IN THE HIGH COURT OF THEUNITED REPUBLIC OF TANZANIA

(IN THE DISTRUCT REGISTRY)

AT ARUSHA

REVISION APPLICATION NO. 65 OF 2019

(Originating from Labour Dispute No. CMA/ARS/ARB/102/2018)

ENGARENAROK LUTHERAN TETRA SCHOOL ..... APPLICANT

VERSUS

EMIL MICHAEL ..... 1ST RESPONDENT

UPENDO DICKSON ..... 2ND RESPONDENT

JUDGMENT

26/07/2021 & 18/10/2021

GWAE, J

Seemingly, the applicant, **Engarenarok Lutheran Tetra School** was aggrieved by an award of the Commission for Mediation and Arbitration for Arusha at Arusha (CMA). She has now filed this application for revision under the provisions of section 91 (1) (a), (2) (a), (b) and (c) of the Employment and Labour Relations Act, No. 6 of 2004, Rules 24 (1), (2) (a), (b), (c), (d), (e), (f), (3)(a), (b), (c) and (d), 28 (1)(a), (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 the records of the CMA and revise proceedings and set aside the Arbitration Award issued in the CMA/ARS/ARB/102/2018.
2. Any other orders this court may deem just to grant in the circumstances.

Facts of the dispute between the parties can be screened from the CMA's records as well as the parties' affidavits are as follows; the applicant and the respondents were in the employment contracts as employer and employees respectively. Both respondents were employed as teachers at diversity dates that is, the 1st respondent was employed on the 1st January 2015 to January 2017 whereas the 2nd respondent was employed from 1st March 2016 to March 2018. The respondents' contracts of employment were for specific period that is two years period but renewable upon express willingness to do so.

That, on the 18th May 2017 the applicant wrote a letter to the Labour officer in-charge-Arusha notifying him of his intention to retrench a total of 12 employees due to decrease number of students' enrolment (from 700 to 388) leading to financial constraints. However, the applicant was informed by the labour officer i/c vide his letter dated 23rd May 2017 that, he she should follow the retrenchment labour procedures as stipulated under section 38 of the Labour and Employment Relations Act No. 6 of 2004 (The Act). On the 1st day of June

2017, the respondents' employment contracts were formally terminated. Despite the termination letters dated 1st June 2017 to the respondents, there were also subsequent termination letters addressed to them titled "Kupunguzwa kazi".

CMA's records further reveal that, the respondents filed their dispute on the 19th March 2018 in the Commission. The Commission unsuccessfully conducted mediation. Thereafter, the dispute was referred to arbitration where it was decided that, the applicant had reason for the retrenchment which affected the respondents but she did not follow the legal procedure. Consequently, the applicant was ordered to pay the respondents their remunerations for the remaining periods of their respective contracts of employment (14 months' salary for the 1st respondent and 9 months' salary for the 2nd respondent).

The CMA's award aggrieved the applicant who opted to filing of this application for revision on the following as errors material to the impugned award;

1. That, the CMA failed to consider the evidence adduced by the applicant's witnesses especially PW2 who was also affected by the retrenchment that the respondents were consulted prior to termination.
2. That, the respondents were paid their gratuity amounted to Tshs. **4, 355, 659/=**

On the 14th day of June 2021 when this application was called on for hearing, with consensus, it was ordered that this matter be disposed of by way of written submission. The parties' written submissions were filed accordingly. And I shall consider the same as determine the applicant's grounds for revision.

> In the **1st** ground for the sought revision, **that, the CMA failed to consider the evidence adduced by the applicant's witnesses especially RW2 who was also affected by the retrenchment that the respondents were consulted prior to termination.**

According to the applicant's advocate, the respondents and others were consulted for the retrenchment and that reasons for the same were accordingly furnished as per testimony of RW2. He made reference to the decision of this court **(Moshi, J)** in **Tanzania Building works Limited v. Ally Mgomba and 4 others**, Revision No. 305 of 2010 (unreported) where it was held that the law impose the duty to engage into consultation in good faith on the employer and employee and that once the employer gives notice to the employee the duty moves to the employer to respond and if time for the employee's response is too short, the employee is duty bound to seek an extension of time.

The respondents, on the other hand argued that RW2 who was re-engaged appeared before the Commission to safeguard the interest of her employer adding that the respondents were never consulted as required by the law. The 1st respondent's counsel specifically submitted that the 1st respondent being a

(a) give notice of any intention to retrench as soon as it is contemplated;

(b) disclose all relevant information on the intended retrenchment for the purpose of proper consultation;

(c) consult prior to retrenchment or redundancy on –

(i) the reasons for the intended retrenchment;

(ii) any measures to avoid or minimize the intended retrenchment;

(iii) the method of selection of the employees to be retrenched'

(iv) the timing of the retrenchments; and

(v) severance pay in respect of the retrenchments,

(d) give the notice, make the disclosure and consult, in terms of this subsection, with-

(i) any trade union recognized in terms of section 67;

(ii) any registered trade union which members in the workplace not represented by a recognized trade union;

(iii) any employees not represented by a recognized or registered trade union.

(2) Where in the consultations held in terms of sub-section (1) no agreement is reached between the parties, the matter shall be referred to mediation under part viii of this Act.

headmaster and secretary of the school board he was not informed of the anticipated changes. The court was asked by the 1st respondent's advocate to make reference to the case of **Alhamudu Ndimkanwa and others vs. Diector Vic Fish,** Revision No. 196 of 2009 (unreported), Labour Division of the High Court where prior retrenchment consultation and exercise of due diligence were emphasized.

Taking different position from that of the 1st respondent, the counsel for the 2nd respondent argued that the RW2 was re-employed with motive to assist the applicant since she was re-employed six months after retrenchment which was in violation of the provision of the law, Gn. 42 of 2007.

In his rejoinder, the counsel for the applicant stated that the contention by the respondent that, the RW2, Flora MicMillan was serving the interest of her employer was new issue which was never raised during arbitration and that, the 1st respondent as the Headmaster ought to have known the retrenchment notice through the notice board.

As retrenchment procedure is clearly stipulated under section 38 of the Act, I think therefore it is prudent and apposite to have it reproduced herein under;

> "38 (1) In any termination for operational requirements (retrenchment), the employer shall comply with the following principles, that is to say, he shall-

(a) give notice of any intention to retrench as soon as it is contemplated;

(b) disclose all relevant information on the intended retrenchment for the purpose of proper consultation;

(c) consult prior to retrenchment or redundancy on –

(i) the reasons for the intended retrenchment;

(ii) any measures to avoid or minimize the intended retrenchment;

(iii) the method of selection of the employees to be retrenched'

(iv) the timing of the retrenchments; and

(v) severance pay in respect of the retrenchments,

(d) give the notice, make the disclosure and consult, in terms of this subsection, with-

(i) any trade union recognized in terms of section 67;

(ii) any registered trade union which members in the workplace not represented by a recognized trade union;

(iii) any employees not represented by a recognized or registered trade union.

(2) Where in the consultations held in terms of sub-section (1) no agreement is reached between the parties, the matter shall be referred to mediation under part viii of this Act.

(3) Where the mediation has failed, the dispute shall be referred for arbitration which shall be concluded within thirty days during which period no retrenchment shall take effect and, where the employees are dissatisfied with the award and are desirous to proceed with revision to the Labour Court under section 91 (2), the employer may proceed with their retrenchment.

Basing on the wordings of the statutory provisions of the law cited above, I am therefore bound to carefully ascertain the testimony of the RW2 as far as retrenchment procedures are concern. The RW2 testified that the respondents and other employees were notified of the retrenchment exercise by the school committee prior to the respondents' termination. She added that the committee informed the respondent's employees that teachers would be retrenched (See page 13 of the typed proceedings).

Examining the evidence adduced by the RW2, it clearly sounds to me that, there was no tangible evidence adduced by the applicant relating to the alleged notice to retrench, no clear evidence if relevant information was furnished to the employees to the retrenchment and if consultation to employees was done as required under section 38 (1) (a) (b) and (c) of the Act reproduced herein above. It is evident that the applicant merely told the Commission that the respondents and other employees were consulted, if so, why notice was not tendered and any

minute of the allegedly held meetings as was rightly observed by the learned arbitrator.

Similarly, the applicant's witnesses did not tell the Commission as to the type of method of selection of those to be retrenched that was used as required under section 38 (1) (c) (ii) and (iii) of the Act quoted herein above. It is my increasingly view that, the applicant's communications with labour officer does not constitute compliance with the retrenchment procedures (See RE2) since it is clear from the labour officer's letter that, the applicant was directed to comply with necessary procedure before retrenchment but as observed by this court and as rightly arbitrated by the Commission, the applicant did not bother or exercise due diligence to at least adhere to the clear procedures envisaged by the law. The decision in the case of **Alhamudu Ndimkanwa and others v. Director Vic Fish** (supra) is therefore applicable in this present dispute.

Contention by the applicant's advocate that the respondents' complaint that the RW2 was biased ought to have been raised during arbitration stage and not revisional stage, I find such concern by the respondents' counsel to be the issue of credibility of a witness, RW2. However, it is the finding of the court that, the same concern was raised during cross examination by the respondents' counsel when she was asked if there was any teacher employed recently (See page 15 of the typed proceedings). Having found as herein, despite the fact that three was

valid reason for the termination in question yet the applicant was duty bound to greatly follow the stipulated procedures. Therefore the 1st ground of this application is found non-meritoriously raised.

As to the 2nd ground which reads; **that, the respondents were paid their gratuity amounted to Tshs. 4, 355, 659/=**

It is the argument of the applicant's counsel in respect of this ground for the sought revision that since the applicant fully paid the respondents their gratuity even before the expiry of their contract period is an indication that the applicant was after departing with respondents peacefully taking into account that the applicant had a valid reason to retrench.

Opposing this ground, the respondents' counsel argued that the Commission properly and legally ordered compensation in favour of the respondents adding that an order of compensation after the termination being found to be unfair, is a remedy provided by the law under section 40 (1) of the Act.

In his style, the 1st respondent's counsel argued that the 1st respondent was entitled to payment of 18 months' compensation denoting the compensation payable for the remaining period of his contract.

From outset, I unhesitatingly hold that, the 1st respondent's contention that he was not awarded compensation in accordance with the law since he was not

compensated for the remaining period is misplaced for the obvious reason that, if he was not satisfied with the award, he ought to file an application for revision to exhibit his grievances to the impugned award. Despite the fact that, under unfair termination of employment of employees whose contracts of employment are specific contracts, the remedy available should the termination be found to be unfair is compensation for the remaining period (see **Good Samarita vs. Joseph Robert Savari Munthu,** Revision No. 165 of 2011 (unreported-HCLD). In our case, the 1st respondent ought to have filed an application for revision if he was really aggrieved by the award.

Now turning to the issue as to the the payment of compensation ordered by the Commission, it is my view that the compensation was justifiable in circumstances as there were accumulative violations of the statutory procedures prior to retrenchment as demonstrated herein above. Payment of gratuity and salary for the June as well as certificate of service, in my considered view, does not vitiate an order of compensation where termination is found to be unfair substantively or procedurally or both.

That said and done, I am not convinced that the impugned award was improperly procured nor was there any illegality to the award in question. The applicant's application is therefore without merits. I consequently dismiss it and uphold the award of the CMA. Each party to be his or her costs.

It is so ordered.

M. R. GWAE
JUDGE
18/10/2021