

**IN HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
ARUSHA DISTRICT REGISTRY
AT ARUSHA
REVISION APPLICATION NO. 66 OF 2020**

(Original CMA/ARS/ARB/176/18)

COMPASSION INTERNATIONAL TANZANIA APPLCANT

VERSUS

NICKSON ALEX RESPONDENT

JUDGMENT

14/06/2021 & 30/08/2021

GWAE, J

This judgment emanates from an arbitral award procured by the Commission for Mediation and Arbitration of Arusha at Arusha (CMA) on the 6th August 2020. The applicant, **Compassion International Tanzania** has preferred this application under the provisions of section 91 (1) (a), (2) (b), and (c) of the Employment and Labour Relations Act, No. 6 of 2004 (ELRA), Rules 24 (1), (2)(a), (b), (c), (d), (e), (f), (3)(a), (b), (c) and (d), 28 (1) (c), (d) and (e) of the Labour Court Rules, GN No. 106 of 2007, praying for the following orders:

1. That, this court be pleased to call for and examine the record proceedings, decision and Award the CMA so that the court should

satisfy itself on the legality, rationality and propriety of the finding and decision of the Arbitrator on the following grounds;

- (a) Having held that the respondent was fairly terminated on substantive reason, the arbitrator erred in reinstating the respondent to his employment position based on the procedural ground which is also not substantiated in evidence
- (b) In the circumstance of the decision of the Chairperson of the Appellate Committee terminating employment of the respondent and having found that the respondent was fairly terminated, the arbitrator erroneously reinstated the respondent
- (c) It was erroneous to order payment to the respondent remuneration arrears from 2nd July 2018 to 1st September 2020 to the sum of Tshs. 96, 811,632/ including accrual of monthly remuneration until date of actual reinstatement
- (d) That, finding in affirmative on item (a) (b) and (c) above, the CMA award be set aside

2. That, any other relief this court deems just and fair to grant.

The applicant's chamber summons is accompanied by an affidavit of Makene Elias Mafwele, applicant's senior manager. The applicant's affidavit is seriously disputing the arbitral award procured in favour of the respondent, Nickson Alex for the grounds set out herein above.

Opposing this application, the respondent through his counter affidavit, stated his termination was not based on the alleged misconducts rather it was on the

unknown added charges prosecuted against him without being availed an opportunity of being heard adding that the arbitrator clearly and properly found the termination to be substantive and procedural unfair. He finally stated that, the arbitrator correctly reinstated him.

As gleaned from the CMA's records as well as the parties' affidavits in this application, brief facts of the parties' labour dispute can be recapped as follows; that, the applicant and the respondent were an employer and an employee respectively. That, both parties entered into contract of employment on 12th February 2013. That the respondent was employed as Complementary Intervention Administrator and that his employment was unilaterally terminated by the applicant on the 2nd July 2018. It is further revealed by the records that, on the 24th July 2018, the Commission duly admitted the dispute and that after mediation had failed, the dispute was accordingly arbitrated, the award was delivered on the 6th August 2020 in favour of the respondent where it was ordered that the respondent be reinstated and be paid his monthly remuneration from the date of termination to the date of reinstatement.

Aggrieved by the arbitral award, the applicant has brought this application for revision on the grounds that are contained in the sought order No. 1 (a-c) above.

When this application was called on the 17th May 2021, the parties' advocates, namely; **Mr. Matuba Nyirembe** and **Miss Noelina Bippa** for the applicant and respondent respectively consensually sought and they were granted leave by the court to dispose of this application by way of written submission. The parties' written submissions were accordingly presented for filing as per the court order. I shall however not reproduce the same but I will consider the parties' respective written submissions while determining each ground of this application as herein under;

a. Whether the arbitrator erred in reinstating the respondent after he had found that the termination was substantively fair save on the procedural ground which was also not substantiated in evidence

In the 1st ground for the revision, the applicant's counsel argued that the arbitrator wrongly ordered reinstatement in favour of the respondent since Disciplinary Committee found him guilty of gross misconducts and since the Commission found that termination was on substantive reason. He further argued that it was not proper to order reinstatement when the termination

is couched in procedural irregularity. Cementing his arguments, he urged this court to make reference to **Vedastus Ntulanyenka 6 others v. Mohamed Trans Ltd**, Revision No. 4 of 2014 where it was held that since the respondent did not follow a fair procedure, the commission was right to order compensation to the applicant according to the circumstance of the case and not reinstatement and Rule 32 (2) (d) of the Labour Institutions (Mediation and Arbitration Guidelines) G. N No. 67 of 2007.

On the other hand, the counsel for the respondent did not dispute that there were misconducts on the part of the respondent as exhibited in the Exhibit P9 however she argued that the National Director sitting as appellate body when the respondent appealed against the decision of the Disciplinary Hearing Committee wrongly and unfairly terminated him on the allegedly discovered new misconduct.

In his rejoinder the applicant's stated that the arbitrator found the applicant to have established that the respondent's termination was on substantive reason.

Upon my examination of the arbitral award, it is my view that, the arbitrator when stated at page 13 of the award that, the applicant had

proved on the balance of probability that the respondent was in violation of the company's procedure he was directing his mind on the manner the Disciplinary Hearing was conducted and its decision (written warning) and **not** the appellate body. It is increasingly clear in our case that the respondent was **not** terminated by the Disciplinary Hearing Committee that is why the arbitrator concluded that the termination of the respondent's employment by the Appellate Committee Chairperson was unfair in limbs, substantive and procedurally (See paragraph 1 of page 16 of the award).

Thus, the applicant's attempts to convince the court to believe that the learned arbitrator found that the termination was substantively fair is not backed by the award or in other words the counsel for the applicant did not clearly understand nature of the awardthe award. This ground is therefore dismissed.

b. In the circumstance of the decision of the Chairperson of the Appellate Committee terminating employment of the respondent and having found that the respondent was fairly terminated, the arbitrator erroneously reinstated the respondent

Having examined the award and the parties' written submissions, it is my firm view that the counsel for the applicant was trying to mislead the court

by stating that the termination was found to be fair while it is patently clear that arbitrator found the termination to be both substantive and procedural unfair. That being the clear position of the award, it is therefore unfounded to state that the arbitrator could reinstate since he found the termination to substantively fair. I would agree with the learned counsel for the applicant that, it is quite unsafe and unjustifiable to reinstate an employee whose employment was unfairly terminated on the procedural aspect only in other words where an employer did not merely follow procedures but he had valid reason for the termination

It is trite law that upon a verdict of unfair termination by an arbitrator or judge as the case may be, such arbitrator or judge is legally empowered to award an employee one of the remedies provided for under section 40 (1) of the Employment and Labour Relations Act No. 6 of 2007 (ELRA) as herein under reproduced;

- (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

From the statutory wordings quoted above, it appears that, the remedies awardable by the labour court or CMA are discretionary however each case must be decided on its own merit dependent on the set its facts and circumstances. The decision of the arbitrator was that the termination by the appellate Committee was illegal since the respondent was not afforded an opportunity of being heard as opposed to the Disciplinary Proceedings before the Disciplinary Hearing Committee. The 2nd ground also lacks legs to stand, it is therefore dismissed.

c. It was erroneous to order payment to the respondent remuneration arrears from 2nd July 2018 to 1st September 2020 to the sum of Tshs. 96, 811,632/ including accrual of monthly remuneration until date of actual reinstatement

Considering the parties' arguments and the award as well as my findings in the 1st and 2nd ground, I am of the view that I should not be curtailed by this ground since once an order of reinstatement is made, it entails that an employee shall not loose his or her monthly remuneration and any other

employment benefits from the date of termination to the date of reinstatement that she or he was entitled immediately before termination. Hence, the ordered payment by the Commission does not constitute any illegality as the ordered payment of remuneration arrears is within the meaning of the remedy of reinstatement.

In the circumstances of this case, if the applicant is not willing to reinstate the respondent, she may pay the respondent his monthly remunerations from the date of termination to the date of his option not to reinstate him plus 12 months' salary compensation as per section 40 (3) of the ELRA. Or otherwise conduct the

In the upshot, this application is entirely dismissed. The CMA's award is confirmed. No order as to costs is made.

It is so ordered.




M. R. GWAE
JUDGE
30/08/2021