

THE REPUBLIC OF UGANDA
IN THE INDUSTRIAL COURT OF UGANDA AT KAMPALA
LABOUR DISPUTE REFERENCE NO. 091 OF 2018
[ARISING FROM LABOUR DISPUTE REFERENCE NO. 509/2018]

BETWEEN

NUWAGABA ELIAS.....CLAIMANT

VERSUS

MAKERERE UNIVERSITYRESPONDENT

BEFORE

1. Hon. Chief Judge Ruhinda Asaph Ntengye
2. Hon. Lady Justice Linda Lillian Tumusiime Mugisha

PANELISTS

1. Mr. Rwomushana Reuben Jack
2. Ms. Rose Gidongo
3. Mr. Beatrice Aciro Akeny

AWARD

By appointment dated 26/06/2013, the claimant was employed by the respondent as Chief custodian on probation. By letter dated 3/12/2013, the claimant was confirmed in the University service effective 1/7/2013.

By letter dated 9/2/2017, the claimant was offered an acting appointment as personal assistant to the Deputy vice Chancellor (F & A) effective 14/2/2017 until the position was substantively filled.

By letter dated 27/09/2017 the claimant was transferred from the office of the Deputy Vice Chancellor (Finance & Administration) to the college of Health sciences as Chief custodian. He was not happy with this transfer and lodged a complaint to the Vice Chancellor who advised him to directly petition the chairman of the appointments Board who had recommended the transfer and also to abide by the decision taken. By letter dated 18/10/2017, the claimant lodged a complaint of unfair transfer and demotion to the labour officer who later on referred the complaint to this court.

Through a memorandum of claim filed in this court on 24/05/2018, the claimant contended that his transfer was in fact a demotion and a termination of employment as Personal Assistant since it was before the substantive post was filled as per the appointment.

Agreed issues:

By a joint scheduling memorandum signed by both counsel and filed on 7/5/2019, the following issues were agreed upon.

- 1) Whether the re-designation of the claimants from the position of Acting Personal Assistant to the Deputy Vice Chancellor (Financial & Administration) to the position of Chief Custodian was lawful.
- 2) Whether the sub-committee of the Appointments Board that tried the claimant was legal and was properly constituted where it tried the claimant.
- 3) Whether the claimant was afforded a fair hearing when he appeared before the subcommittee of the appointments Board.
- 4) Remedies available to the parties.

Representations

The claimant was represented by Mr. Henry Rwaganika and Mr. Raphael Baku of M/s. Rwaganika, Baku & co. advocates while the respondent was represented by Mr. Hudson Musoke and M/s. Esther Kabinga of M/s. Makerere University Directorate of legal affairs.

Evidence adduced in chief

It was the evidence of the claimant through a written witness statement that having been appointed as chief custodian of the respondent substantively, he later on worked as Acting Personal Assistant to the Deputy Vice Chancellor in charge of Finance and Administration from which position he was reverted to chief custodian and transferred to the college of Health sciences.

He considered this transfer as unfair and complained to the Vice Chancellor who informed him that the transfer was upon recommendation of the chairman of the appointments Board.

According to him, this was irregular since it could only be the appointments Board and not its chairperson with power to take such an action. In his view, he was demoted on transfer at a time when there was no substantive Personal Assistant to replace him and his removal from office was a breach of contract since his appointment was to hold the office until a substantive Personal Assistant was appointed.

Evidence of the respondent was adduced from one Yusuf Kiranda, the Acting University Secretary of the respondent who in his written statement of defence testified that the claimant having been substantively appointed as Chief Custodian, was later on assigned additional duties as a Personal Assistant to the Deputy Vice Chancellor in charge of Finance & Administration and as a result he was entitled to an allowance.

According to the witnesses, the claimant while acting as Personal Assistant was involved in unauthorized actions for which he was put under a disciplinary process and dismissed but he appealed to the staff tribunal which reinstated him in his substantive position of Chief Custodian. The witness testified that the posting as a personal Assistant was a temporary assignment which could be terminated at any time.

Evidence adduced in cross-examination

The claimant in cross-examination agreed that his substantive appointment was Chief Custodian and that he was assigned duties as personal assistant by the authority of the Vice Chancellor who later on withdrew the authorization. He confirmed that he was in his substantive post as Chief Custodian. In cross-examination the claimant informed court that in his understanding he was to act as Personal Assistant until a substantive one was appointed by way of advertisement in which case he would be able to apply. His evidence was that the post of Personal Assistant was not filled.

Mr. Yusuf Kironde in cross-examination confirmed that the claimant was dismissed. He informed court that the designation of the claimant as Personal Assistant was not appointment to that office, although the letter designating him as such called it an Acting Appointment. He testified that the position was not yet filled because it is not in the structure of the University. According to the witness the claimant was removed from the position of personal Assistant because he committed various offences outside his office for which he was charged before a sub-committee of the Appointments Board. In re-examination he stated that the post of Ag. Personal Assistant was not a promotion and one would only be entitled to an acting allowance.

Submission

Counsel for the claimant strongly submitted on the first issue that it was in breach of contract when before a substantive Personal Assistant was appointed and after the claimant had occupied the position for some time, the respondent transferred him to the college of Health Sciences.

According to counsel the appointment as Personal Assistant was to a higher position and made by an appointment letter the terms under which the claimant accepted to work and which were binding on both parties. In counsel's view the re-designation of the claimant from the office of the Acting Personal Assistant to the substantive position of Chief Custodian was in breach of the terms in the appointment letter which were to the effect that he was to hold the office until the position was substantively filled.

Referring to **annexture 9** and the claimants letter at page 12-15 counsel contended that the removal of the claimant from the office of Ag. Personal Assistant was a punishment and yet he was not given any opportunity to be heard.

The removal from officer according to counsel was engineered by one Bruce Balase Kabbasa of the appointments Board who had connived with the chairperson of the claimant in performance of his duties as Ag. Personal Assistant.

According to counsel, the salary of Personal Assistant was personal to holder as reflected in the transfer letter of re-designation and it was in breach of contract when the claimant was not paid the said salary.

In respect to the second issue counsel for the claimant contended that the sub-committee that tried and heard the claimant was not a legal establishment since according to him, the universities and other Tertiary Institutions Act 2001 does not contain any Section of the law establishing sub-committees of Boards and mandating such committees to conduct disciplinary proceedings. In counsels view **Section 50(3) of the Universities and other Tertiary Institutions Act** gives exclusive jurisdiction to the appointments Board to handle disciplinary matters of the University staff. Counsel relied on the authority of **Dr. Julius Enon Vs Makerere University MA 381/2005.**

In respect to the third issue counsel argued that the sub-committee having been not have heard a fair hearing. Counsel contended that the chairman of the committee one Jude Mbabaali at the same time took at active part in the proceedings of the substantive Appointments Board that finally dismissed the claimant, making the Board's impartiality and independence questionable.

It was the contention of counsel for the claimant that he was not given sufficient time to prepare for his defence since the charge sheet which he had not been privy to was only attached to an invitation.

In response to the above submissions, counsel for the respondent contended on the first issue that the claimant having been appointed as Chief custodian was only assigned additional duties of Acting Personal Assistant which were later on

withdrawn lawfully according to counsel this post was temporarily and not accompanied by a salary but an allowance.

It was argued on behalf of the respondent that the temporary appointment did not create a separate and distinct contract given that it was pegged to a salary of the chief custodian.

In respect to the said and 3rd issue counsel for the respondent contended that the said issues were overtaken by events since the decision and proceedings of the sub-committee were quashed and set aside by the staff Appeals tribunal in Appel No. 06/2018.

Decision of court

The first issue is whether the re-designation of the claimant from the position of P.A. to the D.V.C (F & A) to the position of chief custodian was lawful.

We have no doubt and it is not disputed by the respondent, that the claimant was substantively appointed and confirmed in the position of Chief custodian. A substantive appointment is an appointment that is occupied by an employee under a contract of service, the employee having been vetted through the necessary procedures and having satisfied the employer that indeed he/she qualifies for the substantive post.

A substantive appointment carries with it a salary i.e. remuneration of an agreed annual amount payable at agreed intervals e.g. monthly.

The claimant having been employed as custodian was promoted and confirmed as Chief custodian. On perusal of both the appointment and confirmation, we gather that the appointment was an open ended contract. This means that his services were not determined by a certain period under the contract but by other factors. It was intended that unless there were disciplinary issues rendering him subject to demotion or dismissal, he was to occupy the position of Chief Custodian until retirement or until promoted to a senior or higher position as provided for in the Human Resources Manual of the respondent.

We have no doubt and it is not disputed by the respondent that in the course of his duties as Chief Custodian the claimant was offered an **“Acting appointment to the position of personal Assistant to the Deputy Vice Chancellor (F & A) until the position is substantively filled.”**

An acting appointment is not a substantive appointment. It is an appointment in respect to additional duties ordinarily performed by a person in a higher position than the position occupied by a person so appointed. As opposed to a substantive position which carries with it a salary, the acting position carries with it an allowance as remuneration for the extra duties in addition to the salary for the substantive post.

The complaint of the claimant as revealed in the submission of his counsel is that by re-designating and transferring him as chief custodian he was demoted and that this was in breach of contract since the post was not yet substantively filled.

Whereas the request of the Deputy Vice Chancellor (Finance & Administration) was for the appointment of the claimant as Personal Assistant, the letter of appointment was for Acting Personal Assistant. At the time of this appointment, it seems to us that the Human Resource department in its wisdom regarded the Acting appointment as the most appropriate for whatever reasons. This having been the case, the claimant was not promoted to the rank of Personal Assistant but rather given additional duties. The binding contract capable of being breached therefore was the contract for the substantive position of Chief Custodian. Consequently, we reject the submission of counsel for the claimant that by transferring his client to the college of Health Sciences as Chief Custodian the respondent demoted and was in breach of the contract. We agree with the submission of counsel for the respondent that the transfer of the claimant was a reversion to his substantive appointment as provided for under the contract since the appointment of Personal Assistant did not create a separate and distinct employment contract for the claimant.

In the recent case of Makerere University Vs Frank Kitumba, LD Appeal 43/2019, the appointment of Frank Kitumba was

“On contract for period of five years effective 1st December 2012 and may be renewed subjected to satisfactory performance following appraisal.”

In rejecting the submission of counsel for the respondent that it was in breach of contract for the appellant to terminate the contract without subjecting the respondent to an appraisal this court in the above case had this to say:

“A provision of satisfactory performance in the contract although a condition precedent to renewal was no necessarily a condition for the appellant to subject the respondent to an appraisal before the renewal. We do not read into the contract an intention of the parties to keep the respondent on the job until an appraisal is made. Rather we reach into the contract the intention that once an appraisal is made for purposes of renewal of the contract then the respondent must pass the appraisal before the renewal.”

The court held that the appellant was at liberty to fill the position when it fell vacant and that the provision of satisfactory performance after an appraisal in the contract did not preclude the appellant from advertising and filling the vacant post without appraising the performance of the respondent.

In the same way, and in the instant case, the claimant having been effectively occupying the substantive position of Chief Custodian, the respondent was not under any obligation by the phrase **“until the position is substantively filled”** to keep him holding the portfolio of Ag. Personal Assistant. It was in the discretion of the respondent (as it was in the above Frank Kitumba case) to retain the claimant as Personal Assistant by confirming him as such through the appropriate processes or remove from him the extra duties as Personal Assistant.

Consequently the effect of the transfer was not a demotion and neither was it a re-designation of the post. It was simply a removal of extra duties and normal transfer of the claimant in his substantive position. There was nothing like a breach of contract.

Accordingly, the answer to the first issue is that the process of transferring the claimant from the office of the Personal Assistant to that of Chief custodian was lawful.

As for the 2nd and 3rd issues, we agree with the submission of counsel for the respondent that these issues were overtaken by events. Given the decision of the staff Appeals Tribunal attached to the submissions of the respondent and marked “A”, it is clear that the proceedings instituted against the claimant were quashed and the Appointments Board directed to conduct a fresh hearing.

Consequently, with the court’s finding that the transfer of the claimant did not amount to a demotion or a termination but a reversion of the claimant to his substantive post and therefore lawful we do not find any merits in the claim which fails with no orders as to costs.

Delivered & signed by:

1. Hon. Chief Judge Ruhinda Asaph Ntengye
2. Hon. Lady Justice Linda Lillian Tumusiime Mugisha

PANELISTS

1. Mr. Rwomushana Reuben Jack
2. Ms. Rose Gidongo
3. Ms. Beatrice Aciro Akeny

Dated: 6/8/2021