



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

CAUSE NO. 507 OF 2014

JACKSON K. BEREGE

CLAIMANT

v

MASAAI MARA UNIVERSITY

RESPONDENT

JUDGMENT

1. For determination in this Cause in one main issue, and it is whether the retirement notice dated 3 June 2014 issued to Jackson Berege (Claimant) by Masaai Mara University (Respondent) was lawful and fair.
2. The Memorandum of Claim was filed on 13 October 2014 while the Response was filed on 7 November 2014. The Cause was heard on 7 May 2015 and the Claimant filed his submissions on 20 May 2015. The Respondent filed its submissions on 16 June 2015.
3. Prior to hearing of the Cause, the Court delivered a ruling on 23 January 2015 staying the Claimant's retirement.
4. The facts are not in dispute and therefore the Court will only give a brief background.
5. The Claimant was employed by Narok University College on permanent and pensionable terms vide a contract dated 24 June 2009 as a Registrar, grade XV.
6. The appointment was subject to the conditions outlined in a Terms of Service Document. The Claimant produced a document titled Terms of Service for Non-Teaching Staff in the Senior Administrative, Catering, Clerical, Hospital, Library and Technical Categories Grades NT 5-14 dated November 2009. Clause 3.0 of the document indicated it applied to Staff in Grades NT 5-NT-16.
7. Under the Terms of Service Document, the retirement age was expressly set at 65 though a staff member could opt to retire at 55 years.
8. On 28 May 2014, the Respondent's Deputy Vice Chancellor issued a general memo to all staff informing them that the mandatory retirement age had been varied to 60 years in compliance with a Government Circular OP.CAB2/7A dated 20 March 2009, and that the Circular took precedence over any other arrangements and therefore the University's Statutes and Terms of Service stood amended.
9. This Memo by the Deputy Vice Chancellor was predicated on the Circular already referred to and which had been issued under the hand of the Permanent Secretary, Office of the President, reviewing the mandatory retirement age from 55 years to 60 years.
10. On 3 June 2014, the Respondent served the Claimant with a Notice of Retirement. The notice

informed the Claimant that he was past the mandatory retirement age of 60 years as set out in the Government Circular/guidelines.

11. In this respect, the Respondent advised the Claimant that his last day of work would be 30 June 2015.

12. The Claimant was not amused hence the present proceedings.

13. The dispute therefore revolves around whether the contract between the Claimant and the Respondent could be amended by and through the Government Circular.

14. The Circular came out on 20 March 2009 while the Terms of Service were issued in November 2009. It can therefore be taken that the Respondent was aware of the Government Circular, but for unexplained reasons did not incorporate/align the retirement age set out in the Terms of Service with that in the Circular.

15. The primary source of the terms and conditions of service in employment are usually contained in the contract. In the instant case these were outlined in the letter of appointment and Terms of Service Document.

16. Apart from the contractual provisions mutually agreed between employer and employee, various statutes have also made interventions and provided for certain rights and duties in the employment relationship.

17. Some of these statutes are the Employment Act, 2007, the Public Service Commission Act and Regulations made there under, The Teachers Service Commission Act and the Code of Regulations made there under, the Labour Relations Act, the Labour Institutions Act and many others.

18. Therefore to discern the terms and conditions of service in an employment relationship, the Court will look to the contract and terms agreed by the parties and also the applicable Statutes to determine the rights and obligations.

19. Because at the first instance the employer and employee negotiate and agree on the terms and conditions of service, the contract of employment, like other contracts can be varied by mutual agreement of the parties.

20. The case at hand however is one where the variation was at the instance of a third party. The Respondent (a public body) was acting on the basis of directives issued by the third party (Executive) and without consulting or seeking the consent of the other party (the employee or his Union).

21. However, a long list of authorities suggests that for a variation to an employment contractual term to be lawful, it should have the consent of both sides.

22. The consent can be express or implied. Consent would be implied for example in situations where an employee does not complain in good time about the variation of a term of the employment.

23. This legal principle has been the subject of discussion in cases such as *Harlow v Artemis Ltd* (2008) IRLR 629, *Rigby v Ferodo Ltd* (1987) IRLR 516 and *Security and Facilities Division v Hayes* (2001) IRLR 81.

24. Although the principle has been laid and accepted in comparative jurisdictions, in my view the legal principles are equally applicable here.

25. The variation under challenge here was not through agreement or consent of the Claimant. It was unilateral. It was based on a Circular. It was used by the Respondent to the detriment of the Claimant in that the retirement age was being unilaterally reduced. And in this regard, it was not only in breach of contract but unlawful.

26. But that is not all that is there to it. My reading of the Circular indicate that its main objectives were to deal with the issue of losing employees with critical skills while still in a productive stage, and harmonizing the retirement age within the East African Community.

27. The consequence was that the retirement was being reviewed upwards from 55 years to 60 years but the Respondent decided to stretch it by reviewing downwards to 60 years the retirement age of 65 it had agreed with its employees.

28. Although the parties did not address this latter issue, it is doubtful in my mind that it was the intention of the Circular to have retirement age in the public service reviewed downwards where a higher age had been agreed.

29. In my view, it was not open to the Government, however described to vary an employment contract to the detriment of employees such as the Claimant, generally through a circular or policy document.

30. For the Circular or policy to be lawful, it required to be underpinned by legislation. I say so because employees like the Claimant had a legitimate expectation, based on the contracts agreed with the employer to a retirement age of 65.

31. The Circular or policy was seeking to take away that which had been mutually agreed. That was not only unlawful but unfair to those whose contracts provided for a higher retirement age (for those whose retirement age was increased from 55 to 60 years, they had no legal right to lose).

32. From the foregoing, there is only one inescapable conclusion that the Court can reach and it is that the notice of retirement was based on an unlawful and invalid document as far as the rights of the Claimant herein were concerned.

33. The Court therefore finds and holds that the Claimant has made a case for a declaration that the notice of retirement dated 3 June 2014 was unlawful and unfair.

34. The Court therefore declares that

(a) The Notice of Retirement dated 3 June 2014 varying the Claimant's contract of employment is unlawful and unfair.

(b) The Claimant be retained in employment with all benefits in accordance with terms of the contract of employment unless mutually varied by the parties or statute.

35. Claimant to have costs.

Delivered, dated and signed in Nakuru on this 17th day of July 2015.

Radido Stephen

Judge

Appearances

For Claimant Mr. Oumo instructed by Oumo & Co. Advocates

For Respondent Ms. Mogere instructed by S. Mogere & Co. Advocates

Court Assistant Janet