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## **LABOUR LAW: - CONTRACT OF EMPLOYMENT AND THE LEGAL STATUS OF AN UNCONFIRMED EMPLOYEE IN NIGERIA**

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**Abstract:** Labour law refers to the legal framework that governs the relationship between employers and employees in Nigeria. Labour law is the law relating to the rights and responsibilities of workers and employers. Labour law on another hand refers to any type of physical or mental exertion. In economic terms, labour is the efforts exerted to produce any goods or services. It includes all types of human efforts, physical exertion, mental exercise, use of intellect, etc. done in exchange of economic reward. The sources of labour law in Nigeria are namely; the Labour Act 2004, the Factories Act, 2004; the Pension Act, 2004; the Trade Dispute Act, 2004; the Trade Union Amendment Act, 2005; the Employees Compensation Act, 2010; the National Minimum Wage Act, 2011; and the Pension Reform Act, 2014.

**Keywords:** Labour law, Employers, Employees, Economic reward, Legal framework

Contract of employment could be written or oral. The terms of the contract of employment guide the court in the interpretation of the rights, duties and obligation of the parties (that is, the employer and employee). In contract of employment, the legal position and status of a confirmed staff is not as confusing and controversial as that of an employee who is on probation. The questions arising from the legal status of an employee on probationary appointment are:

1. What is the meaning of probationary appointment?
2. Can the probationary appointment be terminated or dismissed before the expiration of the probationary period?
3. Does the promotion of an unconfirmed employee during his probationary period amount or imply confirmation of his contract of employment?
4. Does payment of salaries without termination or dismissal of the unconfirmed appointment after the expiration of the probationary period amount to confirmation of the employment without more? Must a written letter of confirmation be issued to an employee after his probationary period for his contract of employment to be regarded as confirmed?

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5. Can probation period be extended? How long would the employee work beyond the probation period to be deemed impliedly confirmed? How long is too long to keep an employee after the probation period? Is the expiration of the probation period sufficient and enough to create implied confirmation? Must there be any positive act or conduct of the parties that must be reckoned with to arrive at the conclusion that the employment has been impliedly confirmed? Can probation period be in perpetuity or is there any limitation recognized by law? What is the essence of employment on probation and what is probation meant for? It is to answer these questions that we have embarked on this exercise. We will also consider the remedies available to an unconfirmed employee whose contract of employment is wrongful terminated or who is dismissed wrongfully.

### 1. Contract of Employment

A contract is an agreement between two or more persons, which creates an obligation to do or not to do a particular thing. It is a promise or a set of promises the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty<sup>1</sup>. The essential elements of a contract are competent parties, subject matter, a legal consideration, mutuality of obligation. Contract involves and consists in offer and acceptance which must be definite. According to Elias C.J. N, in *The Executive Secretary Family Planning Council of Nigeria v. Mrs. Ajayi-Obe*,<sup>2</sup> for contract to be valid in law, there must have been a definite offer by the offeror and a definite acceptance by the offeree.

The offer must not only be definite but it must also be made directly by the offeror to the offeree or to his accredited agent. Where a particular mode or method of acceptance is specified in the offer, the acceptance must be in that particular mode for it to be valid.<sup>3</sup> Where however, there is no defined mode of acceptance specified in the offer, it is settled law that failure to communicate to the offeror in writing terms which are known to him in some other ways will not vitiate the element of communication required in law.<sup>4</sup> Indeed, it would appear that the acceptance of such offer may be expressed or implied from the conduct of the other party. According to Tobi JCA in *Pan African Bank Ltd v. James Ede*,<sup>5</sup> a contract could be in writing. It could also be on parole. Courts can also infer the existence of a contract by the conduct of the parties. Also, a particular trade practice which the parties have adopted or followed in the past to their mutual advantage could also ripen into a contract. From the foregoing, it is clear that all the essential elements of a valid contract are also required in a contract of employment. In a contract of employment, the employer has the power of control over the work of the employee unlike in a contract for service in which an independent contractor is involved and in which the level of control involved is somewhat minimal.

As to the content and form of a contract of employment, the content and terms of a contract of employment are based on the general law of contract, in that, it is a free agreement between the employer and the employee with the sole qualification that such terms are subject to whatever modifications may be made by regulatory statutes.

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<sup>1</sup> Henry Campbell Black, *Black's Law Dictionary*, 12<sup>th</sup> Ed. St. Paul Minn. West Publication Co. 2024, 322.

<sup>2</sup> (1975) All NLR 88

<sup>3</sup> *Afolabi v. Polymera Industries Nig Ltd.* (1967)1 All NLR 144 at 147.

<sup>4</sup> Akintunde Emiola, *Nigerian Labour Law*. Intee Printers Ltd., Ibadan, 1982, 25.

<sup>5</sup> (1998)7NWLR(Pt.558) 422 at 424.

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As stated hereinbefore, a voluntary offer and acceptance, consideration, agreement and intention to be legally bound, legality of objects, and all the other checks and balances of a simple common law contract are relevant to a contract of employment. For example, an agreement which is lacking in mutual consideration will not be enforceable unless it is under seal,<sup>6</sup> and also an infant may avoid a contract of employment unless it is for his benefit or supply of necessities.<sup>7</sup>

A contract of employment may take any form unless in those circumstances and situations where the law made provision to the contrary. For, instance, section 71 (1) (a) (b) (c) of CAMA, made provisions as to the forms of contract between company and company, and between company and other person(s). According to section 71 (2) of CAMA, contracts on behalf of a company made in any of the forms set out in section 71 (1) (a) (b) & (c) shall be effectual in law and shall bind the company and its successors and all other parties thereto, and may be discharged or varied in the same manner in which it is authorized in section 71 (1) of CAMA. By virtue of section 22 of the Merchant Act, every Sea Man employed in a ship must have a written agreement in the prescribed form duly signed by the master and the Sea Man. The agreement must specify some terms of the contract.

In the Nigerian Labour Act Cap 198 Laws of the Federation of Nigeria 1990, (now Cap L 8 Laws of the Federation of Nigeria 2004) certain provisions were made for the form of contract of employment including that of apprenticeship. Section 7(1) of the Act provides that not later than three months after the beginning of worker's period of employment with an employer, the employer shall give the worker a written statement specifying the terms and particulars as set out in section 7(1) (a) (b)(c) (d) (e) (f) (g) & (h) of the Act. Section 7(2) of the Act further provides that if there is a change in the terms to be included or referred after the date to which the statement relates, the employer shall, not more than one month after the change inform the worker of the nature of the change by a written statement. Sections 7 (2) (b) to 7(6) of the Labour Act all made provision as to written particulars of terms of employment.

Section 50 of the Act made provisions for written particular of terms of contract of apprenticeship and the attestation thereof. It provides that every contract of apprenticeship and every assignment thereof shall be in writing and no such writing shall be valid unless attested by and made with the approval of an authorized labour officer certified in writing under his hand on the contract or assignment. Before attesting any contract of apprenticeship, the authorized labour officer must ascertain the issues and particular set out in section 50(2) (a) & (b). As to what extent the apprenticeship contracts in Nigeria complies with these requirements is a totally different issue. Most of them are not only oral but uncertain. In most cases the period of the apprenticeship is not known thereby making it rather very easy for the person with whom an apprentice has been placed to terminate the contract at any time. On the other hand, lack of certainty in the apprenticeship contract places the apprentice in a position where he can also terminate the contract at will. This explains why in Nigeria, there is often a very weak legal relationship between the parties in the contract of apprenticeship. The provisions of section 50 of the Act are rarely complied with in practice. Section 59 of the Labour Act places certain

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<sup>6</sup> Akintunde Emiola, *Nigerian Labour Law*, 27. *Ajayi v. R. T. Brisco Nig. Ltd.* (1962)1 All NLR 673.

<sup>7</sup> *Olsen v. Corry & Gravesend Aviation Ltd.* (1936)3 All ER 241. *Doyle v. White City Stadium Ltd.* (1934)All E.R. 259.

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limitations in the employment of a child and a young person. Section 59 of the Act defined who is a child and a young person for purposes of the Act. Though efforts have been made to analyze the forms of contract of employment in Nigeria, we have to state that till date the terms of "factory gate" employment which is very common in Nigeria are uncertain. The terms of contract of employment in Nigeria is almost always against the employee because of the high level of unemployment in the country. Young Nigerian graduates are willing to accept conditions and terms of contract of employment which are even against them merely because most of them are desperately in need of employment. The employer has a higher bargaining power and force and they are actually using it against the employees. The Nigerian worker is placed in a precarious position.

### **1. Meaning of Probation**

Probation is the testing of a person's abilities or behavior to find out if he or she is suitable. It is a period of observing the character or abilities of a person who is new to a role or job. It is a suspension of a final appointment to an office until a person temporarily appointed has by his conduct proved himself to fill it.<sup>8</sup> An employee on probation is said to be an unconfirmed employee. He does not enjoy the permanence of employment which a confirmed employee enjoys.<sup>9</sup> There is actually a distinction between an employee who is on probation and the other who is confirmed. While a confirmed employee enjoys a permanent employment though not for life, an unconfirmed employee enjoys a temporary employment.

### **1. Essence and Duration of Probationary Employment**

The probationary period of every contract of employment with respect to a probationary appointment is often stated on the letter of employment and this constitutes part of the terms of the contract of the parties. In some cases, the period varies from three months to two years. In interpretation of the probationary period, it is the contract of employment that shall be the guide. The court has no right to import any element which is not in the contract of employment in the interpretation of the same. The Supreme Court of Nigeria in *Baba vs Nigerian Civil Aviation & Anor*, stated thus,

*Parties to a contract enjoy their freedom of contract. This goes with the inevitable implication of sanctity of their contracts and if any question should arise with respect to the contract, the terms in any document which constitute the contract are, invariable, the guide to its interpretation"*<sup>10</sup>

The reason for the position is that when parties enter into a contract, they are bound by the terms of that contract and it is unfair to read into such a contract the terms on which there has been no agreement. The contract of the parties must therefore be construed in accordance with its express terms and no term is to be implied which is not rendered reasonably necessary to carry out the main intention of the parties. This means that where the parties agreed that the probationary period shall be two years, it shall be so. Where parties agreed that the confirmation of the appointment of the employee shall be in writing after the two years, it shall be so and nobody can vary this term as it is the original term of the agreement of the parties.

The essence of a probationary appointment is that the employer retains the right not to confirm the appointment until after a specified period in the agreement of the parties. The employer retains also the right not to confirm

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<sup>8</sup> *Total Nig. Plc. & Anor v. Chief Lawrence Uzoamaka Onuoha* (2001)11 NWLR (Pt.725) 634 at 636 – 637.

<sup>9</sup> *Ihezukwu v. University of Jos & 2ors* (1990)4NWLR (Pt.146)598 at 612.

<sup>10</sup> (1991)5NWLR 388 at 392 -393.

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the employment of the employee until after the expiration of the probationary period. It is a period of trial of the employee. Probationary period gives the employer sufficient time to observe and assess the suitability and fitness of the employee for the job he has been employed to undertake. The employee having taken the employment has by necessary implication warranted and given an undertaking of being competent to do the work. The probationary period is therefore the time within which the employee has to demonstrate his competence in the work and it is also the period within which the employer has to assess him and determine his competence. Competence in this regard will mean ability to do the work, that is, skill, experience and conducts of the employee. The employer has a duty at this period to assess the conduct, behaviour, and character of the employee. Where at the end of the probationary period, the employer finds the work of the employee unsatisfactory, the employer has the right to terminate the appointment of the unconfirmed employee. Where however, the unconfirmed employee has proved himself within the probationary period, the employer may confirm him. A written confirmation letter is often issued to the employee.

It is however not always that this written confirmation letter is issued to the employee by the employer at the end of probationary period. In some cases, the employer may retain the employee after the probationary period and still be paying him salaries and other allowances at the end of the month. The question is what is the legal status of a staff retained in the employment of the employer at the expiration of probationary period and whose monthly salaries and allowances are being paid by the employer without the issuance of confirmation letter to him? The law is that in such a case the employment of the employee shall be deemed to have been confirmed. In *Obafemi Awolowo University v. Dr. A.K. Onabanjo*,<sup>11</sup> the Plaintiff/respondent was an employee of the defendant/appellant. At the expiration of his three years probationary period, he was allowed to continue his work and was paid his salaries and allowances accordingly. The Head of Department of the Plaintiff/respondent had recommended the confirmation of the plaintiff/respondent but the defendant/appellant had not responded in writing. The respondent was thereafter alleged to have committed some wrongs pursuant to which a panel was set up to investigate him. At the close of the investigation by the panel, the appellant/defendant purportedly terminated the appointment of Onabanjo without giving any reason for the termination and treating him as an unconfirmed staff. The Court of Appeal in the instant case decided that "a servant is deemed to have been reappointed and confirmed if after his probationary period, although not specifically confirmed in writing, is encouraged to continue working by his master and duly paid for his continued services by the master."<sup>12</sup>

The decision and reasoning of the court in this matter is based on the principles of estoppels. By section 169 of the Evidence Act, the law is that when one person has by his declaration, act or Omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representatives in interest shall be allowed, in any proceedings between himself and such person or such person's representative in interest, to deny the truth of that thing. The implication of this is that an employer who retains an unconfirmed employee beyond the probationary period, paying him salaries and allowances shall be deemed to have confirmed his appointment. The retention of an unconfirmed employee after the

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<sup>11</sup> (1991)5NWLR (Pt.193) 549

<sup>12</sup> *ibid*



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probationary period simply means that the employer likes and wants his services.<sup>13</sup> The employer cannot be allowed to state the contrary for it is open to him to have terminated the appointment at the expiration of the probationary period. He cannot sleep over his right and be allowed after to claim same to the detriment of the employee who honestly believed that his appointment had been confirmed.

In *Chinonye Amanze v. Union Bank of Nig Plc*<sup>14</sup> delivered by Hon. Justice I. J. Essien of the National Industrial Court Lagos Division on 29<sup>th</sup> June, 2021 the employee was employed on 9<sup>th</sup> May, 2014 on six months probationary contract and disengaged on 14<sup>th</sup> July, 2014 with two weeks salary in lieu of notice, as unconfirmed employee. In holding that the Claimant service had been impliedly confirmed, Hon Justice Essien held that;

*"I must add that where the terms of an employment contract such as the one under consideration in this judgment stipulates for confirmation after a period of probation, unless there are reasons to extend the probation period which must be in writing and duly notified to the employee, the defendant is under a duty to confirm the employee after the period of probation. It will be a breach of contract by the defendant for failing to confirm the Claimant in this action. The Claimant was employed on the 9/5/2014. The confirmation of the Claimant was due on the 8/11/2014. The defendant failed to confirm the Claimant or terminate his appointment. The defendant continued to keep the Claimant in his employment up to 13/7/2017 when they terminated the Claimant vide Exh D5. The Claimant is deemed to have been confirmed by the operation of the law."*

Also, in *Reliance Communication Ltd v Adegboyega*<sup>15</sup> the Respondent was employed by an employment letter dated 6<sup>th</sup> February 2004 for a probationary contract of three months. The contract provides that after the probation either party could terminate the contract by giving three months' notice. In the case brought by the employee (Respondent) to challenge the employer's termination by one month notice even though the respondent has remained in service for the company over one year, the Court of Appeal adopted the judgment of the High Court of Lagos which gave judgment for the respondent. The judgment of the Lagos High Court which the Court of Appeal adopted wholly reads as follows,

*From the evidence before the court, I noticed that though the Claimant did serve a three months probationary period with the defendant as contained in Exh C, there was nowhere in the evidence where the claimant appointment was confirmed by the defendant nor was there any provision for the extension of the probationary period from the initial three months. It is my considered opinion that the defendant by allowing the claimant to continue working for the company for over a year after the expiration of his three month probationary period to extent of issuing a letter to the United State Embassy admitted as Exh C5 which confirms the claimant as his employee who was about to proceed on his annual leave and admitting to the availability of funds for the substance and accommodation of the claimant during his stay in the USA shows that the defendant impliedly confirmed the claimant appointment. Likewise, the defendant by allowing the claimant to continue work and earned his salary, give the impression that he has satisfactorily completed his probationary period and has*

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<sup>13</sup> *Ude v. Osuji* (1998)13NWLR (Pt.580)1

<sup>14</sup> Suit No. NINC/LA/424/2018. *Victor Osaretin Noruwa v Mainstreet Bank Micro Finance Bank Ltd & 2 Ors* Suit No. NICN/LA/2018. *The Council Federal Polytechnic Ede & 7 Ors v. Olowookere* (2012) LPELR 7935 (CA)

<sup>15</sup> *Reliance Communication Ltd v. Adegboyega* (2017)8 CLRN 30 CA. *Lawal v. Union Bank Plc & Ors* (1995) LPELR 1762. *Ipinle Ojuseun v. Hallmark Health Services Ltd.* Suit No. NICN/86/2019

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*subsequently been confirmed though without issuance of confirmation letter, which could be traced to the negligence or omission of the defendant. I also rely on the dicta of Sulu- Gambari JCA as he then was and Akpabio JCA as he then was in the case of Obafemi Awolowo v Dr. A K. Onabanjo. Akpabio JCA as he then was in the above case held thus; the appellant has delayed unnecessarily in making up their minds whether to terminate or confirm the respondent probationary period. By keeping him in his employment and continuing to pay him for three months after the probationary period has expired, they would be deemed by the operation of the law to have confirmed his appointment and the doctrine of estoppels by conduct would operate to prevent the appellant from alleging and treating him as if he was still on probation.” Delay defeats equity”. From the above decision of the Court of Appeal, I am of the view that the claimant’s appointment was confirmed by the defendant immediately after the expiration of the claimant probation”. In affirming the above judgment, the Court of Appeal per Tukur JCA held as follows; I agree with the reasoning of the learned trial judge in Exh C5 a letter issued to the United States Embassy which confirmed the respondent herein as his employee had in my view by itself committed the appellant impliedly confirmed the respondent’s appointment and it will be inequitable to resile from such representation. The Appellant having allowed the respondent to continue in his employment beyond the three months probationary period paying him all his entitlements and further making representation vide Exh C5 to third parties affirming that the Respondent is his employee several months after the end of the probationary period must deemed to have waived his right in insisting of issuance letter of confirmation to the respondent. In such circumstances as obtained in the instance case, estoppels by conduct or representation can readily be invoked.*

### **4 Effect of Promotion during Probationary Period**

The question is as to whether an unconfirmed employee who is promoted during the period of his probation can be said to have been confirmed without more? The issue of confirmation of probationary appointment can only be answered by the terms of the contract of the parties. Where the probationary period is certain and is provided for in the contract of the parties, no amount of promotion during the period can be interpreted to mean confirmation of the appointment. It is not in doubt that during the probationary period, vacancy may exist in the establishment of the employer and in which case the employer may decide to promote the unconfirmed staff to fill the vacancy. This form of promotion cannot be deemed to mean confirmation of the employment or the appointment of the employee. It may also happen that during the probationary period vacancy may exist in the establishment, where the employee applies for appointment to occupy the new position and succeeds, the new appointment does not constitute confirmation of appointment rather it is a new appointment with a new probationary period. The new appointment puts the former employment with its probationary period to an end. Also in some labour regulations with respect to some establishments, it is clearly stated that during probationary period, the unconfirmed employee may be promoted. There is actually no problem with situations where this is expressly provided for but the fact remains that where during probationary appointment, an employee is promoted, the promotion does not terminate the probationary period and hence amounting to confirmation of appointment. In *Alhaji Abdullahi Baba v. Nigerian Civil Aviation & Anor*,<sup>16</sup> the appellant was employed on 4th

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<sup>16</sup> *Ibid* 388 at 393 to 394.

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December 1979 as an Assistant Security Officer in the 1<sup>st</sup> respondents establishment. The first respondent is a statutory corporation established by Act No 31 of 1964. The appellant's letter of appointment, reads as follows:

*Offer of Appointment: Assistant Security Officer. I refer to your application for employment and to the subsequent test and interview you attended on 22<sup>nd</sup> October, 1979. I am pleased to inform you that your application has been successful. You are hereby offered appointment as Assistant Security Officer...You will from the date you assumed duty, serve a probationary period of two years. The Training Centre reserves the right to terminate your appointment by giving you one month salary in lieu of notice. You are also to terminate your appointment with the centre at any time by giving one month notice or by paying one month salary in lieu of notice...*<sup>17</sup>

The appellant accepted the appointment and during the probationary period of two years, he was promoted to the post of Acting Security Officer and security Officer. There was condition of service called Staff Regulations for all the employees of the corporation and which forms part of the contract of employment of the employees in the corporation's employ and by which it was provided that an employee on probationary appointment may be promoted. The employment of the appellant (Alhaji Baba) was terminated following the investigation and panel report on the petition of the junior officers under him. He was terminated and given one month's salary in lieu of notice. The appellant who was aggrieved went from the High Court up to the Court of Appeal and then to the Supreme Court. The Supreme Court decided that "the fact that an employee is promoted during the period of probation does not automatically convert his employment into a confirmed one and make him not liable to termination..."<sup>18</sup>

One thing that is remarkable about the case of *Baba v. N.C.A.T.C* was that the staff regulation which formed part of the contract of employment of the employee provided for promotion during the probationary period. Would the position be different in a situation where there is no express provision for promotion during probationary period? Our answer to this question is that the position will certainly not be the same seeing that promotion during probationary period is a positive act and conduct signifying that the employer is satisfied and happy with the services of the employee. In this case of promotion during the probationary period where such is not provided in the condition of service, it will be immaterial that the contract of employment expressly provided for two years probationary period. What is most important in this situation is that the employer found the employee worthy of promotion because of his satisfactory performance particularly where promotion during probationary period is not provided for.<sup>19</sup>

### **5. Termination of Probationary Appointment**

As stated hereinbefore, it is the contract of employment that shall provide a guide as to how and when a probationary appointment could be terminated and the length of notice required. One thing is certain and that is, that the employer has the right to terminate the probationary appointment of a staff before the expiration of the probationary period. The employer has no duty to wait till the expiration of the probationary period before he can terminate. He also has the right to dismiss an unconfirmed employee at any time and he has no duty to state

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<sup>17</sup> *ibid*

<sup>18</sup> *ibid*

<sup>19</sup> Nwakoby Greg C. Ph.D, "Contract of Employment: The Legal Status of an Unconfirmed Employee in Nigeria", *UNIZIK Law Journal*, 2005, 9



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the reason(s) for the dismissal. In *Ihezukwu v University of Jos*,<sup>20</sup> the court decided that the mere fact that an employee is placed on a probationary appointment does not mean nor could it be implied that his appointment cannot be fully terminated within the probationary period on reasonable notice as the purpose of putting the employee on probation is to give the employer an assurance that the employee is a fit and proper person to be placed on permanent employment. According to Olatawura J.S.C who supported and agreed with the leading judgment delivered by Wali J.S.C in *Ihezukwu v. University Jos*,

*It appears to me a startling proposition of law that during a probationary period an employer has no right to terminate the appointment of the employee notwithstanding the breach of the terms of his appointment or has done anything contrary to the interest of his employer. The sole purpose of putting an employee on probation is to give the employer an assurance that the employee is a fit and proper person to be placed on permanent appointment. Probationary period is a period of observation by the employer. It therefore follows that once the condition laid down for termination of appointment during the probationary period is satisfied or complied with an employee cannot justifiably complain.*<sup>21</sup>

The reason for the decision of the court and the opinion expressed by Olatawura JSC in the instant case was because the counsel to the appellant argued that the termination of the probationary appointment before the expiration of the probationary period was wrongful. By the decisions of the courts so far, it is today a settled principle of law that probationary appointment can be terminated at any time even before the expiration of the probationary period. Either of the parties can terminate the appointment at any time but in terminating the appointment, the terms of the contract have to be followed. This means that where one month notice is required by the contract, the party terminating the contract must give the requisite notice period required or pays the salary for the period in lieu of notice. In *Ihezukwu v. University Jos*, the contract of employment provided for a probationary period of two years in the first instance and if same was not confirmed in the end of the period, it would be terminated by three months' notice or payment in lieu thereof. By letter dated 2nd August, 1982 the appointment of the employee was terminated with one month's salary awarded in lieu of notice. This was a wrongful termination because the notice or the one-month salary awarded in lieu of notice was short of the terms of the contract of employment which provided for three months' notice. It must be emphasized herein that in termination of contract of employment, the agreement of the parties as in the contract of employment or appointment shall be followed strictly.<sup>22</sup>

### **6. Opposing View on Implied Confirmation of Probationary Employment**

The general and popular judicial decisions are to the effect that a probationary employee who is allowed to work beyond the probationary period is deemed confirmed by the employer. The employer who allowed the employee on probation to work beyond the probationary period is stopped from denying that such an employee is a permanent staff of his establishment. However, there exists a contrary judicial decision by Hon Justice J. D.

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<sup>20</sup> *Ihezukwu v. University of Jos* (supra)598. *Anakism v. Union Bank of Nig. Plc* (1994)1 NWLR 557. *Kusamotu v. Wemabod Estate* (1976)11SC 279.

<sup>21</sup> *Ibid* 598.

<sup>22</sup> Nwakoby Greg C. "Contract of Employment: The Legal Status of Unconfirmed Employee in Nigeria," *UNIZIK Law Journal* 2005, 11.

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Peters of the National Industrial Court in *Ogbonna v. Neptune Software Ltd.*<sup>23</sup> Wherein the trial judge held that a probationary contract is inchoate until confirmation and that an employer is not under any obligation to give notice of termination of the service of an employee who is on probation until the employment is confirmed. The basis of the claimant claim in *Ogbonna v. Neptune Software Ltd.*<sup>24</sup> is that he was employed by a letter dated 5<sup>th</sup> September 2008 as the Defendant's Business Development Manager ; that the letter of employment contained his condition of service, that the probationary period in the offer of employment was six months in the first instance after which the employer may confirm the employment on the basis of satisfactory performance; that the appointment is subject to termination by one calendar month notice in writing on either side; that his employment was terminated without the requisite one month notice as an implied confirmed staff as required by the terms of the contract of employment of the parties. Notwithstanding that the employee was retained for two months after the expiration of his probationary employment, the trial judge of the National Industrial Court refused to recognize the Claimant as an implied confirmed employee.

In discussing the decision of the court in this matter, it is important to reproduce the judgment of the court and the reasoning of the Hon Justice D. J. Peters herein. The court held:

*There is consensus among the parties that the document dated 5/9/08 and titled Offer of Employment regulates the master/servant relationship between the parties. That document was tendered by the Claimant and admitted as Exh CI. The same document was tendered by the Defendant and admitted as Exh D2. It would therefore mean that the resolution of this issue depends on the construction of that document. Being documentary evidence therefore no oral or parole evidence will be required to vary or add to the content of same. See Rangaza v. Microfinance Company Limited (2013) LPELR-20303 (CA) & Afemai Microfinance Bank Limited v. SEACOS Nigeria Limited (2014) LPELR-CA/B/98/2012. Now I read the Clause of that Exh. It states as follows- Your employment will be for probationary period of six months in the first instance, at the end of which your appointment may be confirmed based on satisfactory performance. Clause 12 cannot be read in isolation of Clause 2. Indeed, Clause 12 can only be construed and understood within the context of Clause 2. The need to comply with one calendar month in writing will arise after fulfillment of conditions stated in Clause 2. Was the employment of the Claimant confirmed? I find no evidence tending towards that. That being the case. I find and hold the appointment of the Claimant to be one on probation. In Simeon O. Ihezukwu v. University of Jos (1990)LPELR-1461(SC), (1999)7SC (Pt.1)18, the Supreme Court per Wali JSC, pointed out that the essence of probationary appointment is that the employer retains the right not to confirm the appointment until after a specified period; that where the contract of employment provides that the appointment is subject to a probationary of a certain length of time, this does not give the employee a legal right to be employed for that length of time and the employer may lawfully dismiss him before the expiration of that period. A major rationale for putting an employee on probation is simply to give the employer an assurance that the employee is a fit and proper person to be placed on permanent appointment. An employment on probation is akin to a temporary employment; an employment under observation. An employer may decide whether or not to confirm*

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<sup>23</sup> *Ogbonna v. Neptune Software Ltd* (2016)64 N.L.L.R. (Pt228)511

<sup>24</sup> *Ibid.*

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*such appointment where the attached conditions are not met. I may as well add that an employer is not under an obligation to give notice of termination to an employee who is on probation until the employment is confirmed. This is because the employment relationship between the parties is an inchoate one.*

We must state that Hon Justice D. J. Peters who delivered the judgment in *Ogbonna v Neptune Software Ltd*<sup>25</sup> was in error by not considering the earlier judgment of Hon. Justice P. O. Lifu of *Mr. Lawa Gambo v. Federal Inland Revenue Service*<sup>26</sup> of 5<sup>th</sup> November, 2014. For better and proper appreciation of the decision in the above case, we shall reproduce the decision of the court herein;

*In an employment contract as in this case which is a contract of service as against contract for service, the court is not entitled to look outside the contract of service as to the terms and conditions. These must be gathered there from and or from other sources which can be incorporated by reference to the contract as the case may be. It is the best and only way to decide the right of the parties under the contract. See the case of Idoniboye Obuvs. NNPC (2003)2NWLR (Pt.805) page 589 at p. 600. In the same vein, it is trite law that when an employee complains of wrongful termination of employment by his employer, he has the onus to prove the wrongful termination of the said contract of employment by placing before the court the terms and conditions of the contract of employment and proving in what manner the said terms were breached by the employer. See the case of Famakinswa vs.T. A. Nig PCC (2007) WRN (Vol.18)36at40-49... it is within the right of the employer to terminate the services of the employee but where conditions for such termination are terms of the contract of service, such conditions must be satisfied. The facts of this case which are not very complex are that the claimant who was employed by the defendant as a clerical staff in 1990 grew through the ranks and as at the time material to this case was Tax Officer 1. In the course of his employment, he got and obtained the permission of the defendant, his employer, and completed his undergraduate bachelors programme in the University of Jos and also completed his professional programme as the association of national accountant of Nigeria (ANAN) in Jos Plateau State. He was subsequently queried for submitting a forged pr fake university of Jos degree to his employer. The Claimant answer to his query led to his suspension and his eventual termination of his employment hence this action. There is no doubt that there is a contract of service between the parties. It is also not in doubt that the contract is statutorily flavoured as the contract is regulated by the Federal Inland Revenue Services Establishment Act 2007. The query Exh LG-08 that eventually led to the termination of the Claimant's employment with; "it has come to the attention of the management that you presented an academic certificate purportedly issued by the University of Jos, to facilitate your employment into the service, this certificate has been declared to be fake by the institution. In view of the above, I am directed to request you to explain why disciplinary action should not be taken against you for the alleged serious misconduct". The Claimant responded to the query according to his testimony as reflected in paragraph 21 of his witness statement on oath, this has gone a long way to satisfy the requirement of fair hearing principles; fair hearing means hear the other said; fair hearing also means an opportunity to be heard. See the case of Lawrence Idemodia Oborkahale vs. LASU (2013)30NLLR (Pt.85) 1 NIC; In Imonikhe vs Unity Bank Plc*

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<sup>25</sup> Ibidiz

<sup>26</sup> Suit No: NICN/ABJ/341/2012 (judgment was delivered on 5<sup>th</sup> November 2014).

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(2011)12NWLJ (Pt.1262)624 at 640 the Supreme Court held that where an employer accuses an employee of misconduct by way of query and allows an employee to answer the query before the employer takes a decision on the employment of the employee that satisfies the requirement of fair hearing because he answered the query and a decision was taken by suspension and eventual termination... Consequently, upon your formal representation, your submission to the disciplinary committee when you appeared before it; coupled with the investigation report received from the University of Jos reaffirming the stand of the institution that you graduated with a pass instead of the second-class lower division certificate you presented to the service, Management has directed that you should be suspended from the office with effect from 14<sup>th</sup> May, 2012 pending the determination of the case.” From the above it is clear that the claimant was suspended on allegation of presenting fake certificate to the defendant. Exh LG 03 before the court which is the letter of termination of appointment took effect from the date of the suspension ie the 14<sup>th</sup> May, 2012 suffice it to say the letter of termination was dated 7<sup>th</sup> September 2012. In the said letter of termination which is Exh LG 03, there is no specific reason given and no reference is made to the alleged presentation of the fake certificate of which he was suspended and queried. I perceived that the reason for the termination is due to the allegation of presenting fake certificate. In section 167 of the Evidence Act 2011 as amended “the court may presume the existence of any fact which is deemed likely to have happened, regard shall be had to the common course of natural event, human conduct and public and private business, in their relationship to the facts of the case”. In this context the court can in appropriate circumstances look beyond the letter of termination by drawing inferences from the surrounding circumstances of the case to reach a conclusion as to the reason for the termination. See the case of CBN vs. Ogwilo. I therefore hold that the termination of the Claimant employment is one to the allegation of presenting fake certificate as it is directly related or connected with and cannot be divorced from the allegation. Once a reason exists for an action such as termination in this case, the employee can contest that reason if that reason is found by the court not to be a lawful reason, the termination will be declared null and void, ie a nullity which means the employment was never stopped, so it contained and still subsists. See the case Isievwore vs. NEPA (2002)12 NWLJ (Pt.784)417 SC. By Exh GL 09, the Claimant replied to the query issued to him by these words “it was the certificate issued to me by the University that I presented to the Federal Inland Revenue Services (FIRS). I did not present any fake certificate to Federal Inland Revenue Service, right from my primary school leaving certificate and secondary school when I was employed in January 1990”. It is the evidence of the defence witness during cross examination that the entry requirement into the defendant establishment is HND and no particular class of degree is a requirement in the defendant’s rule or law; the Claimant was terminated on the basis of presenting a fake second class lower degree when he had a pass degree, the question is, assuming this is correct does a penalty of termination meet the justice of the case when no law or rule specify a class of degree for employment. Moreover, a letter dated October 24 2011 attached to Exh LG 06. Which was received by the defendant on the 31<sup>st</sup> October 2011 by the Chairman of the defendant gives clearance to the Claimant on this allegation of certificate forgery. The letter from the Examination and Record of the University of Jos by paragraphs 2 and 3 reads, “From our records Gambo Lawal enrolled into the University of Jos during the 2000/2001 academic session. He completed the prescribed academic programme successfully in the year 2003/2004 academic session and was awarded the Bachelor of Science in Business Management with



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*second class honours lower division with testimonial on 203250 as approved by the Senate on August 22<sup>nd</sup>, 2005” ... By Exh LG 010, the Claimant was offered an automatic employment which he accepted with Exh LG 09. It is in evidence that the claimant was still in employment of the defendant when this offer was made sequel to his additional qualifications being a B.Sc certificate and a professional Accountancy certificate which is Exh LG 012. As I have stated earlier in this judgment, Exh LG 010, the offer of automatic employment formed part of the contract of employment upon acceptance with Exh LG 09. Exh. LG 010 took effect on 1<sup>st</sup> June 2010 with a probation period of one year. Paragraph 3 of the Exh states, “during the probation period, either party may terminate this appointment in writing by giving one month notice or pay one month salary in lieu of notice. After confirmation of appointment, notice for termination shall be three (3) months or payment of three (3) months’ salary in lieu of notice from either side”. This Exh LG 010 is a new contract altogether containing its own terms and conditions. Consequently, the earlier appointment even though confirmed and gazette as can be seen in Exh LG 013, 14 and 17 cannot supersede Exh. LG 010. There is no evidence before this court to show that the Claimant employment as constituted by Exh LG 010 was confirmed in any formal manner but he continued to work even beyond the period of confirmation when Exh LG 03 terminating him was received. That means that it took the defendant to terminate one year and five months after the acceptance of the automatic offer of employment; to be more precise the Claimant was offered employment on 1<sup>st</sup> of June, 2010. Through a letter dated 14<sup>th</sup> December 2010, he accepted the offer on 27<sup>th</sup> January 2011 and he was terminated on 14<sup>th</sup> May, 2012 through a letter dated 7<sup>th</sup> September 2012. The purpose of the probation period is normally to enable the parties to make an assessment of the advantages resulting from the conclusion of an employment contract. During this period, the worker has to demonstrate his ability and competence. It is a period of insecurity which should not be unduly prolonged. However, the continuation of services after the expiry of the probation period without a new contract being drawn up in a form of confirmation, is equivalent to the conclusion of a contract of indeterminate duration which takes effect on the date on which the probation period began, or where the worker as in this case continue to work after the probation period, the contract is deemed to have been concluded on the date on which the probation period began. This is in accordance with international best practices and fair labour practice principles as enshrined in section 254(c) (i) (f) of the 1999 Constitution of the Federal Republic of Nigeria as amended. Based on the principle of labour law stated above and by virtue of Exh LG 010, I hold that employment of the Claimant, apart from being one with statutory flavour is a permanent and pensionable one. Consequently, terminating the Claimant giving him one month salary in lieu of notice as stated in Exh LG 03 is contrary to the spirit and intent of Exh LG 010 and therefore unlawful. On issue one submitted for determination by the defendant counsel, it has been established by evidence before this court that the certificate dully issued to the claimant, the basis of which he presented to the defendant was the property of the University of Jos of which the Claimant cannot be held liable in view of Exh LG 06. Issue 2 and 4 have been answered in the affirmative in the course of the judgment as the Claimant cannot complain of fair hearing. On issue 3, this court is satisfied on the basis of imaginary scale that the evidence of the Claimant preponderates and tilts the scale on his favour. The issues submitted for determination by the Claimant are all answered in the affirmative in view of the various reasonings and conclusions which I have irresistibly arrived at in this judgment.... The suspension of the claimant on the 14<sup>th</sup> May,2012 by the*



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*defendant is hereby set aside for being unlawful, the termination of the Claimant appointment by the defendant by a letter dated 7<sup>th</sup> September 2012 is hereby declared unlawful, the defendant ordered to reinstate the Claimant to his employment and pay him all his dues including salaries, emoluments, entitlements, and other benefits attached to his office from the date of suspension till the date of satisfaction of this judgment.*

From the forgoing, it is obvious that once the employee is allowed to work beyond the probationary period and was paid his salaries and other entitlements, the employee's contract of employment is deemed confirmed and cannot be treated as a staff on probation. The judgment of Hon Justice Lifu represents the position of the Nigeria Labour Law.

### **7. Remedies for Wrongful Termination or Dismissal of Probationary Appointment**

We do not intend to waste time on this issue as the matter is settled. A staff on probationary appointment whose appointment was, wrongfully terminated is not entitled to reinstatement as in the case of a confirmed employee.<sup>27</sup> He is only entitled to an award of damages. The damage recoverable for wrongful termination in that regard would be the amount which he would have earned in accordance with the term of notice for termination as prescribe in his contract of employment.<sup>28</sup>

In *Ihezukwu v. University of Jos*<sup>29</sup> which we had discussed before, the court decided that the normal measure of damages recoverable by an employee whose contract has been wrongly terminated is the amount he would have earned under the contract for the period until the employer could have lawfully terminated it, less any amount he could reasonably be expected to earn in other employment. The fact that the termination was wrongful will not entitle a staff on probationary appointment to a remedy of reinstatement as his appointment is still temporary, not pensionable, and not yet permanent. Reinstatement cannot be ordered in a case of wrongful termination of probationary appointment as the appointment is basically temporary.<sup>30</sup> Making a declaration to reinstate the unconfirmed employee would mount to giving the probationary appointment some form of permanence. Reinstatement as remedy is usually granted in cases and situations where the employees are confirmed and are in permanent and pensionable position. The employees who are to be reinstated must have reasonable and compelling grounds for the court to order their reinstatement.

It is important to state, however, that the employer who terminated the appointment of an unconfirmed staff has no duty to prove the reason(s) for the termination. According to the court in *John Oranyelu Anakism v. Union Bank of Nigeria Ltd*,<sup>31</sup> it is not necessary to prove the reasons stated in the notice of termination. The fact that the allegation stated in the letter of dismissal had not been proved will not make the dismissal wrongful. This is a "wonderful" preposition of the law. With respects, the employer has a right to terminate the contract of employment of an unconfirmed employee or even dismiss him without stating any reason at all but one expects that where reasons were given, that the employer shall be put to the prove of such reasons given. The law as we

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<sup>27</sup> *Olaniyan v. University of Lagos* (1985)2NWLR (Pt.9)599. *Ondo State University v. Foloyan* (1994)7NWLR (Pt.345)1

<sup>28</sup> Nwakoby Greg C, "Contract of Employment: Legal Status of Unconfirmed Employee in Nigeria", *UNIZIK Law Journal*, 2005, 11.

<sup>29</sup> *ibid*

<sup>30</sup> *Ihezukwu v. University of Jos* (supra)598 at 610. *Olatubosun v NISER Council* (1988)3NWLR (Pt.80)25. *Nigerian Produce Marketing Board v. A. O. Adewunmi* (1972)11SC 111. *John Oranyelu Anakism v. Union Bank Nig. Ltd.* (1994)1NWLR 557 at 569.

<sup>31</sup> *ibid*

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know it is that he who asserts, has onus of proof. Why should the employers not prove the allegation in respect of wrongful termination of the contract of appointment of an unconfirmed staff or the dismissal thereof? It could be that the court took this position because of the temporary nature of an unconfirmed appointment.

### **Conclusion**

A contract of employment is the binding agreement between the employer and the employee. It is the basis of their relationship. The interpretation of the terms of the contract of employment shall be construed in accordance with its express terms and no term is to be implied which is not rendered reasonably necessary to carry out the main intention of the parties. In fact, the contract of employment in itself and the terms in any other documents which constitute part of it are invariably the guide to its interpretation. The implication of this statement is that nothing that is not contained in the express provisions of the contract of employment shall be imposed on it unless as necessarily contained or incorporated to it by reference to the terms of the contract or regulations of the employment or the condition of service of the establishment.

An unconfirmed employee, that is, probationary employee does not enjoy the permanence of employment which a confirmed employee enjoys. Probationary period is a period of observation of the employee by the employer. The essence of probationary period is for the employer to assess and determine whether the employee is a fit and suitable person for the position and employment offered to him. The employer has the right to terminate the appointment of an unconfirmed employee at any time even before the expiration of the probationary period. The termination shall be in accordance with the terms of the contract of employment.