

IN THE FEDERAL HIGH COURT OF NIGERIA
IN THE ILORIN JUDICIAL DIVISION
HOLDEN AT ILORIN
ON WEDNESDAY THE 23rd NOVEMBER, 2011
BEFORE THE HON. JUSTICE A.O. FAJI (JUDGE)

SUIT NO:- FHC/IL/CS/6/2010

BETWEEN:-

TIMOTHY OGUNDEJI SUNDAY GBADEYAN..... PLAINTIFF

AND

UNIVERSITY OF ILORIN.....DEFENDANT

JUDGEMENT

The originating summons in this matter was filed on 10/2/2010. The Plaintiff raised two issues for determination to wit:

1. Whether pursuant to the Defendant's condition of service for senior staff and the Pensions Act 2004, it is necessary for the Defendant to communicate its acceptance of notice of retirement given by the Plaintiff.
2. If the answer to the above poser is in the affirmative what is the legal consequences (SIC) of the neglect or refusal to accept and/or communicate such acceptance.

The Plaintiff seeks the following reliefs:

1. A declaration that a letter of acceptance of the Plaintiff's notice of retirement constitutes a condition precedent to the valid determination of the contract of service between the Plaintiff and the Defendant herein.

2. A declaration that a letter of acceptance is the condition precedent and a platform upon which the Plaintiff's pension and gratuity can be calculated and paid in accordance with the dictates of the Pension Act 2004.
3. A declaration that the Defendant's mute attitude to the letter of Notice of Retirement written by the Plaintiff since 10th June 2005 constitutes a refusal to accept the Plaintiff's intention to retire.
4. A declaration that the Plaintiff's contract of employment with the Defendant is still valid and subsisting in view of the continued refusal and/or neglect of the Defendant to convey its acceptance of the said notice of retirement.
5. An order mandating the Defendant forthwith to pay all the arrears of salary and other entitlements due the Plaintiff till date.
6. An order directing the Defendant to restore the name of the Plaintiff to the payroll of the staff of the Defendant.

The Plaintiff swore to a 20 paragraph affidavit on 10/2/2010. The following exhibits were attached thereto:

Exhibit A: Plaintiff's letter of appointment dated 5/5/1994.

Exhibit B: Letter of confirmation of Plaintiff's appointment dated 19/5/1996.

Exhibit C: Defendant's letter dated 6/7/2005 addressed to the Plaintiff.

Exhibits C1 and C2: National Pension Commission forms.

Exhibits D1 and D2: Plaintiff's letters addressed to the Registrar, University of Ilorin dated 28/1/2009 and 4/8/2009 respectively.

Exhibit E: Letter dated 31/8/2009 addressed to the Registrar, University of Ilorin and The Dean, Faculty of Law, University of Ilorin.

Mr. OLU MARK, Chief Confidential Secretary of the Establishment division of the Defendant swore to a 25 paragraph counter-affidavit on 22/3/2011. No exhibit was attached.

The Plaintiff's written address was filed on 29/3/2011. The Defendant filed an address to the counter-affidavit on 14/4/2011. The Plaintiff filed a reply on 17/6/2011.

Plaintiff reiterated the facts which show that Plaintiff's employment with the Defendant was governed by the Defendant's conditions of service for senior staff. He worked for more than 10 years and then gave notice of retirement which according to Plaintiff, the Defendant did not accept, though it acknowledged receipt of Plaintiff's notice of retirement. The Defendant never communicated its acceptance of Plaintiff's retirement despite reminders. The non-communication of acceptance of retirement which is a condition precedent to payment of pensions and gratuity under the Pensions Act has denied Plaintiff of any entitlement to pension and gratuity from the pension commission to date. The Plaintiff has not been able to process the payment of his pension and gratuity and has continued to demand for the letter of acceptance. The Defendant did not respond prompting Plaintiff to withdraw his notice of retirement indicating his readiness to resume to his duty post. The Defendant still did not respond.

Plaintiff argued both issues referring to the Defendant's conditions of service to the effect that a member of staff who retires after 10 or more years of service shall be entitled to both pension and gratuity at the approved rate. A contract of service being executory is determinable at the instance of a party subject to acceptance by the other party. The Plaintiff's notice of retirement being an offer the contract can only be brought to an end by an acceptance by the Defendant. There was no written acceptance by the Defendant. Defendant's silence cannot also in the circumstances be treated as an acceptance of the Plaintiff's notice of intention to retire. The Defendant's attitude did not also correspond with the terms of Plaintiff's offer as Defendant never wrote to accept the

offer. A letter of acceptance is also a condition precedent to payment of pension and gratuity by the Pension commission. Counsel relied on:

OLANIYAN-V-UNIVERSITY OF LAGOS (No citation)

ANON LODGE HOTELS LTD-V-MERCANTILE BANK (1993) 3 NWLR (PART 284) 721 @ 730.

On the mode of acceptance, Counsel submitted that since no mode was prescribed in the instant case the mode will depend on the circumstances of the offer and its nature. Since the offer was in writing, the acceptance too should be in writing. Silence cannot constitute acceptance. The acceptance must be communicated in order to be effective. Counsel relied on:

ANON LODGE HOTELS LTD-V-MERCANTILE BANK (supra) and
ORIENT BANK (NIG) PLC-V-BILANTE INTERNATIONAL LTD (1997) 8 NWLR (PART 515) 37.

The implication of the failure by the Defendant to accept the Plaintiff's notice of voluntary retirement means an adoption of the continuation of the relationship existing between the parties. The Plaintiff is thus therefore still in the employment of the Defendant and entitled to all the reliefs claimed. Counsel relied on:

O.S.H.C. -V- SHITTU (1994) 1 NWLR (PART 321) 476 @ 486 and
OLANIYAN-V-UNIVERSITY OF LAGOS (supra)

Counsel urged the court to resolve issues 1 and 2 in Plaintiff's favour.

Defendant's counsel raised two issues for determination to wit:

1. Whether having regard to the facts and circumstances of this suit together with the conduct of the Plaintiff as may be material to this suit, the Plaintiff is entitled to any of the reliefs sought in the originating summons.

2. Whether there was no acceptance cognizable in law of the Plaintiff's notice of retirement.

Counsel reiterated the facts submitting that Plaintiff put in his letter of retirement voluntarily and he was directed to commence the processing of his pension and gratuity with the Chief Executive (Pension and gratuity) within a period of not less than a month from receipt of the letter of retirement. Plaintiff acted accordingly and was given forms which he duly filled and executed. The Plaintiff cannot therefore contend that he has not retired from the services of the Defendant because the Defendant did not write a letter tagged 'Acceptance of voluntary retirement' to him. Plaintiff cannot be allowed to approbate and reprobate. The Plaintiff has also not been assigned any duty by the Defendant neither has he (Plaintiff) performed any duty to the Defendant. The Defendant did not complain about this and stopped paying Plaintiff's salary in September 2005. The Plaintiff did not also complain but continued pursuing his retirement benefits. That the Plaintiff was unable to conclude the processing of his retirement benefits does not mean that he has not retired because his notice of retirement was not accepted. The Plaintiff has always conducted himself as a Retiree of the Defendant and is estopped from denying this or acting contrary to his conduct which he led the Defendant to believe and rely on. Counsel referred to authorities on estoppel by conduct.

The Defendant has not enjoyed any service from the Plaintiff since then and altered its position by employing new members of staff to take Plaintiff's place. The Plaintiff has also been involved in partisan politics and aspires for political office, without showing if he was permitted to do so by the Defendant. If Plaintiff is still in Defendant's service, his conduct is contrary to the code of conduct for Public Officers. The fact that Plaintiff ventured into politics shows that he believed he was no longer in the employment of the Defendant or in the public service.

Counsel therefore submitted that Plaintiff is not entitled to reliefs 4,5 and 6 and urged the court to dismiss same.

On issue number 2, Counsel submitted that there is nothing in the law or regulations governing the relationship between Plaintiff and Defendant which prescribes a specific mode of acceptance of such notice of retirement. Counsel conceded that acceptance must be communicated to the offeror, such communication may be express or implied from conduct or other circumstance. Such acceptance according to Cheshire and Fifoot's Law of contract 9th Edition at page 33 may be collected from the words or document that have passed between them or may be inferred from their conduct. The act or conduct must however be done with the intention (actual or apparent) of accepting the offer.

Acceptance does not therefore have to be in writing. Counsel relied on: in particular: AMANA SUITES HOTELS LTD-V-PDP (2007) 6 NWLR (part 1031) 453 @ 477 F-A. Acceptance by conduct is also good acceptance. So also can it be inferred from documents exchanged by the parties which do not necessarily need be captioned 'letters of acceptance'. They must however contain unequivocal and unqualified acceptance. Exhibits C, C1 and C2 show clearly that the parties were ad idem on the retirement of the Plaintiff. The conduct of the parties also shows that the Plaintiff had ceased to be in the Defendant's employment.

Furthermore, the rejection of an offer must be express and unequivocal as opposed to Plaintiff's position that failure to expressly accept is a rejection of the offer of retirement. Counsel relied on AMANA SUITES HOTELS LTD-V-PDP (supra). A rejection of offer must be express or by a counter-offer varying the terms of the offer. There was no rejection or counter-offer communicated to the Plaintiff. The Plaintiff's retirement was also accepted by virtue of the fact that he was referred to the pension and gratuity section of the Defendant.

The Plaintiff failed to exhibit the letter of notice of retirement in which he gave 3 months notice to the Defendant. Pursuant to this the Defendant stopped paying the

salary of the Plaintiff in September 2005 – 3 months after the notice of retirement. This also suffices as acceptance.

Counsel distinguished the authorities relied upon by the Plaintiff contending that O.S.H.C -V- SHITTU supports the Defendant's case as the employer therein wrote a letter expressly rejecting the notice of voluntary retirement. In the instant case, the Defendant referred Plaintiff to the C.E.O (Pension and Gratuity) for issues relating to his retirement. The employee in SHITTU'S case was also ordered to return to his duty post which he did but was subsequently suspended indefinitely.

The case of ORIENT BANK (NIG) PLC-V-BILANTE (supra) supports Defendant's position that acceptance can be implied from the conduct of the parties or the documents exchanged between them. Exhibits C, C1 and C2 are documents from which the court can infer acceptance of Plaintiff's retirement and the letters written subsequently were mere surplussage. The Defendant was ready, but for the administrative lapse of loss of Plaintiff's file, to meet Plaintiff's demand. The Plaintiff has not shown by relevant materials that the purported non-acceptance of his retirement gave rise to his inability to receive his pension from the appropriate authority.

The Plaintiff cannot also unilaterally return to his previous place of employment. The Plaintiff's notice of retirement was accepted vide exhibits C, C1 and C2 and the conduct of the parties also bears this out. The Defendant also agrees that Plaintiff is entitled to payment of all his benefits as a retiree which may have fallen due to him with effect from September, 2005. The Defendant is thus not averse to paying the Plaintiff his pension and gratuity with effect from September, 2005.

The Plaintiff raised issue on the late filing of the Defendant's address. This was regularised by motion on notice which was granted by the court on 26/7/2011.

On the contention that Plaintiff was approbating and reprobating, Plaintiff's Counsel urged the court to discountenance same as Plaintiff complied with the terms

and conditions of his employment by giving notice of retirement to the Defendant. The Defendant never accepted this offer. It is also common ground that the retirement process goes beyond filling of forms as various departments in the Defendant are involved and Plaintiff was unable to complete the necessary forms. The Defendant never replied Plaintiff's letters including exhibits D1, D2 and D3 and cannot now feign ignorance of same and deny Plaintiff his just due. The doctrine of estoppel cannot also avail the Defendant as Plaintiff's offer to retire was never accepted by the Defendant, there is no evidence that Plaintiff waived his rights to pension and gratuity and even the said alteration of the Defendant's position was not within the contemplation of the law. It would have been so if the Defendant paid Plaintiff's entitlement after the notice of retirement and then turns round to assert that Plaintiff was still in its employment. Only then would the doctrine of estoppel apply.

On issue 2: Counsel submitted that for an acceptance to be valid, it must be positive and correspond with the terms of the offer. Mere passive intention is not sufficient. The acceptance must also be communicated. The mode of acceptance can also be inferred from the circumstances where no mode has been prescribed. The Plaintiff's offer having been in writing, the acceptance must also be in writing. The offer was specific and required unqualified acceptance. It was not a general offer which can be accepted by conduct indicative of acceptance. The Defendant's offer was not accepted within a reasonable time as Plaintiff waited for 4 years before approaching the court. The offer therefore lapsed. The Defendant cannot also rely on **ORIENT BANK (NIG) LTD-V-BILANTE** (supra) which does not assist Defendant's case. The Defendant cannot also rely on its own carelessness to cause pain to the Plaintiff as the loss of Plaintiff's file is a case of utter disregard for Plaintiff's well-being. Exhibit C cannot also be an acceptance letter as it is vague and if it sufficed as an acceptance letter the verification team from National Pension Commission would not have insisted on the letter of approval of Plaintiff's notice of retirement.

Counsel urged the court to grant all Plaintiff's reliefs.

Counsel adumbrated by way of oral arguments. Plaintiff contended that the need for a communication of the acceptance is two-fold: to bring the employment contract to an end and to enable the Pension Commission to take cognisance of the retirement and pay Plaintiff the appropriate sum. The Pension Commission requested for a letter of acceptance from Plaintiff's employers and Plaintiff could also not fill the Pensioner's Verification Form – Exhibit C1 – fully as there was a column for the date of the letter of acceptance. The Defendant did not respond to Plaintiff's letters and even those who had retired 6 months before the Plaintiff were not denied letters of acceptance by the Defendant. The Defendant have thus not done what they should do to bring the contract of employment to an end. Plaintiff therefore urged the court to hold that the Plaintiff is still in the services of the Defendant. The court does not countenance a decision with a retrospective effect a fortiori a contract of employment.

Defendant's counsel pointed out to the court that by paragraph 20 of the counter-affidavit the Defendant has agreed to pay Plaintiff his pension and gratuity from August 2005 when his retirement took effect. Counsel reiterated Defendant's opposition to relief 1 and 2 of the originating summon. Counsel distinguished O.S.H.C. -V- SHITTU on the facts. Exhibit C is also indicative of Defendant's acceptance of Plaintiff's retirement and amounts to a surplussage as there is no law that expressly provides that an employer is under an obligation to issue a letter of acceptance of retirement to a retiring employee before the retirement can take effect. Counsel submitted that once a letter of retirement is submitted, the retirement takes effect from the date of receipt of that letter. Counsel referred to ADEFEMI-V-ABEGUNDE (2004) ALL FWLR (part 203) 2109 @ 2129 F especially at 2127 and the reference to Ademola CJF in BENSON-V-ONITIRI. The Plaintiff has not cited a particular section either of statute or regulations which make a letter of acceptance a condition for Plaintiff to be entitled to pension. In any event, Plaintiff has slept on his rights as shown by the documents he attached. He also did not

exhibit the letters issued to those of his colleagues who retired 6 months after him. Further more exhibit C1 originated on 28/8/2008 – 3 years after exhibit C was made. Exhibits D1 and D2 were written on 28/1/2009 and 4/8/2009 respectively. Counsel's further submission that there is no indication that the letters were received by the Defendant was challenged by Plaintiff who countered by saying the Defendant has not said the documents were not received.

Defence counsel stated further that exhibit E has the stamp of the Faculty of Law on it as opposed to exhibits D1 and D2 which do not show where they were received. Counsel urged the court not to place any reliance on the said exhibits. The Plaintiff has not placed any statute or regulation before the court for interpretation. No document indicating that a letter of acceptance is a condition-precedent for the retirement of an employee has been placed before the court. Counsel urged the court not to act on sentiments even though Defendant sympathises with Plaintiff and urged the court to dismiss the action.

Plaintiff responded submitting that exhibit C does not have the effect of bringing the contract of employment to an end as it was just an invitation letter to appear to clarify some issues. Plaintiff also submitted that reliance on ADEFEMI –V-ABEGUNDE was misplaced. The Plaintiff has invited the court to rule on whether Plaintiff is entitled to pension and gratuity and when? The Defendant agrees that Plaintiff is entitled but the issue is when? The Defendant itself has not referred to any legal provision and have not shown a legislation which entitles Defendant not to write a letter.

Plaintiff argued that the Pension Commission came into force in 2004 by way of legislation. Before then the University performed the dual duties of accepting letter of retirement and payment of pension and gratuity. That is an additional reason why there are no additional provisions in the University statutes. The University called on the member of staff to fulfil a required condition. The position is different under the Pensions Act of 2004. To say that there is no law therefore is to disregard the purport of the

Pensions Reform Act. The Defendant cannot also say they are prepared to pay the pension and gratuity as that is the function of the Pension Commission.

Those were the arguments of Counsel.

It seems to me upon another look at the issues for determination in this case that Plaintiff's case is that considering the Defendant's conditions of service for senior staff and the Pensions Act is it necessary for the Defendant to communicate its acceptance of the Notice of Retirement given by the Plaintiff. The answer to this will lead to consequences. If Defendant refuses to accept the notice of retirement, what are the consequences?

It also appears to me that Plaintiff's position is that the said failure has led to the denial of his pension and gratuity as the Pensions Commission is unable to compute same since Plaintiff has been unable to fill the requisite forms. That is the gravamen of relief number 2.

Plaintiff however goes further. It is his position from reliefs 1, 4-6 that the failure means that the contract of service has not come to an end and Plaintiff is entitled to be treated as a member of staff of the Defendant with all the incidents thereof.

Rather curiously, Plaintiff has not referred to the relevant provisions of the Pensions Act but it seems to be common ground that a person in Plaintiff's position is entitled to pension and gratuity once he has like Plaintiff put 10 years of service in the Defendant this is as per in the conditions of service. Even though Plaintiff has not cited provisions of the Pensions Act 2004, Exhibits C1 and C2 do not contain a column for date of letter of approval of notice of retirement. However, paragraph 11 and 14 of Plaintiff's affidavit, the Pensions Commission asked for the said document. The absence of that document stalled the processing of Plaintiff's retirement benefits. The Defendant did not deny paragraphs 11 and 14 of this affidavit. The Defendant did not also state that the demand by the Pensions Commission is not appropriate or without legal basis.

It therefore seems that relief 2 has merit. Indeed, Defendant tactfully admitted this by indicating its willingness to pay Plaintiff's pension from September 2005 – the date when Plaintiff's retirement took effect. That declaration in relief 2 is just a declaration and is not and cannot be a basis for the grant of the other reliefs. Issue 1 would thus seem to have two implications: Is the letter necessary for pension purposes? The answer is yes from the summation I have just made.

The other implication is: Is the letter necessary or is it required by law to bring the contract of employment to an end? Indeed, that is the question on which the live issues in this case rest.

Plaintiff has contended that since the notice of retirement was in writing, it must be accepted in writing and that the acceptance must correspond with the notice. Rather curiously, Plaintiff did not exhibit his notice of retirement and gave no reason for doing so. It is thus a bit difficult and in fact it borders on conjecture and speculation to consider this line of argument by the Plaintiff.

It however seems that more questions arise than were raised by the Plaintiff. One of them is: Is there really a need for a notice of retirement to be accepted by the employer before the employment can come to an end? I must thank Defendant's Counsel for making the task of the court easier on this point. It would also seem to me that Plaintiff unsuccessfully tried to change his claim in his oral address by saying that the question in the instant case is: Is Plaintiff entitled to pension and gratuity? The Plaintiff himself answered this in the affirmative. The follow-up question raised by the Plaintiff himself was: When? That is however not Plaintiff's claim. Indeed, relief 2 is not that expansive. Even if that was Plaintiff's claim – which it is not – the Plaintiff is not claiming his pension and gratuity but rather seeking to be reinstated. Neither can payment of pension be considered as an entitlement under relief 5 because Plaintiff himself has made the valid point that an employer like the Defendant is not the one to pay pension and gratuity.

The Defendant as earlier on stated made the task of the court lighter. The case of ADEFEMI-V-ABEGUNDE (supra) cited in oral arguments appears to have laid the issue to rest. The Court of Appeal having considered the circumstances under which the letter of resignation was tendered by the 1st Respondent was of the view that to expect the employer to accept the notice of resignation would make it possible for them to deliberately delay or refuse to grant such approval. The case of BENSON-V-ONITIRI states the matter beyond doubt or controversy. The Supreme Court per Ademola C.J.F said:

'The correct approach in my view, is that there is a right to resign an office unless there is a reason or reasons to show a man cannot resign

On the authority of the LARNARKSHIRE'S case (1775) Douglas Report 367 referred to at page 29 of Rogers on Election Vol. 2 19th Ed It would appear that resignation takes effect from the date of receipt of the notice

I think that on the authorities – Patterson's case (supra) ; Tiddlerley's case (supra) it is clear that a member of a corporation may give notice of resignation to the corporation and that the corporation has a right to receive it. There is absolute power to resign and no discretion to refuse to accept notice. I am of the view that notice to either is good, nor do I think it necessary for the board or anybody else to reply that the resignation is accepted.

It is note-worthy that in both BENSON's case and ADEFEMI's case, the notice of retirement was given for the purpose of bringing the employment contract to an end within a defined period of time and for a purpose. So it is also in this case as Plaintiff stated that he gave 3 months notice of retirement. BENSON-V-ONITIRI is still good law.

I will now consider the authorities relied upon by the Plaintiff. All the authorities except 3 dealt with matters of general contract and not contract of employment. The case of OLANIYAN-V-UNILAG (supra) was a case of unlawful termination. The reverse

is the case in the instant case. CHUKWUMAH-V-SHELL PETROLEUM (supra) is also of unlawful termination. The only case that deals with notice of retirement cited by Plaintiff is O.S.H.C-V-SHITTU (supra) and in that case the employer refused to accept the notice. Indeed the employer expressly rejected the notice of retirement which was accompanied by one month's salary in lieu of notice. The one month's salary in lieu of notice was not returned to show that his resignation was not accepted. In the instant case, the Defendant did not expressly reject the notice of retirement but rather showed its acceptance by stopping Plaintiff's salary after 3 months of the giving of notice. The facts are therefore different. In any event O.S.H.C.-V-SHITTU would appear to have been wrongly decided or better still decided in ignorance of the decision of the Federal Supreme Court in BENSON-V-ONITIRI. For these reasons therefore O.S.H.C.-V-SHITTU does not apply and is not of much assistance.

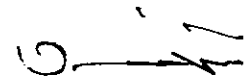
I must therefore reiterate the position that a notice of retirement takes effect from the day it was received and brings the employment contract to an immediate end. Indeed, the Defendant acknowledged receipt of the notice of retirement vide its letter of 6th July 2005 which the Plaintiff exhibited.

Question 1 is therefore answered as follows:

Pursuant to the Defendant's conditions of service and the Pensions Act 2004 it is not necessary for the Defendant to communicate its acceptance of the Notice of Retirement given by the Plaintiff for the purposes of bringing the employment contract to an end since the contract comes to an end as soon as the notice of retirement is received by the employer. Since the answer to question 1 is in the negative there are no legal consequences except that the contract of employment has come to an end.

The sub-answer to question 1 is that for purposes of pension and gratuity and in the circumstances of this case in which Defendant has not disputed the requirement of the acceptance of the notice of retirement for purposes of pension and gratuity as put forward by the Pensions Commission, as a matter of law it is not compulsory for the

employer to give an approval of the retirement but is desirable and only necessary to that extent for the employer to give such an approval of retirement. The only relief claimed in this connection is relief 2 to the extent that approval of retirement is the platform upon which the Plaintiff's pension and gratuity can be calculated and paid in accordance with the dictates of the Pension Act. 2004. The Plaintiff has however not shown that it is a requirement under the Pension act 2004. It is however desirable for the employer to so do. Reliefs 1, 3-6 are hereby dismissed. Relief 2 is granted to the extent that approval of retirement is the platform upon which the Plaintiff's pension and gratuity can be calculated and paid being at best an administrative requirement of the Pensions Commission.



A.O. FAJI
JUDGE
23/11/2011

Counsel:

Plaintiff in person,
Y. Dauda Esq with S.O. Babakebe Esq,
N.R. Mbamara Esq, and M.B. Yamuza (Miss) for the Defendant.