IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 378 OF 2019

BETWEEN

STANDARD CHARTERED BANK (T) LIMITED.....APPLICANT

VERSUS

LINAS SIMON.....RESPONDENT

JUDGMENT

Date of Last Order 23/03/2020

Date of Judgment 08/05/2020

A. E. MWIPOPO, J

The applicant Standard Chartered Bank (T) Ltd is aggrieved by the decision of the Commission for Mediation and Arbitration (CMA) in labour dispute no. CMA/DSM/ILA/346/16/333 dated 23/02/2018. The CMA held that termination of respondent namely Linas Simon employment by the applicant was unfair and ordered for re instatement of the respondent without loss of his salaries. Following that decision, the applicant instituted the present application for revision applying for the following orders:-

i. The court to call for the CMA record of labour dispute no. CMA/DSM/ ILA/346/16/333 decided by Hon. Makanganya, Arbitrator on 23/02/2018 to examine the pleadings, proceedings, exhibits and the award of the Commission with a view to satisfying itself as to the correctness, legality and rationality of the award in the light proven gross dishonesty on the part of the respondent.

ii. That consequently the court be pleased to revise, set aside the award and confirm the applicant's decision for termination of the respondent's employment.

iii. Any other reliefs that the Court deems fit to grant.

Background of the case in brief is that the respondent was employed by the applicant as a teller from 04/05/2011 to 13/04/2016 when she was terminated for a reason of failure to follow procedure of receiving clients' money and posting the same in their account. Following the misconduct the respondent was suspended, charged before the disciplinary Committee and was terminated from employment for the misconduct that was alleged to have occasioned loss of 27 million to the applicant. The respondent was not satisfied with the applicant's decision to terminate her from employment and referred the dispute before the commission. The Commission award was

given in favour of the respondent. Aggrieved by the CMA award the applicant instituted the present application.

When the matter came for hearing both parties appeared and where represented. Ms. Glory Venance Advocate appeared for the Applicant whereas Mr. Gerald Shirima Advocate appeared for the Respondent.

Ms. Glory Venance Advocate stated that the applicant have four grounds of revision. The first ground of revision is whether it was proper for the trial Arbitrator to order re-instatement even after the admission of the offence by the respondent during the disciplinary hearing. She was of the view that arbitrator erred to order the employer to re-instate the respondent and to pay him the 22 months salaries from the time the respondent was terminated from employment to the date of CMA Award while the evidence proved that the termination was fair substantially and procedurally. In the disciplinary hearing form - exhibit D4 the respondent admitted that the slip were genuine, there was no alteration and the same could only be errors caused by work pressure.

But the alleged error was done consecutively for 5 months according to the evidence of DW1. DW1 testified that the receipt produced by the client

did show that the money was deposited to his account while the money was not entered into the account. The stamp in the client receipt and the bank receipt were different. The impact of not depositing the money in the customer account is that the customer who has a loan will be charged interest on the dates while the client deposited the money on time.

Despite the overwhelming evidence shown by DW1, DW2 and exhibit D4 which proved that the respondent committed the misconduct, the Arbitrator decided in the Award that the respondent to be re-instated. It was improper for the Arbitrator to order re-instatement in the circumstance of the case.

The second ground of the revision is whether the trial arbitration did properly evaluate the evidence of the parties prior to making an order for re-instatement. On this ground she submitted that the evidence of the Applicants proved that the termination was substantively and procedurally fair. The Arbitrator held in page 15 para 3 and in page 16 para 1 of the Award that it was not proper to terminate the respondent as it was his first offence and punishment was supposed to be warning instead of termination.

She submitted further that the exhibit D4, D6, D7, D1 and D3 and respondent exhibit A2, A3 and A4 show that the procedure for termination from the employment was adhered. According to exhibit D1 the respondent did breach the known procedure of dealing with client's money on the reasons that there was system problem. However there was no report on the issue to the employer. In line with the exhibit produced before the CMA, the trial Arbitration failed to evaluate the evidence available and ended up delivering erroneous award. The counsel for the applicant cited the case of **NMB Vs. Rose Laizer, Case No. 123 LCCD 2014** where the arbitrator decision was found invalid and was quashed for failure to evaluate the evidence before it.

She was of the view that in the matter at hand the reason for arbitrator is not correct as there is proof that the respondent did not deny the wrongful act. Thereafter she prayed for the Court to find the termination was fair and to quash the arbitrator's Award.

The third ground is whether the arbitrator did have clarity of mind to distinguish the inconsistence between the sum of Tshs. 30,000,000/= stated during investigation and the amount of Tshs. 27,000,000/= finally confirmed as lost after bank reconciliation. Ms Glory submitted that the respondent was

suspended during investigation when the loss was found to be Tshs 30 million. But after reconciliation the actual amount found to be lost was Tshs. 27 million. Instead of differentiating the amount, the arbitrator was of the view that it is not known what is the amount which was lost, was it shillings 30 million or 27 million. She was of the opinion that the difference in the amount alleged to be lost was not sufficient reason to hold that the termination was not fair.

The last ground is whether the trial Arbitrator exercised her powers properly in ordering re-instatement after all evidence proved that the respondent committed the offence. The counsel for the applicant argued that it is a requirement of the law for the arbitrator to act judiciously in making the decision. In the present case, following the occurrence of the matter affected the employer employee relationship which was deteriorating to the extent of being intolerable. The order of the arbitrator to order re-instatement is not practical. In the case of **NMB vs. Eliamdis Mlay and Chacha Boniface 2015 LCCD Case No. 195** where it was held that the reason for termination was valid hence the employer discharged his duty to prove termination was fair. The court held further that remedy for unfair termination has to be according to the law and not in excess or addition of

what is provided by the law. In the present case the remedy of re-instatement is not impracticable as the arbitrator did not act judiciously.

In the case of **Petter Mbowe Vs. A. and A computer Limited 2015 LCCD Case No. 196** the Court held that the additional benefits provided to the complainant was not justifiable. Also the order for re-instatement would be impracticable due to the hostile relationship between the parties.

She prayed for the court to revise and set aside the decision of the arbitration in this matter.

In reply, Advocate Charles Kisoka submitted that the Commission for Mediation and Arbitration (CMA) after going through the submissions confirmed the alleged misconduct was based on invalid reasons.

He was of the view that since the respondent was honest while discharging her duty as the bank teller at Cocacola Kwanza Branch there were no occasioning loss. A demand for explanation {Charges} - Exhibit A3 show that there were four cheque by the applicant. As to the exhibit, there was no loss occasioned to the Applicant as the respondent deposited all checks in bank. In the charge sheet there is no indication of the amount lost.

He argued that the Arbitrator stated in the Award at page 12 paragraph 4 that there was issue of the delay in depositing the money, but the money was deposited on the clients account. Page 13 paragraph 2 of the Award the Arbitrator found that there was no loss occasioned to the Applicant. The alleged conspiracy under paragraph 2(c) of the applicant's affidavit shows that no other employer was charged or terminated or connected to similar charge. This prove that the justice was not adhered by the employer.

There were no proof during arbitration hearing to substantiate the loss of Tshs. 27 million. At page 12 of the Award it shows that the amount lost differs from one witness to another. DW1 stated that the amount lost was 32 million while DW2 stated that the loss was 27 million. During disciplinary hearing, the misappropriation of 27 million was not part to the charge.

The charges which were given to the respondent was mis-posting that there are specific amount which were deposited by the way of cheques in the date after they were received. There was no evidence to show that the cheques were not deposited.

The allegation that the deposit receipts were stamped differently between customer receipt and bank's receipt also was not part to the

charges before disciplinary committee. The same were brought by surprise during disciplinary hearing and during Arbitration hearing. The respondent raised objection on its tendering, but the same was admitted for identification purposes.

The Counsel for the respondent have contended that the respondent admitted to the misconduct. However, exhibit A5 shows that what was admitted by the respondent is that sometimes there were system failures, system problem, password failures and also she was assigned other duties such as Bank Office Manager, Branch Manager and the custodian. All of these led to the respondent to post some of the amount on the next day.

On the termination, He submitted that the respondent had no previous charges or similar charges led to the termination. The applicant did not do anything to train the respondent in the scenario or after occurrence of the said mis-posting. Also it was the first mistake or misconduct by the respondent since he was employed in 2011. As it was held in page 15 of the award that the first offence of an employee shall not justify termination unless proved that such a misconduct is so serious that it make makes a continued employment relationship intolerable.

On the allegation that delay in depositing the clients' money may cause the client with the loan to be charged interest, there is no evidence to show that the clients have the money missing or the client was charged interest.

On the **NMB Case** cited by the applicant he submitted that it is different from the current case. The respondent in the cited case was terminated for negligence. In the current matter at hand the respondent was terminated for dis honesty. And the award which was quashed and set aside is re-engagement and not re-instatement as in this case. The **Peter Mbeya's case** is distinguished as it is talking about circumstances where the court did not see that the re-instatement was tolerable in the circumstances.

He referred this court to the case of **NMB PLC Vs. Ethoy E. Ntakabanyula, Revision No. 911 of 2015 High Court, Labour Division at Mwanza** where the court confirm the decision of the Arbitrator to re-instate the employee on the ground of gravity of the offence; circumstances of infringement itself where there have to be other section that termination; lengthy of employee service in the Applicant business; and Other employee dismissed or terminated for the same offence.

He argued that in the present case despite the fact that other 5 employee were alleged to have committed the offence it was only the respondent who was terminated. He prayed for the court to dismiss the entire application as it contains no merit at all.

In rejoinder, Miss Glory Venance submitted that exhibit D6 and D7 shows the loss, one show the loss during investigation and the other shows the actual amount lost after reconciliation. The misconduct was found after the client complained. The allegation of system failure, password failure and other excuses were not reported. In order for an employee to get some training assistance she had to complain first. The misconduct was committed several times thus it was gross misconduct.

On the cases cited, the principles in those cases are relevant to the present case. The case of **Ethey Ntakabangula** cited by the respondent is distinguishable as Ethey worked for NMB for 30 years while in the present case the respondent have worked for 5 years only.

On the issue that there was other employees charged but were not terminated she submitted that the offences were different.

The she prayed for this application to be granted and CMA Award to be quashed and set aside.

From submissions from both parties and the evidence available in the record there are two main issues for determination in this application. The issues are as follows:-

i. Whether the reason for termination of respondent's employment was valid and fair.

ii. Whether the procedure for termination was adhered.

iii. What are remedies to both parties?

The employment and Labour Relations Act, 2004 in section 37 (2) provides for the duty of the employer, in dispute for termination of employment, to prove that the termination was fair. Section 37 (2) reads as follows:-

> ***"Section 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-

(i) related to the employee's conduct, capacity or compatibility; or

(ii) based on the operational requirements of the employer, and

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

The intention of the legislature in the above section is to require employers to terminate employees on valid and fair reason and on fair procedures, but not on their own whims. Failure of the employer to prove that the termination becomes unfair.

In regards to the first issue whether the reason for termination of respondent's employment was valid and fair, it is a well established principle of law that once there is issue of unfair termination the duty to prove the reason for termination was valid and fair lies to employer and not otherwise. **(See Tiscant Limited Vs. Revocatus Simba, Revision No. 8 of 2009, High Court, Labour Division, at Dar Es Salaam and Amina**

Ramadhani vs. Staywell Appartment Limited, Revision No. 461 of 2016, High Court Labour Division, ata Dar Es Salaam).

In the present case the applicant have submitted that the termination of the respondent was substantively and procedurally fair. In the disciplinary hearing form - exhibit D4 the respondent admitted that the slip were genuine, there was no alteration. The applicant was of the view that the admission of the offence charged plus other evidence available and exhibit tendered proved the misconduct hence the arbitrator erred to order re instatement despite the presence of such overwhelming evidence.

In contention the respondent submitted that what was admitted by the respondent is that sometimes there were system failures, system problems, password failures and also she was assigned other duties such as Bank Office Manager, Branch Manager and the custodian. All of these led to the respondent to post some of the amount on the next day. He submitted that the arbitrator was justified to order re instatement of the respondent as the termination was not fair.

The evidence available in record shows that the respondent was terminated by the applicant on 13/04/2016 according to the termination

letter – Exhibit D6. The reason for termination is the misconduct of the respondent to mis-post client's fund in respective accounts as required and revealed by records of transaction. Exhibit D6 states that the explanation given by the respondent in demand explanation – Exhibit D5 and during disciplinary hearing were not satisfactory. The respondent in Exhibit D5 denied to commit the misconduct intentionally and stated that the failure to post may be caused by the act of collecting the client cash with their slip (drop safe) which are of the day before or failure to post after receiving the cash due to system problems, password failures and may be human errors in not changing stamp dates.

The disciplinary hearing form – exhibit D4 shows that the respondent was charged by the applicant for failure to post fund collected from the client Coca Cola Kwanza Agency to the respective accounts which resulted into financial and reputational loss to the bank. According to the invitation to the disciplinary hearing which is part of exhibit D4 the transactions which were subject of the hearing are as follows:

i. Cash deposit no. 16140 received on 08/01/2015 for shillings 15,100,000/= was posted on 09/01/2015.

ii. Cash deposit no. 16136 received on 08/01/2015 for shillings 19,840,000/= was posted on 09/01/2015.

iii. Cash deposit no. 12948 received on 14/01/2015 for shillings 8,000,000/= was posted on 14/01/2015.

iv. Cash deposit no. 15892 received on 14/01/2015 for shillings 5,600,000/= was posted on 15/01/2015.

From the four transactions above, three transactions with no. 16140, 16136 and 15892 funds which were received by the respondent from the client was posted in their respective account in the next day. In one transaction with no. 12948 the respondent received the fund from the client and posted it in the respective account on the same date which is 14/01/2015. The respondent adopted his defence from explanation demand – exhibit D5. Therefore, there was no dispute on the transactions that were deposited on the next day but the respondent insisted that it was a human error. And the late posting of the fund occurred on 08/01/2015 and on 14/01/2015 and not for five consecutive months as alleged by the Counsel for the applicant.

The findings of the disciplinary committee found the respondent guilty of the misconduct which they alleged that it resulted into a loss of 27 million to the bank. This findings is unfair as Exhibit D3 shows that during the disciplinary hearing and even the notice of disciplinary hearing the exactly amount which was lost was not mentioned. There is no evidence at all to prove that 27 million was lost by the applicant following the misconduct of the respondent. The evidence available shows that all the fund which was collected by the respondent was posted in the respecting account either in the same date or the following date. Thus, it is clear that there was no loss whatsoever which was caused by the delay or late posting of the fund in the transactions collected by the respondent.

DW1 in his testimony alleged that the act of posting late the fund of the clients have effect of the bank to miss the information about the clients deposit and the client rights of his fund to be deposited on time is infringed. DW1 alleged that if the client have a loan then he will be charged interest on the respective day while the client have already deposited the fund. Unfortunately, DW1 did not prove that the client Cocacola Kwanza Agency was charged an interest for delay in posting of the received fund which was done by the respondent. The question is where did the amount 27 million

which was alleged to be lost came from? DW1 tendered investigation report – exhibit D3 which he alleged that it was the basis of the allegation.

The exhibit D3 shows that 4 employees were found with the offence of mis-posting or delay in posting of clients fund in clients' respective accounts. Therefore the exhibit D3 concern four employees and not the respondent alone. The investigation find that a total of 32, 503,500.00 was misappropriated up to 01/08/2015. The exhibit D3 shows that some employees were interviewed and one of them admitted to the allegation of misappropriate a total of 27 million and promised to pay the whole fund by 14/08/2015. The remaining 3 employees including the respondent denied to know anything about the misappropriation. Unfortunately in the conclusion the report stated that all four employees including the respondent unlawfully obtained 32,503,500.00 shillings which is not true. The investigation revealed the employee who was responsible for the loss of 27 million shillings and it was not the respondent. From the content of exhibit D3 (which was also admitted as exhibit D7) respondent did not cause any loss to the applicant.

From the above it is my findings that there was no evidence to prove that the respondent caused a loss of 27 million shillings to the applicant as

the recommendation of the disciplinary committee and the letter of termination alleged. Also there was no evidence to prove that the applicant or applicant's client suffered a loss of 27 million shillings in the transactions. Thus, the reason for termination is not valid and fair and as result the answer to the first is negative.

The second issue is whether the procedure for termination was adhered. The applicant submitted that the Arbitrator erred to hold that it was not proper to terminate the respondent as it was his first offence and punishment was supposed to be warning instead of termination. The learned counsel for the applicant submitted further that the exhibit D4, D6, D7, D1 and D3 and respondent exhibit A2, A3 and A4 show that the procedure for termination from the employment was adhered. According to exhibit D1 the respondent did breach the known procedure of dealing with client's money on the reasons that there was system problem. However there was no report on the issue to the employer.

In contention the Counsel for the respondent submitted that what was admitted by the respondent is that sometimes delay in posting the client's fund occurs when there is system failure, system problem, password failures and also when she was assigned other duties concerning the client such as

Bank Office Manager, Branch Manager and the custodian. All of these led to the respondent to post some of the amount on the next day. He submitted that the respondent had no previous charges or similar charges which led to the termination as it was the first mistake or misconduct by the respondent since she was employed in 2011.

As it was held in page 15 of the Commission award, I agree with the arbitrator that according to rule 12 of the GN. No. 42 of 2007 the first offence of an employee shall not justify termination unless proved that such a misconduct is so serious that it make makes a continued employment relationship intolerable. In the present case the respondent posted the client fund in delay for a day in three transactions as provided in exhibit D3. The respondent in exhibit D5, D3 and in her testimony stated that what occurred was human error caused by several factors. It is obvious in such circumstances the misconduct was not so serious to make the applicant terminate respondent employment.

Further, Rule 13(5) of GN No. 42 of 2007 provides for the duty of the employer to give the employee a proper opportunity to respond to the allegation. In the present case exhibit D3 also show that the disciplinary committee convicted the respondent for occasioning loss of 27 million

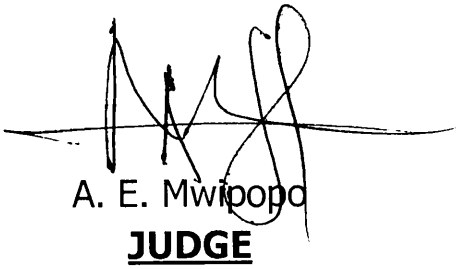
shillings to the employer {applicant} the offence which its facts and evidence was never revealed to the respondent. The termination letter also states that the reason for termination is misconduct which occasioned loss of 27 million shillings to the applicant. Therefore the respondent was not given opportunity to defend herself on the charges of causing loss of 27 million shillings to her employer.

From the above, it is my finding that the procedure for termination of respondent employment was not adhered and as result the second issue is answered in negative.

Then, what is the remedies to the parties after finding that the termination was not fair substantively and procedurally? The Employment and Labour Relations Act, 2004 provides for three remedies for unfair termination. The remedies are re-instatement, re-engagement and compensation. The Honourable trial Arbitrator after finding that the termination was not fair substantially and procedurally ordered for re – instatement of the respondent without loss of remuneration. This Court is of the same opinion that where termination of employment is found to be unfair substantively and procedurally the remedy to the respective employee is re instatement without loss of remuneration.

Therefore, I upheld the CMA Award that the respondent to be re-instated without loss of remuneration. If the applicant find the order is impracticable due to hostile relationship between applicant and the respondent as submitted by the Learned Counsel for the applicant, then the employer {applicant} may do the needful according to Section 40(3) of the Employment and Labour Relations Act, 2004. Thus, this revision application is dismissed for lack of merits.

It is so ordered.



A. E. Mwipopo
JUDGE
08/05/2020