



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU
CAUSE NO. 506 OF 2014

JEREMIAH K. KANDAGOR

CLAIMANT

v

MAASAI MARA UNIVERSITY

RESPONDENT

RULING

1. Jeremiah K. Kandagor (applicant) was employed by Maasai Mara University (Respondent) as a Senior Assistant Registrar (Human Resource) on permanent and pensionable terms through a letter dated 26 April 2010. The appointment was subject to terms specified in the Terms of Service for Non-Teaching Staff in the Senior Administrative, Catering, Clerical, Hospital, Library and Technical Categories.
2. The Respondent, through a notice dated 3 June 2014, gave notice of retirement to the applicant effective 30 June 2015. According to the notice of retirement, the mandatory retirement age was 60 years, pursuant to Government guidelines on retirement.
3. The applicant appears to have been aggrieved with the notice of retirement and on 13 October 2014, he lodged a Memorandum of Claim against the Respondent seeking a declaration that the notice of retirement dated 3 June 2014 varying the terms of the contract of employment is unlawful and unfair and other relief.
4. Together with the Memorandum of Claim, the applicant filed a motion seeking

1. THAT this application be certified urgent and service thereon be dispensed with in the first instance.

2. THAT pending the hearing and determination of this Application, the Notice of Retirement dated 3rd June 2014 varying the terms of contract of employment be stayed and the Claimant be retained in his current employment position with all benefits and terms of service as per the Contract of Employment.

3. THAT pending the hearing and determination of this Suit, the Notice of Retirement dated 3rd June 2014 varying the terms of contract of employment be stayed and the Claimant be retained in his current employment position with all benefits and terms of service as per the Contract of Employment.

4. THAT the costs of this Application be borne by the Respondent.

5. When the motion was placed before me on 14 October 2014, I certified it urgent and directed that

- it be served for *inter partes* hearing on 22 October 2014.
6. On 22 October 2014, both parties agreed by consent to the grant of prayer 2 of the motion. Prayers 3 and 4 of the motion were canvassed on 18 November 2014.
 7. The applicant's case and submissions is that according to his contract of employment, the retirement age was set at 65 years and that the notice of retirement notifying him of retirement effective 30 June 2015 was a unilateral variation of his contract of employment and this was against his legitimate expectation as an employee.
 8. For the Respondent, it was urged that the notice of retirement was proper in law as it was pursuant to a government policy issued in March 2009 setting the retirement age at 60 years. It was further submitted that the contract of employment had erroneously fixed the retirement age at 65 and that the contract of employment had been vitiated by the policy.
 9. The Court needs to caution itself that it is not dealing with the merits of the main suit and that it must not make determinations at this interlocutory stage which may fetter the hands of the trial judge on the merits.
 10. At this stage, the Court needs to examine whether the applicant has satisfied the test set out in the case of *Giella v Cassman Brown & Brothers Ltd* on the grant of injunctive relief at the interlocutory stage.
 11. On the papers on record, clause 6.5(a) of the Terms of Service, retirement age was expressly agreed by the parties as 65 years. The Terms of Service were explicitly incorporated into the applicant's contract of employment.
 12. The Respondent contends that in giving notice of retirement to the applicant, it was acting pursuant to government policy on retirement at 60 years, and its action was lawful and further that the policy vitiated the contract of employment.
 13. As a general legal principle, for a variation of an employment contract to be lawful, it should be by mutual agreement. Consent may be implied or express (see *Harlow v Artemis Ltd* (2008) IRLR 629 and *Security and Facilities Division v Hayes* (2001) IRLR 81).
 14. The discussion on the legal impact or consequence of a government policy *vis a vis* the express terms of an employment contract must wait examination after full hearing and arguments. But at this stage, the Court is satisfied that the applicant has shown a *prima facie* case and is entitled to grant of prayer 3 of the motion dated 13 October 2014.
 15. The Court therefore orders
 - a. THAT pending the hearing and determination of the Cause, the notice of retirement dated 3 June 2014 be stayed and the applicant be retained in his employment position with all benefits and enjoyment of the terms of service.
 - b. Costs of the motion be in the cause.
 - c. The Cause be fixed for hearing on an accelerated basis on a date convenient to the parties and the Court, forthwith.

Delivered, dated and signed in open Court in Nakuru on this 23rd day of January 2015.

Radido Stephen

Judge

Appearances

For applicant Mr. Oumo, Oumo & Co. Advocates

For Respondent Mr. Mogere, S. Mogere & Co. Advocates