IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT MWANZA

LABOUR REVISION No. 67 & 70 OF 2020

(ORIGINAL CMA/GTA/134/2019)

GEITA GOLD MINING LIMITED ---------- APPLICANT

VERSUS

DAMIAN BUTAGE ---------- RESPONDENT

JUDGMENT

12th February & 27th April, 2021

TIGANGA, J

The respondent in this application, hereinafter the employee, was employed by the applicant, a Gold Mining Company, hereinafter the employer, as a trainee Human Resources Officer from 25th January 2010 and was later promoted to a Senior Human Resources Officer on permanent basis, until when his employment was terminated by the respondent.

By virtue of his position he was trusted to access confidential information, which in handling was supposed to abide to policy and regulations of the employer. In July 2018, the applicant received a complaint that the respondent was misusing confidential information for his benefit. Following that information, the investigation was conducted which went as far as calling the respondent to show cause why the disciplinary hearing should not be conducted. The respondent did not attend as required as a result 24th October, 2018, the hearing proceeded exparte. The employee was charged for breach of trust in performance of duty, misuse of position for personal interest, misappropriation and misuse of the company property for personal interest, failure to observe duty of confidentiality, and other serious breaches of organization rules or policy which have the effect of causing an irreparable break down in employment relationship between the employer and employee.

Initially, at the disciplinary hearing, the employee appeared and requested the hearing to be adjourned on allegation that, there was a case pending at the CMA and High Court on the matter. That, despite the fact that the chairperson of the disciplinary hearing asked the respondent to wait for the decision but the employee left the premises before he received

the answer. After being satisfied that the matter pending before CMA and High Court had nothing to do with the disciplinary hearing, the hearing proceeded in the absence of the employee, a result of which the respondent was found guilty as charged.

The appeal against the verdict was unsuccessful; therefore he was terminated for misconduct, and was paid all his entitlement.

The employee filed the Labour Dispute before the CMA, which was resolved in his favour on 28th July 2020. The decision aggrieved the employer, hence this application

The application was preferred by the Notice of Application, Chamber summons, and supported by the affidavit sworn by Charles Francis Masubi, who introduced himself as the Senior Human Resources Manager of the employer, authorized to depose on facts in this case. The affidavit, narrates the historical background, and the sequence of events as indicated above.

The notice of application, and the chamber summons raises about eleven complaints, which for purposes of brevity, I will paraphrase them without necessarily distorting the meaning, as follows;

(a) That the arbitrator failed to properly analyse evidence consequence of which he reached at a wrong conclusion,

(b) That the arbitrator erred in law and fact by holding that the respondent was terminated for claiming salary increments,

(c) In the alternative and without prejudice to grounds (a) and (b) above, that the arbitrator erred in law and fact for failure to consider that the respondent committed the disciplinary offence he was found guilty with,

(d) That the arbitrator erred in law and facts by holding that the respondent was denied right to be heard during the disciplinary hearing,

(e) That the Arbitrator erred in law by faulting the procedural fairness of termination based on the alleged irregularities in filling the Hearing forms,

(f) That the arbitrator erred in law and facts by admitting and relying on a document that was not produced by the respondent during the disciplinary hearing and the appeal,

(g) That the arbitrator erred in law by ordering reinstatement without loss of remuneration as a remedy for unfair termination

when there was proof that termination was substantially and procedurally fair,

(h) In the alternative and without prejudice from the foregoing, the Arbitrator erred in law by ordering, reinstatement taking into consideration that the circumstances surrounding the termination suggested that a continued employment relationship would be intolerable,

(i) That the arbitrator erred in law for issuing contradicting decision in relation to the award of compensation;

(j) That the arbitrator erred in law and facts by ordering payment of repatriation allowance and subsistence allowance when there was proof that the respondent was paid repatriation costs upon termination, and

(k) That the arbitrator erred in law by awarding payment of notice and severance pay when the termination was due to mis conduct

The applicant proposed eight issues for determination namely,

(i) Whether the arbitrator properly analysed the evidence on record in reaching a decision that there was no valid and fair reason for termination,

(ii) Whether the respondent was denied an opportunity to be heard during the disciplinary hearing,

(iii) Whether the Arbitrator was right to conclude that the procedure for termination was unfair merely because of the alleged irregularities in the hearing forms while there was evidence that the hearing committee was properly constituted,

(iv) Whether the arbitrator was right to admit and rely upon a document that did not form part of the records at the disciplinary hearing or the appeal,

(v) Whether the Arbitrator was right to order reinstatement without loss of remuneration in the circumstances of this case,

(vi) Whether the arbitrator was right in law for issuing contradicting decision in relation to the award of compensation,

(vii) Whether the respondent was entitled to an order of payment of repatriation and subsistence allowance, and

(viii) Whether the respondent, is entitled to payment of notice and severance pay

The application was opposed by the employee who filed the notice of opposition in which he mainly disputed all eleven complaints raised by the employer in the notice of application. He generally said the arbitrator correctly analysed the evidence, and rightly held that the respondent's termination based on his claim of salary increase which was not a valid reasons which was also done without him being given the right to be heard thereby without following fair procedure.

He also stated that, the award based on the evidence adduced by the parties and reached at the just and appropriate orders and reliefs to the employee. It in the end asked the application to be dismissed for want of merit.

Together with the notice of opposition, he filed the counter affidavit in which he almost disputed all contentious facts, and together with it he

also filed the notice of representation which introduced one Erick Rutehanga, Advocate as the representative of the employee.

Beside Revision No. 67 of 2020, filed by the employer, the employee filed a cross Revision No. 70 of 2020 in respect of the same dispute. In that cross application, the employee asked for the court to call for the record of the Commission for Mediation and Arbitration for Geita in respect of the same award and revise it and set it aside on the ground that,

a) The said award is tainted with errors material to the merits of the subject matter causing injustice to the Applicant,
b) The said award is unlawful, illogical or irrational,
c) The award is not supported by the evidence adduced by the parties,

He also asked for cost and any other reliefs as the court may deem just to grant.

In the affidavit filed in support of the application, besides pointing out the background information in as far as the dispute is concerned, he raised the complaint as follows, that the award of eight months salary as additional to unpaid salary during the termination and awarding of severance pay of three years and awarding eight years instead of ten years

was made in error. The application was also objected by the employer by the counter affidavit sworn by Mr. Kyariga Kyariga. In paragraph 8 of the counter affidavit, he reiterated eight issues in the affidavit filed in support of Revision No. 67 of 2020 and asked the court to find that the award be set aside and find that the termination was substantively and procedurally fair.

By the order of this court, upon oral application made by Mr. Rwazo and conceded by Mr. Rutehanga, on 15/12/2020 the two revision applications that is Revision No. 67 of 2020 and 70 of 2020 were consolidated, to be Labour Revision No. 67 and 70 of 2020. They were ordered to be disposed by way of written submissions.

Although the submission in chief filed in support of Revision No. 67 of 2020 contained 19 pages, most of the information contained therein is just repetitions of the content of the affidavit and other information which are already on records. For purposes of brevity, I will not reproduce them in the manner presented by the applicant, but without necessarily distorting the message, I will summarize it as brief as I can.

In his submission in chief, he decided to argue grounds No. 1, 2 and 3 together as they are interrelated, while the rest of the grounds were argued separately. Arguing the first issue, which represent the three first grounds, which is whether the arbitrator properly analysed the evidence on record in reaching a decision that there was no valid and fair reason for termination?

He submitted that there was enough evidence to support the findings of the disciplinary hearings to find the employee guilty of the disciplinary offence he was accused with. He submitted that the law regulating the termination as provided under section 37(2) of the Employment and Labour Relations Act, [366 R.E 2019] read together with Rule 9(4) of the Employment and Labour Relations (Code of Practice) Rule, 2007 were complied with as the employee was charged and found gilty by the disciplinary hearing committee.

He submitted that the offence he was charged with, are part of disciplinary policy of the applicant in Clause 12.3.5, 12.3.12, 12.4.8, 12.9.2 and 12.16.1.

The counsel for the employer further submitted that, there were three witnesses who proved the charges and that the reasons for termination were fair in terms of rule 12(1) of the Employment and Labour Relations (Code of Practice) Rule, 2007

He submitted further that, the acts committed by the employee, amounts to gross dishonest which according to law, is one of the serious misconduct to justify termination. He cited the decision of my brother Hon. A.E. Mwipopo, J in the case of **U.T.T Project & Infrastructure Development PLC vs Yusuph Nassor,** Consolidated Revision No. 903 of 2019, he submitted that, basing on the evidence on record, the applicable policy and law, the applicant proved the case on the balance of probabilities, thus resolving the 1st, 2nd, and 3rd grounds of appeal in the affirmative.

Regarding the second issue, as to whether the applicant was denied an opportunity to be heard during the disciplinary hearing. He submitted that, on 04/09/2018 the employee was informed of the accusation of misconduct and was suspended. On 17/10/2018 he was served with the notice of the disciplinary hearing, which was scheduled to take place on 24/10/2018 at 14.00hrs, the employee attended at the hearing venue, but

decided to leave the hearing venue despite being asked to wait for Committee's decision on the letter served to the employee on hearing date seeking adjournment on the ground that, there were other cases pending before the CMA and the High Court, but to the best of the employer's knowledge there was no any case.

According to him, even on the appeal, the employee produced no evidence to prove his appeal; it was proved that the employer used flimsy ground to obstruct the cause of justice. He submitted that the disciplinary hearing proceeded in terms of Rule 13(6) of the code of Good practice, which allows the employer to proceed with the disciplinary hearing in the absence of employee where an employee un reasonably refuses to attend the hearing. He cited the case of **Oswald Chenyenge vs Pangea Mineral Limited** (2015) L.C.C.D Part I No. 81, Hon. Mipawa, J (as he then was).

To further support his contention, he cited the case of **Majige M. Makoko vs Pangea Minerals Limited**, Labour Revision No.46 of 2016, High Court Shinyanga, Hon. Mkeha, J, where it was held that where the employee opts to waive his right of being heard, he cannot be right in condemning the employer for not according him a right to be heard. Basing

on the authority above, he submitted that the employee's right to be heard was waived by the employee himself, he can not be heard to complain.

On the third issue which is whether the Arbitrator was right to conclude that the procedure for termination was unfair merely because of the alleged irregularities in the hearing forms, while there was evidence that the hearing committee was properly constituted. On that he submitted that the committee was properly constituted in the sense that, it had the chairperson, the secretary and a member from the management, to prove that, he referred to the evidence of DW2 and submits that, the hearing should not be faulted on that flimsy ground.

Regarding the fourth issue which is whether the arbitrator was right to admit and rely upon a document that did not form part of the records, at the disciplinary hearing or the appeal, he submitted that, the respondent tendered a sick sheet, showing that he was sick on the date of the disciplinary hearing. That sick sheet was admitted by the arbitrator; regardless the fact that it was not tendered at the disciplinary hearing and therefore did not therefore form part of the record. He submitted that, in his opinion the CMA when determining fairness of the termination is required to rely on the information that was relied upon during the

disciplinary hearing to find the employee guilty. Therefore the CMA can not rely on the document or information which did not form part of record at the disciplinary hearing in determining the fairness of the termination.

Regarding the fifth issue which is whether the Arbitrator was right to order reinstatement without loss of remuneration in the circumstances of this case, he submitted that, in terms of Rule 32 (2)(b) and (c) of the Labour Institutions Mediation and Arbitration Guidelines, GN. No. 67 of 2007, that the circumstances surrounding the termination are such that a continued employment relationship would be intolerable and that it is not reasonably practical for the applicant to reinstate the respondent.

According to him, while the employee had duties to maintain the highest degree of honesty and integrity, and was aware of that requirement, he failed to do so. Since he was no longer trusted by the employer, it was not practically viable for the CMA to issue an order for reinstatement without loss of remuneration.

On that he relied on the authority in the case of **Majige M. Makoko vs Pangea Minerals Limited**, (supra) in which it was insisted that, trust

is a fundamental relationship, once breached, it would not be proper to order reinstatement.

Regarding the sixth issue which is whether the arbitrator was right in law for issuing contradicting decision in relation to the award of compensation, on that, he submitted that, the law section 40 (1) of ELRA and Rule 32(1) of GN No. 67 of 2007 requires the reinstatement to be awarded as an alternative to compensation or re engagement and vice versa. However, in this case, the CMA issued both compensation and reinstatement at the same time. He cited the case of **NMB vs Leila Mringo and others,** Civil Appeal No. 30 of 2018, CAT at Tanga. According to him that leaves the award tainted subject to be revised.

Regarding the seventh issue which is whether the employee was entitled to an order of payment of repatriation and subsistence allowance, on that he submitted that the employee unequivocally admitted that he was paid terminal benefits listed in exhibits C6 after termination which are, one month basic salary as repatriation allowance, payment of outstanding leave of 61.17 days, outstanding salary up to 10/11/2018, 10 months leave saving allowances, housing allowance, educational assistance, year end package and senior staffs allowance. He submitted that, under section

43(1)(c) of ELRA the subsistence allowance is only payable during the period between the date of termination and the date of repatriation, while in this case the respondent was paid repatriation on the date of termination, thus making the said order revisable.

Regarding the eighth issue which is whether the respondent is entitled to payment of notice and severance pay? He submitted that, the employee who has committed material breach of employment contract and as the breach of trust is an important aspect of breach of contract, the respondent is not entitled to salary in lieu of notice.

Further to that, he submitted that, under section 42(3)(a) of the ELRA, Rule 26(2) of the code, that severance pay is not payable upon fair termination on ground of misconduct. That since misuse of position for personal interest amounted to a breach of trust which is misconduct; the respondent was not entitled to severance pay.

He invited this court to allow the revision for being meritorious, and proceed to revise, and set aside the award of Commission for Mediation and Arbitration at Geita.

The reply submission is by the employee, that there are ample evidence proving that, the termination of the respondent was because he filed the complaint at the CMA, claiming salary increment. To justify that, he cited the evidence of DW2. He submitted further that, there was no evidence to justify the allegation of the breach of confidentiality. In the documents tendered before the CMA, as what was found was the salary information of the employee which are never confidential.

He referred at pages 20, 23 and 31 of the CMA proceedings to justify his arguments. He said there was no justification for termination because he claimed the salary increase before the proper forum established under section 12 of the Labour Institutions Act, [Cap 300 R.E 2019].

Further to that, he submitted that the constitution of the United Republic of Tanzania in its article 23(1) guarantees the right to just remuneration commensurate to works, which is what the respondent was claiming.

He submitted that demanding right is not dishonesty to the employers. He submitted that the applicant failed to prove the case on the

balance of probabilities, and the arbitrator analysed the evidence and reached to a proper conclusion.

Responding to the second issue, he once again referred to the evidence of DW2 as seen at page 21, 43 and 44 of the proceedings. He further made reference to Rule 13(3) of the Employment and Labour Relations (Code of Good Practice) Rules 2007 which directs that the employee is entitled to a reasonable time to prepare for the hearing and to be assisted in the hearing by a trade union representative or fellow employee depending on the circumstances and complexity of the case.

He insisted that, in this case when the matter was called, the employee was sick and his representative was out of the country but the disciplinary hearing did not adjourn the matter. He submitted that since there were reasonable grounds for adjournment, it cannot be said that the respondent unreasonably refused to appear at the disciplinary hearing, and then proceedings in the absence of the employee was not justified and can be taken to have denied the employee opportunity to be heard.

He further submitted that, the observation of the principle of Natural Justice is fundamental in dealing with disciplinary matter, as it was stated

in the book of The formation of Employment Contracts in Tanzania, by **Hamidu M.M. Millulu, Chem-chem publishers 1st Print,** 2013 at page 48 and 49 and so is Article 13(6)(a) of the Constitution of the United Republic of Tanzania, 1977 as well as the decision of **Director of Public Prosections vs Sabinis Inyasi Tesha and Raphael J. Tesha** [1993] TLR 237 CA, and **Ndesamburo vs AG** [1997] TLR 137

Countering the allegations that the applicant was not aware of the presence of the case at the CMA and High Court, he submitted that no any witness said that there were no such cases and even the counsel for the employer did not cross examine on that aspect. Since he did not cross examine then, he can not be heard complaining at this stage. He cited the case of **Maganga Lusinde vs Republic,** Criminal Appeal No. 6/2019 that a party who fails to cross examine a witness on a certain matter is deemed to have accepted that matter and will be stopped from asking the appellate court to disbelieve what the witness said.

Distinguishing the authorities cited by the counsel for the applicant, he submitted that the case of **Oswald Chenyenge vs Pangea Minerals Limited** (supra) is distinguishable, as while in that case the adjournment

based on the police letter, in this case the adjournment based on the ill-health of the employee and the absence of the representative.

Regarding as to who was involved in the disciplinary hearing, he referred to page 19 of the proceedings of the CMA that DW2 said it was only the chairperson and the secretary who were involved in the matter to its finality.

Responding to fourth issue, he submitted that exhibit C5 is not new because it was introduced on appeal and could not have tendered it at the disciplinary hearing because the hearing was conducted exparte. Therefore the only place to tender it was at the CMA where the applicant had audience.

Regarding the fifth issues No. 5 and 6 collectively he recited section 40(1)(a)of the ELRA which provides for reinstatement without loss of remunerations as one of the reliefs. He submitted that the Arbitrator did not block the applicant's power not to reinstate the respondent, if he wish upon paying all remuneration during the period that the respondent was absent from work due to unfair termination in additional with compensation

of 12 months basic salary and other benefits as provided under section 40(3) of ELRA.

Regarding the compensation of 8 months basic salary in additional to all salaries unpaid during to unfair termination period instead of 12 months compensation, he submitted that, it is a call of law herein above that compensation of 12 months is mandatory. This is inferred from the word shall as used in the statute. It is therefore not under the arbitrator's discretion to award less or more than 12 months. The employer has to comply with the law as it was enacted. To cement on that legal stand, he cited the case of **Standard Chartered Bank (T) Limited vs Linas Simon**, Revision No. 378 of 2019 HC-DSM.

Nevertheless, he insisted that the awarding of 8 months salary instead of 12 months is a simple mistake which any party to the case could apply for its correction under rule 33(1) and (2) of the Labour Institution (Mediation and Arbitration Guidelines) Rules, 2007.

Regarding the seventh and eighth issues, he submitted that, the principle of the burden of proof requires the employer who alleges to have paid repatriation to prove that he paid such repatriation. He said the

respondent place of employment was Magu therefore after termination he was supposed to be repatriated to Magu that was according to him not done.

This is according to section 43(1) of the ELRA. Where the employee is not repatriated on time, then the employer must pay him/her subsistence allowance, and that the determinant factor is the place of recruitment not the place of domicile. He cited the decision of **Higher Education Students' Loans Board vs George Nyatega**, HC-Labour Div. Labour Revision No. 846 of 2018.

On the issue of severance pay, he submitted that it is provided under section 42(1)(2) of the ELRA, that given the criteria, the respondent was entitled to be paid severance allowance and that since the termination was unfair, then the order for severance allowance was just and fair.

In conclusion he submitted that there is no doubt that, the applicant had no valid reasons and did not follow fair procedure in termination of the employee's employment; he was terminated when he demanded his right. He cited the decision of the High Court Labour Division in **Bati Services Company Limited vs Shargia Feizi,** HC Labour Div at DSM, Labour

Revision No. 106 of 2019 in which it was held that, it is established principle that for the termination of employment to be considered fair it should be based on valid reason and fair procedure.

In other words there must be substantive and procedural fairness of termination of employment. He said the award was correct save on payment of compensation for 8 months instead of 12 months in addition of the unpaid salaries during the termination period.

In the employer's rejoinder which had 11 pages submission, which save for few aspects which are new and responded to the reply in a novelty manner, he mostly reiterated what he earlier on submitted in the submission in chief. For that reasons I will only discuss the new issues. In a summary form, the applicant submitted by way of insistence that the applicant presented enough evidence to prove that the employee committed the disciplinary offences he was charged with.

He also proved that the employee was served with the notice of hearing, but he unreasonably refused to attend, therefore he cannot complain that he was not given opportunity to be heard. He cited a persuasive decision of the Labour Court of South Africa in the case of

Medscheme Ltd vs Vanessa Pillay and Another, Case No. JR 1483/2012 to support his argument.

He insisted that there are no irregularities, in the proceedings of the disciplinary hearing and the hearing was properly constituted as required by the regulations.

Further to that, he submitted that the employee could not use the ground of sickness at the CMA and tender the documents which were not tendered in at the disciplinary hearing or an appeal.

Further more he submitted that, since the employee's termination based on the fair reasons and adopted the fair procedure, it was not proper for the CMA to order reinstatement without loss of remuneration.

He also insisted that the award is contradictory because the CMA can not order reinstatement and payment of subsistence allowance. He cited the case of **Mantra Tanzania Limited vs Daniel Kisoka,** Labour Revision No.267 of 2019 HC- Lab. Div.

Regarding the payment of repatriation costs, he insisted that, the respondent was paid repatriation costs on the date of termination; therefore subsistence allowance is not applicable and payable.

Last is regarding on the non payment of the notice and severance pay, he submitted that, since the termination is based on a serious misconduct, the employee is not entitled severance pay or payment of notice.

In the submission in chief filed by employee in respect to Revision No. 70 of 2020, he basically challenged the compensation of 8 months instead of 12 months, he submitted that under section 40(1)(a) of the ELRA, the award of 12 months is mandatory, it is not optional. He submitted further that once an order for reinstatement has been made the employer has an option of not reinstating or re engaging, if he so opt he is required to pay 12 months salaries in additional to wages due and other benefits from the date of unfair termination to the date of final payment. In support of the contention, he referred the case of **Standard Chartered Bank (T) Limited vs Linas Simon (T) Ltd,** Revision No.378 of 2019 HC-Lab. Div. DSM

In his reply to the submissions in opposition of Revision No. 70 of 2020 the counsel for the employer submitted in relation to the 8 months basic salary in additional to unpaid salary during the termination, that in terms of rule 32(2)(b) and (c) of the Labour Institutions (Mediation and

Guidelines) Rule, GN No. 67 of 2007 the CMA was not supposed in the first place to have ordered reinstatement considering the fact that the employment relationship would be intolerable. He recited the case of **Majige M. Makoko vs Pangea Minerals Limited** (supra), and insisted that there is no mutual trusts between the employer and employee therefore reinstatement could not be practically ordered. He submitted while distinguishing the authority in **Standard Chartered Bank (T) Limited vs Linas Simon (T) Ltd** (supra) and submitted that the same was erroneously decided as the available remedy in a hostile relationship is only compensation. He asked the court to disallow the application and find that the proper remedy was compensation and not reinstatement.

Submitting on the issue of severance pay, he said by simple arithmetic the period which severance pay was supposed to be paid for, is from 25th day of January 2010 to 19th November 2018, which is a period of 8 years, therefore the order by the CMA was justifiable. However, he submitted that in terms of section 42(3)(a) of the ELRA and Rule 26(2)(b) of the Employment and Labour Relations (Code of Good Practice) Rules, 2007 severance pay is not paid to an employee who is fairly terminated for misconduct. To support his stand he cited the authority in the case of

Security Group (T) Limited vs Mashaka Setebe, Revision No.54 of 2017 in the High Court of Tanzania, Mongella, J.

In rejoinder in respect of Revision No. 70 of 2020, the counsel for the employee submitted that, under section 40(3) of the ELRA the employer has been given an option, to pay 12 months basic salary instead of re instating the employee.

That marked the submission by the parties, having summarized at length the record and the content of the submissions by the parties, it is instructive to find that the issues for determination are as proposed in paragraph 17(a) - (h) of the affidavit filed in support of Revision No. 67 of 2020. These issues were almost squarely argued in the Revision No. 70 of 2020 as well, therefore in this judgment I will discuss and resolve both revisions simultaneously.

For the reasons to be apparent in the due course, I will start with the second issue, which is whether the respondent was denied an opportunity to be heard during the disciplinary hearing? In law the concept of unfair termination as provided under section, 37(1) of the Employment and Labour Relations Act, (supra), makes it unlawful for an employer to

terminate the employment of an employee unfairly. The issue whether the employee was afforded or denied an opportunity to be heard touches the procedural fairness, it is therefore proper to start with it.

From and submissions, there is no dispute that, the disciplinary hearing which heard and determined the disciplinary charges against the employee were conducted exparte, in the absence of the employee or his representative. This means the employee was terminated based on the charges which he did not defend.

The justification given as to why it proceeded exparte is that the employee was served with the notice of hearing, but unreasonably refused to attend. On the other hand, the employee admitted to be informed the hearing date, however, he wrote a letter dated 23/10/2018 exhibit P5 took it there himself asking for adjournment on three grounds: **one,** that his representative Isack B. Senya was on safari out of the country therefore he could not attend to represent him, **two,** that, there was a pending case No. CMA/GTA/70/2018 at CMA Geita, **three**, that there was a case No. 23/2018 pending before the High Court.

Substantively, the disciplinary hearing are conducted under the procedure provided under the "HUMAN RESOURCES DEPARTMENT POLICY No. GHRO – POL -04510, DISCIPLINARY POLICY AND PROCEDURE" of 07/10/2016 which in its Part I, item 6 sub item 6.1.1 provides for among other rights of the offender,

i) the right to an interpreter,

ii) the right to representation by an employee of alleged offender's choice,

iii) the right to state her/his case and defend himself or herself, and,

iv) the right to call his/her witness and cross examine the witnesses of the complainant.

As these are the right provided by the policy under which the hearing was to be conducted, then the same was supposed to be followed. As rightly submitted, the employee asked for the adjournment of the hearing on the ground of the absence of the representative of his own choice, and proved by an email attached that he was not present in the country, therefore the disciplinary hearing was duty bound to consider his application and if they were doubting the information, they were supposed

to write the reasons for its doubt and communicate the same with the employee.

From the record, it is not disputed that the disciplinary hearing received a letter asking for adjournment. What the secretary said is that, upon passing through the letter, the disciplinary hearing decided to proceed on the ground that the cases before the High Court and CMA were not related to the matter before it.

In my considered view, what the disciplinary hearing did was the denial of the right of the employee to be heard as there are no reasons as to why after all these steps and reasons given, the employer was not ready to adjourn the hearing but to the contrary, term the non attendance to be an unreasonable refusal to attend the hearing.

I hold so because, the disciplinary hearing committee was composed of the people who were staffs of the employer, it can therefore not be said that, there was any intolerable cost of adjournment. Even if there was any likelihood of the costs, but that could not have been at the expenses of the constitutional right of the employee. In the case of **Mbeya Rukwa Auto**

parts & Transport Ltd vs Jestina George Mwakyoma [2003] TLR 251 it was held that;

> *"In this country natural justice is not merely a principle of common law, it has become a fundamental constitutional right. Article 13(6)(a) includes the right to be heard among the attributes of equality before the law"*

Further to that an emphasis on the point has been made in the case of **Tenelec Limited vs Commissioner General TRA**, Civil Appeal No. 20 of 2018 CAT- Dodoma which relied on the authority in the case of **Samson Ng'walida vs Commissioner General TRA,** Civil Appeal No.86/2008 and **VIP Engineering and Marketing Limited** CAT, Consolidated, Civil Appeal No. 6, 7, 8, of 2006 in which it was held *inter alia* that;

> *"In view of the stand in **Ng'walida** and **VIP** (supra) to the effect that the right of a party to be heard before the adverse action or decision is taken against such a party is a basic constitutional duty and that any violation of it nullifies the entire proceedings."*

From what I have pointed out, the employee was un reasonably denied the right to be heard at the disciplinary hearing, the action taken against him is procedurally unfair, and since he was not heard we can not

go further to discuss the reasons for his termination. This means on that aspect alone, the CMA was right to find that the termination of the employee was unfair. This resolves the first, second, third and fourth issues.

Regarding the fifth issue, whether the arbitrator was right to order reinstatement without loss of remuneration in the circumstances of the case. This issue will not detain me much, as the answers to the issue is in section 40 of the ELRA (supra) which provides that,

> *"40(1) If an arbitrator or Labour Court finds a termination is unfair, the arbitrator or Court may order the employer -*
>
> > *(a) to reinstate the employee from the date the employee was terminated without loss of remuneration during the period that the employee was absent from work due to the unfair termination; or*

From the provision above, this is one of the award which the CMA or Labour Court may issue if it finds that the termination of the employee was unfair. However, the contention of the counsel for the employer is that given the prevailing relationship between the employer and the employee the order for reinstatement was not proper. I entirely agree that may be the position in as far as the relationship between the two is concerned.

However the legislature while mindful of that predicament, it found the employer to be better is better placed to know the relationship between him and the employee, the legislature through section 40(3) of the ELRA empowers the employer with an option to pay compensation instead of reinstating the employee. For purposes of clarity the same is hereby reproduced hereunder.

> *"40(3) Where an order of reinstatement or re-engagement is made by an arbitrator or Court and the employer decides not to reinstate or reengage 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."*

With the presence of this provision, there is no reasons for the employer to complain of an order for reinstatement, if he doesn't want the employee back, then he may use that option provided by law, to pay him compensation as it would have been ordered under section 40(1)(c) of the ELRA, the ground therefore lacks merits.

Regarding to the sixth issue, as earlier on pointed out, remedies awardable in labour cases which bases on unfair termination are statutory as provided by section 40(1) of the ELRA. This provision if properly

construed, the arbitrator or a court may, after finding that the termination was unfair, order the followings;

> (a) to **reinstate** the employee from the date the employee was terminated without loss of remuneration during the period that the employee was absent from work due to the unfair termination; or
>
> (b) to **re-engage** the employee on any terms that the arbitrator or Court may decide; or
>
> (c) to **pay compensation** to the employee of not less than twelve months remuneration.

This is also the position of the Court of Appeal in the case of **National Microfinance Bank Versus Victor Modest Banda,** Civil Appeal No. 29 Of 2018, CAT-Tanga (Un reported) when it was held that by the use of "or" the reliefs are disjunctive.

From the provision and the authority in the above cited cases of **NMB vs Victor Modest Banda** (supra), the order under this section are issued in the alternative to each other, in the sense that once reinstatement has been issued, the arbitrator or Court cannot issue re-

engagement or compensation and vice versa. This means in this case after the arbitrator had issued an order for reinstatement, he was supposed not to issue the order for re engagement and or compensation as the amount to be paid in the alternative, to reinstatement and re-engagement under section 40(3) is statutory and the court needs not to order the amount to be so paid. That said I find the ground to have merit, I thus revise the order for payment of 8 months salary as compensation and direct that, if the employer will opt not to reinstate the employee he is therefore bound to comply with the provision of section 40(3) of ELRA.

Regarding the seventh issue which is whether the employee is entitled to an order for payment of repatriation and subsistence allowance? In law, repatriation and subsistence allowance is provided under section 43 of the ELRA, which for easy reference it is reproduced hereunder:

> *"43.-(1) Where an employee's contract of employment is terminated at a place other than where the employee was recruited, the employer shall either-*
>
> *(a) transport the employee and his personal effects to the place of recruitment;*
>
> *(b) pay for the transportation of the employee to the place of recruitment; or*

Last is the eighth issue, which is whether the respondent is entitled to payment of notice and severance pay? This right is provided under section 42 of the ELRA as hereunder reproduced;

> *"42.-(1) For the purposes of this section, "severance pay" means an amount at least equal to 7 days' basic wage for each completed year of continuous service with that employer up to a maximum of ten years,*
>
> *(2) An employer shall pay severance pay on termination of employment if –*
>
> > *(a) the employee has completed 12 months continuous service with an employer; and*
> >
> > *(b) subject to the provisions of subsection (3), the employer terminates the employment.*
>
> *(3) The provisions of subsection (2) shall not apply -*
>
> > *(a) to a fair termination on grounds of misconduct;*
> >
> > *(b) to an employee who is terminated on grounds of capacity compatibility or operational requirements of the employer but who unreasonably refuses to accept alternative employment with that employer or any other employer; or*

Last is the eighth issue, which is whether the respondent is entitled to payment of notice and severance pay? This right is provided under section 42 of the ELRA as hereunder reproduced;

> *"42.-(1) For the purposes of this section, "severance pay" means an amount at least equal to 7 days' basic wage for each completed year of continuous service with that employer up to a maximum of ten years,*
>
> *(2) An employer shall pay severance pay on termination of employment if –*
>
> > *(a) the employee has completed 12 months continuous service with an employer; and*
> >
> > *(b) subject to the provisions of subsection (3), the employer terminates the employment.*
>
> *(3) The provisions of subsection (2) shall not apply -*
>
> > *(a) to a fair termination on grounds of misconduct;*
> >
> > *(b) to an employee who is terminated on grounds of capacity compatibility or operational requirements of the employer but who unreasonably refuses to accept alternative employment with that employer or any other employer; or*

(c) to an employee who attains the age of retirement or an employee whose contract of service has expired or ended by reason of time."

From the provision, the severance pay is payable when the employer terminates the employment of the employee with the attribute mentioned in subsection (2) (a) and (b). Now the issue is whether the employee is entitled to a severance pay, as the order of the tribunal for reinstatement has been upheld, the employee is deemed to be in service. However the employer should opt to exercise his right under section 40(3) he will be obliged to pay the severance pay as required by law.

In the upshot, I find the application to be substantively unmeritorious in the reasons and procedure for termination, the employee is found to be terminated procedurally unfair, therefore the application fails. However in some other grounds, the applications have been revised to the extent explained above. The award is upheld with some rectifications above.

It is so ordered.

DATED at **MWANZA** this 27th day of April, 2021

J.C.Tiganga

Judge

27/04/2021

Judgment delivered in the presence of Mr. Kyariga Kyariga, learned Advocate for the Applicant, and Mr. Erick Rutehanga, the representative of the respondent. Right of Appeal explained.

J.C.Tiganga

Judge

27/04/2021