IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LABOUR DIVISION)

AT ARUSHA

LABOUR REVISION NO. 82 OF 2020

(C/F Original Dispute No. CMA/ARS/ARB/163/2013)

ABERCROMBIE AND KENT (T) LTD..... APPLICANT

VERSUS

DEUS MEELA.....RESPONDENT

RULING

20/10/2021 & 10/11/2021

ROBERT, J:-

The applicant, Abercrombie and Kent (T) LTD, seeks revision of an award of the Commission for Mediation and Arbitration (CMA), Arusha in Labour Dispute No. CMA/ARS/ARB/163/2018. The application is supported by an affidavit sworn by Qamara Aloyce Peter, Counsel for the Applicant.

Facts relevant to this application reveals that, the respondent who was an employee of the applicant in the position of Sales and Marketing Consultant from 03/04/2013 until 09/07/2018 filed a complaint against the respondent at the CMA alleging unfair termination. He further claimed a relief of 12 months' compensation and other terminal benefits. After the

hearing, the CMA decided that the respondent's termination was substantively and procedurally unfair and awarded him 12 months' salary compensation and other terminal benefits sought through CMA- F1. Aggrieved, the applicant filed this application seeking revision of the award on the following grounds;

1. *That, the award of the Arbitrator was unlawful, illogical, irrational and irregular for the Arbitrator to make the interpretation of the act of incompatibility (kutokuhitajika).*
2. *That, the award of the Arbitrator was unlawful, illogical, irrational and irregular for the Arbitrator to make the finding that the injury was not done and the report of the inquiry was not presented before the hearing committee.*
3. *That, the award of the Arbitrator was unlawful, illogical and irrational and full of irregularities for finding that the complainant was terminated for personal issues, particulary CHODAWU issues.*
4. *That, the award of the arbitrator was unlawful, illogical and irrational and full of irregularities for finding that the complainant was terminated without being given an opportunity/time to improve.*
5. *That, the award of the Arbitrator was unlawful, illogical and irrational and full of irregularities for finding that the termination was done with bias which is against the principle of natural justice.*
6. *That, the award of the Arbitrator was unlawful, illogical, irrational and irregular for the Arbitrator to make the finding and ordering the payment claimed and unproved before the Commission.*
7. *That, the award of the Arbitrator was unlawful, illogical, irrational and irregular for the Arbitrator's failure to consider the evidence,*

testimonies" and exhibits tendered during the hearing proceedings, thus arriving to unjust and unfair termination.

At the request of parties, the application was argued by filing written submissions. The applicant enjoyed representation from **Mr. Qamara Aloyce Peter**, Learned Advocate while the respondent was represented by **Mr. Eliakimu Sikawa**, learned advocate.

Submitting on the first ground (3.1), Mr. Qamara argued that, the Hon. Arbitrator was wrong to interpret the word "incompatibility" to mean "kutokuhitajika". He treated the word incompatibility in similar way as incapacity for poor work performance under item 8 (2) of G.N. No. 42 of 2007. He argued that, according to Oxford Advanced Learner's Dictionary, sixth edition, two people who are "incompatible" are very different from each other. It is not poor performance as interpreted by the Arbitrator. He maintained that, by interpreting the word "incompatibility" wrongly the Arbitrator went on to decide unjustly against the applicant. The applicant's employment was terminated for an act of incompatibility. Accordingly, he prayed for the CMA award to be quashed and all its remedies.

Responding to this ground, Mr. Sikawa told the court that, the term incompatibility was rightly interpreted and was given the real meaning intended in the termination letter which was tendered at CMA as Exhibit D1. The meaning of the word under Oxford Dictionary as submitted by

Mr. Qamara was the same meaning taken by Hon. Arbitrator in his award since the cause of termination was personal clashes. There was an issue of CHODAWU which led to personal clashes hence unfair termination, if the applicant could have treated it harmoniously the matter could have been resolved peaceably and the employee could have remained at work. He referred the Court to the case of **Parastatal Pension Fund vs Siriel Mchembe**, Labour Revision No. 389 of 2013, LCCD page 5.

Coming to the second ground (3.2), Mr. Qamara argued that, the evidence adduced at the CMA reveals that investigation was conducted as required under Rule 13 (1) of G.N. No. 42 of 2007 (See Exhibit D2, D3 and D13). The said exhibits proved the investigation was conducted and it was preceded by a warning letters.

In reply, Mr. Sikawa told the court that, no investigation was conducted by the applicant as submitted by the learned counsel. He maintained that, if investigation was conducted as required by the law, investigation report could have been tendered before the CMA to prove that the employer adhered to the requirement of the law.

Coming to the 3rd ground (3.3), Mr. Qamara contended that, the CMA should have made a finding that the alleged act of incompatibility was done before 10/10/2016 and there is evidence to that effect (See

exhibit D4). Besides the finding at page 6, the alleged finding was not found anywhere else.

Responding to this ground, Mr. Sikawa argued that, the letter from CHODAWU was one of the reasons for termination because there were many issues between the employer (applicant) and the employees which was handled by the respondent herein. Thus, the argument made by the counsel for the applicant has no merit and prayed for this ground to be dismissed.

On the fourth ground (3.4), Mr. Qamara faulted the arbitrator for making a finding that the respondent was not given time to improve (See exhibit P2, D3 and D13). He submitted that, the respondent was given an ample time to improve his performance as required by the law and added that, the applicant did follow the procedure on how to handle the issue of incompatibility as required under item 6 (a) & (b) (i) –(iv) of GN 42/2007. See also exhibit D2-D10 which proved that the procedures were followed.

In response, Mr. Sikawa submitted that, before terminating the employee for the reason of incompatibility, the applicant was supposed to assist the employee to correct himself by using various ways. Exhibit D2 was the appraisal training conducted before the personal clashes between the employee and the management of the employer. That cannot be

treated as the means of correcting incompatibility of the employee. He added that, the employee was not afforded an ample time to correct his performance.

On ground number five (3.5) Mr. Qamara, informed the court that, the person who signed the termination letter was the general manager who was not a party to the disciplinary hearing. He clarified that, what was done by the hearing committee was only to advise on the appropriate action to be taken (see item 11 and 12 of the hearing form). The respondent appealed to the General Manager who was the only person to sign a termination letter. Thus, there were no conflicts between the person who signed an appeal form and the one who signed a termination letter.

On this ground, Mr. Sikawa was of the views that, the termination letter (exhibit D1) and letter to pronounce the decision of the appeal (Exhibit D18) were signed by the same person who is the general manager. He was the one who appointed members for disciplinary hearing, wrote the termination letter and sat as an appellate board determining the respondent's appeal which is against the rule of natural justice that a person cannot be a judge on his own case. The said decision was not proper that's why it was not entertained by the CMA.

On the last ground (3.7), Mr. Qamara told the court that, the Hon. Arbitrator failed to consider evidence, exhibits and testimony of the applicant. Going by evidence and taking into consideration exhibit D2-D18, it proved that the termination was substantively fair. It suffices to say that, all the procedures were followed from the Disciplinary hearing up to this court and the respondent was given a time to appeal, therefore, they prayed for this court to quash the award of the CMA.

On the last ground, respondent's advocate replied that, all the evidence, documents and testimonies tendered before the CMA were considered by the Hon. Arbitrator that is why it reached to a fair and just decision. The applicant failed to prove any loss occurred due to the conducts of the employee (respondent herein) which amounted to the so-called incompatibility. The policies alleged to have been violated by her were never tendered before the CMA. Thus, he prayed for the appeal to be dismissed with costs.

In his brief rejoinder, Mr. Qamara maintained that, the issue of incompatibility was not between the management and the employee but between the employee and his failure to handle client. Exhibit D16, item 8 shows that the respondent had challenges dealing with the agent and he was warned several times. Regarding the issue of exhibit P4 (letter

from CHODAWU is just an afterthought as it was not addressed to the employer and the employee did not complain that the hearing committee was not properly composed.

Having considered submissions from both parties and examined records of this matter, this Court finds that the main issues for determination are whether the applicant's termination was substantively and procedurally fair and to what reliefs are the parties entitled. I will now make a determination on the issues raised in light of each ground.

Starting with whether the respondent's termination was substantively fair, it is apparent from the records that the reason for termination of the respondent's employment according to exhibit D16 (Hearing Form) was "incompatibility". Mr. Qamara faulted the Arbitrator for interpreting the word "incompatibility" to mean "kutokuhitajika". He argued that, incompatibility is treated in similar way to incapacity for poor work performance under item 8(2) of the G.N. No. 42/2007 and the act of incompatibility is in itself is a sufficient cause for termination of employment.

Having examined how the CMA analyzed the reasons for termination, semantics aside, this Court agrees with the conclusion reached by the CMA that the respondent's termination was substantively

unfair. Although Counsel for the applicant argued that the word "incompatibility" is not "utendaji mbovu wa kazi" (poor work performance), the employer's witness Nenduvoto Parsalaw (DW1) who is the Human Resources Officer for the applicant testified at page 5 of the CMA proceedings that the respondent was terminated due to "utendaji kazi usioridhisha (poor work performance)".

The issue of poor performance is extensively elaborated in Rule 17 & 18 of the Employment and Labour Relations (Code of Good Practice) G.N. No. 42 of 2007. Rule 17 has given criteria to be taken into consideration by the court in determining termination of employment based on poor performance. Rule 17 (1) reads as follows; -

> "17 (1) *Any employer, arbitrator or Judge who determines whether a termination for poor work performance is fair shall consider;*
>
> *(a) Whether or not the employee failed to meet a performance standard.*
>
> *(b) Whether the employee was aware or could reasonably be expected to have been aware, of the required performance standard.*
>
> *(c) Whether the performance standards are reasonable.*
>
> *(d) The reasons why the employee failed to meet the standard and (e) Whether the employee was afforded a fair opportunity to meet the performance standard.*

Rule 18 of the Rules gives guidance to the employers before terminating their employees' employments on the ground of poor performance. For clarity Rule 18 is reproduced herein under;

> "18 (1) *The employer shall investigate the reasons for unsatisfactory performance. This shall reveal the extent to which is caused by the employee.*
>
> *(2) The employer shall give appropriate guidance, instruction or training, if necessary, to an employee before terminating the employee for poor performance.*
>
> *(3) The employee shall be given a reasonable time to improve. For the purpose of this sub-rule, a reasonable time shall depend on the nature of the job, the extent of the poor performance, status of the employee length of service, the employee's past performance record.*
>
> *(4) Where the employee continues to perform unsatisfactorily, the employer shall warn the employee that employment may be terminated if there is improvement."*

In the present case, when determining whether the employee's termination on poor work performance was fair, the CMA looked at how specific allegations of poor performance were proved by the employer and determined that there was no sufficient evidence to back the allegations. I will let the words of the Arbitrator at page 4 of the impugned award to speak on this. The last paragraph reads as follows:-

> *"Ukiangalia tuhuma nyingi za mlalamikaji – exh D3 kosa ni kusababisha hasara katika file OT3b45053 hii ilipelekea kuitwa katika*

kikao cha nidhamu tarehe 16.1.2017 – exh D4 ambapo adhabu ni alipatiwa onyo – exh D5. Ukweli ni kwamba mwajiri hakuweza kueleza ni kwa namna gani hasara hiyo imetokea. Suala la DW1 kusema kosa hilo lilibainika kutoka na kwa uchunguzi uliofanyika hakuwa kuleta nyaraka yoyote kuhusu hilo. Kwa mujibu wa exh D6 taarifa ya kuhudhuria kikao kingine cha nidhamu kosa ni kushindwa kufuatwa sera za kampuni (File OT3B460031), ambapo pia iliamuliwa apatiwe onyo - rejea exh D7 lakini hakuna sera zozote za kampuni zilizotolewa kama uthibitisho kuonyesha vipengele vilivyokiukwa. Pamoja na tuhuma zingine na adhabu za onyo alizopatiwa kama inavyookena katika exh D8 hadi D14. Ukweli ni kwamba pamoja na kuwa amesaini kikao cha nidhamu na taarifa kuitwa katika vikao hivyo na matokeo ya vikao hivyo ni kupatiwa onyo kwa njia ya maandishi kwa makosa ya siku za nyuma kati ya mwaka 2016/2017 na hatimaye alimua kusitisha ajira yake kwa kosa la kutohitajika (incompatibility) sababu ambayo Tume inaona siyo ya msingi kwa mujibu wa Kanuni ya 9(5) ya GN No.42/2007 ambayo inataka sababu za kusitisha ajira kuwa na uzito wa kutosha kuhalalisha kuachisha kazi."

Further to this at page 6 of the impugned award, the CMA looked specifically at the issue of incompatibility as a reason for termination of the employees and made a finding, which this Court finds to be correct, that the employer did not investigate the reasons for unsatisfactory performance (allegaations raised in respect of exh D15 were not investigated) and apart from the warning letter issued to the respondent there is no evidence of other measures taken by the employer to improve the performance of the employee. Accordingly, this Court agrees with the CMA that the employee's termination was substantively unfair.

Coming to the second issue of whether the applicant's termination was procedurally fair. At the CMA the respondent alleged that no investigation was conducted prior to his termination as required by Rule 13 (1) of G.N No. 42/2007. Once again, this court agrees with the Arbitrators' findings that the applicant did not follow proper procedures in terminating the respondent. Particularly, on the issue of investigation. According to Rule 13 (1) of G.N. No.42/2007 the requirement for investigation is mandatory to the employer who wishes to hold the hearing. Rule 13 (1) reads as follows; -

> "(1) *the employer shall conduct an investigation to ascertain whether there are grounds for a hearing to be held.*"

In the present case, Mr. Qamara alleged that the investigation was conducted based on exhibit D2, D3- D13 tendered before the CMA. I have revisited the said exhibits and noted that there is no investigation report of this matter apart from the hearing form (disciplinary hearing) which contains allegations raised against the respondent herein. In the absence of the investigation report, this court finds it difficult to ascertain if the investigation was conducted. Since the records are silent as to whether the applicant conducted investigation prior to disciplinary hearing, and since Rule 13 (1) imposes mandatory duty on the employer to conduct

investigation before hearing, this Court finds and holds, as rightly held by the CMA, that the procedure adopted was not fair.

Regarding the issue of relief, the respondent prayed to be paid 12 months compensation and other terminal benefits. Since it is also the finding of this court that termination was unfair both substantively and procedurally, I find no need to fault the arbitrators order regarding the same.

In the circumstances, I hereby confirm the award given by the Commission for Mediation and Arbitration (CMA) and dismiss this application for lack of merit.

It is so ordered.

K.N. ROBERT
JUDGE
10/11/2021