IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

DAR ES SALAAM

REVISION NO. 488 OF 2019

BETWEEN

MAKTECH & TEL CO LTD ..... APPLICANT

VERSUS

RELIEF MTENGA ..... RESPONDENT

JUDGEMENT

Date of Last Order: 12/04/2021

Date of Judgement: 26/05/2021

Aboud, J.

The applicant, filed the present application seeking revision of the decision of the Commission for Mediation and Arbitration (herein CMA) delivered on 09/07/2018 by Hon. Makanyaga, A.A. Arbitrator in labour dispute No. CMA/DSM/ILA/R.524/15/864. The application is made under section 91 (1) (a), 94 (1) (b) (i) and section 91 (2) (c) of the Employment and Labour Relations Act [CAP 366 RE 2019] (herein referred as the Act) read together with Rule 24 (1) 24 (2) (a) (b) (c) (d) (e) (f) 24 (3) (a) (b) (c) (d) and Rule 28 (1) (c) (e) of the Labour Court Rules GN. No. 106 of 2007 (herein referred as the Labour Court Rules).

The employment relationship between the parties commenced on 09/11/2012 where the respondent was employed as an Assistant Finance and Administrative Manager. On 2013 the respondent was promoted to the position of Senior Accountant and on 2014 she was further promoted to the position of Finance and Administration Manager up to 31/12/2014. Thereafter the parties renewed the contract for another term of two years in the same position as Finance and Administration Manager, the position held until her termination on 20/08/2015. The respondent was terminated after she rejected the newly offered position of Business Analyst Manager which was restructured after the retrenchment process on July, 2015.

Aggrieved by the termination the respondent referred the dispute at the CMA claiming for unfair termination. The CMA decided on the respondent's favour and ordered the applicant to pay her 16 months salaries as compensation for the remaining period of the contract, one month salary in lieu of notice and severance pay. The applicant was dissatisfied by the CMA's award he therefore filed the

this application on the following grounds:-

(i) Whether following the respondent's refusal to take up the new post the applicant was legally obliged to seat and discuss with the respondent on how to terminate her employment.

(ii) Whether the respondent has any claims/terminal benefits against the applicant not paid.

The matter was argued orally. Both parties enjoyed services of Learned Counsels. Mr. Jerry Msamanga was for the applicant while Mr. Stephen Mwakibolwa appeared for the respondent.

Arguing in support of the application Mr. Jerry Msamanga adopted the applicant's affidavit to form part of his submission. He stated that he does not dispute the Arbitrator's findings on the reason for termination but on procedural aspect only. On procedural aspect he submitted that, the procedures used were fair.

It was submitted that following the change of business partner the applicant decided to undergo retrenchment process. On 29/07/2015 the employees attended meeting where they were informed about the intended retrenchment process. It was stated that the ones who were ready to be retrenched accepted the process.

The Learned Counsel submitted that in order to minimize the effect of retrenchment the applicant decided to restructure the office department and among the department which was formed was the Department of Business Development which required the Business Analyst Manager.

It was further submitted that, as the retrenchment meeting was taking place the respondent was on maternity leave and when she came back, she was given the re-designed letter to change her position to be Business Analyst Manager the changes which neither affected her salary nor did affect her allowances. It was also submitted that the respondent requested the meeting with the management to discuss about the new position and on 07/08/2015 the meeting was held whereby she was informed to write a letter to explain why she refused to take the new position as Business Analyst Manager. It was strongly submitted that, on the basis of refusal to take the new position the applicant decided to terminate the respondent's employment contract.

It was strongly submitted that, the Arbitrator erred in law in deciding that the termination was unfair procedurally. He submitted that, the retrenchment procedures were followed as it is provided

under Rule 24 to Rule 24 of the Employment and Labour Relations (Code of Good Practice) Rules, GN. No. 42 of 2007 (herein GN. 42 of 2007). It was further submitted that the applicant notified the respondent about the retrenchment meeting so there was consultation in that matter. It was added that, the applicant retrenched the respondent following her refusal to take the new position. The Learned Counsel stated that, the respondent did not attend the retrenchment meetings as she was on maternity leave.

It was further submitted that, the employer has no duty to find an alternative work acceptable by employee in retrenchment process, he added that it is not part of the pre-requisite of the retrenchment process that the employer and employee to reach consensus after the structural changes. To cement his submission, he cited the case of **Moshi University Collage of Cooperative & Business Studies (MUCCOBS) V. Joseph Ruben Sizya**, Lab. Div. DSM. Rev. No. 11 of 2012.

It was also submitted that, the applicant had no obligation to find the alternative work acceptable by the respondent.

On the issue of terminal benefits, it was submitted that the respondent was not entitled to severance pay and fourteen months salaries as awarded by the Arbitrator. The Learned Counsel argued that, the legal basis regards to severance pay is under section 42 (3) (b) of the Act. He stated that, the respondent unreasonable refused to take the alternative work offered by the applicant thus, she was not entitled to the remaining months salaries of her contract. He therefore prayed for the application to be allowed.

Responding to the application Mr. Stephen Mwakibolwa adopted the respondent's counter affidavit to form part of his submission. He submitted that it is clear from the Counsel's submission and in the face of the record the retrenchment procedures were not followed. He stated that, as correctly submitted there were meetings between the applicant and other employees while the respondent was on maternity leave. It was submitted that, the respondent was neither informed nor involved in the said meetings.

It was further submitted that immediately after the respondent reported back to work, she was re-assigned from her post of Finance Manager and Acting Chief Finance Accounting Officer to the post of Business Analyst where she realized she did not qualify as she had no

knowledge about the business analyst work. The Learned Counsel went on to submit that the respondent sought a meeting with the management and after that meeting is when she realized that there were other meetings regarding retrenchment following restructuring of the office. He said the respondent was further informed that her post has been given to another new recruited employee being dissatisfied by such employer's decision she respondent that she did not qualify to hold the newly offered position.

It was also submitted that the respondent was ordered to stay home until when she was notified to come back to work. He said when she came back after seven days, she was informed to report to the Human Resource Manager who gave her a letter of termination on the ground that she refused a new post. It was strongly submitted that the respondent was not treated fairly because she was not involved in retrenchment procedures and that she was re-allocated to a new post which she did not qualify. He added that the said termination was malicious and had nothing to do with economic requirements as required in law.

It was also argued that the authority of **Moshi University** (supra) cited by the applicant's Counsel is distinguishable to this case.

The Learned Counsel stated that, in the referred case the employee was offered two years course in order to be qualified to the new post and that course was fully sponsored by the employer. He added that in that case the post that the employee hold was abolished while in the case at hand the post that the respondent had is still in structure up to date. It was further added that in the referred case the employee was fully involved in retrenchment meetings which is not the position at hand. He therefore prayed for the referred case to be disregarded and the application be dismissed for lack of merit.

In rejoinder Mr. Jerry Msamanga reiterated his submission in chief and argued that, it is not true that the respondent was not involved in retrenchment process. He strongly added that the respondent was the right person in the new post thus, the termination was not malicious as submitted by the respondent's Counsel. It was strongly submitted that there was room for further meeting after the respondent refused the new post. He therefore prayed for the application to be allowed.

Having gone through parties' submissions, Labour laws, CMA and Court records with eyes of caution I believe the issues for

determination are, whether the respondent's termination was fair procedurally and to what relief are the parties entitled.

On the first issue as to whether the respondent's termination was fair procedurally, the law requires employers to terminate employees on valid reasons and fair procedures and not on their own whims, this is in accordance with section 37 of the Act. As stated in the applicant's submission the fairness of the reason for termination is not disputed thus, the Court find no need to labour on that aspect.

In the application at hand the respondent was terminated on the ground of retrenchment after she refused to take the newly offered position as reflected in the termination letter (exhibit D9). It is well known that retrenchment is one of the types of termination recognized in our Labour laws which is based on operational requirement. The procedures for terminating an employee on the ground of retrenchment are provided under section 38 of the Act which provides as follows:-

> *'Section 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 minimize 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 notice, make the disclosure and consult, in terms of this subsection, with:-***

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

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

(iii) any employees not represented by a recognized or registered trade union;

(2) Where in any consultation held in terms of sub-section (1) no agreement is reached between the parties, the matter shall be referred to mediation under part VIII of this Act.

(3) Where, in any retrenchment, the reason for termination is the refusal of an employee to accept new terms and conditions of employment, the employer shall satisfy the Labour Court that the recourse to a lock out to effect the change to terms and conditions was not appropriate in the circumstances'.

[Emphasis is mine].

The above stipulated procedures and principles are mandatory and have to be adhered by any employer on termination for retrenchment. The section is in pari materia with Rule 23 - 24 of the Codes.

The record of this case shows that during the retrenchment exercise the respondent was on maternity leave. On her first day of resuming work, the respondent was served with a re-designation letter (Exhibit D8). The respondent on her own initiatives demanded a meeting with the applicant's management to discuss about her re-designation post (exhibit D6). On 07/08/2015 the said meeting was held with the management as per exhibit D7 and the respondent refused the position which she was offered.

The procedures quoted above demand the employer to consult an employee prior to the retrenchment process. However, from the above analysis, the respondent was not consulted because she was on maternity leave. Again, when she reported back to work, she was not consulted but served with re-designated letter to the position of Business Analyst Manager. The record indicates that the respondent had no prior knowledge of the restructuring of the applicant's office department. Under the circumstances, it is crystal clear that the procedures for retrenchment stipulated above were not followed by the applicant. In other words, in this case there was no notice of retrenchment and no consultation as required by the law.

I have noted the applicant's submission that the employer has no obligation to find an alternative work acceptable to the employee. Indeed, that is the position decided in a number of cases including the case of Stephano **Chambo V. J.D. International Ltd.**, Lab. Div. Tanga Rev. No. 02/2010 [2013] LCCD 1 where it was held that:-

> *'Employers have mandate to make a decision as was made by the respondent in this case, sometimes such decision would lead to retrenchment of impacted employees. When such a situation arises, the law only requires the employer to follow procedures which would minimize negative impact on the affected employee. One way employers do that is by providing alternative work, as happened in this case. In my understanding of the law, the employer is not duty bound to find a job acceptable to the employee'.*

Also, in the case of **Moshi University Collage of Cooperative & Business Studies (MUCCOBS) V. Joseph Ruben Sizya** (supra) cited by the applicant's counsel it was held that:-

> *'I wish to stress that the way understand it, it is not part of the prerequisites of the procedural requirements that, parties must reach a consensus after consultation or that*

the employer has a duty to find alternative work acceptable by the employee'.

However, the cases referred above also insisted the employer to follow the required procedures before offering an alternative work to the affected employee. The respondent at hand was offered an alternative work before following the retrenchment procedures. Moreover, the employer is supposed to offer an alternative work which is in relation to the previous position of the employee. In this application the respondent was a Finance and Administration Manager and she was re-designated to the position of Business Analyst Manager which she specifically stated that she did not have qualification for the same.

In my view the applicant did not satisfy the Court that the respondent's refusal to take the new post was not appropriate in the circumstance of this case as required under section 38 (3) of the Act. The respondent was not properly involved in the retrenchment process but was ambushed with the new post which she had no qualities to hold it, not only that no proper arrangements which were made and testified before the Arbitrator that the respondent will be trained to gain the knowledge acquired to hold the new post offered

by the application as required in law. In other words the whole process did not follow the procedures required in retrenchment process. Furthermore the applicant denied her to be interviewed in the remaining two vacant post she listed in her forms as required in that retrenchment process. So, all those situation cumulatively clearly expresses that the respondent was subjected to the intolerable condition of work and she found the way out was to resign as she did forcefully.

On the basis of the above discussion, I have no hesitation to say that the termination procedures under the ground of retrenchment were not followed by the applicant in this case as rightly found by the Arbitrator.

On the last issue as to what reliefs are the parties entitled. The Arbitrator awarded the respondent 16 month's salaries as compensation for the remaining period of the contract, one month salary in lieu notice and severance pay. I find such an award to be just and fair as it is the position of this Court in termination of fixed terms contracts. Therefore, the same is hereby confirmed.

In the result, as it is found that the procedures for terminating the respondent were not followed, I find the present application has no merit. Consequently, the Arbitrator's award is hereby upheld. Thus, the application is dismissed accordingly.

It is so ordered.

I.D. Abood

JUDGE

26/05/2021