IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB-REGISTRY OF MWANZA

AT MWANZA

LABOUR REVISION NO. 43 OF 2022

(Originating from Labour Dispute No. CMA/MZ/NYAM/320/2020/125/2020)

AIRCO HOLDINGS LIMITED.....APPLICANT

VERSUS

SAID JAMAL MAYELE (Administrator of Estates of Jamal Mayele, the deceased) .....1ST RESPONDENT

MECKY MWANDAMBO.....2ND RESPONDENT

JUDGMENT

17/11/2023 & 23/2/2024

ROBERT, J:-

This matter came before the Court for a revision of the award of the Commission for Mediation and Arbitration (CMA) for Mwanza in Labour Dispute No. CMA/MZ/NYAM/320/2020/125/2020 dated 21st February, 2022. The applicant, AIRCO HOLDINGS LIMITED, sought an order to revise, quash, and set aside the award.

The respondents, Jamal Mayele and Mecky Mwandambo, were employed by the applicant under fixed-term contracts. The contracts were subject to renewal at the discretion of the applicant. The respondents'

contracts expired, and during a transitional period, the applicant continued their employment under special arrangements. However, in August 2020, the applicant reviewed the contracts and determined that the respondents had reached the age of retirement, making them subject to compulsory retirement. The applicant issued them with the notice of retirement.

The respondents filed complaints with the Commission for Mediation and Arbitration, alleging unfair termination and breach of contract. The arbitrator awarded the respondents compensation for breach of contract, leading to the current application for revision. In the affidavit supporting this application, the applicant raised three legal issues for determination by the Court:-

(a) *Whether it was legally proper for the trial arbitrator to award the respondents a total amount of TZS 9,802,212.60 as terminal benefits without considering evidence that the respondents had already been paid the amount as terminal benefit to the tune of TZS 12,952,310/=.*

(b) *Whether the arbitrator failed to observe that the respondents' complaints were incompetently fused to unfair termination and breach of contract on one hand, and its arbitrability is a question in law on the other hand.*

(c) *Whether the arbitrator failed to consider the applicant's evidence that the respondents' employment flopped due to age limit sanctioned by law, contract, and the nature of the working conditions.*

When this application came up for hearing parties were represented by Messrs. Julius Mushobozi and Masoud Mwanaupanga, learned counsel for the applicant and respondents respectively. At the request of parties, hearing of the application proceeded by way of written submissions.

Submitting in support of the application, Mr. Mushobozi started his submissions on the second legal issue. He argued that, the complaints of unfair termination and breach of contract were improperly fused, affecting the arbitrability of the matter. He argued that each respondent instituted two causes of action namely breach of contract and unfair termination in the same complaint by ticking and filling the respective areas in the CMA F-1. He maintained that combining two distinct claims with different reliefs in one pleading leads to fatal defects and nullifies the proceedings. He sought to rely on the precedent set by **Bosco Stephen v. Ng'amba Secondary School**, Revision No. 38/2017 (unreported), where the court observed that combining two distinct claims with different reliefs in one pleading renders the proceedings defective.

In response, counsel for the respondent argued that the applicant withdrew the objection regarding the fusion of complaints at the trial stage, and therefore, she is estopped from raising it at the revision stage. He relied on the principle that an appellate court only deals with matters that have been decided by the lower court.

Citing the case of **Richard Majenga v. Specioza Sylivester**, Civil Appeal No. 208/2018, CAT at page 10 (unreported), counsel for the respondents emphasized that the revisional court can only deal with matters that have been decided, and the applicant's withdrawal of the objection prevents them from revisiting the issue.

Rejoining on this matter, counsel for the applicant submitted that the principle argued by the respondents does not work when the issue is on a point of law. He maintained that the Court has no jurisdiction to entertain a defective and incompetent pleading.

Upon examination of the proceedings and issues raised and determined by the Tribunal, the Court finds that while it is true that the respondents filled both parts A and B of the CMA F.1 form, indicating both breach of contract and unfair termination, the Tribunal treated the matter solely as a

breach of contract. Therefore, any procedural irregularity arising from the fusion of complaints did not materially affect the proceedings. Moreover, the applicant's withdrawal of the objection at the trial stage further supports the conclusion that the issue of fusion was not considered significant at that juncture. Consequently, the Court dismisses the applicant's argument regarding the fusion of complaints.

Coming to the first and the last grounds, counsel for the applicants submitted that, the arbitrator wrongly considered the transitional period between 2019 when the respondents' contracts expired and the 2020 when the applicant notified the respondents the intention to decline an execution of the new contracts as renewal by default. He maintained that, it is the position of the law as prescribed by Rules 4(3) and 5(5) of the Employment and Labour Relations (Code of Good Practice) GN. No. 42 of 2007 that when there is special arrangements to warrant the employee to continue working for the employer after the expiry of contract of employment or after attainment of normal age of retirements that shall not be considered a renewal by default and the employment will terminate automatically.

He submitted further that, it is also a trite law that a contract of employment terminates automatically with attainment of the normal age of

retirement as prescribed by rule 5(3), or by virtue of implied practice in the industry as prescribed by rule 5(4) with concession and TAA policies, the practice in industry of aviation restricted the employees with normal ages of retirement to renew their contracts of employments. In this case, the respondents had attained the normal age of retirement hence the contract of employments expired automatically.

He maintained that, it is completely wrong for the Arbitrator to make a finding that the renewed contract by default under Rule 5(5) of the Code could apply to breach of contract while the said provision permits the applicant to terminate the contract even if it has been renewed by default.

He argued further that, from the respondents' evidence, the fact that the respondents had attained the age of retirement and that the respondents' contracts came to an end in 2019 were not an issue. By virtue of exhibit-D 1, the respondents were invited to work for monthly salaries during the transitional period (waiting period) pending it's concession with the Tanzania Airports authority. The offer or otherwise of the new contracts depended on the Tanzania Airports Authority's policy and the change of business. Clause 1 of the exhibit-C-1 and C-3 subjected the renewal to the discretion of the applicant and the status of the business carried on. The age

limit was very crucial as the COVID-19 in 2019 to 2020 was at its peak, the persons with age of retirements being vulnerable.

He maintained that according to the evidence adduced by the respondents, they had no complaints with the termination of employment due to age. In other words, the reasons and procedures for termination were fair. The respondents neither complained against the terminal benefits as incorporated in exhibit D-3 nor the arrangement reached to make the respondents work after the expiry of contract as per exhibit D-1. He submitted that, the arbitrator's decision on payment for breach of employment contracts is unjustifiable and was exercised with the material illegalities.

He argued further that, in the case of **John Peter Mollel v. The Impala Hotel**, Labour Revision No. 111 of 2018, High Court of Tanzania at Arusha (unreported), the Court addressed the legal exceptions to the renewal by default after an employee attains the age of retirement where the contract is silent of the retirement limit. He propounded the legal position that when the employer makes a special agreement to let the employee work after the expiry of contract, that does not amount to renewal by default. The applicant's compliance with Rule 8(1) (b) of the Code of Good Practice,

Section 41 to 44 of the Employment and Labour Relations Act and the Exhibit C-1 and C-3 proves that the respondent was procedurally and substantively fairly terminated. In the alternative the respondents' contracts had expired automatically with attaining the age of retirements. In the end, he prayed for this application to be granted.

In response to the 1st and 3rd grounds, counsel for the respondents submitted that, the Tribunal' decision was right because according to exhibit 'C1 ' and 'C3' which are respondents' contracts of employment, there was no agreement as to the retirement age. Furthermore applicants sole witness DW1 did not produce cogent evidence that shows applicant's policy on the age limit for their employees that could have been a reason of termination of respondents which to his view could have not served applicants liability over claim that she had breached respondents contracts unlawfully.

He maintained that, oral evidence from DW1 was not sufficient as the respondents were employed at an old age. For instance 1st respondent testified that he was 60 years of age when he was employed. Hence, the applicant was not justified to terminate respondents' contracts since evidence disclosed that they continued working after their former contract had come to an end. In view of rule 4 (4) of the G.N. No. 42 of 2007, that is

tantamount to renewal by default. He referred the Court to the case of **Malaika B. Kamugisha and Lake Oil,** Revision no. 591/2019, H.C, Mwanza (unreported-annexed) at page 12. He maintained that the case of **John Peter Mollel** (supra) is distinguishable from this case since in the present case there was no agreement between applicant and respondents to retire upon reaching the age of 55 or 60 years of age. Moreover as 1st respondent evidence shows at the time of employment he was 60 years of age.

In his rejoinder submissions, counsel for the applicant submitted that, the arbitrator's finding ought to centre on the lawfulness of the termination and not the breach of employment contract the result of which, the awarded reliefs do not support the termination.

He maintained that, the respondents' point of argument about the period between the expiry of the respondents' employment (2019) and the moment their services were officially terminated (2020), to amount to renewal by default is also misplaced in a sense that the applicant had informed the respondents through Exh. D-1 on the reasons and conditions under which the respondents continued to work after the expiry of their contracts prior to the review and renewal of the intended contracts. The

renewal of contracts and issuance of the new conditions depended on the completion of the concession process between the applicant and the Tanzania Airports Authorities.

He submitted further that, the respondents' argument that the termination of services due to age limit was not among the terms and conditions of the contracts (Exh. C-1 & 3) is empty of merit. The law has established the remedy for both parties (employer and employee) when their employment contracts are silent. He argued that the question whether the respondents were employed while aged or not does not compel the applicant to adopt similar conditions when the business working condition changes. It does not flop the fact that the renewal of contract depended on the applicant's discretion and change of business working condition as permitted under clause 1 of exh. C-1 & 3.

He argued further that, the reliefs awarded by the arbitrator are not awardable under the aspects of termination of contract and prayed that they should be set aside accordingly.

I will start with the issue of termination due to retirement age, the applicant asserts that the termination of the respondents' employment was

lawful due to the automatic termination of contracts upon reaching retirement age and the special arrangement between the parties during the transitional period. Counsel for the applicant has cited relevant legal provisions, including Rules 4 and 5 of the Employment and Labour Relations (Code of Good Practice) GN. No. 42 of 2007 to support his argument.

However, upon closer examination, the Court finds that the applicant's argument that the termination of the respondents' employment was lawful due to the automatic termination of contracts upon reaching retirement age and the special arrangement between the parties during the transitional period lacks merit. While Rule 5(5) of the GN. No. 42 of 2007 allows for the automatic renewal of contracts after the expiration of fixed terms, it does not absolve the employer from fulfilling contractual obligations or complying with statutory requirements. In this case, the absence of an explicit agreement on retirement age in the employment contracts and the failure to produce compelling evidence regarding the applicant's policy on age limits cast doubt on the lawfulness of the termination.

Furthermore, the Court notes that the applicant's reliance on the special arrangement during the transitional period does not exonerate it from ensuring compliance with contractual and legal obligations. While the

transitional period may have provided a temporary extension of employment, it does not negate the need for proper termination procedures or adherence to employment laws.

Therefore, this Court concludes that the termination of the respondents' employment cannot be deemed lawful solely based on the automatic renewal provisions of Rule 5(5). The lack of clear contractual provisions regarding retirement age, coupled with insufficient evidence of compliance with industry practices, undermines the applicant's argument.

On award of terminal benefits, the applicant contests the arbitrator's failure to consider evidence that the respondents had already received terminal benefits, arguing that such oversight renders the award unjustifiable. However, it is crucial to note the specific nature of the respondents' claim before the CMA and the contractual provisions governing terminal benefits.

Upon review, it is evident that the respondents' claim before the CMA was treated as limited to reliefs for breach of contract. Furthermore, the employees' contracts of employment with the applicant explicitly provided for payment of gratuity upon ceremonious cessation of employment and

permanent separation from AIRCO. Specifically, the contracts stipulated the provision of an ex-gratia employment-completion bonus of one month's basic salary to a maximum of five years worked with AIRCO as a gesture of appreciation to the employee.

Considering the limited scope of the respondents' claim and the contractual provisions governing terminal benefits, it becomes apparent that the issue of terminal benefits was not within the purview of the respondents' claim before the CMA. Therefore, the arbitrator's failure to address the matter cannot be deemed unjustifiable, as it falls outside the scope of the relief sought by the respondents and the contractual obligations imposed on the applicant.

Therefore, in light of the foregoing analysis, the Court finds that the applicant's contention regarding the award of terminal benefits lacks merit. The limited scope of the respondents' claim before the CMA and the specific contractual provisions governing terminal benefits preclude the consideration of such matters in the context of the relief sought by the respondents. Therefore, the Court upholds the arbitrator's award, as any alleged oversight regarding terminal benefits does not materially affect the validity of the award or the relief sought by the respondents.

That said, the Court dismisses the applicant's application for revision for lack of merit and the arbitrator's award is upheld. Each party shall bear their own costs of this application.

It is so ordered.

K.N.ROBERT
JUDGE
23/2/2024