

**SUPREME COURT OF NIGERIA**  
23RD JUNE, 2000. SC. 47/1995  
**CORAM:- A. B. WALI, O. ACHIKE, U. A. KALGO,**  
**S. O. UWAIFO, E. O. AYOOLA, JJSC**

PSYCHIATRIC HOSPITAL	.....	DEFENDANT/
MANAGEMENT BOARD		APPELLANT
AND		
E. O. EJITAGHA	.....	PLAINTIFF/RESPONDENT

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***MASTER & SERVANT - Public servant - Pensions Act, 1979 - A person employed in the Psychiatric Hospital - Is a public servant subject to the Act.***

***MASTER & SERVANT - Retirement - Pensions Act, 1979 - Section 4 thereof - Three conditions that must be satisfied - Before an officer can be retired under subsection (2)***

***MASTER & SERVANT - Retirement - Burden of proof - Pensions Act, 1979 - Provisions of section 4 - The burden is on the employer to show that the provisions were complied with.***

***MASTER & SERVANT - Retirement - Statutory Powers - Under section 4 (2) of the Pensions Act - A public Body invested with statutory Powers - Must act within the law.***

**FACTS**

In the High Court, Benin City, the Plaintiff/respondent brought an action against the defendant/appellant claiming for a declaration that his compulsory retirement was null and void and without legal effect; a declaration that he is still in the service and entitled to all his dues in the form of salaries, allowances and emoluments; and an order directing his reinstatement or that he be paid all his said dues until he attains the age of 60 years. At all material times to the suit, the respondent was the Chief

Executive Officer (Accounts) in the services of the appellant at the Psychiatric Hospital, Uselu, Benin City. He was born on 15th. December, 1942 and by the conditions of service would retire at the age of 60 years, that would be on 15th. December, 2002. By a letter dated 22nd. July, 1987, the respondent was dismissed from the service by the appellant. He contested this in Court and on 12th. September, 1990, the dismissal was declared null and void. Following the terms of the judgment, the respondent was reinstated to his position in the service.

About four months thereafter, by a letter dated 4th. December, 1990, (Exhibit B) written to the respondent by the secretary to the appellant Board, the respondent was compulsorily retired from the service. Exhibit B offered three months' salary and other entitlements in lieu of notice to effect the immediate retirement of the respondent. Hence, the present action challenging the retirement. At the conclusion of the trial, the learned trial judge dismissed the claim. He held that the respondent did not lead evidence to show that his forced retirement was not justified. The respondent's appeal to the Court of Appeal Benin Division was allowed by a split-decision of 2:1, but that Court held that the Pensions Act, 1979 does not apply to the respondent. The appellant has now appealed to the Supreme Court raising two issues.

**ISSUES FOR DETERMINATION**

*(a) whether the Pensions Act of 1979 applies to and governs the mode of compulsory retirement of the respondent from the service.*

*(b) whether the respondent was validly compulsorily retired from the service in accordance with the relevant provisions of the Pensions Act.*

**HELD** (Unanimously dismissing the appeal per lead judgment of **UWAIFO JSC**)

***Master & Servant - Public servant***

1. The UBTH is, in the second schedule to the Pensions Act, 1979 (formerly Decree No. 102 of 1979), one of the organisations declared as Public Service under that Act. The respondent being employed in the Psychiatric Hospital which is part of the UBTH clearly makes him a public servant subject to the said Act. Apart from this, the appellant is among

the organisations formally declared Public Service under the Act by Government Notice No. 455 published in the Federal Republic of Nigeria Official Gazette No. 24, vol. 68 of 21 May, 1981. (p. 2331 A)

### ***Master & Servant - Retirement***

2. There can be no doubt that the respondent comes under the Pensions Act both as to when and how he may leave the service by way of retirement and as to his retirement benefits. Section 4 provides for when to retire. As can be seen, for subsection (2) to be applied, the three conditions must be met. First, it requires the intervention of the Minister of Health. It must be clear that the Minister has so requested an officer to retire from the service. Second, the officer must have attained forty-five years. Third, the officer must be given three months' notice in writing that the Minister requires him to retire. Three months' salary in lieu of such notice will not suffice as was purported in the letter to the respondent. I do not think it is right to hasten such officer out of office overnight or to give that impression. He must, in accordance with the law, be given three months to wind up his tenure in office. I am of the view that all three conditions must be satisfied. (p. 2333 B)

### ***Retirement - Burden of proof***

3. The burden is clearly on the appellant here to show that the provisions of s. 4 were faithfully complied with. There is nothing in the letter of the purported compulsory retirement to show that it was at the instance or intervention of the Minister. As he is the only appropriate authority who could require the respondent to retire from the service prematurely, it must be apparent on the face of the letter that he did so: see Wilson v. Attorney-General Bendel State (1985) 1 NSCC (vol. 16 pt. 1) 191 at 204 (p. 2333 G)

### ***Retirement - Statutory Power***

4. It is obvious that it was not the Minister who so directed or indeed who required the respondent to retire. To make matters worse, para. 2 of exhibit B purported to offer three months' salary and other entitle-

ments in lieu of notice to effect the immediate retirement of the respondent. Not even the Minister could do this under s. 4 (2) of the Act. He must act within the law. In Mayor etc. of Westminster v. London & North-Western Railway Co. (1905) Ac 426 at 430. Lord Macnaghten

B said:

*"It is well settled that a public body invested with statutory powers such as those conferred upon the corporation must take care not to exceed or abuse its powers. It must keep within the limits of the authority committed to it. It must act in good faith. And it must act reasonably."*

C The appellant purported to exercise power which it has not got. (p. 2334C)

### **NOTABLE POINTS OF INTEREST**

#### **UWAIFO JSC**

D 1. *Conditions that must be followed for a valid termination of appointment under Decree No. 92 of 1979*

Besides, there are strict procedural requirements that must be observed under the said Decree No. 92 of 1979, section 13, in the case of an E officer of the respondent's cadre which were not if it had been a case of termination of appointment. It is very well settled that unless those conditions are followed, such a termination is invalid: see Olaniyan v. University of Lagos (No. 2) (1985) 2 NWLR (pt. 9) 599. (p. 2329 A)

F

2. *Compulsory retirement - The burden of proof is on the employer*

To force a public servant into retirement, that is, before he gets to his retirement age is an unusual action against him in his career. Such an action could, admittedly, be due to a variety of reasons including ill-health, G redundancy, reorganisation, retrenchment, unproductivity etc., or even upon contractual or regulatory powers conferred on and exercised by the employer. When an employer relies on one or more of these reasons, he would be expected to have facts or the law in support. The burden is H on him to satisfy the court on this. To place the burden of proof wrongly on a party will usually lead to a miscarriage of justice. This is because the judge's opinion will normally be weighted unjustly on relevant issues against such a party: see Onobruhere v. Esegine (1986) 1 NWLR (pt.

Psychiatric Hospital Management Board v. Ejitagha (2000) 6 KLR 2327  
19) 779; (1986) 2 SC 385. (p. 2329 E)

### **AYOOLA JSC**

#### *3. How to justify the exercise of power granted by statute*

Where a person, body or authority claims to have acted pursuant to powers granted by a statute, such person body, or authority must justify the act, if challenged, by showing that the statute applied in the circumstances and that he or it was empowered to act under it. That has not been done by the appellant in this case. (p. 2343 B)

C

#### *4. Policy speech cannot supersede the law*

It is evident that the alleged "policy speech", was of no relevance to the case since, if the appellant had not been included in the list of bodies to which the Pension Act would apply, a Minister's policy speech would have no effect in achieving that result. A Minister's policy speech cannot supersede the law. (p. 2343 F)

### **REPRESENTATION**

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Albert Akpomudje Esq., for the appellant

A.B. Odiete Esq., for the respondent

### **CASES REFERRED TO**

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Olaniyan v. University of Lagos (No. 2) (1985) 2 NWLR (pt. 9) 599

Eperokun v. University of Lagos (1986) 4 NWLR (pt. 34) 162

Olatunbosun v. NISER Council (1988) 3 NWLR (pt. 80) 25

U.N.T.H.M.B. v. Nnoli (1994) 8 NWLR (pt. 363) 376

Onobruhere v. Esegine (1986) 1 NWLR (pt. 19) 779; (1986) 2 SC 385

Ejitagha v. Psychiatric Hospital Management Board (1995) 2 NWLR (pt. 376) 189 per Ubaezonu JCA at p. 197

Wilson v. Attorney-General Bendel State (1985) 1 NSCC (vol. 16 pt. 1) 191 at 204

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Mayor etc. of Westminster v. London & North-Western Railway Co. (1905) AC 426 at 430, Lord Macnaghten

**STATUTES REFERRED TO**

Psychiatric Hospital Management Board Act, 1979 (Formerly Decree No. 92 of 1979); s.13

Pensions Act, 1979 (Formerly Decree No. 102 of 1979); S. 4.

B

**LEAD JUDGMENT BY UWAIFO JSC**

The respondent was the plaintiff in this case. At all material times to this suit he was Chief Executive Officer (Accounts) in the services of the appellant at the Psychiatric Hospital, Uselu, Benin City. He was born on 15 December, 1942 and by the conditions of service would retire at the age of 60 years; that would be on 15 December, 2002.

By a letter dated 22 July, 1987, the respondent was dismissed from the service by the appellant. He contested this in court and on 12 September, 1990, the dismissal was declared null and void. Following the terms of the judgment, the respondent was reinstated to his position in the service. But shortly after, about four months, the respondent was served with a letter dated 4 December, 1990 by the appellant compulsorily retiring him from the service.

It was that notice of compulsory retirement which caused the respondent to go to court again to seek (1) a declaration that his compulsory retirement was null and void and without legal effect (2) a declaration that he is still in the service and entitled to all his dues in the form of salaries, allowances and emoluments and (3) an order directing his reinstatement or that he paid all his said dues until he attains the age of 60 years. This was calculated as N292,824.48. He also claimed N292,824.08 being arrears of salary and emoluments for December, 1990. On 6 January, 1992, in a judgment delivered by G.E. Edokpayi, J., sitting at the High Court, Benin, the claim was dismissed. He held, quite surprisingly, after referring to Decree No. 92 of 1979 that the respondent did not lead evidence to show that by the conditions of service between him and the appellant, the appellant could not terminate his appointment if it no longer required his services when indeed the issue was not termination of appointment. The simple issue was that of forced retirement or what was referred to as compulsory retirement.

Besides, there are strict procedural requirements that must be observed under the said Decree No. 92 of 1979, section 13, in the case of an officer of the respondent's cadre which were not if it had been a case of termination of appointment. It is very well settled that unless those conditions are followed, such a termination is invalid: see Olaniyan v. University of Lagos (No. 2) (1985) 2 NWLR (pt. 9) 599; Eperokun v. University of Lagos (1986) 4 NWLR (pt. 34) 162; Olatunbosun v. NISER Council (1988) 3 NWLR (pt. 80) 25; U.N.T.H.M.B. v. Nnoli (1994) 8 NWLR (pt. 363) 376.

Again, even more amazing, the learned trial judge made further observation imposing the burden of proof on the respondent to show that his forced retirement was not justified when he said as follows:

*"The plaintiff testified that the defendant cannot compulsorily retire him until he is 60 years of age. No provision of the General Orders or Decree No. 92 of 1979 was pointed at in justification or this assertion ... The plaintiff has not led evidence to establish the wrongfulness of his compulsory retirement and payment to him of three months' salary in lieu of notice. The mere fact that the plaintiff was retired before he attained the age of 60 years does not by itself prove the wrongfulness of his retirement."*

I think this legal faux pas must be corrected at once. To force a public servant into retirement, that is, before he gets to his retirement age is an unusual action against him in his career. Such an action could, admittedly, be due to a variety of reasons including ill-health, redundancy, reorganisation, retrenchment, unproductivity etc., or even upon contractual or regulatory powers conferred on and exercised by the employer. When an employer relies on one or more of these reasons, he would be expected to have facts or the law in support. The burden is on him to satisfy the court on this. To place the burden of proof wrongly on a party will usually lead to a miscarriage of justice. This is because the judge's opinion will normally be weighted unjustly on relevant issues against such a party: see Onobruchere v. Esegine (1986) 1 NWLR (pt. 19) 779; (1986) 2 SC 385.

That was very apparent in the learned trial judge's resolution of

issues in the present case. Apart from the excerpts made above from his judgment, he could not get out of the implication of wrongly placing the burden of proof. He went on again towards the end of his judgment to virtually repeat that:

B       *"The plaintiff has not show that the conditions of service be-*  
*tween him and the defendant do not allow the defendant to retire him*  
*compulsorily on condition that he is given three months' notice of such*  
C *retirement or he is paid three months' salary in lieu of such notice. He*  
*also has not shown that under the contract or conditions of service he has*  
*the right to reject the three months' salary in lieu of notice. He also has*  
*not shown that the defendant was wrong in its decision that the services*  
*of the plaintiff were no longer needed by the defendant."*

But on 4 July, 1994, the Court of Appeal reversed that decision.  
D It held that the onus was on the appellant to justify its action to retire the  
respondent as it did which it failed to discharge. It declared that the  
compulsory retirement of the respondent was null and void; that he is still  
in the services of the appellant and entitled to all his salaries, allowances  
E and emoluments; and ordered the immediate reinstatement of the respon-  
dent.

In its appeal against that judgment, the appellant has put forth  
two issues for determination, namely: (a) whether the Pensions Act of  
F 1979 applies to and governs the mode of compulsory retirement of the  
respondent from the service. (b) whether the respondent was validly  
compulsorily retired from the service in accordance with the relevant  
provisions of the Pensions Act. The respondent is of the view that only  
issue (b) arises for determination. From the facts of this case, I have no  
G doubt that the two issues are relevant. Certainly in resolving the issues,  
the Pensions Act 1979 must come into prominence.

The respondent being in the services of the appellant, his em-  
ployment was governed by the Psychiatric Hospital Management Board  
H Act 1979 (formerly Decree No. 92 of 1979). He was a chief Executive  
Officer (Accounts) on grade level 13. The third schedule to the said Act  
names the Hospitals under the control and management of the appellant  
Board (i.e. the Psychiatric Management Board). They are three in num-



ber, including the Psychiatric Hospital Uselu, Benin City. Each of these Hospitals is affiliated to a teaching hospital. The one in Benin City is affiliated to the University of Benin Teaching Hospital (UBTH).

**The UBTH is, in the second schedule to the Pensions Act, 1979 (formerly Decree No. 102 of 1979), one of the organisations declared as Public Service under that Act. The respondent being employed in the Psychiatric Hospital which is part of the UBTH clearly makes him a public servant subject to the said Act. Apart from this, the appellant is among the organisations formally declared Public Service under the Act by Government Notice No. 455 published in the Federal Republic of Nigeria Official Gazette No. 24, vol. 68 of 21 May, 1981.** As regards the present case, it is the issue of retirement under that Act that is relevant as contained in section 4 (2). The lower court was therefore in error when it observed in this case reported as Ejitagha v. Psychiatric Hospital Management Board (1995) 2 NWLR (pt. 376) 189 per Ubaezonu JCA at p. 197 as follows:

*"There is no evidence before the lower court that the appellant's appointment is a pensionable one or that it is subject to the Pensions Act. The mere fact that a person is said to be in public office does not ipso facto entitle him to pension or bring his services under the Pensions Act so as to subject his appointment to the provisions of s. 4 (2) of the Act. The Second Schedule to the Act lists the Organisations and establishments declared as a public service under the Act. There are over one hundred of such Federal Government parastatals listed in the Second Schedule. The Psychiatric Hospital Management Board (respondent) is not there. The respondent cannot retire the appellant under a law that does not apply to or regulate his appointment S. 4 (2) of the Pensions Act, Decree No. 102 of 1974 does not apply to the appointment or conditions of service between the appellant and the respondent."*

The learned Justice's observation was obviously per incuriam as his attention was not drawn to the relevant provisions of the law on the point. The appellant (as respondent) in the Court below had submitted before that court that the Pensions Act applied to the respondent (as appellant) in that court and that he was retired under S. 4 (2) of that Act.

He submitted further that Decree No. 92 of 1979 which set up the Board does not deal with retirement but that s. 13 thereof deals with discipline and removal of some categories of staff, including administrative staff. This was in contrapose to the contrary argument that the only way open by which the respondent could have been removed from office was to comply with the said s. 13. Unfortunately, the court below then proceeded to consider the provisions of the said s. 13 of the Act establishing the Board which lay down the procedure for removing an officer of the status of the respondent from office. It then observed [1995] 2 NWLR (Pt. 376) at p. 198 per Ubaezonu JCA as follows:

*"It is not denied by the respondent that the retiring age of the appellant is 60. It is also not denied that at the time of the purported compulsory retirement, the appellant was only 49 years of age . Before the appellant should rightly be deprived of his eleven remaining years of service he ought to be informed of the reason and given the opportunity of controverting the deprivation of that right. The provisions of s. 13 (1) of Decree 92 of 1977 (sic: 1979) ought to be complied with.*

*The respondent does not pretend that it complied or purported to comply with s. 13 (1) of Decree 92 of 1977 dealing with removal of its staff of the appellant's cadre. It acted under the Pensions Act which does not apply."*

It was on that basis the appeal was allowed. This was an error. It would have been inappropriate, in my view, to purport to retire the respondent in the circumstances by resorting to the provisions of s. 13 which smacks exclusively of the impugment of his character as that could not be explained other than as a measure of discipline. But the letter of 4 December, 1990 (exhibit B) written to the respondent by the Secretary to the appellant Board was headed "COMPULSORY RETIREMENT" and the body reads:

*" I am directed to inform you that the Board, at its 51st Regular Meeting held on 3rd and 4th December, 1990, decided that it no longer requires your services. You are therefore compulsorily retired with immediate effect.*

*2. You will be paid three months' salary lieu of notice and your*

*other entitlements, less any outstanding debt owed to the Psychiatric Hospital, Urelu, Benin City.*

3. *You are to complete the necessary retirement papers for processing and ensure that you return to the Medical Director, any hospital property in your possession and obtain a clearance letter from him.*" [Emphasis mine] B

**There can be no doubt that the respondent comes under the Pensions Act both as to when and how he may leave the service by way of retirement and as to his retirement benefits. Section 4 provides for when to retire as follows:** C

*"4 (1) Every officer shall retire upon attaining the age of sixty years, so however that for officers retiring on or before 31st March, 1977, the compulsory retiring age shall be fifty-five years.*

*(2) The minister may require an officer to retire from the service at any time after he has attained the age of forty-five years subject to three months' notice in writing of such requirement being given."* D

**As can be seen, for subsection (2) to be applied, the three conditions must be met. First, it requires the intervention of the Minister of Health. It must be clear that the Minister has so requested an officer to retire from the service. Second, the officer must have attained forty-five years. Third, the officer must be given three months' notice in writing that the Minister requires him to retire. Three months' salary in lieu of such notice will not suffice as was purported in the letter to the respondent. I do not think it is right to hasten such officer out of office overnight or to give that impression. He must, in accordance with the law, be given three months to wind up his tenure in office. I am of the view that all three conditions must be satisfied.** E F G

**The burden is clearly on the appellant here to show that the provisions of s. 4 were faithfully complied with. There is nothing in the letter of the purported compulsory retirement to show that it was at the instance or intervention of the Minister. As he is the only appropriate authority who could require the respondent to retire from the service prematurely, it must be apparent on the face** H

**of the letter that he did so: see Wilson v. Attorney-General Bendel State (1985) 1 NSCC (vol. 16 pt. 1) 191 at 204 where Nnamani JSC, who read the leading judgment, said inter alia:**

*"Sections 1 and 3 (1) of Act No. 10 of 1976 had as indicated earlier vested in the appropriate authority the power to remove or dismiss a public officer .... There is nothing whatsoever in exhibit 2A to indicate that the act of dismissal of the appellant was the act of the appropriate authority, nor is there any evidence either that he authorised or directed any person to so dismiss him."*

The Secretary to the appellant Board who wrote exhibit B simply said he was directed to inform the respondent that "the Board, at its 51st Regular Meeting held on 3rd and 4th December, 1990, decided" that his services were no longer required. **It is obvious that it was not the Minister who so directed or indeed who required the respondent to retire. To make matters worse, para. 2 of exhibit B purported to offer three months' salary and other entitlements in lieu of notice to effect the immediate retirement of the respondent. Not even the Minister could do this under s. 4 (2) of the Act. He must act within the law. In Mayor etc. of Westminster v. London & North-Western Railway Co. (1905) Ac 426 at 430. Lord Macnaghten said:**

*"It is well settled that a public body invested with statutory powers such as those conferred upon the corporation must take care not to exceed or abuse its powers. It must keep within the limits of the authority committed to it. It must act in good faith. And it must act reasonably."*

**The appellant purported to exercise power which it has not got.** Although the lower court misunderstood the essence of exhibit B by which that power was exercised, it was right in declaring it invalid and allowing the appeal against the compulsory retirement of the respondent. It was also right in ordering the reinstatement of the respondent to his office and the payment of all his salaries, allowances and emoluments. I accordingly dismiss this appeal as totally lacking in merit. I award the respondent N10,000.00 costs against the appellant.

## WALI JSC

I have had the privilege of reading before now, the lead judgment of my learned brother Uwaifo, JSC and I entirely agree with his reasoning and conclusion for dismissing the appeal.

The main issue for determination in this appeal was the plaintiff/ B respondent's compulsory retirement by the defendant/appellant as per Exhibit B. Before Exhibit B, plaintiff/respondent was dismissed from the defendant/appellant service against which he successfully contested in the High Court. The dismissal was declared null and void and he was C reinstated on the court's order.

Briefly stated, the facts of the case are as follows -

The plaintiff/respondent was/is an employee of the defendant/ D appellant. His appointment was summarily terminated by defendant/plaintiff as per Exhibit B by compulsory retirement. Before his summary termination, he was earlier dismissed by the defendant/plaintiff. He successfully challenged the dismissal in court which declared the dismissal null and void. He was reinstated on that court's order some few months E after his reinstatement the defendant/appellant compulsorily retired him from the service. The plaintiff /respondent again challenged his retirement by filing an action in the High Court which he lost. He successfully F appealed to the Court of Appeal, Benin Division, and in the majority judgment [2-1] of that court delivered by Ubaezonu JCA, it allowed the appeal and ordered that his purported retirement from service by the defendant/appellant was null and void and ordered his immediate reinstatement. Hence this appeal by the defendant appellant to this court.

The learned trial judge after reviewing the pleadings and the evidence adduced in support thereof, he opined thus:- G

*"The Plaintiff testified that the Defendant cannot compulsorily retire him until he is 60 years of age. No. provision of the General Orders or Decree No. 92 of 1979 was pointed at in justification or proof of this H assertion. The Plaintiff has not pleaded or led any evidence to show that by the conditions of service between him and the Defendant, the Defendant cannot terminate his appointment if the Defendant not longer requires the services of the Plaintiff. The Plaintiff has no led evidence to*

*establish the wrongfulness of his compulsory retirement and payment to him of three months salary in lieu of notice. The mere fact that the Plaintiff was retired before he attained the age of 60 years does not be itself prove the wrongfulness of his retirement."*

B And the Court of Appeal in allowing the appeal against the decision (supra), concluded as follows:-

*"In the instant case on appeal, the respondent had dismissed the appellant from its services. Following the judgment in Suit No: B/335/87 (Exhibit A) the respondent was compelled to reinstate the appellant. Subsequently thereafter, and like a bolt from the blues, the respondent purportedly retired the appellant. It is not denied by the respondent that the retiring age of the appellant is 60. It is also not denied that at the time of the purported compulsory retirement, the appellant was only 49 years of age. Before the appellant should rightly be deprived of his eleven remaining years of service he ought to be informed of the reason and given the opportunity of controverting the deprivation of that right. The provisions of Section 13 (1) of Decree 92, of 1977 ought to be complied with.*

*The respondent does not pretend that it complied or purported to comply with Section 13 (1) of Decree 92 of 1977 dealing with removal of its staff of the appellant's cadre. It acted under the Pensions Act which does not apply. This appeal therefore succeeds."*

F Learned counsel for the appellant is correct in his submission that -

*"With effect from 6th May, 1981, the Appellant Board was listed as No. 8 among the organisations declared Public Service under the Pensions Acts No. 102 of 1979 pursuant to the provisions of section 24 of the Act."*

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*"It is observed that in deciding the issue of whether the Pensions Act, Cap. 346 LFN 1990, applies to, or governs the service and tenure of office of the Respondent, the Court of Appeal, with utmost respect, confined itself rather too severely to a mere reading of the list of organisations specified in Schedule 2 to the Act; without directing itself to section 24 of*

*the Act which contains dynamic provisions inserted therein. It should be noted that these provisions duly take care of such other organisation as may from time to time be added to the organisations originally listed in Schedule 2 to the Act, for example: the additional bodies declared in Government Notice No. 455 (supra)."*

I entirely agree with this submission of learned counsel on this issue. Section 4 (2) of the Act provision as follows:-

*"4 (2) The Minister may require an officer to retire form the service at any time after he has attained the age of forty-five year subject to three month's notice in writing of such requirement being given."*

The wording of Section 4 (2) of the Act does not contain express or implies provision for a summary retirement of an officer form the service as purported to be done by the appellant in Exhibits B. There is nothing suggestive in Exhibit B that the respondent was being retired under Section 7 (1) or (2) of the Act. In order to validly retire a servicing Officer under Section 4 (2) of the pensions Act, the affected officer must -

- (i) have attained the age of forty-five years;
- (ii) be given three months notice in writing of such requirement being given; and that such a request
- (iii) have been authorised by the Minister himself or by delegation as required by law.

There is nothing in the totality of the evidence presented in this case that there was even exercise of such powers by the Minister directly or through proper delegation of the exercise of the powers vested in him by Section 4 (2) of the Act. The position of the non - validity of Exhibit B was further compounded by non-compliance with the 3 months notice, and not three months salary in lieu of notice as purportedly done in that Exhibit B

It is for this and the fuller reasons in the lead judgment of my learned brother Uwaifo JSC, that I also hereby allow this appeal and adopt the consequential orders in the lead judgment, with that of costs inclusive.

**ACHIKE JSC**

I have had the privilege of reading, in draft, the judgment of my learned brother, Uwaifo, JSC. I agree with him that the appeal should be dismissed.

B The respondent had earlier been dismissed from appellant's service. He questioned the dismissal in court and was reinstated to his office by the order of the court, which declared the dismissal null and void. That was on 12th September, 1990. Just about three months thereafter, the appellant by a letter dated 4th December, 1990 summarily C but compulsorily retired the respondent from its service. Again, the respondent contested his retirement in the Benin High Court praying the court to declare the said compulsory retirement null and void, that he was still in the service, entitled to all his dues and also that the court D should direct his reinstatement or be paid his entitlements until he attains the age of 60 (the appellant being only 49 years at the material time). His claim was dismissed but by a split-decision of 2:1, his appeal to the Court of Appeal, Benin Division was allowed. The lower court nullified his E purported compulsory retirement from service and ordered his immediate reinstatement.

Dissatisfied, the appellant Board appealed to this Court.

A little background information is necessary. The respondent F was a Chief Executive Officer (Accounts) on grade level 13 at the Psychiatric Hospital Uselu, Benin City attached to the University of Benin Teaching Hospital (UBTH). His employment unquestionably was governed by the Psychiatric Hospital Management Board Act 1979 (formerly G Decree No. 92 of 1979). The third schedule to the aforesaid Act lists hospitals under the control and management of the appellant Board of which Psychiatric Hospital Uselu, Benin City is included, and as earlier stated, attached to the UBTH. The UBTH is listed in the second schedule to the Pensions Act, 1979 (formerly Decree No. 102 of 1979) and is H stated as Public Service under that Act. The respondent, therefore, was undoubtedly a civil servant under the said Act. Furthermore, by Government Notice No. 455 in Nigeria Official Gazette No. 24, Vol. 68 of 21st May, 1981 the appellant Board was declared Public Service under the



said Pensions Act, 1979.

Now the Court of Appeal in allowing the appeal of the appellant (herein respondent) per the leading majority judgment delivered by Ubaezonu, JCA observed, inter alia,

*"The respondent does not pretend that it complied or purported to comply with S. 13 (i) of Decree 92 of 1977 dealing with removal of its staff of the appellant's cadre. It acted under the Pensions Act which does not apply."* (emphasis supplied by me)

Clearly, Ubaezonu, JCA was right when he opined that the removal of the respondent herein from office under S. 13 (i) of Decree 92 of 1977, which stipulates procedure for removal of officers of respondent's cadre by the appellant was ineffectual. But when he further stated in the last sentence that "it acted under the Pensions Act which does not apply", that was clearly erroneous because he had overlooked the aforesaid Government Notice No. 455 of 21/5/81 which had formally declared UBTH as one of the organisations declared as Public Service under the 1979 Act.

It is manifest that the respondent herein could not be removed from office under section 13 of the Act of 1977 under the circumstances of this case as his character was never in issue having regard to the letter, Exhibit B whereby his service was compulsorily terminated. Thus the basis for allowing the appeal by the majority judgment of the lower court based on S. 13 of the Act was erroneous. Nevertheless, it is common ground that Exhibit B a letter dated 8/12/90 written by the Secretary to the appellant Board, headed "COMPULSORY RETIREMENT" precipitated the respondent's action against the Board. The relevant content of Exhibit B reads thus:

*"I am directed to inform you that the Board, at its 51st Regular Meeting held on 3rd and 4th December, 1990, decided that it no longer requires your services. You are therefore compulsorily retired with immediate effect.*

*2. You will be paid three months' salary lieu of notice and your other entitlements, less any outstanding debt owned to the Psychiatric Hospital, Uselu, Benin City.*

3. *You are to complete the necessary retirement papers for processing and ensure that you return to the Medical Director, any hospital property in your possession and obtain a clearance letter from him."*

In the present appeal, appellant has identified two issues for the determination by the court, namely, whether the Pensions Act 1979 applied and governs the mode of compulsory retirement of the respondent from the service, and secondly whether the respondent was validly and compulsorily retired from the service in accordance with the provisions of the Pensions Act. Respondent, in his own view identified only the second issue as appropriate for determination. In my view, it is manifest that the understanding of the second issue this would readily be best appreciated against the background of the first issue; so both issues arise and are relevant to the resolution of the controversy in this appeal. Perhaps, to avoid under repetition the two issues should be taken together.

We had earlier shown that the Pensions Act applies to the respondent's service of employment between him and the appellant Board. It is section 4 (2) that is appropriate and directly in point in the circumstances of this case, particularly having regard to Exhibit B which had been reproduced in this judgement. It states:

*"4 (2) The Minister may require an officer to retire from the service at any time after he has attained the age of forty-five years subject to three months' notice in writing of such requirement being given."*

The simply question that arises is whether there was due compliance with the provisions of section 4 (2) of the Pensions Act, having regard to the content of Exhibit B? To comply with section 4 (2), three conditions must be satisfied, namely,

- (1) the Minister must initiate the retirement of the officer (no doubt he may delegate this function);
- (2) the officer must have attained the age of forty-five years and
- (3) the officer must be given three months' notice in writing of such retirement being given.

Clearly, the onus is on the appellant Board to establish to the satisfaction of the trial court that each of the above three conditions has been strictly complied with. Thus, for example, paying the officer three months'

salary in lieu of the three months' notice which is aimed at precipitating the immediate exit of the respondent from service is completely at variance with the provisions of section 4 (2). Furthermore, when Exhibit B states that its author i.e. the Secretary to the Board, was directed to say that the Board no longer requires the respondent's service, both the Secretary and the Board were acting ultra vires the provisions of S. 4 (2). Neither of these two bodies has statutory power to act in the decision-making to retire the respondent. Unambiguously, it is section 4 (2) that invests the power of compulsory retirement of officers of the respondent's cadre from the service of the Board on the appropriate Minister. No doubt, there could be a delegation of this function by the Minister; this must clearly be borne out by proper evidence and must be evident in the body of Exhibit B. No such evidence was established nor alleged. Therefore, Exhibit B was a worthless document that should be treated with levity by the respondent.

On the evidence placed before both the trial court and the Court of Appeal, the appellant Board lacked the competence to compulsorily retire the respondent. To that extent only, the lower court was correct in declaring Exhibit B invalid, null and void and consequently allowing the appeal against the respondent's compulsory retirement as well as ordering the payment to the respondent of all his salaries, allowances emoluments and his reinstatement.

I would accordingly dismiss the appeal as being unmeritorious and award N10,000.00 costs to the respondent.

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### KALGO JSC

I have had the privilege of reading in advance the judgment of my learned brother Uwaifo JSC in this appeal and I entirely agree with him that there is no merit in the appeal.

Although the appellant was declared public service under the Pensions Act (Decree No. 102/1979) Cap. 346 of Nigeria 1990, it had no power by itself to retire or dismiss the respondent or any employee under it. Section 4 (2) of the said Act, which the appellant purported to act

under, only empowered the Minister of Health or any person authorised by him to retire the employee from service. The appellant failed to show any compliance with the provisions of Section 4 (2) aforesaid or any valid and legal authority why they compulsorily retired the respondent.

B The retirement cannot therefore be upheld and must be declared as null and void.

It is for this and more detailed reasons given by my learned brother Uwaifo JSC in the leading judgment that I also dismiss this appeal as being without merit. I abide by the orders of costs made in the leading judgment.

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### AYOOLA JSC

D I have had the privilege of reading in draft the judgment delivered by my learned brother Uwaifo, JSC. I agree with him that this appeal should be dismissed.

It is evidence that, apart from consensual and voluntary termination by either of the parties, the respondent's service could have been determined by the appellant either acting pursuant to section 13 (1) of Decree 92 of 1977 which deals with removal of staff of the respondent's cadre for cause only; or, if acting on delegation by the Minister pursuant to section 20 (1) of the Pensions Act, by the Minister acting through the appellant pursuant to section 4 of that Act.

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Ubaezonu, JCA, was correct when, in delivering the leading judgment of the Court of Appeal, he said that the "respondent does not pretend that it complied or purported to comply with section 13 (1) of Decree 92 of 1977 dealing with removal of its staff of the appellant's cadre." He was not quite right when he said that: "It acted under the Pensions Act."

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He was in error in holding that the Pensions Act did not apply. That error occurred because his attention was not drawn to the Government Notice No. 455 published in the Federal Gazette 24, Vol. 68 of 21st May, 1981. On this appeal, it was not contended by the respondent that the Pensions Act did not apply.

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The only contentious question was whether the respondent was validly compulsorily retired in accordance with the provisions of the Act. The appellant's counsel proceeded on the footing that once the question of the applicability of the Pensions Act is resolved in favour of the appellant, validity of the retirement would follow as of course. He was in error in that approach. The question of the applicability of the Act and that of the validity of the retirement purported to be made under the Act are two separate questions. The latter only arises on an affirmative answer to the former. Where a person, body or authority claims to have acted pursuant to powers granted by a statute, such person body, or authority must justify the act, if challenged, by showing that the statute applied in the circumstances and that he or it was empowered to act under it. That has not been done by the appellant in this case.

The appellant sought to justify the removal of the respondent when it averred by its statement of defence that: "Defendant invoked Pension Decree No. 102 which commenced on 1st April, 1974 Defendant shall rely on this Pension Decree 102 of 1974 (sic) together with the policy speech at the trial." The "policy speech" referred to, as averred in paragraph 3 (a) of the statement of defence, was one alleged to have been made by the Minister of Health sometime in 1991 that: "conditions of service for the teaching Hospital and specialist Hospital staff are as available in the Federal Civil Service."

It is evident that the alleged "policy speech", was of no relevance to the case since, if the appellant had not been included in the list of bodies to which the Pension Act would apply, a Minister's policy speech would have no effect in achieving that result. A Minister's policy speech cannot supersede the law. In the face of the averment in paragraph 7 of the amended statement of claim that " the Defendant has no right whatsoever to retire compulsorily the plaintiff from the service of the Defendant when the Plaintiff has not reached the retirement age of 60 years or when the Plaintiff has committed no wrong .....", it was incumbent on the appellant to show that it had such power or that it acted on delegation by the Minister charged with responsibility for Pensions who had. Any such delegation must, in terms of section 20 (1) of the Pensions Act, be

by "order published in the Federal Gazette." No such delegation of power has been alleged or established by the appellant.

I am in entire agreement with my learned brother Uwaifo, JSC, when he said that under section 4 of the Pensions Act, Cap 346: LFN  
B 1990) the Minister was the only appropriate authority who could require the respondent to retire from the service prematurely. The appellant  
which averred that it "invoked" the Pensions Act without establishing any delegation in writing of the Minister's power, pursuant to section 20  
C (1) of the Pensions Act, cannot be said to have come any way near to justifying lists act.

Being in complete agreement with the conclusions reached by my learned brother Uwaifo JSC, and the fuller reasons he gives, I too dismiss the appeal and abide by the order for costs he makes.  
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