IN THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

HIGH COURT OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

LABOUR REVISION NO. 17 OF 2022

(C/F Labour Dispute No. CMA/KLM.MOS/ARB/49/2021)

TPC LTD ……..…… APPLICANT

VERSUS

SINANA SAMSON MWITA ……..…… RESPONDENT

JUDGEMENT

Date of Last Order: 10.08.2023
Date of Judgment: 07.09.2023

MONGELLA, J.

The applicant herein has preferred this application under section 91(1) (a), (2) (b) and (c) of the Employment and Labour Relations Act [Cap 366 R.E 2019] (ELRA) and Rule 24(1), (2), (a), (b), (c), (d), (e), (f), 3 (a), (b), (c) and (d), 28 (1), (c), (d) and (e) of Labour Court Rules, 2007, GN No. 106 of 2007. He is seeking for this court to call the records of the Commission for Mediation and Arbitration for Moshi (CMA, hereinafter) in Dispute No. CMA/KLM/MOS/ARB/49/2021 in order to examine the legality, propriety and correctness of the award and to grant any relief it finds fit to grant.

Briefly, the respondent was employed by the applicant as security guard in the risk and security department in 2013. On 09.02.2021 in a department meeting, the respondent had a conflict with his co-worker

and supervisor one, Aisha Saidi Kitundu, on corruption allegations which was allegedly unresolved. 0n 24.02.2021, the respondent wrote a letter to the security manager, Human Resource Executive Officer and Chairman of TASIWU complaining on the conflict being unresolved and requesting the same to be resolved. Thereafter, the respondent was charged for various misconducts which he denied. A disciplinary hearing was held and the respondent was terminated from employment. The respondent lodged an appeal in the employer's disciplinary system, which was also dismissed.

Aggrieved, the respondent referred the case to the CMA in which he challenged the reasons and procedure for his termination. To prove that the termination was fair both procedurally and substantively, the applicant called five (5) witnesses being: Andrew Bright Ngurila (DW1), Yohana Msengi (DW2); Benard Josephat Mwaipaja (DW3); Aisha Saidi Kitundu (DW4) and; Antonia Michael Temba (DW5). The applicant's witnesses also produced seven (7) documents which were admitted as exhibits: Exhibit T-1, hearing form; T-2, suspension letter; T-3, Charge letter; T-4 respondent's Statement of defense; T-5, termination letter; T-6, appeal form and; T-7, outcome of appeal.

The respondent did not call any witnesses to prove his case, but furnished three exhibits being: Exhibit S-1, his complaint letter; S-2, Suspension letter and; S-3, termination letter.

After trial, the CMA found that the respondent's termination was both substantively and procedurally unfair and hence ordered for his reinstatement with no benefits lost. Aggrieved, the applicant has preferred the application at hand.

The application has been accompanied by the affidavit sworn by Mr. David Shilatu, learned advocate duly instructed to represent the applicant. In his affidavit, he faults the CMA award for being unlawful, illogical and problematic on the ground that the Hon. arbitrator failed to analyze the evidence and exhibits tendered thereby wrongly holding the termination as unfair substantively and procedurally.

The respondent challenged the application through his counter affidavit in which he countered that the decision of the CMA was justly reached since the applicant failed to prove the allegations against the respondent and did not comply with the required procedures. The respondent prayed for the application to be dismissed and the reinstatement order by the CMA maintained.

The application was resolved by written submissions whereby the applicant was represented by Mr. David Shitalu, learned advocate while the respondent was represented by Mr. Manase G. Mwanguru, his representative.

Mr. Shilatu begun by briefly explaining the essence of enactment of the Employment and Labour Relations Act [Cap 366 R.E 2019]. He said that the law was enacted to enhance industrial relations at work and thus the establishment of the CMA was for the same purpose. He faulted the CMA award averring that the Arbitrator failed to observe relevant laws as she failed to address whether the reasons and procedures for termination were observed by the applicant during termination of the respondent. That, the arbitrator failed to analyze the evidence tendered before the CMA, hence arrived at an unlawful, illogical and problematic award.

He argued that the respondent was properly charged and the applicant adhered to all procedures prior to terminating the respondent. That, the respondent challenged the decision of the hearing committee instead of the decision of the appeal contrary to the holding of this court in **DELIGHT AMINIEL MUSHI vs. EQUITY FOR TANZANIA LTD (EFTA)**, Labour Revision No. 01 of 2022 (unreported).

Mr. Shilatu further averred that the Arbitrator failed to appreciate that the respondent was terminated by way of letter, exhibit T-5 as evident in the award. That, DW5 was very clear in terms of reasons and procedures leading to the termination of the respondent. That, the said witness testified before the CMA that the respondent had verbally attacked DW2 for reasons only known to him and that he did the same believing that it was DW2 who suspended him from work. He contended that, assaulting an employer is a serious offence thus it was strange for the arbitrator to hold that the applicant did not observe or partly observed the required procedures.

Submitting further on whether procedures were observed, Mr. Shilatu averred that the Arbitrator did not indicate procedural irregularities and to what extent they infringed the fundamental rights of the respondent. He had the view that, if the issue was on non-proving of the charges, then it was a misdirection on the part of the Arbitrator. Insisting that the charges were proved, he again reiterated his position that the respondent's attack on his employer is a world known serious offence. He further argued that the act of the respondent accusing a fellow employee without any evidence disturbed the peace and put in question his honesty and trust at the workplace.

Mr. Shilatu submitted that the issue of non-compliance with incompatibility procedures also fails as the respondent attacked his employer, DW2. He insisted that the Arbitrator erred in law and fact by ruling that the applicant did not comply with procedures and reasons for termination. Referring to Exhibit T-1 he had the stance that the same duly reflects the hearing held by the applicant in which the respondent admitted to committing all offences he was charged with and called for the applicant's leniency. He therefore prayed for the award to be revised, quashed and set aside for being unlawful, problematic and irrational.

In reply, Mr. Mwanguru briefly explained that the respondent was employed by the applicant in 2013 as a guard and unlawfully terminated on 30.06.2021 which is why the CMA ordered his reinstatement. That, originally the dispute was between the respondent and one Aisha Kitundu and the same is evident in paragraph 1and 2 of the charge "Exhibit T-3" whereby the charge was on allegations of bribery which DW4 admitted to have received a cock from the respondent as bribe. That, the applicant twisted "Exhibit T-3" and made the respondent to appear as a violent person who disturbed the peace in the workplace while he is a good and disciplined employee.

He averred that it was not true that the respondent had committed four offences. That, the applicant failed to prove the charges against the respondent as even DW5, as indicated in the Award, was unaware of when the respondent committed the offences he was charged with. He had the stance that the application is without merit because; **one**, the applicant could not prove when the respondent organized the alleged unlawful strike and how many people were there with him; **two**, there

was no one called before the hearing committee to prove that he was mobilized by the respondent to strike; **three**, DW2 who was allegedly assaulted testified that he had resolved his dispute with the respondent and that he was called to the disciplinary hearing to testify on the dispute between the respondent and DW4 and not on his personal dispute with the respondent; **Four**, that the applicant never called one Dickon Mlembezi who was mentioned by his witness thus blocked her own fundamental right and; **Five**, that the procedure was not observed since the dispute was originally between the respondent and DW4, but the applicant suspended both the respondent and Aisha and afterwards held two disciplinary hearings, that is, one between the applicant and respondent and another between the applicant and DW4.

Mr. Wanguru further contended that the disciplinary committee committed several mistakes being: the same chairman presided over both disputes; the hearing form (Exhibit T-1) does not indicate to which case does the outcome of the hearing relate to; and the outcome of the dispute between the respondent and DW4 was not provided to show how she was found not guilty and reinstated.

He contended that upon filing his appeal and the same being dismissed as evident in Exhibit T-5 and T-6, the respondent took appropriate measures under the Employment and Labour Relations Act by referring the dispute to the CMA within 30 days. He considered the CMA decision justly entered on the ground that both parties were accorded the right to be heard.

Mr. Wanguru contended that there was only one charge and one hearing, but DW1 testified that he was called to the dispute between the respondent and Aisha, however, surprisingly, after the said dispute he was told there was another hearing for the respondent and the two disputes were both heard by the same committee chaired by the same chairman, while there was a single charge (Exhibit T-3) and a single hearing form (Exhibit T-1). In the premises, he contended that it is unclear as to which dispute the respondent was terminated. That, the respondent had filed a complaint against DW4 via his letter "Exhibit S-1" which was the foundation of the disciplinary hearing, however the respondent was charged and terminated while DW4 remained at work.

He further contended that the respondent was alleged to have disturbed the peace at the workplace and to hold an unlawful strike as found in paragraph 3 of "Exhibit T-3." However, he said, the applicant failed to prove the allegations before the disciplinary committee. He added that exhibit T-5 shows that the applicant clearly misdirected herself and thus failed to prove the allegations against the respondent. He therefore prayed for the revision to be dismissed and for the court to confirm the CMA award.

In rejoinder, Mr. Shilatu maintained his stance that the award was illegal, problematic and irrational for ordering reinstatement of the respondent while he attacked his employer. That, the offence against the respondent was not altered since paragraph 6 of the charge indicate that the respondent was charged for breaching Code 20 of the Company Disciplinary Code. That, the applicant proved the offence against the respondent whereby he assaulted the Human Resource business partner who is a member of the management staff. That the

said offence was one of the reasons for the termination of the respondent as indicated in the termination letter.

That there were no mistakes made by the disciplinary hearing committee as the hearing was conducted in a consolidated way whereby the respondent having admitted to have committed the offence, as testified by DW1, was charged. That, the outcome of the hearing was clear that the decision was to terminate the employment of the respondent without notice and the form was signed by the respondent, the chairman of hearing committee, and the management representative.

Mr. Shilatu asserted that he was not against the respondent's act of filing the claim at the CMA, but was opposing the award on the ground that the respondent never challenged the decision of the internal appeal before the CMA as based on **Guidelines 4(15) of the Guidelines for Disciplinary, Incapacity and Incompatibility Policy and Procedure Rules, GN. No. 42 of 2007**. He contended that the CMA was improperly moved as was held in **DELIGHT AMINIEL MUSHI vs. EQUITY FOR TANZANIA LTD. (EFTA)** (supra).

He finalized by stating that the respondent's submission was misguided and that the same was intended to mislead this court. He maintained his prayers for this court to quash and set aside the CMA award for the same being problematic, irrational and illegal.

I have objectively observed the submissions of both parties as well as the record of the CMA. The applicant herein challenges the CMA award on

the ground that the termination was based on fair reason and procedures. He considers the award problematic, irrational and illegal.

The applicant also argued that the respondent never challenged the decision of his appeal before the CMA and as such, the award was improperly procured. Before addressing the fairness of the termination, I shall first address the issue, whether the respondent never challenged his appeal before the disciplinary hearing committee and whether the same rendered the dispute a nullity.

The applicant has challenged the competence of the dispute before the CMA based on **Paragraph 4(15) of the Guidelines for Disciplinary Incapacity and Incompatibility Policy and Procedures** which states:

> *"An employee wishing to challenge the outcome of the appeal, may utilize dispute mechanisms contained in the Employment and Labour Relations Act. The period within which to exercise these rights shall commence from the date the employee is advised of the outcome of the appeal."*

In **DELIGHT AMINIEL MUSHI vs. EQUITY FOR TANZANIA LTD. (EFTA)** (supra, cited by Mr. Shilatu), the respondent had filed his dispute before the CMA after the outcome of the disciplinary hearing without filing his appeal. This court found that the dispute had been preferred prematurely since the applicant did not exhaust all available remedies.

From the CMA record it is clear that the dispute was preferred after the respondent had appealed and the appeal body had maintained the same results as the disciplinary committee which was to have the

respondent dismissed from his employment with the applicant. This is evident from "Exhibit T-6" the appeal form filled by the respondent after the outcome of the disciplinary hearing; and "Exhibit T-7" which is the outcome of the appeal. I am thus of considered view that the requirement under **paragraph 4(15) of the Guidelines for Disciplinary Incapacity and Incompatibility Policy and Procedures** was duly observed as the respondent exhausted all remedies. In that respect, and with due respect to the learned counsel, the decision in **DELIGHT AMINIEL MUSHI vs. EQUITY FOR TANZANIA LTD (EFTA)** (supra) is inapplicable.

It is well settled that for termination of employment to be considered fair, the same must have been done for a valid reason and procedures must have been followed. This is well stated under **section 37 (2) of the ELRA** which states:

> *"(2) A termination of employment by an employer is unfair if the employer fails to prove-*
> *(a) that the reason for the termination is valid;*
> *(b)N/A*
> *(c) that the employment was terminated in accordance with a fair procedure."*

The applicant was charged for the following misconducts; (i) *unacceptable behaviour towards customers, clients, fellow employees or members of the public*; (ii) *breach of organizational rules or policy*; (iii) *dishonesty or any major breach of trust*; (iv) *abuse behavior, harassment, assaults, threatened assaults or other totally unacceptable conduct towards members of management staff or other employees, customers, clients or members of the public*; (v)*initiating, inciting and intimidating others and participating in a strike that does not comply with the*

provision of the labour laws; and (vi) *incompatibility with the work environment*.

The particulars of the charge referred to the dispute between the respondent and DW4 occurred on 09.02.2021 in a department meeting of the risk and security department within the applicant's premises which included allegations of bribery. The charge also disclosed the grievance he filed against DW4. The respondent was also alleged to have created disharmony environment in the workplace and that he tried to convince his co-workers to strike by facing the Chief Executive Officer (CEO) to deliver their grievances. That, the management and HR team tried to mediate the dispute between him and DW4, but the same was in vain. That, the investigation further revealed that he was incompatible with the workplace. The applicant, in fact, terminated the employment services of the respondent on the said reasons. It is evident on record that, apart from the dispute between the respondent and DW4, the rest of the allegations had no details regarding date, time or year of commission.

The underlying question is whether the allegations were proved against the respondent. I have observed the record of the hearing before the disciplinary committee as well as evidence adduced before the CMA and I am of the finding that the allegations were not proved against the respondent. This is based on the following observation:

There was no enough evidence adduced to prove the allegations against the respondent to the required standard. This can be seen in reference to all charges levelled against him. Briefly, in observing the evidence tendered before the CMA, it is evident that all witness

presented by the applicant mostly testified on the procedures being observed rather than the misconducts leading to the respondent's termination. The common issue raised is the grievance between the respondent and DW4 which was briefly explained by DW4. At some point DW2 also mentioned that the respondent verbally assaulted him after he was suspended pending his disciplinary hearing.

Most of the evidence adduced at the disciplinary hearing can be seen in Exhibit T-1, the hearing form. In this exhibit it was shown that one Dickson Mlembezi, a leading investigation officer, had seen the respondent organizing his co-workers to strike by going to the CEO to air their complaints and he duly advised him to follow the laid-out procedure and informed his supervisor on the same. However, he did not mention the date, time or year this event took place. In addition, the respondent's supervisor and the co-workers he allegedly mobilized, who, in my view, would have all the necessary details, were not called before the disciplinary committee to testify. In the premises, even if such incident had indeed taken place, the information given does not anyhow prove how the respondent and his co-workers' act of discussing about going to the CEO to air out their views amounted to a strike in any way.

Exhibit T-1 also shows DW2, as the second witness, explained on the details of the dispute between the respondent and DW4 that began on 09.02.2021 and how the Human Resource department tried to resolve the same in vain. He then testified on how the respondent assaulted him on 02.06.2021 an issue not within the charge leveled against the respondent and which DW2 agreed to have been resolved between him and the respondent. There was thus no evidence proving the

respondent's continuous misconducts within the workplace creating disharmony, his consistent acts of assaults against co-workers and clients, his organizing of the strikes or any other allegations leveled against him.

While the allegations were clearly not proved against the respondent, still, his termination seems to have been made without the applicant taking prior step to resolve the alleged issues. It is well known that termination of one's employment should serve as the last resort and the same is only fair when the employee has contravened a standard regulating conduct relating to employment. This has well been stated under **paragraph 4 (11) of the Guidelines for Disciplinary, Incapacity and Incompatibility Policy and Procedures** which states:

> "***Termination of employment should only take place in cases of serious or repeated misconduct, when the employer is justified in concluding that the misconduct has made the employment relationship intolerable to be continued.*** *When considering whether a termination for misconduct is fair, the chair person should consider the following;*
>
> *(a) Whether the employee contravened a rule or standard regulating conduct relating to employment.*
> *(b) Whether such rule or standard contravened was;*
> *(i) Reasonable;*
> *(ii) Clear and unambiguous;*
> *(iii) Known, or ought to have been known, by the employee;*
> *(iv) Consistently applied and;*
> (v) *Sufficiently serious to justify dismissal.*

I thus agree with the findings of the CMA. Not only were the allegations unproved, but also the particulars disclosed were ambiguous. Clearly the employer failed to prove the allegations on balance of probabilities. The respondent was evidently terminated for an unfair reason.

As to whether procedures for termination were observed, I have observed the records of the CMA as well as the evidence of the disciplinary hearing tendered before it. As evident from exhibits T-1, T-2, T-3, T-4, T-5, T-6 and T-7, the charge was levelled against the respondent on 18.06.2021and he was suspended on the same day. The respondent filed his reply to the charge letter on 19.06.2021 and the hearing took place on 28.07.2021. He was terminated on 30.07.2021. He filed his appeal on 05.07.2021 while the appeal was decided on 09.07.2021. On the face of it one might think that the procedures for the respondent's termination were observed. However, that is not the case on the following grounds:

One, since the employee was charged with incompatibility the applicant ought to have complied with steps required in allegations for incompatibility as laid under **Paragraph 22 (3) of The Code of Good Practice,** which require the employer to record incidents of incompatibility, warn and counsel the employee before the decision to terminate the employment is reached. All these procedures were not observed prior to the disciplinary hearing being called. There was no record of incidents produced before the hearing committee. It was also unclear as to whether there were incidents in which the applicant was heard on allegations of incompatibility and duly warned.

Two, the respondent was faced with new allegations not contained within the charge. As I have observed, the charge was seemingly served to the respondent on 18.06.2021 and he was suspended on the same date, however, DW2 who also testified as a witness before the disciplinary committee informed the committee that the respondent had assaulted him on 02.06.2021 and the suspected reason was that he believed that DW2 was responsible for suspending him. These facts were not disclosed in the particulars of his charge and seemingly the same took place after the charge had been served. Briefly, this indicates that the respondent was not accorded the right to be heard in the sense that he did not know the full allegations levelled against him. The charge ought to have been amended and the respondent given opportunity to reply to the allegations. Further, DW2 himself admitted to have no dispute with the respondent which was not considered by the applicant.

In the premises, I am of considered view that the CMA justly found the termination being unfair in both reason and procedure. The applicant's claims are therefore found to lack merit.

With regard to the order of reinstatement, upon going through the records of the CMA, I am of the considered view that the reinstatement of the respondent, though sought by the respondent himself, is a rather an inappropriate approach for both the applicant and respondent. The circumstances of his termination would not only cause him to work in a difficult environment, but could possibly create an unpleasant environment for his coworkers to operate, especially those he was in conflict with, as well as his employer who appears to have lost confidence in him.

Section 40 (3) of the ELRA offers the employer an option to pay the employee compensation of twelve months salary in lieu of reinstatement. The same provides:

> *"**40 (3)** Where an order of reinstatement or re-engagement is made by an arbitrator or Court and the employer decides not to reinstate or re-engage the employee, the employer shall pay compensation of twelve months wages in addition to wages due and other benefits from the date of unfair termination to the date of final payment."*

In **CHARLES MWITA SIAGA vs. NATIONAL MICROFINANCE BANK PLC** (Criminal Appeal 112 of 2017) [2022] TZCA 227 TANZLII, the Court of Appeal addressed circumstances where reinstatement was denied as a relief and in lieu thereof the court ordered compensation by considering the nature of the industry. The Court held:

> *"We subscribe to the above holding of the High Court and endorse it as a correct position of the law in our jurisdiction. It would be unrealistic to reinstate the appellant who was found by the respondent to be marred with dishonesty after having been convicted of gross misconduct and failure to perform duties to the standard required and in whom the respondent had lost confidence."*

While in this application, the applicant is not stated to be a sensitive industry, the respondent operated as a security guard in the security department, which is a rather sensitive department within the industry. I am therefore of the considered view that the best relief was for the respondent to be awarded compensation of twelve months' salary

according to **section 40 (1) (c) of the ELRA** instead of reinstatement. In the circumstances, I therefore hereby substitute the order for reinstatement issued by the CMA with that of compensation. The applicant should pay the respondent 12 months' salary as compensation for unlawful termination and in doing so, she should take note of other relevant reliefs as prescribed under **section 44 of the ELRA**.

In the foregoing, with exception of the claims regarding the order of reinstatement, I find the rest of the claims in the application without merit and dismiss them accordingly. Considering that this is a labour matter, I make no orders as to costs.

Dated and delivered at Moshi on this 7th day of August 2023.

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
MOSHI DISTRICT REGISTRY

X

L. M. MONGELLA
JUDGE
Signed by: L. M. MONGELLA