

IN THE HIGH COURT OF TANZANIA
LABOUR DIVISION
AT DAR ES SALAAM
IN THE MATTER OF REVISION NO.8 OF 2009
BETWEEN
TISCAN LIMITED -APPLICANT
AND
REVOCATUS SIMBA – RESPONDEN

16/4/2010 & 30/4/2010

RULING

The applicant has lodged the present application under Sections 91(1) and 94(1)b) of the Employment and Labour Relations Act, 2004, Rule 24(1),(3) and (11), and Rule 28(1) of the Labour Court Rules, 2007 and any other enabling provisions of the law seeking a Revision of Commission for Mediation and Arbitration(C.M.A) Award dated 17th December, 2008; he prays for the following reliefs:

1. A declaration that the respondent, for valid reasons and observance to the procedure, was lawfully terminated by the applicant.
2. An order that the commission erred in reinstating the respondent without sufficient cause, amidst clear loss of trust between the parties herein.
3. A declaration that the respondent was fully paid terminal benefits.

The issues before the C.M.A were (I) whether there was a valid reason for terminating respondents services (II) Whether the employer followed a fair procedure in terminating the respondent's services. The arbitrator found that there was no valid reason for termination; and that the respondent was not given a right to be heard; also that a hearing procedure was not adhered to.

1. It is clear that the main reason for termination was non performance. To determine whether the work performance is poor is a question of fact; see R.17 (1), (3), R.18 of the G.N.NO 42/2007. Therefore the employer was duty bound to inquire on the fairness of the reason and to follow the stipulated procedure.
2. Failure to follow the stipulated procedure denied the respondent the fundamental right to be heard on the allegations charged in the termination letter. The transactions which the employee was required to give explanation, prior to suspension were quite different from those indicated in the termination letter. Hence the employee, in the circumstances of the case was entitled to be given an opportunity to account for the poor work performance. The law requires the employer to ascertain whether it is a misconduct or incapacity. After making such a finding then the relevant procedures should be followed. If it is a misconduct Rules 11, 12 and 13 of G.N NO.42/2007 would follow; and if it is poor work performance then Rules 17 and 18 of G.N. NO 42/2007 would be complied with.
3. It is my view that R. 8(2) (a) to (d) of G.N.NO.42/2007 do not provide for automatic termination. The material breach has to be proved on balance of probabilities and has to be communicated to the employee, as the fairness procedure requires.

Also Rule 12(1) of G.N. 42/2007 provides for guidelines for determining whether the reason was fair; the arbitrator did consider whether the reason was valid; see pg. 9 -10.

Having discussed as I did, I find no reason to differ with the arbitrators findings that there was no valid reason s for termination and that the fairness procedure was not followed. THUS the termination was unlawful.

The arbitrator ordered reinstatement of the employee to his employment. However, learning from the submissions, it is obvious that the parties' relationship has been tainted. I therefore, in order to maintain industrial harmony; order under Section 40 (3) of the Employment and Labour

Relations that if the employer decide not to reinstate the respondent within fourteen(14) days from the date of this Ruling; The Employer (applicant) should pay the employee (respondent) **COMPESATION of TWELVE MONTHS salaries in addition to what was paid to him.** Section 40(3) provides thus:

Where an order for reinstatement or re-engagement is made by an arbitrator or court and the employer decides not to reinstate or to re-engage the employee, 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.

Apart from the variation of the above order the, the application is dismissed for want of merits.

It is so ordered.

R/ A Explained.


S. C. MOSHI

JUDGE

30/ 04/ 2010