IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT MWANZA

CONSOLIDATED REVISION NOs 21 & 22 OF 2013

MSAFIRI BUSAGI .....APPLICANT/Respondent

VERSUS

SANDVIK MINING AND CONSTRUCTION TANZANIA LTD ..... RESPONDENT/Applicant

(ORIGINAL/CMA/MZ/104/2012)

26/11/2013 & 17/2/2014

R. M. RWEYEMAMU, J:-

JUDGMENT

Both parties in this dispute were dissatisfied with the Commission for Mediation and Arbitration (CMA) decision and award issued on 11th February, 2013 and proceeded to seek its revision. The applicant/employee herein after, Msafiri, lodged his application first, registered as revision number 21/2013. Thereafter, the respondent/employer also lodged an application for revision off the same decision and it was registered as revision 22/2013. That registration procedure was improper. Be that as it may, the two applications were consolidated for purpose of hearing.

At the time of hearing, the employee was represented by Mr. Nyanjuki S.Masudi *a personal representative* while the employer was represented by Mr. Malongo Advocate. It was an undisputed fact that the employee started work on 20/9/2010 and was terminated on 8/3/2012. The parties' key arguments in the two applications (beginning with revision 21) and my decision thereon are summarized below:-

a. According to the applicant's Mr. Masudi, the Arbitrator erred in failing to find termination unfair despite the fact that the employee was terminated while undergoing treatment. According to the employee's representative, termination under

such circumstances is prohibited under Section 100 of Cap 366, a repealed law but which section was saved under rule 6 of the 3rd schedule to the *Employment and Labour Relations Act*, 6/2004, herein after, the ELRA.

The ground was opposed by the respondent/employer who submitted that the said issue was not raised at the CMA, as such; it cannot be ground for revision. He added that the employee was terminated because he could not hear properly and had lung problems not because he was undergoing treatment.

I have checked facts on record and it would appear both parties' arguments were based on a misapprehension of facts and law. The facts indicated that the issue of **termination while undergoing treatment,** was raised by the applicant under part 6 (b) of the dispute referral form- CMA F1, contrary to the employer's submission that the same was not raised at the CMA. After reading the relevant law- CAP 366 however, I found out that the relevant section is 109 not 100 as indicated by the applicant. Further, I note that the section has nothing to do with validity of terminations. Rather, the section prescribes for an employer's duty to provide medical treatment to an employee and his family. In my view, termination of employment while an employee is undergoing medical treatment is not of itself evidence of unfair termination.

Termination on ground of ill health is considered unfair where an employer has failed to conduct an enquiry in terms of Rule 19 (1) (a) to (e) of the Employment and Labour Relations (Code of Good Practice) Rules GN 42/2007,(herein after, the Code). While on the evidence on record, it was not disputed that the employee was sick, was receiving medical treatment, or that alternative employment was offered by the employer; it was also undisputed that the employer did not show/prove that an enquiry had been made as to whether the ill-health was permanent or temporary in nature. And may be more important; there was no proof that in the opinion of an independent registered medical practitioner, the ill-health was work related. The only

medical opinion used was that of a medical professional but an employee of the employer. I accordingly agree with the applicant that the employer did not prove all key ingredients required to show that termination on ground of ill-health was fair.

b. The Arbitrator's decision ignored adduced evidence which established that the employees' termination was procedurally unfair. Termination was not in accordance with the procedure prescribed under Rule 19 of the Code

That was opposed by Mr. Malongo who submitted that the Arbitrator properly found that, all procedures of termination on ground of ill-health were adhered based on the evidence of DW1. Further, it was undisputed that the employee was given alternative work but he refused to take it up as the employee did not contradict the employer's testimony to that effect. Counsel elaborated that medical tests were done and the employee was found to be suffering from permanent hearing impairment, a disease which according to the employer's medical practitioner, was not work related.

My decision on validity of the termination is relevant to determination of procedural fairness for which guidelines are prescribed under rule 21 (1) of the Code. Where no investigation has been made as to the cause of the ill-health, as was the position in this case, it is not possible to objectively decide whether the ill-health was work related. And without such information, the question of whether the employer has taken reasonable steps to accommodate the employee's ill-health, including consulting on possible alternatives to termination cannot be properly decided. For that reason, I agree with the Arbitrator's decision that termination was procedurally unfair, although unlike him, I put the degree of unfairness to more than 20%. That is because in my view, it is of fundamental importance in such cases, to ensure that objective investigations are conducted to establish whether or not an employee's ill-health is work related.

With respect to the employer's application (revision number 22), the position is as follows:-

c. THE employer submitted that the award was tainted with errors material to the subject matter causing injustice to the employer. The Arbitrator's error was explained

as, finding that the employer had breached rule 21 (8) of the Code, while that issue was not a source of complaint by the employee as per his CMAF1 therefore, the employer had no chance to defend himself. The employee's response was generally that, the employer did not follow prescribed procedures. In my view, no injustice was caused to the employer, who after all, had a duty to prove procedural fairness including compliance with the rule in question.

d. The employer's second ground of complaint was that, having found that procedures were not adhered to by 20%, the Arbitrator erred in ordering the employer to pay 6 months' salary, which is 50% of the prescribed amount. Mr. Malongo argued that the amount granted was not appropriate but was excessive because the penalty ought to have reflected the degree of non-compliance. Mr. Masudi for the employee opposed the ground and repeated their submission that proper procedures were not followed.

   On this issue, my decision is that the Arbitrator has discretion to decide on appropriate remedy depending on particular circumstances of each case. That decision does not necessarily depend on the quantitative aspects of non compliance but also qualitative ones. For example in this case, some of the procedures not complied with, like failure to investigate cause of the ill-health, were fundamental in order to guarantee fairness.

e. The employer's last ground for revision of the award was that the employee's claim was unjustified because he had already accepted payment of terminal benefits. I will not decide this issue. It was not argued at the CMA and is therefore not a proper ground for revision.

In view of all the above, it is my conclusion that the Arbitrator's decision that termination was fair was on the adduced evidence, not wholly justified. I quash it, find that termination was to a large extent unfair, and order the employer to pay compensation to the

employee equivalent to 12 months salary, calculated at the rate the employee was earning at the time of termination.

R.M. Rweyemamu

JUDGE

16/2/2014

Date: 17/2/2014

Coram: R.M. Rweyemamu, J.

Applicant: Present in person

For Applicant: Mr. N Masudi, a personal Representative

Respondent: Mr. Jonathan Wangubo, legal officer from office of respondent's advocates

C.C. Mr. C. Shauri

COURT: This matter is for judgment.

Judgment delivered this 17/2/2014.

Right of Appeal explained.

R.M. Rweyemamu

Judge

17/2/2014