

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(LABOUR DIVISION)**

AT ARUSHA

REVISION NO. 114 OF 2021

*(Originating from Labour Dispute No. CMA/ARS/ARS/122/20, Award by Lomayan Stephano,
Arbitrator, dated 16th July, 2021)*

CONSOLIDATED TOURIST AND HOTEL INVESTMENT LTD.....APPLICANT

VERSUS

HUSSEIN MUSSA KOTIWA..... RESPONDENT

JUDGMENT

01/08/2022 & 10/10/2022

GWAE, J

Aggrieved by an award procured on 16th July 2021 by the Commission for Mediation and Arbitration for Arusha at Arusha (CMA) with effect that the respondent, Hussein Mussa Kotiwa be paid a total of Tshs. 36,396,000/= being arrears for payment of 18 years' retirement gratuity, the applicant, Consolidated Tourist and Hotel Development Limited has now brought this application for revision under the provisions of section 91 (1) (a), (2) (a), (b) and (1), (4) (a) and (b) (i) 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)(a), (c), (d) and (e) of the Labour Court Rules, GN No. 106 of 2007 (Rules), 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 CMA/ARS/ARB/122/2020
2. That, the court be pleased to find the impugned award illogical or irrational on the following grounds;
 - (a) That, the arbitrator seriously erred in law and fact by holding that the respondent was supposed to be paid the severance pay as per the Addendum to the Collective Bargaining Agreement of 13th day of April 2021 instead of the Collective Bargaining Agreement of 1st January 2020 to December 2021 which was in existence at the time the applicant gave her consent to the respondent's application for early retirement
 - (b) That, the arbitrator erred in law and fact to consider that, earlier retirement is not automatic right instead it is complete at time the employer gives his consent
 - (c) That, the arbitrator accorded no weight to the documentary evidence tendered by the application proving her case.

3. That, the court be pleased to determine the matter in the manner it consider it appropriate and give any other relief it considers just to grant.
4. That, the court be pleased to grant any the relief (s) it deems fit to grant for the interest of justice

Facts of the dispute between the parties can be recapitulated from the award and proceedings of CMA and it is as follows, that, the applicant was an employer of the respondent since 1st April 1992 as electrical technician, that, the respondent's last salary was at the tune of Tshs. 674, 000/= . That, on 1st day of November 2019 the respondent wrote a letter (PE1) to the applicant for early retirement and his letter was responded by the applicant informing him that, his request would be responded after two months' period on 4th day of November 2019. Essentially, the applicant refusing the respondent's request on the ground that, there was unsatisfactory work force in his work field.

That, the CMA's record further reveals that the respondent was paid his gratuity (Tshs. 21, 767, 855/=) in terms of the Collective Bargaining Agreement as of 1st January 2020 to 31st December 2021. That, before the

Commission and this court the contentious issue between the parties is, whether the respondent was to be paid his gratuity in accordance with Collective Bargaining Agreement (herein 'CBA') dated 13th day of April 2019 or as per CBA dated 1st January 2020.

This application was called on 1st day of August 2022 for hearing and the applicant and respondent had representation from Mr. David Khawa, the learned counsel and Mr. A. Marco, personal representative respectively, both representatives orally argued this application. And both parties' representatives sought court's adoption and consideration of their respective affidavit and counter affidavit.

Submitting for the application, Mr. Khawa, **firstly** stated that, the arbitrator erred in law and fact by ordering severance basing on the CBA as of 13th day of April 2019 instead of CBA dated 1st January 2020 which was in existence at the time the applicant consented for the applicant's earlier retirement since the applicant accepted his request on 7th day of March 2020. Henceforth, the retirement package was prepared in pursuant to CBA as of 1st January 2020 which was to come to an end on 31st December 2021. It is further the submission of the applicant's counsel that the respondent was

accordingly paid his retirement gratuity and there is no dispute on that particular payment. He added that, the respondent's contention that, he was to be paid according to addendum of 13.02.2019 is unfounded since the applicant's consent was yet to be obtained.

Secondly, the learned counsel for the applicant further submitted that the arbitrator erred in law and fact in holding that failure to reply to the respondent's application for voluntary retirement by the employer should be a blameworthy on the employer as conditions stipulated for earlier retirement under article 11 of the CBA since the requisite consent by the employer was obtained on 7th March 2020 and **thirdly**, Mr. David argued that, the respondent failed to issue three months' notice. He finally asked this court to set the impugned award on the ground that, it was improperly procured.

Repelling to the applicant's oral submission, Mr. Marco argued that the CMA's was properly procured as the CBA applicable was that of 2019 due to the following reasons;

1. The respondent applied for voluntary retirement on 1st November 2019 whereof the CBA in operation was of 7th

April 2018 ending 6th April 2020 which rectified article 12 and made the so-called Addendum to the CBA of 13th April 2019.

2. According to Article 11:1 of CBA once an employee applies and gives one month notice such an employee shall be deemed as a retiree. Hence, it is not the consent of the employer which determines earlier retirement of an employee. The employer ought to have made a reply within two months' period. Hence, if the applicant made a reply to the respondent's application for the earlier retirement still the respondent would be covered by the former CBA that is why this a reminder letter dated 21st February 2020. The applicant's delay to respond to the respondent was actuated with ill will.
3. According to 11: 1 of the later CBA, consent is mandatory unlike to the former CBA.

Basing on the above arguments, the respondent's representative was of the opinion that the award of the Commission was properly procured. He

thus prayed for an order dismissing this application to avoid wastage of precious time of the court.

Riposting to the submissions made by the respondent Mr. Khawa stated that, an early retirement is not automatic right to an employee and that, mere application for a voluntary retirement does not on itself constitute retirement as the same must be considered by the employer now applicant. He added that even before CBA of 2021, consent by an employer was vitally important.

Rejoining on the respondent's contention that there was delay to reply to the respondent's letter on the part of the applicant, Mr. David stated that the contention is unsubstantiated on the ground that the respondent's application was answered on 4th November 2019 but the same was declined due to the shortage of human resources.

Examining the CMA record, affidavits of the parties for and against this application and submissions of the parties through their representatives, it goes without saying as correctly argued by Mr. Marco that, the respondent did apply for a voluntary or early retirement through his letter dated 1st November 2019 while the parties' CBA in operation was the one which was

made on 7th June 2018 ending 6th day of April 2020 (hereinafter to be referred to as former CBA).

It is also acknowledged fact that, while there was CBA of 2018 to 2020 was operative, an addendum dated 13th day of April 2019 was entered by the applicant and CHODAWU aimed at improving the retirement gratuity payable to the applicant's employees who attain either compulsory age of retirement or those who voluntarily retire at the age of fifty-five (55) years upon application by an employee. The records also plainly reveal that the applicant accepted the respondent's request for his early retirement through his letter dated 7th March 2020 as correctly argued by the parties when the former was already replaced by the new CBA commencing from 1st January 2020 to 31st December 2021.

Considering the above, I have found that, there are two issues for determination these are, whether the date of voluntary retirement should be on the date the respondent wrote the application to the applicant (1st November 2019) or when the applicant consented to his request (7th March 2020) and whether, the applicant was to pay the respondent his gratuity in accordance with the new /current CBA (1/1/2020 to 31/12/2021) or former CBA (7/4/2018 to 6/4/2020).

Before I start determine the said two issues, I find it apposite to have relevant Articles and their paragraphs in relation to the CBA of 7th April 2018 to 6th April 2020 and its Addendum dated 13th April 2019 and CBA of 1st January 2020 to 31st December 2021 reproduced herein under;

CBA entered on 7th April 2018 with effective 7th April 2018 to 6th April 2020 (24 months' duration) reads;

"11. 1 Parties to this agreement accept that CHTI and Elewana Africa T Ltd Management staff shall upon the attainment of the age of 60 (sixty) years. However, early retirement at the age of 55 (fifty-five) years will be considered on request from the employee"

"11.1 Those considered for retirement shall give or given 1 month-notice before the date of retirement

*"12.1 When an employee retires from work in accordance with the retirements of paragraph 11.1 of this agreement, the employee shall be paid severance pay as per law **which 7 days' wage** for each completed year of service*

Addendum to the Collective Bargaining Agreement made on 13th April 2019 amending inter alia, Article 12. 1 provides;

*"When an employee retires from work in accordance with the retirements of paragraph 11.1 of this agreement, the employee shall be paid severance **pay of 25 % of his /her annual wages multiplied by number of years worked,** in addition to his /her statutory terminal benefits"*

CBA between CHODAWU and applicant dated 1st January 2020 to 31st December 2021 relating retirement benefit under Article 12 provides;

*"When an employee retires from work in accordance with the retirements of paragraph 11.1 of this agreement, the employee shall be paid severance pay of **25 % of his /her annual wages multiplied by number of years worked, a maximum of 10 years** in addition to his /her statutory terminal benefits (emphasis supplied) "*

Having quoted the Articles of the former CBA as well as its addendum and new or current CBA herein, I turn to the court's determination of the issues above; Regarding the **1st issue** on, whether the date of voluntary retirement should be on the date the respondent wrote the application to the applicant (1st November 2019) or when the applicant consented to his request (7th March 2020).

According to the wording of paragraph 11.2 of the former CBA cited above, it is an employee who applies requesting for early retirement after he or she has attained the age of fifty-five (55) years old to his employer who shall consider such application. In my view, consideration by the employer may be in favour of the applicant or otherwise that is why the wording of the CBA is to the effect that, those considered for retirement denoting that there would be employees' applications or requests for early retirement that would be successfully and others which would be rejected. Hence, the argument that, the respondent's letter dated 1st November 2019 requesting for the voluntary retirement would be considered or the same could be deemed as an automatic retirement is not founded from the terms and conditions of CBA as the same is subject to consideration by the employer now applicant.

More so, there is no provision that obliges the employer to respond to the letter for voluntary retirement after attaining the age of 55 years. In our case the applicant's application for early retirement was refused and reason of doing so was given via the applicant's letter dated 4th November 2019.

The respondent's assertion that, the mere application and issuance of one-month notice did not require consent from the applicant is not backed by the Former CBA neither in its Addendum. Therefore, application for compulsory retirement or early retirement of an employee is sanctioned by consideration by the employer/applicant.

Similarly, the holding by Hon. Lomayan Stephano is, arbitrator in my considered view, a misconstruction of the applicant's letter dated 4th day of November 2019 which indicated a refusal of the respondent's request for early retirement in order to give a room for the applicant's management to look for a solution or a respondent's replacement. Thus, the permission was not yet given. For the sake of clarity parts of the applicant's letter addressed to the respondent is hereby replicated;

"Maombi yako haijafanikiwa (sic) kwa kipindi hiki ila uongozi unafanya utaratibu katika kitengo chako ndani ya muda wa miezi miwil ilikukupa nafasi ya kustaafu kwa hiari kama ulivyoomba barua yako ya tarehe 01/11/2019".

Carefully going through the above quoted words, it is plainly clear that, the respondent's requested was to be consented by the applicant as

explained herein. Thus, the word consideration entails that there should be consent from the employer.

In the **2nd issue** on, whether the applicant was to pay the respondent his gratuity in accordance with new /current CBA (1/1/2020 to 31/12/2021) or former CBA (7/4/2018 to 6/4/2020). According to the former CBA. Under Article 2 of the ILO ***Collective Bargaining Convention 154 of 1981***, the term CB is defined as negotiations which take place between an employer or a group of employers or one or more employers organization on one hand, and one or more **workers organizations**, on the other hand. A Collective Bargaining Agreement known by its acronym "CBA") is the labour contract between a union representing employees and the employer (management). A CBA sets the terms and conditions of employment, such as wages, working hours and conditions, employee benefits/incentives, grievance and arbitration procedures, union's rights and responsibilities or Management's rights and responsibilities.

Looking at the Former CBA especially its Addendum dated 13th April 2019, the incentive provided there in is more attractive than the later CBA in that the gratuity in the former does not set limit of number years served in

respect of payment of retirement pay while the later set a maximum of ten (10) years taking into account that the respondent was employed by the applicant since 1st April 1992. Hence, about 28 years of service.

In our dispute, the applicant and CHODAWU are clearly found to have entered into another CBA (Later CBA) while the former was still in existence. I am holding so simply because the former CBA was to expire on 6th April 2020 while the new CBA was entered on 1st January 2020 meaning that before expiration of the former CBA. It is trite law that CBA are effective and operational for a specified duration stated in the agreement, for example, three years or two or one year Unlike regular contracts,

However, it is known principle that, parties' rights and obligations do not end on the expiration of a collective bargaining agreement if a successor collective bargaining agreement has not been concluded by the time the former CBA expires. This position was stressed in a foreign jurisprudence in the case **Dunkley and other vs. Kostal Ltd** (2019) EWCA, Civil 1009 where it was stated that, a former agreement remains enforceable until change is negotiated, agreed or imposed. In view of the underlying principle that if a CBA expires before the next CBA is in place, almost all the terms of

the expired contract continue while the parties are bargaining. Equally, in my considered opinion, when new CBA comes in force, the predecessor Collective Bargaining Agreement ceases automatically and the parties to the successor CBA shall be bound by the terms and conditions of the new CBA as per provisions of section 71 (2) (3) (4) and (5) of the Employment and Labour Relations Act, Cap 366, Revised Edition, 2019 (ALRA) which read and I quote;

“(2) A collective agreement shall be binding on the last signature unless the agreement states otherwise.

(3) A collective agreement shall be binding on –

(a) the parties to the agreement;

(b) any members of the parties to the agreement;

(c) any employees who are not members of a trade union party to the agreement if the trade union is recognised as the exclusive bargaining agent of those employees under section 67.

(4) A collective agreement shall continue to be binding on employers or employees who were party to the agreement at the time of its commencement and includes resigned members from that trade union or employer association.


(5) A collective agreement becomes binding on employers and employees who become members of the parties to the agreement after its commencement”.

According to the CBA of 1st January 2020 which was to come to an end on 31st December 2021, it is observed that the same was duly signed on 14th January 2020 by the following persons in authority representing, employers (M. Wissanji-Managing Director, Mr. Hennie-CTHI), Ms. Jai-ELEWANA), Registered Trade Union (Jeremiah Meliari-CHOAWU Secretary) employees' trade branch representatives (Branch Chairpersons from Tarangire Sopa, Serengweti Migration Camp, Serengeti Sopa Lodge and Ngorongoro Sopa Lodge).

In the light of the provisions of section 71 of the ALRA, it is plainly clear that, a Collective Bargaining Agreement is binding in nature between the parties provided that it was made in accordance with the law. It was therefore wrong for the arbitrator not considering the successor CBA as the one which was a basis for the payment of the Termination Gratuity payable in favour of the respondent as correctly argued by the applicant's learned counsel unless it was established to the contrary which is not the present dispute.

That said and done, the impugned Commission award is hereby quashed and set aside. The respondent was to be paid as per the new CBA (1st January 2020 to 31st December 2021 and not the Predecessor CBA (7th April 2018 to 6th April 2020). Given the fact that this is the labour dispute, each party shall bear his or her costs. It is so ordered.

Dated at Arusha this day of 10th day of October, 2022



M. R. GWAE
JUDGE
10/10/2022

Court: Right of appeal to the Court of Appeal fully explained



M. R. GWAE
JUDGE
10/10/2022