeria (Federal and State levels) go beyond to include actual appointments, promotions (rewards) and discipline (punishment) within the Service. Powers of appointment also include powers of transfer from one service or from one branch of the same service to another. Reason for the position and powers of Nigeria Civil Service Commission inheres in the fact that British Government anxious and determined to put in place a Civil Service modeled after the British Civil Service — impartial, neutral and all that planned that a politically untainted body manned by persons of transparent impartiality, of great experience and proven integrity should have those powers. Thus, it came to be that in Nigeria, Civil Service Commission (at Federal and State levels):

- 1) Organize and conduct interviews for new appointees into the civil service.
- 2) Employ and post new appointees to various arms of the civil service.
- 3) Constantly monitor, review and revise conditions of service governing all civil servants.
- 4) Is in charge of appraisals, promotions, transfers, postings and disciplines of all civil servants.

Implementation Guidelines on Civil Service Reforms; Federal Government Printer, 1988, pp. 15-16.

The Udoji Public Service Review Commission discovered during their investigations, that almost all the top functionaries in the Civil Service blamed — the low standard of discipline and productivity in the Service on the insufficient powers of discipline flowed them by the Civil Service Commission, which do not enable them to deal promptly with cases of indiscipline in their departments and ministries. Their argument is that unless junior officers realize that their immediate senior officers have power to punish them, they will continue to flout their authority (Akpan, 1962:134).

The fact of 'statutory flavour' does not act as a shield from the responsibility that is imposed on a party in an employment simply because there is an element of statutory provision setting up the organization or regulating the employment. At best, the statute will directly provide for the regulation of the employment and at worst, the statute will allow for a delegated regulation of the employment either expressly or by default, either way, the employment will certainly be regulated. In the event of trepidation or any act of insubordination, consequences will most likely follow irrespective of the presence or absence of statutory flavour. As far as the employer acts within the provisions of the statute in the discipline of the employee, statutory flavour may even aid the actions of the employer.

### 3.2 The Principle of Natural Justice

Foundational tenet of justice are the principles; *nemo judex in causa sua* and *audi alterem partem*. These principles of natural justice serve to guarantee that fairness and transparency are integrated into our justice systems.

Succinctly put by Wikipedia:<sup>4</sup>

Natural justice allows a person to claim the right to adequate notification of the date, time, and place of the hearing as well as detailed notification of the case to be met. This information allows the person adequate time to effectively prepare his or her own case and to answer the case against him or her. The right to a fair hearing requires that individuals should not be penalized by decisions affecting their rights or legitimate expectations unless they have been given prior notice of the case, a fair opportunity to answer it, and the opportunity to present their own case. The mere fact that a decision affects rights or interests is sufficient to subject the decision to the procedures required by natural justice.

Where a party to a dispute has being afforded the opportunity to answer to the allegations against them and a decision reached on the matter, the adverse nature of the decision will not negate the fact that the party has been

heard especially where the defense put forward by the party alleging lack of fair hearing is documentary by way of a 'reply to a query' issued to them. The very document: 'reply to the query' issued, serves as evidence that the party was indeed heard.

### 3.3 The Place of Responsible Work in Nigerian Civil Service

Lack of diligence in carrying out one's duties is not a thing to be proud of nor is it a phenomenon that is to be defended as of right. No employer will be happy with a worker who shirks responsibilities and no employee should be boasting about truancy. There is no virtue in braggadocious laxity that attracts negative attention to a worker and portrays the worker in a bad light especially before the management and superiors at work. There is usually no good defense for irresponsibility and any attempt to defend it deepens the hole of prejudice that the employee has exposed themselves to by their actions. It is the vision of most Civil Service of various states: 'To be a World Class Human Resource Organization that is Dynamic, Efficient and Effective.'<sup>5</sup>

Working diligently is not just a healthy work ethic but also a good way to raise morale amongst employees and work well done produces a vibrant environment for the entire organization. It is rarely the case that when an employee delivers effectively and efficiently, the employer will complain. The opposite is true, when an employee puts in honest hard work; the employer is delighted and even recommends the employee for promotions and rewards.

### 4. He Who Comes to Equity Must Come with Clean Hands

Right from the early years of the formation of the Law in England, the doctrines of equity have always ameliorated the harshness of common law. More recently, Equity has been looked upon as a shortcut to a desired remedy at the expense of justice. This Maxim of Equity; 'he who comes to equity must come with clean hands' seeks to balance the equation so that one does not take undue advantage of the merciful nature of the doctrines of equity to deliberately and maliciously short-change justice.

The clean hands doctrine is based on the maxim of equity which states that one "who comes into equity must come with clean hands."<sup>6</sup>

The proper use of the doctrine was captured by Cornell Law School thus;

This doctrine requires the court to deny equitable relief to a party who has violated good faith with respect to the subject of the claim. The purpose of the doctrine, as explained in *Colby Furniture Company, Inc. v. Belinda J. Overton* is to prevent a party from obtaining relief when that party's own wrongful conduct has made it such that granting the relief would be against equity and good conscience. However, as noted by the U.S. Supreme Court in *Keystone Driller Co. v. General Excavator Co.* such a wrongful act must have an immediate and necessary relation to the equity that is being sought.

The clean hands doctrine is an affirmative defense that the defendant may claim. For example, in *Holy Family Catholic School v. Boley*, the defendant opened an account at a pharmacy for the benefit of the plaintiff so that plaintiff could obtain medication for his work-related injuries. The plaintiff charged items unrelated to these work-related injuries. The defendant closed the account, and the plaintiff sued to keep the account open. The court held that the plaintiff's abuse of the account necessitated a finding that the plaintiff had "unclean hands" and that requiring the defendant to keep the account open would be against good conscience.<sup>7</sup>

The 'clean hands doctrine' is the least that an 'under-dog' can do to benefit from the considerable benefit of doubt extended by equitable remedies. If one comes to equity with the insolence that is characteristic of a deliberate act of insubordination and shows apparent lack of remorse but further aggravates their misdeed with unrealistic justifications then it will be highly unreasonable to expect equity to aid such a person.

### 5. Recommendation

It goes without saying that cost follows event and when a bird perches on a tree, it should be ready to dance with the tree. It is an aberration and an absurdity to cause an event and not expect the effect. When a person violates the laid down rules, it is only natural for such a person to expect the fallout of the violation. There is really no other way of expressing the fact that one gets what is coming to them when they subvert authority, it is actually an automated outcome at the end of a process that simply allows one to lie on their bed as they have made it.

So one will be taken-aback if an employee who has violated their statutory position and duty (without lawful excuse and permission) is not disciplined and called to order. It will be the height of condonation for the courts to side with a negligent and indisciplined worker. What ought to be done is for the law to reject mediocrity and uphold excellence as was rightly done by all levels of courts in the instant case.

### 6. Conclusion

It is therefore pertinent to reiterate that the decision of the trial court in this case was stellar and on point, re-enforcing the moral and ethical responsibility of the worker and requiring diligence as the acceptable practice in the Civil Service while jettisoning mediocrity and laxity as intolerable and unjustifiable. This decision also established the fact that surreptitious attempts to shortchange justice in the guise of lack of fair hearing and other technicalities were stunts that the courts no longer fall for and vehemently discountenances.

This decision is also hailed as restoring the place of dignity in work and strongly discourages shirking of responsibilities and nonchalant attitude towards work. It is evident that the decisions of the Trial Court all the way to the Supreme Court left no doubt about the fact that mediocrity does not stand a chance when faced with excellence and indeed 'he who comes to equity must come with clean hands'.

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<sup>7</sup> Ibid.

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