IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 13 OF 2019

BETWEEN

CLARE HAULE.....APPLICANT

VERSUS

WATER AID TANZANIA.....RESPONDENT

JUDGMENT

Date of Last Order: 18/03/2020

Date of Judgment: 04/05/2020

A. E. MWIPOPO, J

Aggrieved by the Commission of Mediation and Arbitration Award in the labour dispute no. CMA/DSM/KIN/R.476/17, the applicant **Clare Haule** have filed the present application for revision. The application is preferred under Rule 24(1),(2)(a)(b)(c)(d)(e)(f), 24(3)(a)(b)(c)(d) and Rule 28(1)(c)(d) (e) of the Labour Court Rules, GN No. 106 of 2007. Also under the provisions of Sections 94(1)(b)(i) and 91(2) (c) and of the Employment and Labour Relations Act, Act No. 6 of 2004 (ELRA).

The applicant is praying for the following orders:-

1. *That this Honourable Court be pleased to call for the records of the proceedings and the award dated 03/12/2018 from the Commission for Revision and Arbitration in Labour Dispute No. CMA/DSM/KIN/R.476/17, revise and set aside the award of the Commission for Mediation and Arbitration dated 03/12/2018 delivered by Hon. Masaua, Arbitrator.*
2. . *That the Honourable Court be pleased to grant cost of this application.*
3. *That the Honourable Court be pleased to make such any other orders as it may deem fit.*

The applicant have five legal issues for the court to determine. Those legal issues are as follows;

a. That the arbitrator erred in law and fact in failing to evaluate evidence tendered at the Commission for Mediation and Arbitration in relation to the applicable labour laws and labour cases.
b. That the arbitrator erred in law and fact in failing to find that the applicant was condemned unheard in the retrenchment exercise in

which the termination letter was signed for delivery on the 30/07/2017 but invited for meeting on 31/07/2017.

c. That the arbitrator erred in law and fact in that the decision to terminate the applicant was made and concluded by the respondent without the involvement of the applicant as required.

d. That the arbitrator erred in law and fact in failing to understand that consultation process in retrenchment has to result into voluntary agreement failure of which the respondent has to file a matter at the Commission for Mediation and Arbitration.

e. That the arbitrator erred in law and fact for holding that there was fair procedure and for holding that there was fair reason for termination of the applicant's employment contract by the respondent.

The background of the dispute in brief is that the applicant was employed by the respondent as the Program Officer urban on 12/06/2014 and was terminated on 31/03/2017. During employment he was promoted to various post and at the time of terminated he was a Senior Program Manager Policy. Aggrieved by the employer's decision he referred the matter to the Commission for Mediation and Arbitration on 24/04/2017 as referral no. CMA/DSM/KIN/R.476/17. The matter was heard interparty and the

Commission delivered its award on 04/12/2018 where the complaint was dismissed for lack of merits. Following the decision the applicant filed the present application for revision against the CMA award.

The application came for hearing on 18/03/2020 and both parties were represented. Advocate Frank Mwalongo appeared for the applicant whereas Advocate Gerald Shirima appeared for the Respondent. The hearing of the application proceeded orally.

The applicant commenced his submission by making a prayer for the adoption of legal issues for determination of this case contained in the Affidavit to form part of his submission. He then decided to argue ground b, c, d and e jointly as they all referring to the procedure before the CMA. The applicant submitted that on these grounds that the procedure for termination of the applicant employment was unfair. He stated that Section 38 of the Employment and Labour Relations Act, No. 6 of 2004 prescribes four procedural items in order to conduct the retrenchment. The items are notice of intention to retrench; disclosure of relevant information; consultation prior to retrenchment; and retrenchment itself. He argued that in the present matter the only communication in record prior to retrenchment is the attendance register of the respondent; e-mail communication of 24/03/2017

calling a meeting to discuss budget deficit and staff level; and e-mail of 30/03/2017 was calling for meeting which was postponed to the 31/03/2017 where it was held. He stated that those are the only evidence in record on the procedure for termination by retrenchment which was followed by the respondent.

The counsel for applicant submitted further that when the applicant appeared for the meeting on 31/03/2017 she was given a letter of termination of employment by retrenchment. The award show that the DW1 testified that the termination letter was written on 30/03/2017 while the meeting to discuss for retrenchment was called a day later that is 31/03/2017. He averred that when the applicant was supposed to appear for a consultative meeting the letter for retrenchment had already been written a day before and the same contravene S. 38(1) (C) of the Employment and Labour Relations Act which provides that consultation should be made prior to retrenchment. In the present application, the applicant was terminated before consultation.

In support of his position the applicant cited the case of **Jasson Peter Lwiza and 2 Others Vs. Christian Council of Tanzania, Revision No. 18 of 2013, High Court, Labour Division at Dodoma {Unreported};-**

held that the evidence adduced by applicants show that the employer did not consult the employee trade union prior to the termination as required by the law hence retrenchment become unfair. This court also in the case of **Sodetra {SPRL} Ltd Vs. Njellu Mezza and Another, Revision No. 207 of 2008, High Court, Labour Division, at Dar Es Salaam {Unreported}** was of the view that the respondent has duty to prove that the respondent were consulted before retrenchment exercise.

He then proceeded to argued that the evidence adduced in the CMA shows that there was no disclosure of the information on retrenchment for the purpose of informing the employees on the retrenchment. The respondent have stated that the reason for retrenchment is budget deficit and change of structure of the company. When the witness for the respondent Henry Raphael Horombe – DW1 was cross examined he answered that the alleged new structure that removed or deleted the applicants' position was not tendered before the CMA. The alleged structure was never disclosed to the Applicant nor produced to the CMA hence the change of organization structure cannot be proved.

On the legal issue "a" which refers to the reasons for retrenchment, the learned counsel for applicant submitted that the respondent testified

before the Commission that the budget constraints and change of organization structure are the reasons for termination. He argued that there was no evidence tendered to prove that the respondent was in a financial constraints other than general statement that there was budget deficit. The organization structure was never tendered.

He submitted that Rule 23(2) of the Employment and Labour Relations {Good of Good Practice} GN No. 42 of 2007 provides that the reasons for termination by operation requirement may be economical needs, or technological needs or structural needs a similar reasons to this one. The respondent have not proved reasons similar to the one provided by the law.

He argued that the duty to prove the reason of retrenchment is upon the employer. In support of the position he cited the case of **Security Group (T) Ltd Vs. Florian Modest Shumbusho and another, Revision No. 302 of 2014, High Court, Labour Division at Dar Es Salaam, {Unreported}** the court was of the view that operational reasons are not supposed to be used by the employer as present to terminate an employee unfairly at employer's will.

He averred that in the present case the employer used operational reason to remove the applicant from the employment. He prayed that this

revision to be allowed, CMA Award to be set aside and the applicant to be granted 24 months salaries amounting to Tshs. 108,965,568/= and compensation of Tshs. 36,321,856/= as additional salaries for 2 years for rent, leave for that period. General damages amounting to 50 million.

In reply, the learned counsel for the respondent Mr. Gerald Shirima prayed for the court to adopt a Counter Affidavit of the respondent as part of his submission. Thereafter, he submitted that retrenchment of the Applicant was substantially and procedurally fair and Section 38 of the Employment and Labour Relations Act, Act No. 6 of 2004 (ELRA) was complied by the respondent. He submitted further that it is in record that there was consultation done between the respondent and the employees to inform them about the budget deficit and the need to change organization structure. He referred to Page 7 last paragraph of the Commission award which shows that the employees was aware of what was happening in the company. He averred that DW1 tendered exhibit R3 – attendance sheet which shows the morning meetings which were discussing the company tendency. That exhibit R.3 shows that the employees were aware of the retrenchment since 24/03/2017.

On the e-mail which was sent to employees he submitted that respondent did write e-mail to the staff – exhibit R4 which contained information about retrenchment and new organization structure of the company. He stated that termination letter - Exhibit R2 shows applicant entitlements and consent form to the calculation of benefits and terminal payment. He argued that what was done when the applicant was called on 28/03/2017 was to complete the last part of the retrenchment procedure as the other 3 stages has already been done.

On the two cases cited by the applicant to support applicant's submission he was of the opinion that they are irrelevant to the present matter and the circumstance is different.

On the issue of disclosure of the information, he submitted that the record shows that there was disclosure of information in the meetings.

On the ground number (a) regarding reasons for terminations, he submitted that the evidence in record shows that due to budget constraints the employer was forced to change its structure and this is not in dispute as there were several meetings called to discuss the budget deficit. The applicant himself attended those meeting. He argued that the respondent was not supposed to give to employer the budget with its deficit before the

employees have requested or asked for it. For that reason, **the Security Group (T) Ltd case** is not relevant to the matter as employer had valid reasons to retrench the applicant whose position was no longer present in the new organization structure as tendered in exhibit – R4. He submitted further that there are five employees who were retrenchment together with the applicant, thus she was not alone.

Regarding to the claims for 24 months salaries & 36 millions compensation, he submitted that the applicant was paid terminal benefits according to the law. She was paid Tshs. 13,057,374.62 which she accepted. He then prayed for the revision to be dismissed.

In rejoinder the Counsel for the applicant submitted on the issue of disclosure of retrenchment information that Section 38(1) (a) of ELRA gives the duty to the employer to disclose information about retrenchment. Therefore, the submission that the employee have to request for information have no basis.

On the submission that the applicant consented to the payment of terminal benefit, he submitted that payment came after retrenchment for that reason the applicant was not consenting to the retrenchment.

On the attendance sheet that was tendered to prove attendance of the applicant to the meeting, He submitted that the attendance sheet was not supported with anything to shows what transpired during the meeting. He therefore retaliated his prayer in submission in chief.

From above submissions from both parties and the evidence available in record issues for determination in this revision application are as follows:

i. Whether the termination of applicant employment by the respondent was fair.

ii. What are remedies to the parties to the dispute.

Starting with the first issue whether the termination of applicant employment by the respondent was fair, the Employment and Labour Relations Act, 2004 in section 38 it provides for termination based on operational requirements (retrenchment). Section 38 (1) of the Act reads as follows:

> ***38;-(1) In any termination for operational requirements (retrenchment), the employer shall comply with the following principles, that is to say, be 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 minimise the intended retrenchment;

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

(iv) the timing of the retrenchments; and

(v) severance pay in respect of the retrenchments,

(d) shall give the notice, make the disclosure and consult, in terms of this subsection, with-

(i) any trade union recognised in terms of section 67;

(ii) any registered trade union with members in the workplace not represented by a recognised trade union;

(iii) any employees not represented by a recognised or registered trade union.

From above provision, in termination for operational requirement the employer is required to comply to four mandatory principles which includes giving notice of any intention to retrench; disclose all relevant information on the intended retrenchment; consult prior to retrenchment; and to give the notice of retrenchment. Section 38(1) reads together with rule 23 (1), (2), (3), (4), (5), (6) and (7) of the Employment and Labour Relations (Code of Good Conduct) Rules, GN. No. 42 of 2007 which provides for the requirement of the law on the operational retrenchment of the employee by the employer.

The applicant in the present case have submitted that the reason and procedure for termination of the applicant employment was unfair. She

submitted further that the mandatory procedure for retrenchment as provided under section 38 (1) of the ELRA, 2004 was no adhered. She was of the view that Applicant was not informed about the redundancy and the alleged communication was done after letter of termination has already been written. Moreover the Counsel for applicant submitted that the reason for retrenchment was not fair. In opposition the respondent submitted that the termination by way of retrenchment was fair as all of the procedures provided by section 38 (1) of the ELRA, 2004 was adhered.

In regards to the reason of termination, it is in record that the budget constraints and change of organization structure are the reasons for termination. The evidence from the record shows that the applicant was terminated by the respondent for operational requirement with effects from 31/03/2017. The termination letter – exhibit CL 2 which was written on 30/03/2017 provide the reason for termination is that the position of Senior Programme Manager Policy, Advocacy and SE which was held by the applicant does not fits in the new structure of the organization. The change of organization restructure aimed to reduce budget of the respondent following the reduction of donation from donors who supported the respondent.

The applicant was of the view that the respondent have to prove the budget deficit. However, the evidence in record shows that while cross examined the applicant testified that she attended the 24/03/2017 meeting which the main agenda was budget deficit and organization structure. This evidence prove that the employer gave notice of intention to retrench and also did disclose relevant information on the intended retrenchment. Further, the new organization structure commencing on 01/04/2017 which is part of exhibit R 4 does not contain the position of Senior Programme Manager, Policy, Advocacy and SE which the applicant was holding at the time of retrenchment. This prove that the applicant position was removed from the new organization structure that commenced on 01/04/2017. According to rule 23(2) (a) and (c) of G .N. No. 42 of 2007 provides that economic needs and structural changes are among the fair reasons for the termination by operational requirements. For that reason it is my finding that the evidence available proves that the reason for termination was fair.

In regards to submission of the applicant that consultation was effected prior to retrenchment which is contrary to the law, the law provides in section 38 (1) (c) (i) (ii) (iii) (iv) and (v) the consultation which is prior to retrenchment shall be on the reasons for intended retrenchment, measures

to avoid or minimize it, criteria for selection of employees to be retrenched, time of retrenchment and severance pay in respect of the retrenchment. Also the GN No. 42 of 2007 in rule 23 (4) (c) provides that the purpose of the consultation required by Section 38 of the ELRA, 2004 is to permit the parties, in the form of a 'joint problem-solving' exercise, to reach agreement on the areas provided. Therefore the consultation was supposed to be on the reason for intended retrenchment, measures to avoid or minimize it, criteria for retrenchment, time for retrenchment and the payment. There is no evidence in the record to prove that there was consultation which was conducted between the respondent and the applicant or the employees' trade union in the place of work.

The evidence available in record prove that the employees were informed of the possible retrenchment due to organization structure change and the reason for retrenchment is the budget deficit and operational requirement as it is found in the testimony of DW 1 and PW 1 that the meeting of 24/03/2017 agenda was on those areas.

According to Section 38 (1) (d) (i) (ii) and (iii) of the ELRA, 2004 the employer is required to consult with any trade union or the respective trade union in the workplace or the employees. As the employer did not consult

with any trade union then it was mandatory for the employer to consult with individual employees the thing which according to the evidence in record was not done.

This Court in the case of **Jason Peter Lwiza and 2 Others v. Christian Council of Tanzania, Revision No. 18 of 2013, High Court of Tanzania Labour Division at Dar Es Salaam,** held that "It is clear from the law that guide retrenchment that the employer shall consult the trade union in the workplace before resorting into termination of his employee to see the possible alternative can be explored".

Also, the Court of Appeal was of the similar position in the Case of **Security Group (T) Ltd v. SAMSON YAKOBO AND 10 OTHERS, CIVIL APPEAL NO. 76 OF 2016, CAT at Dar Es Salaam,** (unreported) when discussing the requirements for retrenchment under section 38 (1) of the ELRA held that, I quote; "So, even if there would have been evidence that the respondents were members of CHODAWU, from the evidence of DW1, the consultation envisaged under S. 38(1) (d) (iii) of the ELRA was obviously not done. What can be gathered from the evidence of DW1 is that he held a meeting with the appellant to determine the amount of severance allowance after the respondents had been retrenched".

Moreover, the evidence in record according to DW1 and termination letter show that the termination latter – exhibit P3 was written on 30/03/2017, but the consultation meeting was conducted on 31/03/2017 after it was adjourned on 30/03/2017. This means that the consultation meeting was just a meeting for the purpose of showing that the retrenchment procedure was adhered and was no called for the purpose of a joint problem-solving' exercise to reach an agreement as provided by GN no. 42 of 2007 in Rule 23 (4).

This Court in the case of **Security Group (T) Ltd Vs. Florian Modest Shumbusho and Another, Revision No. 302 of 2014, High Court, Labour Division at Dar Es Salaam, {Unreported}** cited with approval the holding of this Court in the case of Case of **Security Group (T) Ltd v. Samson Yakobo and 10 Others, Revision No. 171 of 2011, High Court of Tanzania Labour Division at Dar Es Salaam, (unreported)** that the retrenchment procedures are not meant to be applied in a checklist fashions. Meaning "what" employer's need to comply with is as it is.

In the present case the law provides in section 38 (1) (c) that the consultation must be made prior to retrenchment. As the letter was written

in 30/03/2017 before the consultation was made it is obvious that the consultation was not meant for a joint problem-solving' exercise to reach an agreement, but rather for making sure that the procedure was followed or in another word it was applied in a checklist fashions.

From above, I find that the consultation prior to retrenchment was not adhered by the employer as there was no consultation on measures to avoid or minimize the retrenchment, criteria for retrenchment, time for retrenchment and the payment. Further the alleged consultation was done after termination letter was already written and not prior to the retrenchment as provided by the law. Thus the reason for termination was fair but procedurally unfair as a result the termination was unfair procedurally.

The second issue is that what are remedies to the parties? Section 40 of the Employment and Labour Relations Act, 2004 provides for remedies for unfair termination. The section 40 (1) and (2) provides that:-

> ***40;-(1) If an arbitrator or Labour Court finds a termination is unfair, the arbitrator or Court may order the employer -***

(a) to reinstate the employee from the date the employee was terminated without loss of remuneration during the period that the employee was absent from work due to the unfair termination; or

(b) to re-engage the employee on any terms that the arbitrator or Court may decide; or

(c) to pay compensation to the employee of not less than twelve months' remuneration.

In the present case the applicant is praying to be granted 24 months salaries amounting to Tshs. 108,965,568/=, compensation of Tshs. 36,321,856/= as additional salaries for 2 years for rent, leave for that period and General damages amounting to 50 million.

On the prayer for general damages, there is no evidence whatsoever to prove it. Also as the termination was unfair procedurally, then applicant is entitled to 12 month's salary compensation only.

Therefore, I hereby quash the CMA Award and order that the respondent (employer) to pay 12 months' salary compensation to the applicant for unfair termination.

A. E. Mwipopo
JUDGE
04/05/2020

Date: 04/05/2020

Coram: Hon. A. E. Mwipopo, J

Applicant: Present in person

For Applicant: Ms. Halima Semanda, Advocate for the Applicant

Respondent:

For Respondent: Ms. Halima Semanda, Advocate holding brief for Mr. Bernard Shirima, Advocate for the Respondent

CC: Neema

Court: Judgment delivered in the presence of Ms. Clare Haule, The Applicant and Ms. Halima Semanda, Advocate for the Applicant who also hold brief for Mr. Benard Shirima, Advocate for the respondent this 04/05/2020.

A. E. Mwipopo
JUDGE
04/05/2020