IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 359 OF 2019

BETWEEN

BRIGHTON GERSON MWIGA.....APPLICANT

VERSUS

THE DIRECTOR GENERAL PCCB.....RESPONDENT

JUDGEMENT

Date of last Order: 04/08/2020

Date of Judgement: 23/10/2020

Aboud, J.

The applicant in the application for revision namely Brighton Gerson Mwiga seeks revision of the Commission for Mediation and Arbitration (the CMA) award delivered on 06/03/2019 at Dar es Salaam by Kachenje, J. Arbitrator. The CMA ruled in favour of the Respondent the Director General PCCB. The applicant had in the CMA filed a Trade Dispute No. CMA/DSM/ILA/R.239/2017 for unfair termination based on unknown reason as per the form no. 1 against the K.K. Security, Respondent erstwhile employer.

The applicant was an employee of the respondent employed on 18/07/2002 as Investigator Officer Grade III. Later on the applicant was promoted to different positions. On 2013 he was promoted to the position of Principal Investigation Officer Grade II the position held until his termination.

The applicant was terminated after being charged and found guilty of the misconduct namely absenteeism and non -with the respondent's policy. He was therefore terminated on 04/11/2016. Aggrieved by the respondent's act the applicant referred the dispute at the CMA claiming for unfair termination.

The CMA decided in the respondent's favour and ruled that the applicant's termination was fair both substantively and procedurally. Being resentful by the Arbitrator's award the applicant filed the present application.

The matter was argued by way of written submissions. Both parties were represented during hearing. Mr. Danstan Kaijage, Learned Counsel appeared for the applicant while Mr. Moza Kasubi, Learned State Attorney was for the respondent.

Arguing in support of the application Mr. Danstan Kaijage submitted that the impugned award is worthy to be revised on the reason that such an award is tainted with material illegalities as the Honourable Arbitrator failed to address one of the key issues framed. He stated that four issues were framed at the CMA and the Arbitrator did not determine the last issue.

The Learned Counsel went on to submit that, the applicant applied and was granted his annual leave to be spent in the United States of America as evidenced by annexture MB-2 collectively. He stated that the applicant had 28 consecutive days which was to commence on 11/05/2015 to 08/06/2015. He added that despite the fact that applicant was on his annual leave up to 08/06/2015 he was wrongly charged and terminated due to absenteeism even for the days he was on annual leave that is 08/06/2015.

He further submitted that the Arbitrator failed to asses properly the evidence tendered hence arrived at a wrong decision. It was submitted that, it is on record that the applicant after his annual leave was in contact with the respondent as seen in annexture MB-2 which means that the respondent knew the applicant's whereabouts.

He added that the respondent even assisted the applicant to channel his letter to the next stage after approving the applicant's request.

The Learned Counsel went on to submit that the respondent did not take any action against the applicant since 09/06/2015 of the alleged absenteeism because the respondent knew exactly that the applicant followed proper procedure to seek for leave without pay. He submitted that it was when the applicant completed his leave without pay then the respondent raised unfounded allegation of absenteeism and proceeded to terminate him on 03/02/2017.

Mr. Danstan Kaijage further argued that, in the termination letter the respondent indicated that the applicant was terminated on 01/07/2015 which basically amounts to retrospective termination which is unsuitable in law. He stated that, it was not the applicant's obligation to forward his leave application to the (PS) Permanent Secretary Establishment as per Order H. 19 (2) of the Standing Orders. He strongly submitted that, the applicant was on leave without pay the fact which was known to the respondent, thus there was no valid reason to terminate him from his employment.

The Learned Counsel submitted further that, the trial Arbitrator wrongly found that the termination procedures were followed while there was no any preliminary investigation contrary to Regulation 37 (2) of the Prevention and Combating of Corruption Bureau (PCCB) Regulations of 2009, Regulation 36 of the Public Service Regulations of 2003, Regulation 10.1 10.2 10.3 10.4 of the Public Service Disciplinary Code of Good Practice of 2007, GN. 53 of 2007 and Regulation 13 (1) of the Employment and Labour Relations (Code of Good Practice) Rules, GN. 42 of 2007 (herein GN. 42 of 2007).

Mr. Danstan Kaijage went on to submit that, the Committee was composed of only two members from the management, he added that the person who signed the charge was the one who terminated the applicant. He strongly submitted that the chairman had influence on the outcome of the matter and that there was no any complainant who pressed charges against the applicant. He therefore stated that the applicant was not afforded a fair hearing. He therefore prayed for the applicant to be reinstated to his employment.

Responding to the application Ms. Moza Kasubi, learned State Attorney submitted that, the present application is devoid of merits as there are no grounds given to warrant Court's intervention of the CMA decision. He stated that, the trial Arbitrator diligently discharged his task of analyzing the evidence in line with all framed issues and reached to a sound decision as evidenced from page 4 to 19 of the impugned award. She added that the Arbitrator discussed eloquently the procedures for applying for leave without pay as per the provisions of section H. 19 (1) and (2) of the Public Service standing Orders, 2009. She said the Arbitrator was satisfied with the evidence adduced that the applicant did not comply with the requirement even after being informed and advised of the procedure. The Learned State Attorney argued that since the applicant proceeded with leave without permission the respondent was right to terminate his employment on the ground of absenteeism.

As regards to termination procedures it was submitted that, the respondent adhered to the laid down procedures and the same were well analyzed by the Arbitrator from page 28 to 30 of the impugned award.

Regarding the issues framed at the CMA it was strongly submitted that, the Arbitrator properly determined the issues raised. The learned State Attorney therefore prayed this application be dismissed want of merit.

In rejoinder Mr. Danstan Kaijage for the applicant vehemently submitted that, the CMA did not address issue No. 3 as framed by the parties. He reiterated his submission in chief in respect of the applicant's termination. He therefore urged the Court to allow the application.

I have duly considered the submission of both parties with eyes of caution. I also read the CMA record and the issues evolve which the Court has the duties to resolve and decide are; whether there was valid reason (s) or substantive fairness to terminate the applicant's employment by the respondent, secondly is whether there was procedural fairness in terminating the applicant and lastly is to what relief are the parties entitled.

I have noted the applicant's submission on the issues framed at the CMA. The CMA records reveals that three issues were framed and as to when exactly the applicant was termination from his

employment was the last issue framed by the parties at that stage. Going through the impugned award though the Arbitrator did not determine such issue independently as raised by the Applicant but it was clearly stated at page 30 of the award in question that the applicant was terminated on 04/11/2016. Therefore, such an issue was determined by the Arbitrator. Though I have to comment that the Court and tribunal are duty bound to determine the issues raised in consultation with the parties as they are and, is not a good practice to come up with their own issues.

On the first issue as to whether the respondent had valid reason to terminate the applicant. It is a trite law that employers are required to terminate employees on valid reasons only and not on their own whims. The concept of a valid reason is well elaborated under the provision of section 37 (2) of the Employment and Labour Relations Act, [CAP 366 RE 2002] (herein the Act) which provides as follows:-

> "37 (2) - A termination of employment by an employer is unfair if the employer fails to prove:-

(a) That the reason for the termination is valid;

(b) That the reason is a fair reason related to the employees conduct and

(c) That the employment was terminated in accordance with a fair procedure".

In the application at hand the applicant was terminated for two misconducts namely absenteeism and violation of Regulation 35 (2) of the PCCB Regulations, 2009. The applicant strongly disputed the fact that he was absent from work without permission. He submitted that he was in unpaid leave the fact which was within the respondent's knowledge.

The procedures for obtaining leave without pay in the respondent's offices are governed by Order H. 19 (1) of the Public Service Standing Orders, 2009 (to be referred as Standing Orders) which is to the effect that:-

"H.19 Leave without pay:-

(1) it is the government's policy not to grant leave without pay to employees. However the

Permanent Secretary (Establishments) may grant leave without pay to public servants provided that he is satisfied that it is the public interest to do so. Such approval shall be obtained before a public servant goes on leave without pay.

(2) Leave without pay may be granted to a public servant who stands for political elections or who attends higher education, a course or training or accompanying a spouse outside the country which is not the training programme of the employer. Where the public servant is on pensionable terms under Section 18 (b) (i) of the Public Service Retirement Benefits Act, Cap 371 shall apply. Applications for leave without pay shall be made through the employer who shall forward it with recommendations to the Permanent Secretary (Establishments) for approval".

As cited in the provision above, an employee is obliged to obtain approval of leave without pay before its commencement. In the matter at hand as rightly found by the Arbitrator there is no dispute that the applicant indeed applied for leave without pay as evidenced by a letter dated 04/05/2015. The applicant's application for leave without pay was denied by the respondent with a letter dated 25/05/2015. The applicant made another request to the respondent by a letter dated 04/06/2015 where he stated that he was ready to pay all of his pension deduction for the whole period that he planned to undertake the unpaid leave.

The record reveals further that, in a letter dated 17/06/2015 the respondent instructed the applicant to channel his application to the Permanent Secretary (Establishments) as in compliance with Order H. 19 of the Standing Orders cited above. The applicant complied with the respondent's instruction and wrote another letter dated 19/06/2015 requesting for leave without pay. This time the respondent approved the applicant's application on 25/06/2015. The respondent only wrote one Swahili word in the relevant letter "Imepitishwa".

From the discussion above the respondent was legally required to forward the applicant's application with recommendations to the Permanent Secretary which was not done. On the other party, applicant relied on the fact that the respondent approved his application then he proceeded with his leave without pay. According to the applicant he believed his application was forwarded to the Permanent Secretary and approved due to the respondent's conduct. The applicant stated that while he was on unpaid leave he was in communication with the respondent but he was never alerted/asked about the approval of his application. He added that the respondent stopped to pay his salary, thus, under those circumstances he believed his application was approved by the Permanent Secretary.

Under the circumstances of this case I do not agree with the Arbitrator's findings that both parties have to be blamed for what had happened to the applicant. It is on record the respondent did not discharge his obligation of forwarding the letter to the responsible Permanent Secretary. On his part the applicant after the respondent's communication o him that he had no objection of his request or application for leave without pay he relaxed and never made any follow up as to whether was approved by the legal authority, to wit

the Permanent Secretary Establishment or not and, without being sure of such approval he proceeded with his leave without pay contrary to Order H. 19 of the Standing Orders. Thus, I do not see the basis of the arbitrator's blames to the respondent in this matter. The applicant being a public servant was supposed to adhere to the policies of good practice, rule, regulations and statutes governing his service. Applicant's negligence in handling his issue of leave without pay and its consequences cannot be shifted to anyone, but he should blame himself for failure to follow the procedures which fortunately were known to him very well.

On the basis of the foregoing discussion it is my view that so long as the applicant did not comply with the requirement of Order H. 19 (1) of the Standing Orders cited above the respondent was right to charge him with absenteeism and non-compliance with the respondent's policy for all the period the applicant was out of work. In this application I fully agree with the Arbitrator's findings that the respondent proved the misconducts levied against the applicant as required by section 39 of the Act.

On the second issue as to whether the respondent followed procedures in terminating the applicant. The procedures for terminating an employee on the ground of misconduct are provided under Rule 13 of the Employment and Labour Relations (Code of Good Practice) Rules, GN. 42 of 2007 (herein GN. 42 of 2007). In this application the procedures applied in terminating the applicant were analyzed by the Arbitrator in the impugned award from page 25 to 30 and I must say that I really appreciate the Arbitrator's analysis and I fully agree with the findings.

The applicant is claiming in this Court that there was no preliminary investigation. He mentioned a number of provisions which were violated by the respondent in that regard. He stated that the provisions cited are in line with Rule 13 (1) of GN. 42 of 2007 which is to the effect that:-

> "The employer shall conduct an investigation to ascertain whether there are grounds for a hearing to be held".

In this application it is my view that the respondent complied with such provision. By a letter dated 18/08/2016 (exhibit PCCB-1

collectively) the respondent demanded explanation from the applicant of the alleged misconduct. In the letter dated 22/08/2016 the applicant replied to the respondent. In my view the communication between the parties was in due process of investigation. The respondent collected all the necessary information before summoned the applicant to a disciplinary hearing.

The applicant further alleged that, there was no fair hearing as the person who signed the charge was the one who terminated him. I have consciously gone through the charge sheet served to the applicant (exhibit PCCB-1) collectively and there is no name of the person who signed it. In the termination letter the person who signed the relevant document was the Director General, Valentino Mlowola. In my view there is not provision of the law exempting the employer from signing charge sheet. Assuming that it is true the charge sheet and letter of termination were signed by the same person in my view I do not see any injustice occasioned to the applicant so long as the chairman of the disciplinary hearing was an impartial person known as John Kabole as indicated in the disciplinary hearing report (exhibit PCCB-03). It has to be in mind that in public service the initiator of the disciplinary action normally is the disciplinary authority and is the

one to implement the final decision, which is whether to terminate the offender or to take any relevant action depending on the gravity of the offence charged and penalties available in the governing laws.

The applicant also contends that, he was terminated retrospectively. In the termination letter the applicant was terminated effective from 01/07/2015. In my view I do not see any retrospective decision in writing that date because it is from that time the applicant himself absconded from work without any permission from the respondent.

In the circumstances of this case as cited above I fully agree with the Arbitrator's findings that all termination procedures were followed by the respondent. In other words I have no hesitation to say that the applicant's termination was fair procedurally.

On the last issue as to parties' reliefs, it is on record that at the CMA the applicant prayed for reinstatement. As discussed above the applicant's termination was fair both substantively and procedurally, therefore he is not entitled to the reliefs stipulated under section 40 of the Act as he claimed.

In the result I find the present application has no merit. The applicant's termination was fair both substantively and procedurally as rightly found by the Arbitrator. I therefore uphold the Arbitrator's award dated 06/03/209. The application is dismissed accordingly.

It is so ordered.

I.D. Aboud

JUDGE

23/10/2020