

THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT MWANZA

REVISION NO 39 OF 2017

*(From the Original Award Decree of Decision No CMA/MZA/ILEM/149/2014
Before Lucia Chrisantus, Arbitrator)*

SAAD S/O NTALARUKA.....APPLICANT

VERSUS

PHILIPS PHARMACEUTICALS.....RESPONDENT

RULING

6.12.2018 & 15.1.2019

Matupa, J.

The applicant has taken issues with the decision of the commission in his computation of its award, by not including a subsistence allowance. The application by the applicant asks the court to order that he be paid subsistence allowance for the whole period after his termination to the period he was repatriated.

Mr. Kasim Gilla for the respondent took exception with the application contending that, it would appear the applicant is seeking the review of the

computation by the registrar, rather than the decision of the CMA. In his opinion this is not an application that is bone out of section 91(1)(a)(b) which only directs that the award of the commission is the subject of review and not the computation of the registrar. This contention is not true, because the application is not based on the calculation by the Registrar, but the calculation of the Commission itself.

On the 13th day of July, 2015 the Commission was not satisfied that the applicant was terminated. Thus, it ordered re-instatement of the applicant. The Commission also ordered the payment of some statutory reliefs amounting to shillings 12,070,000/= this is according to the decision of Lucia Chrisantus, which is dated 13th July, 2015. From the application, this decision is not a subject of the present revision. It would appear that the employer was not contented to re-engage the applicant. Thus, the commission again drew an order on the 15th of May, 2017 for statutory payments resulting from the developments after the decision of the employer not to re-engage the applicant, in terms of section 40 (3). These included an item on salaries from August, 2015 to April, 2017.

There is record that the respondent paid the amount on the 20th of June, 2017. The applicant prays that he has also to be paid an allowance

for the days he was delayed to be repatriated. The commission disallowed the claim for the allowances, for the reason that the applicant would benefit twice, for the period he was paid a salary. This means that if the employer paid a salary for the period between July, 2015 and April, 2017, and also the employer paid salaries for the re-instatement, then the termination was on the date he paid the last salary in April, 2017. Going by this reasoning, at least from 1st May, to 20th June, 2017 the applicant was not repatriated. The remark that the applicant was to benefit twice is not therefor bone by the order of 15th May, 2017. This is because on that day, already the employment was terminated.

I think the application has merit. Section 40(3) of the Employment and Labor Relations Act provides as follows:

"Where an order for instatement or re- engagement is made by an arbitrator or the court, and the employer decides not to re-instate the employee, the employer shall pay compensation of twelve months wages in addition to wages due and other benefits from the date of unfair termination to the date of final payment."

There is no dispute that the employee elected not to re-engage the employee after the decision of 13th July, 2015.

There is no evidence when did the employer make the decision not to re-engage the applicant, except for the salaries the employer paid for the period he was supposed to have engaged the applicant, notwithstanding that the payment was made as a result of the order of the commission. It would appear, this was the difficulty, which the Commission faced on the 15th of May 2017 when it was dealing with the matter. The commission thus decided to resort to payment of a salary for the period the respondent refused to re-instate the applicant. As such, I will take it that he was entitled to his statutory payments of twelve months in addition to the salaries he paid the applicant. He was also entitled to a kind of a maintenance allowance for the period he was not repatriated.

There is no dispute that the applicant was paid this payment. The applicant was also paid "countable salaries" for the months of August, through April, 2017. There was no explanation for this payment, except for the fact that, he was decried to beat work for all this period. There is no material before me to suggest any other day when the decision not to engage the applicant was made. The applicant was therefore entitled to payment of some allowance for the period after he was so unlawfully, terminated.

The difficult task in cases of this nature is to determine the kind of maintenance allowance payable to an employee during the period when he awaits repatriation. Unless an agreement is made for a different allowance or evidence is made available of a kind of an allowance to be paid, good sense would require that the applicant is entitled to some payment equivalent to his salary for that period.

I am making this decision consciously, aware that the allowance under the section was not meant to be a reop off, but to assist the employee to subsist when awaiting repatriation. Since this is merely a form of an allowance, and this is because it cannot be a salary in the absence of a contract of employment, it has to be net of any deductions. I will therefore revise the decision of the Commission and allow an allowance in a form of a salary from the month of May to 20th June, 2017 as an allowance envisaged under section 40(3) of the EALA; and this is in the absence of evidence of any other form of allowance.

This application is allowed to the foregoing extent.

Dated at Mwanza, this 15th January, 2019.


S.B.M.G. Matupa,
Judge

Date: 15.01.2019

Coram: Hon. Matupa, J

Applicant: absent

Respondent: Liborius Bahabile Legal Officer for the Respondents

B/c: I. Isangi

Court:

The ruling is delivered on the 15th January, 2019 in the absence of the applicant and in the presence of Mr Liborious Bahabile Legal Officer for the Respondent this 15th day of January 2019.



At Mwanza
15th January, 2019


S.B.M.G. Matupa
Judge