IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

LABOUR REVISION NO. 190 OF 2019

BETWEEN

KUEHNE AND NAGEL LIMITED..... APPLICANT

VERSUS

GRACE URASSA ..... RESPONDENT

JUDGEMENT

Date of Last Order: 15/07/2020

Date of Judgement: 07/08/2020

Aboud, J.

The Applicant **KUEHNE AND NAGEL LIMITED** filed the present application seeking revision of the award of the Commission for Mediation and Arbitration (herein CMA) in Labour Dispute No. CMA/DSM/ILA/R.310/17/543, which was delivered on 05/02/2019 by Hon. Johnson Faraja, Arbitrator. The application was made under the provisions of Sections 91 (1) (a) (b) & 91 (2) (a) (b) and 94 (1) (b) (i) of the Employment and Labour Relations Act [CAP 366 R.E 2019] (herein the Act) and Rules 24 (1), (2) (a) (b) (c) (d) (e) (f), (3) (a)

(b) (c) (d) and 28 (1) (a) (b) (c) (d) (e) of the Labour Court Rules, GN No. 106 of 2007 (herein the Rules). The applicant moved the Court on the following grounds:-

i. That the Arbitrator misconducted himself in law and fact by holding that the applicant failed to prove reasons and procedures for retrenchment of the respondent while in fact the applicant discharged these duties within the standards required by law.

ii. That the Arbitral award was illogical, irrational, and thus illegal as such as 24 months salaries and two years granted as severance allowances are unsubstantiated.

The applicant supported the application by the affidavit of Israel Danda, the applicant's Principal Officer. On the other hand the respondent challenged the application through her counter affidavit.

Brief facts leading to the present application are as follows; the respondent was employed by the applicant on a permanent base contract on 04/06/2014 as an Assistant Accountant, Credit Controller. On 20/02/2017 the respondent was retrenched from her employment, basing on the applicant's economic reason that the

company was working under loss. Dissatisfied by the applicant's decision, the respondent referred the dispute to CMA. CMA awarded the respondent on the basis that, the applicant had no valid reason to retrench the respondent and the procedures to do so were not followed. The respondent was awarded compensation of twenty four (24) months salaries and two years severance payment. Aggrieved by the CMA's award the applicant filed the present application seeking for the Court to set aside the said award.

In this Court the matter proceeded by way of written submission. Both parties were represented. Mr. Ndanu Emmanuel, Learned Counsel was for the applicant while Mr. Juma Maro, Chief Executive Officer of Akilimali Bureau of Advisors (T) Ltd, appeared for the respondent.

Arguing in support of the application Mr. Ndanu Emmanuel submitted that, the applicant managed to adduce facts and evidence to prove on balance of probability that the retrenchment was necessitated. He stated that, the applicant tendered exhibit D8 which shows profit and loss of the Company for the months of November

2016, December 2016 and, January to February 2017 which was sufficient to prove the business flow.

Mr. Ndanu Emmanuel went on to submit that, the Arbitrator misdirected herself to hold that the applicant ought to have tendered an audited report or any other relevant information because there is no any law which categorically states what amounts to relevant information. He added that, it was not possible to wait until the audit report is out which is usually after financial year specifically on June or July so as to take action in respect of financial challenges.

Regarding the issue of procedure Mr. Ndanu Emmanuel submitted that, the respondent adhered to all procedures for retrenchment. To robust his submission he cited the case of **Metal Product Limited Vs. Mohamed Mwerangi and 7 others**, Revision. No. 148 of 2008. He said, the respondent was dully consulted and she accepted the retrenchment package. Mr. Ndanu Emmanuel added that, the section criteria used were valid and strongly submitted that Mr. Mtweve was not working in Finance department but he was in managerial cadre.

As to the award of 24 months salaries and two years severance payment Mr. Ndanu Emmanuel submitted that, such an award is illogical, irrational and illegal because the Arbitrator narrated facts never stated by the respondent. He stated that the Arbitrator asserted that, the respondent was the mother of the family so the retrenchment exercise denied her fundamental and Constitutional right to work and right to life the facts which never stated by the respondent. The Learned Counsel added that, even if the retrenchment was unfair the Arbitrator was supposed to award the respondent 12 months salaries compensation and not exceeding the award without any justifiable reasons. He therefore prayed for the CMA award to be set aside.

Responding to the application Mr. Juma Maro submitted that, the Arbitrator lawfully decided that the retrenchment was unfair because the applicant failed to adduce evidence to prove the contrary. He stated that, the applicant failed to tender financial reports to prove that the alleged poor financial position was audited by the external Auditor and the report tendered ought to be signed by the Applicant's Director. Mr. Juma Maro went on to submit that,

there is no evidence to show that the applicant's Finance Manager is registered by the National Board for Accountants and Auditors (NBAA) and authorized to certify financial Statement as provided under section 91 (2) (e) (iii) of the Income Tax Act, [CAP 332 RE 2017].

Mr. Juma Maro further argued that, the cited case of Metal Products Limited (supra) supports the respondent's case other than the applicant's case because retrenchment in the instant case was used as a mere pretext to hide the true reason for terminating the respondent.

On procedural aspect Mr. Juma Maro submitted that, the applicant failed to disclose relevant information for the purposes of proper consultation because the respondent was on annual leave when general staff meeting was held. Mr. Juma Maro added that, the applicant did not observe LIFO as selection criteria in retrenching the respondent on the reason that, Mr. Mtweve who was employed after the respondent was retained while the applicant got retrenched. He further stated that Mr. Mtweve was retained based on seniority however, the seniority was not part of the retrenchment criteria.

As to the award Mr. Juma Maro submitted that, the award is lawful, logical and rational because section 40 (1) (c) of the Act empowers the Arbitrator to award compensation of not less than 12 months. That in the application at hand the respondent was unfairly terminated both substantively and procedurally, hence the award of 24 months was reasonable. He therefore prayed for the application to be dismissed.

In rejoinder Mr. Ndanu Emmanuel reiterated his submission in chief. He added that, the argument of the financial statement tendered by the Applicant's Financial Manager ought to be tendered by a registered Auditor is a new fact as was not raised at the CMA.

On procedural aspect Mr. Ndanu Emmanuel submitted that, the respondent was a member of a Trade Union which participated in the consultative meetings which bound its parties as provided under section 38 (2) of the Act. Mr. Ndanu Emmanuel therefore urged the Court to set aside the CMA award.

After going through parties' submissions, Labour laws, CMA and Court records with eyes of caution, I find the issues for determination are, whether the termination of employment on retrenchment was

based on a valid reason and stipulated procedures and, lastly is to what reliefs are the parties entitled.

In answering the first issue it has to be noted that retrenchment is one of the types of termination recognized in our Labour laws which is based on operational requirement. The term operational requirement is defined under section 4 of the Act which is to the effect that:-

> "Means requirement based on the economic, technological, structural or similar needs of the employer".

Rule 23 of GN. No. 42 of 2007 provides for circumstances that might legitimately form the basis of a termination under operational requirement. The relevant provision is to the effect that:-

> "Rule 23 (1) - A termination for operational requirements (commonly known as retrenchment) means a termination of employment arising from the operational requirements of the business. An operational requirement is defined in the Act as a

requirement based on the economic, technological, structural or similar needs of the employer.

(2) As a general rule the circumstances that might legitimately form the basis of a termination are:-

a) **economic needs** that relate to the financial management of the enterprise;

b) **technological needs** that refer to the introduction of new technology which affects work relationships either by making existing jobs redundant or by requiring employees to adapt to the new technology or a consequential restructuring of the workplace;

c) **structural needs** that arise from restructuring of the business as a result of a number of business related causes such as the merger of businesses, a

change in the nature of the business, more effective ways of working, a transfer of the business or part of the business. [Emphasis is mine]

The existing jurisprudence, particularly those emanating from opinions of the ILO Committee of Experts on Application of Convention 158 and Recommendation 166 (CEACR) is that; the policy objective of the law in regulating retrenchment or termination for operational requirements starts from the premises that, employees have a right not to have their contract of employment prematurely terminated unfairly or unjustifiably. Therefore, the employer has the duty to prove before the Court that, he had no any other option to secure the business than to retrench some of the employees. The position was emphasized in the case of **Bakari Athuman Mtandika v. Superdoll Trailler Ltd,** Revision No. 171/2013 DSM Registry (Unreported) where it was held that:-

"To ensure that operational reasons are not used by the employer as pretext to terminate an employee unfairly at the employer's will;

thus 'circumventing the employee's right to security of tenure guaranteed under the parties' contract of employment."

In that case the Court went on to hold that:-

"the basic duty of decision maker in unfair termination dispute, where operational reasons are raised as a cause for terminating an employee.....among issues to be framed should be whether or not operational grounds were genuine reason justifying termination or a pretext."

In this case, the reason for retrenchment was based on economic needs of the business. The Arbitrator in her finding held that, the applicant had no valid reason to terminate the respondent's employment because he did not tender audited financial report to prove the loss incurred by the applicant. I have careful examined the record, the applicant tendered his internal financial report (Exhibit D8) to prove that the Company was operating under loss from December 2016 to February 2017 as rightly testified by John Jofrey

Mangesho, DW2 . In my view the relevant document was sufficient evidence to prove that the applicant's business was in financial crisis and available appropriate measures were to be taken to secure the business such as reducing the number of employees as he did. The respondent was also informed that her department was affected.

In my opinion the Arbitrator misdirected herself to demand the applicant to tender audited report from external auditors. The fact that the report tendered was genuine, such evidence should have been considered because the audited report would have not changed the position reflecting the applicant's Company incurred loss.

The economic reason for retrenchment was dully communicated to all employees as per exhibits D1, D2 and D3. Even the respondent at hand was notified of such reason as per the meeting with staff involved in retrenchment (Exhibit D5). Under the circumstances it is my view that the applicant had a valid reason to retrench the respondent.

On the second limb of fair termination, that is the procedural fairness of retrenchment, the legal position is that even if the

employer might have a legitimate reason to retrench employees he/she also have to adhere to mandatory stipulated procedures for retrenchment. In our labour laws procedures for termination on retrenchment/operational requirement are provided under section 38 of the Act read together with Rules 23 and 24 of the Codes and the Guidelines under the Employment and Labour Relations (Code of Good Practice) GN. 42 of 2007. I quote the relevant section of the Act for easy of reference:-

> "Section 38-(1) in any termination for operational requirements (retrenchment), the employer shall comply with the following principles, that is to say, he shall:-
>
> (a) **give notice of any intention to retrench** as soon as it is contemplated;
>
> (b) **disclose all relevant information** on the intended retrenchment for the purpose of proper consultation;
>
> (c) **consult prior to retrenchment** or

redundancy on:-

(i) the **reasons for the intended retrenchment**;

(ii) any **measures to avoid or minimize the intended retrenchment**;

(iii) the **method of selection of the employees** to be retrenched;

(iv) the **timing of the retrenchments**;

(v) severance pay in respect of the retrenchment.

[Emphasis is mine].

The above position was also clarified in the book Titled **Employment Law Guide for Employers** by George Ogembo, 2018 where at page 339 states as follows:-

"In determining the legality of a redundancy, the court examines the bona fides and integrity of the entire process. Even if it is a

fair reason, the dismissal can still turn out to be unfair if the employer fails to act reasonably and follow the steps required to effect fair redundancy".

Section 38 of the Act reads together with Rule 23(4) of GN No. 42 of 2007 which provides as follows:-

"Rule 23 (4) the obligations placed on an employer are both procedural and substantive. The purpose of the consultation required by section 38 of the Act is to permit the parties, in the form of a joint problem-solving exercise, to reach agreement on:-

(a) the reasons for the intended retrenchment (i.e. the need to retrench);

(b) any measures to avoid or minimize the intended retrenchment such as transfer to other jobs, early retirement, voluntary

retrenchment packages, lay off etc;

(c) criteria for selecting the employees for termination, such as last-in-first-out (LIFO), subject to the need to retain key jobs, experience or special skills, affirmative action and qualifications;

(d) the timing of the retrenchment;

(e) severance pay and other conditions on which termination took place; and

(f) steps to avoid the adverse effects of terminations such as time off to seek work.

In the matter at hand the record reveals that all the retrenchment procedures as stipulated above were followed. All employees were notified of the intended retrenchment as per exhibit

D1 and D2. The respondent claimed that she was not properly notified because she was on annual leave. However she agreed that the notice was sent to her email, therefore there is no dispute she received the relevant notification. Immediately after completion of her annual leave on 27/01/2017 she was notified of the intended retrenchment on 02/02/2017 of which she accepted and eventually terminated on 20/02/2017.

The respondent was also consulted prior to retrenchment as reflected in Meeting with staff involved in Retrenchment (Exhibit D5), where it was specifically indicated that she was ready to be retrenched as proposed by the employer.

The Arbitrator also found that the selection criteria used by the applicant was not genuine because Mr. Mtweve who was employed later than the respondent was retained. I have gone through the record and it is not proved that the said Mr. Mtweve was in the same department with the respondent. Therefore, the respondent's allegation that Mr. Mtweve was retained while he was employed later than her cannot stand. Under the circumstance it is my view that the selection criteria used was valid. Furthermore the respondent was not

the only employee affected by such retrenchment as wrongly held by the Arbitrator. As per discussion meeting between Management and COTWU Branch on the intended Retrenchment Process for Dar es Salaam HQ (Exhibit D3), the applicant disclosed that the retrenchment process involved five permanent employees from different sectors/departments including the respondent.

On the basis of the above discussion it is crystal clear and I am satisfied that, the applicant complied with all the mandatory procedures for retrenchment as provided by the labour laws of this country. The respondent was properly notified, consultated and the selection criteria as well as all relevant information of the said retrenchment process were disclosed by the applicant. The respondent also voluntarily agreed to the retrenchment process as discussed above. Therefore, in my opinion if the Arbitrator had considered all the above circumstances would have arrived at a different conclusion.

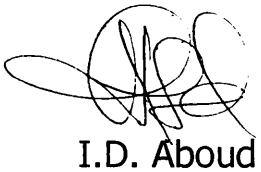
On the second issue as to parties relief, it is on record that upon termination on retrenchment the respondent was paid her statutory terminal benefits which includes salary up to 28/02/2017,

one month basic salary in lieu of notice, outstanding annual leave allowance of 16 days not taken, severance allowances of two years computed at 7 days basic wages for each completed year of continuous service as required under section 42(1) of the Act and, a certificate of service as reflected in Termination letter (Exhibit D7).

On the basis of the above discussion it is crystal clear that, the termination of respondents' employment on retrenchment was fair substantively and procedurally. Thus, she is not legally entitled to any compensation stipulated under section 40 of the Act.

In the result I do not hesitate to fault the arbitrator's award and find that, the present application has merit. The arbitrator's award is hereby revised, quashed and set aside.

It is so ordered.



I.D. Aboud

JUDGE

07/08/2020