IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

LABOUR REVISION NO. 38 OF 2021

(Arising from Labour Dispute No. CMA/ARS/156/20/89/2020)

HODI (HOTEL MANAGEMENT) COMPANY LIMITED

T/A MOUNT MERU HOTEL.....APPLICANT

VERSUS

ERIC MUBWEKA MUGENYA..... RESPONDENT

JUDGMENT

11.05.2022 & 31.05.2022

N.R. MWASEBA, J

This is an application for revision against an award of the Commission for Mediation and Arbitration (CMA) at Arusha delivered in favour of the respondent herein, Eric Mubweka Mugenya, in Labour Dispute No. CMA/ARS/156/20/89/2020. At the CMA, the respondent, an erstwhile employee of the applicant herein filed a complaint against the applicant herein claiming for his terminal benefits following the unfair termination.

At the CMA the following issues were raised:

i. Whether or not the purported extension of CBA to complainant who is part of management without involving trade union amendment to CBA is valid in Law.

ii. Whether there is breach of contract by failure of respondent to compile terms containing in CBA.

iii. What relief both parties are entitled to?

At the end of the trial, the CMA decided that the extension of the CBA benefited the respondent and it was valid in law. As to the second issue it was the finding of the CMA that the applicant did not breach the terms of the CBA and therefore the applicant was bound to adhere to the terms of the agreement by paying the respondent 2 months' notice and severance amounting to a total of USD 19,000.

Aggrieved, the applicant moved this Court to revise the CMA award on the grounds set forth at paragraph 8 of the affidavit sworn by Mr. Andrea Strim, principal officer of the applicant, as follows:

i. Whether the Respondent was covered by the collective bargain agreement.

ii. Whether the respondent was entitled to notice pay and severance pay in a fixed term contract.

The application was heavily opposed by the respondent through his counter-affidavit filed on 2nd day of July, 2021.

At the request of parties, the application was argued by filing written submissions as ordered by the Court. Parties in this application enjoyed legal representation from Messrs Paschal Kamala and Mwinyiwala Mapembe, learned counsel for the applicant and respondent respectively.

Starting with the first ground, the question for determination is whether the respondent was covered by the collective Bargain Agreement.

Mr. Kamala argued that the award of the CMA was delivered in favour of the respondent based on exhibit D5 which purported to extend the Collective Bargain Agreement to employees of managerial cadre. However, the Collective Bargain Agreement is a creature of statute which is Employment and Labour Relation Act, Cap 366 R.E 2019, thus, any agreement which is against the law will be invalid and will not be enforceable. As per exhibit D1 the CBA dated 01.04.2016 and exhibit D4 dated 01.04.2018, clause 1.2 stated that CBA applies to employees who are CHODAWU members employed by the Company.

He added that, in order to be a CHODAWU member you must possess a membership card and contribute to the union (See Section 60 (1) (a) and 61 (1) of Cap 366 R.E 2019). And as per clause 3 (g) a member of

CHODAWU must have entered a contract of unspecified period, therefore a mere letter written by the Human Resource Officer cannot make a person a beneficiary under CHODAWU and CBA. Moreover, **Section 51(6) of the Employment and Labour Relations (Code of Good Practice)** GN 42 of 2007 excludes Senior management Position from being beneficiary of CBA. And even DW1 admitted that exhibit P3 was mistakenly issued to the respondent that's why on 5th March 2020 they wrote another letter to him apologizing for their mistake and retracting exhibit P3 but the respondent refused to accept the said letter for the reason known to himself.

On his side, counsel for the respondent submitted that DW1 extended the terms and benefits state in CBA to the respondent including two months' notice pay and severance pay (See exhibit P5) the allegation that DW1 had no mandate to extend the terms of CBA is not backed up by any evidence. He added that clause 15.5 allow modification of the employment contract as long as it does not reduce the employee's benefits. Thus, the CMA was correct in ordering that exhibit P5 extended the benefits of CBA to the respondent. It was his further submission that the CMA correctly ruled out that Rule 50 (5) of GN 42 of 2007 only exclude Managerial Personnel from being members of trade union and not be beneficiaries of

CBA and that the law gave room for the parties to the employment contract to determine terms beyond those minimum conditions. He cited the case of **Muhimbili National Hospital Vs Linus Leonce**, Civil Appel No. 190 of 2018 and **Section 123 (1) of the Evidence Act**, Cap 6 R.E where the court insisted that a party cannot run away from his previously freely made choices.

Having determined the arguments of counsels regarding this ground, this court finds it pertinent to look into the relevant provision of the law dealing with the Collective Bargaining Agreement. Collective bargaining is a key means through which employers and their organizations and trade unions can establish fair wages and working conditions. It also provides the basis for sound labour relations. Typical issues on the bargaining agenda include wages, working time, training, occupational health and safety and equal treatment. However, the law excludes senior management from being member of trade union which deals with Collective bargaining agreement.

Rule 50 (5) of GN 42 of 2007 provides that:

> "Members *of senior management who by virtue of their position are responsible for determining policy on behalf of the employer and who are authorised to conclude*

collective agreement on behalf of the employer shall not be member of the trade union."

Further to that, **Rule 51 (6) of GN No 42 of 2007** which define senior management read as follows;

"The term "Senior Management" means an employee who, by virtue of that employee's position makes policy on behalf of the employer and is authorised to conclude collective agreement on behalf of the employer"

Based on the cited provisions of the law it is crystal clear that the respondent was excluded from being members of trade union, thus, not eligible to have benefits listed under the CBA (exhibit D1). I have revisited the proceedings of the trial court and noted that the Commission relied on Exhibit P5 (a letter written by the Human Resource manager) to vacate from the position of the law, the position which was against the law. Further to that the law does not allow the terms of Collective bargaining agreement to be made by one party alone as it was defined by the context in **ILO Collective Agreements Recommendation**, No. 91 of 1951 where it is stated in Clause 11(1) of the recommendation:

"*For the purpose of this Recommendation, the term collective agreements means all agreements in writing*

regarding working conditions and terms of employment concluded between an employer, a group of employers or one or more employers' organisations, on the one hand, and one or more representative workers' organisations, or, in the absence of such organisations, the representatives of the workers duly elected and authorised by them in accordance with national laws and regulations..."

More so, having gone through part V of GN 42 of 2007 which deals with Collective bargaining, among the reasons which allow parties to depart from the stipulated provisions was not to include Senior Management to be part of the Collective bargaining Agreement without any consultation from the worker's representative.

Thus, this court disagree with the trial commission that the respondent needs to benefit from CBA only based on a mere letter which does not carry any legal enforcement. For the said reasons, the respondent was not covered by the Collective Bargain agreement as he was a lastly the acting general manager which is a senior position.

As for the second ground where the applicant asked whether the respondent was entitled to payment of two months' notice and severance

pay in a fixed term contract. Mr. Kamala submitted that severance pay is payable to employees who have unspecified contracts not to those with fixed term contract as per **Section 42 (3) (c) of the ELRA** as amended by **Section 3 of the Written laws (Miscellaneous Amendments) Act** No. 2 of 2010. Thus, he says the Hon. Arbitrator erred to allow the payment of notice and severance pay to the respondent who was on a fixed term contract.

Responding to this ground, Mr. Mapembe argued that the coming of the new CBA (exhibit D1) did not replace the respondent's benefits since relinquishing the respondent from entitlements contained in a new CBA agreement without consultation and consent is contrary to **Section 15 (4) of the ELRA**. Thus, since his entitlements of two months' notice and severance pay are covered under CBA as per clause 5.1, the respondent was entitled to be paid the same.

It is a trite law that an employee with a fixed term of contract is not entitled to severance pay as the same is paid to employees with unspecified term of contract or permanent employees as per **Section 42 (3) of ELRA.**

The same was held in a case of **Tanzania Electric Supply Company Limited Vs Innocent Shirima and 43 Others**, Revision Application No. 323 Of 2020 (reported at Tanzlii) that:

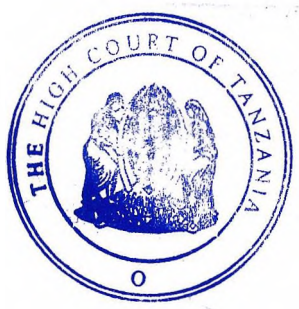
> *"Since the contracts expired automatically, the arbitrator erred to award the respondents to be paid 12 months' salary compensation. I hold also that both notice and severance pay were wrongly awarded to the respondents."*

In our present application the evidence at the trial commission revealed that the respondent's contract ended automatic on 03.03.2020, thus as held in the first ground that the respondent herein is not covered by the terms of the CBA therefore, he was not entitled to payment of severance and two months' notice as demonstrated under paragraphs 5.1 and 5.3 of CBA.

In the upshot, this court do agree with the submission made by the applicant's counsel that the respondent was not qualified to be benefited from the Collective bargaining agreement. Consequently, the Revision Application is allowed and the Commission Award is hereby quashed and set aside. Each party should bear its own costs.

Ordered Accordingly.

DATED at **ARUSHA** this 31st day of May, 2022.



N.R. MWASEBA

JUDGE

31.05.2022