



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

CAUSE NO. 129 OF 2014

GITAU HARRISON JOSHUA

CLAIMANT

v

TEACHERS SERVICE COMMISSION

1st

RESPONDENT

COUNTY DIRECTOR OF TEACHERS SERVICE COMMISSION, NAKURU COUNTY **2nd**
RESPONDENT

JUDGMENT

1. Gitau Harrison Joshua (Claimant) was employed by the Teachers Service Commission (1st Respondent) as a P1 teacher on 12 May 1989. After serving as a teacher for some time, the 1st Respondent promoted him to a Headteacher and posted him as acting Headteacher, Hyrax Primary School through a letter dated 27 June 2007. On 10 March 2011 he was confirmed.
2. The 1st Respondent a through letter dated 1 April 2011 informed the Claimant that he was being deployed as Assistant Teacher and therefore being transferred to Menengai Primary School with immediate effect.
3. The Claimant felt aggrieved and on 2 May 2014, he launched legal proceedings against the Respondents and he stated the issues in dispute as *unlawful demotion, unlawful transfer, violation of constitutional rights and unfair labour practices*.
4. At the same time, the Claimant filed a motion under certificate of urgency seeking conservatory orders suspending the demotion and transfer.
5. Ongaya J granted the orders sought on an interim basis on 5 May 2014 pending *inter partes* hearing. The orders were slightly varied on 6 May 2014. The orders as varied were extended on 8 May 2014.
6. On 23 May 2014, Ongaya J granted interim interdict until the hearing and determination of the Cause.
7. The Respondents filed a Response on 13 May 2014, Supplementary List of Documents on 19 February 2015, and the Cause was heard on 19 February 2015 and 29 April 2015.
8. The Claimant filed his submissions on 13 May 2015 while the Respondents filed their submissions on 29 May 2015 (Respondent wrote to Court on same day stating that the Claimant had not served them with his submissions).
9. The Court has considered the pleadings, evidence and submissions and identified the issues for determination as, *whether the transfer/deployment of the Claimant was unlawful and appropriate relief*.

Whether transfer/deployment was unlawful

10. Because most of the relevant facts are not in dispute, the Court will only make reference to such piece of evidence and testimony as may be relevant and germane to answering the questions posed.
11. According to the Claimant's letter of appointment, his employment was subject to the 1st Respondent's Code of Regulations for Teachers.

Promotion

12. It is not in dispute that the Claimant was offered permanent appointment on 12 May 1989. On 27 July 2007 he was appointed an acting Headteacher and he was confirmed through a letter dated 10 March 2011.
13. The appointment as a Headteacher was a substantive appointment. It was a promotion which was made after interviews. The Claimant had risen in rank.

Transfer

14. The 1st Respondent is a constitutional creature having been established pursuant to Article 237 of the Constitution, 2010 (the 1st Respondent had legal existence prior to 2010).
15. And for purposes of the present discussion, it is worth noting that the 1st Respondent has been expressly authorised by the Constitution to *assign teachers employed by the Commission for service in any public school or institution* (Article 237(2)(c), and to *promote and transfer teachers* (Article 237(2)(d)).
16. Regulation 27 of the Code made provision for transfer of teachers. The regulation has provided for different scenarios for transfer. A teacher may request for transfer after serving for 5 years in a school while regulation 27(3) reserves to the 1st Respondent the discretionary power to transfer a teacher even without a request.
17. But regulation 27(5) may also be relevant. It provides that teachers in administrative posts may be *transferred to a higher post, an equivalent post or on deployment*.
18. Regulations 28(8) and 33 (1) of the Code gives examples of administrative posts and these include Principal/Headteacher, Deputy Headteacher, Head of Department, Dean of Students etc.
19. The Claimant therefore was promoted to a higher post (Headteacher), and pursuant to regulation 27(5)(a)(iii) of the Code of Regulations, he was deployed to Hyrax Primary School.
20. And by virtue of regulations 27(5), 33(1) and 33(2) of the Regulations, he was holding an administrative post.
21. A reading of Article 237(2)(d) of the Constitution and regulations 27(5) and 33(1) and (2) of the Code of Regulations leave no doubt in my mind that the Respondent had the authority to transfer the Claimant to another school but as a Headteacher, because he did not apply for the transfer as envisaged by regulation 27(5)(b) of the Code of Regulations.
22. In my view therefore, in so far as the Claimant was being transferred from Hyrax Primary School to Menengai Primary School, the 1st Respondent had contractual authority to so act.

Deployment/demotion

23. But the letter also informed the Claimant that he was being deployed as *Assistant Teacher*. It therefore becomes material to establish who is an *Assistant Teacher* and its ranking *vis a vis* the position the Claimant held as a Headteacher.
24. Before ascending to the position of Headteacher, the Claimant went through a process. He went through an interview and satisfied the 1st Respondent that he had what was required to be a Headteacher. He performed well and was confirmed in that position. Then the transfer/deployment came as *Assistant Teacher*.
25. I have perused the Teachers Service Commission Act, 2012 and the Code of Regulations (Revised 2005) but have not been able to pinpoint the designation of *Assistant Teacher*.
26. Regulation 10(3) of the Code of Regulations provides for the different categories of appointments

- while schedule V of the Code has outlined the grades within the teaching service.
27. The Respondent did not draw my attention to any category or grade of teacher known as *Assistant Teacher*. If such a position is created or exists by virtue of the Scheme of Service, the same was not produced.
 28. On the basis of the material placed before Court, the position of *Assistant Teacher* appears non-existent.
 29. In my view, the 1st Respondent had no contractual or statutory authority to purport to deploy the Claimant to a non-existent position or transfer him otherwise as but a Headteacher (such deployment to a lower position could only be at the request of the Claimant and not at the instance of the 1st Respondent).
 30. In deploying the Claimant as an *Assistant Teacher*, the 1st Respondent was not only demoting him, but demoting him to a position not known in the relevant law or contract.
 31. What is demotion? Black's Law Dictionary, ninth edition defines demote as to *lower a person in rank, position, pay, or other status*.
 32. Even if the Claimant was going to retain his pay, his deployment as an *Assistant Teacher* was a lowering in rank, position and status. Essentially, he was being removed from office of Headteacher.
 33. And Article 236(b) of the Constitution protects public officers (of which the Claimant is) from removal from office, demotion or reduction in rank without due process.
 34. Common sense also dictates that a Headteacher cannot be equivalent of an *Assistant teacher*.
 35. This was therefore a case of demotion in that the 1st Respondent was removing the Claimant from the performance of administrative duties.
 36. In this respect the 1st Respondent was expected to follow a fair procedure before taking the decision to deploy the Claimant as an *Assistant Teacher*. He was being penalised.
 37. The Respondents made much of the declining performance of Hyrax Primary School where the Claimant was the Headteacher as the reason for the transfer and deployment.
 38. I have looked at the offences enumerated in both the Teachers Service Commission Act, 2012 and the Code of Regulations. But the Respondent did not suggest that the Claimant's conduct was in breach of any standard or Code or that it was taking disciplinary action against the Claimant.
 39. The exercise carried out by 3 TAC tutors on 27 January 2014 could not amount to and was not a disciplinary process or hearing. It was purely an exercise to establish the cause of the declining performance at Hyrax Primary School and if it were to be the basis of any sort of action against the Claimant, he should have been afforded a hearing/due process.
 40. If I were wrong on the conclusions reached based on contractual and statutory provisions, I would have still found for the Claimant on the basis of the common law.
 41. The Claimant was offered permanent appointment on 12 May 1989. On 27 July 2007 he was appointed an acting Headteacher and he was confirmed through a letter dated 10 March 2011.
 42. The appointment as a Headteacher was a substantive appointment. By purporting to transfer and deploy the Claimant as *Assistant Teacher*, the 1st Respondent was fundamentally varying the terms of the contract.
 43. And for such a variation to be lawful, it required the Claimant's consent (see *Rigby v Ferodo Ltd* (1987) IRLR 516, *Security and Facilities Division v Hayes* (2001) IRLR 81, *Harlow v Artemis Ltd* (2008) IRLR 629).
 44. In the instant case, the variation was unilateral and the Claimant expressed his non acceptance by moving to Court. The variation was unlawful.

Appropriate remedies

Declaration demotion and transfer was unlawful, null and void

45. The Court has reached a conclusion that the 1st Respondent had no contractual or statutory authority to deploy the Claimant to a non-existent position of *Assistant Teacher*.
46. The Court therefore declares that the deployment of the Claimant as *Assistant Teacher* was unlawful, null and void.

Declaration that Claimant could not be demoted without due process.

47. Considering the declaration above, this declaration is superfluous.

Declaration the demotion was unfair labour practice

48. Again this demotion would serve no practical purpose.

General damages

49. The Claimant sought general damages. The Claimant, in his submissions made a feeble plea for award of general damages.

50. In my view this is not an appropriate case to award general damages.

51. In lieu of general damages, I would award the Claimant any financial loss he has suffered as a result of the actions of the 1st Respondent. If there are any benefits or allowances he lost up to date of this judgment, the 1st Respondent should compute the same and pay him.

52. The Claimant was directed to serve his submissions by 15 May 2015. The Respondents wrote to the Deputy Registrar on 29 May 2015 complaining that the Claimant had not served the submissions. Their submissions were therefore without the benefit of the Claimant's submissions.

53. The Claimant is denied costs.

Delivered, dated and signed in Nakuru on this 3rd day of July 2015.

Radido Stephen

Judge

Appearances

For Claimant Mr. Kibet instructed by Mirugi Kariuki & Co. Advocates

For Respondents Mr. Anyuor instructed by Zipporah Mambo Advocate

Court Assistant Nixon