A Newsletter on Labour Law and Emerging Trends

Perchstone & Graeys
SOLICITORS, ADVOCATES & ARBITRATORS

EMPLOYEE MEDICAL FITNESS TEST: AN INFRACTION OF EMPLOYEES' FUNDAMENTAL RIGHT?

FACTS

The facts of *Dr. Olusola Adeyelu V. LU.T.H and Ors*[1] and its sister-case, *Dr. Olusola Adeyelu V. L.U.T.H and Ors*[2], instituted by the Claimant against the same Defendant, are of interest; not least for the issues of legal significance they highlight. The Claimant, a resident doctor and member of the Association of Medical Doctors in Lagos University Teaching Hospital ('L.U.T.H.') was, by a letter dated January 23, 2017, instructed by his employers, the Defendants, to present himself for a medical fitness test at its '*Family Medicine Department*'. This request came 6 weeks after the Claimant had resumed from a sickness absence. It was the Claimant's contention that the decision to subject him to a medical fitness test was discriminatory, unlawful and constituted a breach of the *Public Service Rules (PSR)* and the *Constitution of the Federal Republic of Nigeria 1999 (as amended)*.

ISSUES

The questions for the court's determination were essentially twofold: (i) Whether the Defendants, as the Claimant's employer, had the authority to demand that he undergo a medical test; and (ii) Whether the directive to undergo a medical assessment amounts to discrimination.

FINDING/DECISION

Leaving aside the more complicated aspects of the court's reasoning, the court held the yardstick for determining discrimination as being that the Claimant *must show any employee whose circumstance is same as his and yet was treated differently.* Unfortunately for the Claimant, he failed to satisfy the test. The facts he placed before the court were insufficient to establish an infraction of any of his constitutional rights. Similarly, the court interpreted the relevant provisions of the Public Service Rules against him. Put simply, contrary to his contention of a breach of the rules in asking him to submit for a medical test when it did, the court held that the employer, the Defendant, was empowered to demand a medical examination of the employee *at any time*.

[1] Unreported suit with SUIT NO. NICN/LA/50/2017
[2] Unreported SUIT NO. NICN/LA/94/2017

COMMENTS

The Adeyelu decisions bring to the fore the attitude of the court towards the overlap between contracts (of employment) freely made by parties and existing statutory regulations. In this case, the employer's power to request a medical examination at any time was provided for by Rules 070105 of the Federal Government Public Service Rules. The Court held that the Rule 070105 is not delimited by any timeframe, nor based on any complaint first had and received before it comes into play. In this case the rule stated that the Permanent Secretary/Head of Extra-Ministerial Office may at any time call upon the officer to present himself for the medical examination. Therefore the employer was well within its right to request for a medical fitness examination from the employee, a public servant. Suffice it to say that contracts of employment must be read with relevant statutes to which they are subjected.

The Public Service Rules create an obligation on federal civil servants to submit themselves for examination in 5 years and *at any time* respectively. The Court therefore ruled that: "*In other words, it is when an officer must present himself for medical examination after every 5 years that Rule 070102 applies. But when it is the employer who demands medical examination, it is Rule 070105, which is not delimited by any timeframe or complaint, that applies; and here the Rule states that the Permanent Secretary/Head of Extra-Ministerial Office may at any time call upon the officer to present himself for the medical examination.*" The legal implication being that employees may be subject to routine or time specific medical fitness examination, if an overriding statute provides for it. Such medical examination must not be carried out in a discriminatory manner or in a way that could threaten the fundamental rights of employees including the right to privacy, personal dignity and freedom from discrimination. However in this case, the claimant could not establish that any of his fundamental rights were in fact threatened.

Medical Fitness Test, HIV/AIDS and Workplace Discrimination

The right of an employer to subject an employee to a medical fitness test as may be provided in the contract of employment is not sacrosanct; it is circumscribed by the duty of the employer to be fair to all employees. Employees must therefore not be subjected to medical tests which may potentially bring them into. In *NMCN V. Adesina*[3] the Court of Appeal defined "*discrimination*" as "*differential treatment; a failure to treat all persons equally when no reasonable distinction can be found between those favored and those not favored.*" Medical tests that are targeted at persons living with HIV/AIDS with the intention of discriminating against them on grounds of their status for example will be held discriminatory, and any action taken in that regard wrongful.

In *Georgina Ahamefule V. Imperial Medical Centre & Dr Alex Molokwu*[4], the Plaintiff challenged the termination of her employment as an auxiliary nurse on the grounds of her HIV-positive status. For reasons set out in the judgment, the court held the termination to be "*illegal, unlawful, and based on malice and extreme bad faith*". The Defendant was directed to pay N5, 000,000.00 in general damages and N2, 000,000.00 as compensation for conducting an HIV test on the Plaintiff without her consent. The Defendant was also found to be negligent in the manner in which it conducted the test and in not affording the Plaintiff pre and post-test counselling. Denying the Plaintiff medical care on grounds of her HIV status also constituted a

[3] (2016) LPELR-40610 (CA)
[4] Suit No: ID/1627/2000

violation of her right to health under *Article 16* of the *African Charter on Human and People's Rights (Ratification and Enforcement), Act*[5], and *Article 12* of the *International Covenant on Economic, Social and Cultural Rights*[6].

Similarly, in *Mr. X v. Smiridu Nigeria Limited*[7], the court agreed with the Applicant's counsel that the Applicant was constructively dismissed from employment and that his dismissal amounted to a violation of his fundamental right to human dignity and freedom from discrimination since it was ostensibly premised on his HIV status. The court also held that it was unlawful for a Company to mandate its employees to undergo any form of medical test, as doing so would amount to an invasion of the employees' right to privacy and a flagrant disobedience of *Section 10 (d)* of the *Protection of Persons Living with HIV and Affected by Aids Law of Lagos State, 2007*.

ILO (*International Labour Organization*) International Labour Standard on HIV and AIDS 2010 (No 200) provides that "*there should be no discrimination against or stigmatization of workers, in particular jobseekers and job applicants, on the grounds of real or perceived HIV status or the fact that they belong to segments of the population perceived to be at greater risk of or more vulnerable to HIV infection.*" By the provision of the Standard, employers must not subject prospective employees to discrimination on the ground of their HIV/AIDS status. The National Industrial Court is constitutionally empowered to apply this ILO International Labour Standard in Nigeria; *Section 245C (1) (f) and 2 of 1999 Constitution (as amended)*[8].

CONCLUSION

The decision of the Court in the aforementioned cases establishes that, while it is important to protect the fundamental human rights of employees, some employment relationships may be subject to overriding statutes or regulations that could empower employers to subject employees to medical fitness test. However, the test must not be used as a tool for discrimination against any employee.

Perchstone & Graeys
SOLICITORS, ADVOCATES & ARBITRATORS

Lagos: *1, Perchstone & Graeys Close, off Remi Olowude, Lekki Epe Expressway, Lagos; Tel: +234- 1-3429131, 7611051*
Abuja: *D3, Jima Plaza, 1627 Ahmadu Bello Way, Area 11, Garki Abuja; Tel: +234 92919191, 07045984792*
Benin City: *40, Adesogbe Road, Benin City, Edo State; Tel: +234 7068518650, 07045984776*
Email: *editor@perchstoneandgraeys.com; counsel@perchstoneandgraeys.com*
Website: *www.perchstoneandgraeys.com*
Photo Credit: *http://www.nardonelimited.com; http://www.keywordsuggests.com*

[5] CAP 10 Laws of the Federation of Nigeria
[6] ratified in Nigeria in 1993
[7] Suit No. NIC/LA/265/2015
[8] Aero Contractors Co. Of Nigeria Limited V. National Association of Aircrafts Pilots and Engineers (NAAPE) & ORS (Unreported suit No. NICN/LA/379/2013; judgment delivered on February 4, 2014).