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**THE UNITED REPUBLIC OF TANZANIA
LABOUR DIVISION OF THE HIGH COURT**

AT DAR ES SALAAM

LABOUR REVISION NO. 35 OF 2009

BETWEEN

KNIGHT SUPPORT (T) LIMITED - APPLICANT

AND

CHRISPRINUS S. KALOLI - RESPONDENT

(ORIGINAL CMA/DSM/KIN-ILA/1039/2008)

16/4/2010 & 16/4/2010

S.C. MOSHI, J.


RULING

The applicant seeks revision of arbitrators award dated 10/2/2009 whereby the respondent was awarded the following reliefs:-

- i. Compesation of T.Shs. 1,106,560/= being salary of twelve months for unlawful termination.
- ii. Unlawful deductions from respondents salaries from January, 2007 – September, 2007 without his consent.

The grounds for the application were thus:

- i. That the arbitrator concentrated much on the fact that there was no disciplinary inquiry made and no notice of the intended retrenchment was given to the respondent; which was not the issue in controversy.

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- ii. That the issue to be considered was whether the respondent followed proper procedure in booking his sick sheet and abided to Organizational Rules in obtaining the claimed treatment from a hospital or clinic not recommended by his employer and whether he continued to be away without leave for a period not allowed by Law.
 - iii. That, being away for more than five working days was sufficient ground of termination.
 - iv. That the arbitrator disregarded the testimony of the applicant; hence breached the code of good practice Rules.
 - v. That the Arbitrator based much on the disciplinary procedure but according to Law it does not detract from Management's right to depart from it depending on the circumstances of each case and nature of the offence.
 - vi. That in the circumstances the Respondent's absence from work for 5 (five) days constituted serious misconduct and leading to termination.

I have considered the grounds for the application as set out by both parties as well as the Commission for Mediation and Arbitration (C.M.A) proceedings and award; and I have the following observations:-


- a) On grounds (i) and (ii); The record shows that the referral Form, Form No.1 indicates that there was a procedural issue which needed to be determined; on fairness/unfairness of termination. On part B of the said form the respondent filled

in; and referred the issue of procedural fairness and it's written thus:

“Mwajiri hakufuata taratibu wakati wa kufikia uamuzi wa kunifukuza kazi kwani alikataa kutambua vyeti vyangu kutoka Hospital ya Serikali”

The certificate of settlement/ non settlement (F.No.5) indicates that the nature of claim was terminal benefits. In F.No.1; this was the expected outcome of the Mediation. The parties, agreed during mediation, on some of the benefits to be paid, these included severance allowance, night allowance, leave allowance and six days pay totaling, Tshs. 89,865.30. Other benefits claimed; Notice pay, refund of wages deductions, mediation costs and refund of deducted money for lost uniform were referred to Arbitration.


When the matter was referred to the arbitrator, two issues were drawn, namely:- (1) Whether the termination of the complainant was fairly done (2) To what reliefs are the parties entitled to. This was done after hearing opening statements from both parties. From the flow of the events, it is my view that the arbitrator did correctly narrow the issues in accordance with Section 22 (2)(b) of the Labour Institutions (Mediation and Arbitration Guidelines) G.N. No.67/2007. Grounds (i) and (ii) involves fairness of procedure and reason; hence fairness of termination. Thus the 1st issue canvasses both the disciplinary inquiry question and the issue on respondents conduct of obtaining treatment from a clinic not recommended by the employer. The record too, shows that the issue in question was discussed; finally the arbitrator found that there was no valid reason and that the procedure for termination was unfair. I therefore find that the C.M.A correctly dealt with the issue which was in controversy.

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- (b) Regarding ground No. (iii) and (v) I see no reason to fault the arbitrators findings a) there's ample evidence that the respondent was sick. He attended medical treatment at the employer's recommended hospital. However when the condition persisted he attended a Government hospital. The employer was informed of the respondents ailment. As found by the arbitrator, it is clear that the respondent was sick. Hence he didn't abscond from his work and no misconduct was committed. Even if there was any misconduct, the employer (applicant) was duty bound to comply with the provisions of Rules 11 (4) of the Employment and Labour Relations (Code of Good Practice) G.N. No.42/2007.
- (c) On ground No. (iv). The record is very apparent that the applicant's side of the story was taken into consideration. See page 5 and 6 of the typed award. The two pages contains the applicants testimony and the same has been taken into consideration by the arbitrator when reaching at the decision.
- (d) Lastly; ground No. (v). Rule 13(1) of the cited G.N. 42/2007 provides that the employer shall conduct an investigation to ascertain whether there are grounds for a hearing to be held. This provision imposes a mandatory obligation upon the employer to ascertain whether there are grounds for a hearing. It doesn't give a discretion upon the employer to opt for a hearing or otherwise as a first step. The initial step to be undertaken is to investigate whether there are grounds for a hearing to be held. Therefore it is not an automatic option nor doesn't give an automatic right to the employer to depart from hearing. The right is subject to compliance with R.13(1) of the code of Good Practice, G.N. No.42/2007.

All in all, and for the observations made above I am satisfied that there's no defect on arbitrators award; and C.M.A record as a whole to justify a revision.


In the result the application fails and it is dismissed accordingly.

R/A Explained.


S.C. Moshi
JUDGE
18/3/2010

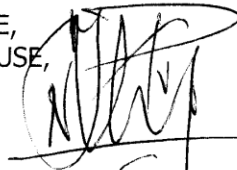
Date: 16/4/2010
Coram: Hon. S.C. Moshi, J.
Applicant: Mr. Pascal Mayokolo (Afisa Mwandamizi) – Present
For " Absent
Respondent: Mr. Chrispinus Kaloli - Present
For " Absent
CC: J. Kalolo

Court: The Ruling is delivered on this 16/4/2010 in presence of both parties per coram.


S.C. Moshi
JUDGE
16/4/2010

COPIES TO:

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2. R.B. MRISIKALE, ADVOCATE,
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 - KGF 03/06/2010
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