IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

CONSOLIDATE REVISION NO. 680 OF 2019 & 232 OF 2021

TANZANIA ELECTRIC SUPPLY CO. LTD.....APPLICANT

VERSUS

ROBERT SHEMHILU..... ..... RESPONDENT

(From the decision Commission for Mediation & Arbitration of DSM at Kinondoni)

(Massay: Arbitrator)

dated 5th day of July 2019

in

Labour Dispute No. CMA/DSM/KIN/R.427/13/598

JUDGEMENT

6th October & 6th December 2021

Rwizile, J

This application emanates from the decision of the Commission for Mediation and Arbitration. This court has been asked to call for and examine the records of the Commission and thereby revise it. Facts that paved the way to this application may be briefly stated thus; for seventeen years, prior 2011, the respondent worked as an employee of the applicant. He was employed as an accountant for a long-term contract on 30th September 1994.

The same lasted for 15 years, when he was promoted to hold a post of Deputy Managing Director, Corporate services. It was a contract of three years renewable. It was signed on 25th May 2011. Having served for almost 2 years, he was terminated on 3rd June 2013. His termination was following charges and a finding of guilty on counts of gross negligence and gross inefficiency. All offences were founded under the Employment and Labour Relations (Code of Good Practices) Rules GN. No.42 of 2007 and the TANESCO code of ethics and conduct (the disciplinary code)

Not satisfied, he filed a labour disputed before the Commission, where he claimed for reinstatement and compensation for unfair termination. The reasons advanced were that the disciplinary hearing committee had no jurisdiction, he was not afforded a chance to prepare his defence, charges were discriminatory and selective and that the committed had a predetermined decision. The commission heard the dispute and found termination to have been unfair both in substance and procedure. The respondent was awarded terminal benefits to the tune of 95,832,000/= as compensation for unexpired term of the contract.

He was not satisfied, he filed Revision No. 680 of 2019, claiming for an order for reinstatement and enhancement of terminal benefits upon setting aside the award. On party of the applicant, she was not happy with the decision, she therefore filed revision No. 232 of 2021 to challenge the whole award. The two applications were consolidated by this court on 27th August 2021. At the hearing, parties agreed to argue five issues as follows;

i. The arbitrator seriously misdirected himself when held that it was wrong to take disciplinary action against the respondent individually for decisions made collectively by Tender Board members without even determining whether those decisions were illegal.

ii. The arbitrator seriously misdirected himself when held that the respondent was not a disciplinary authority of Chief Financial Officer (CFO) when the latter failed to observe foreign currency exchange rate procedure applied by applicant.

iii. The arbitrator seriously misdirected himself for failure to address the disputed issue of misconduct of the respondent failing to observe conversion rate provided in a contract of supplying Heavy Funnel Oil (HFO) entered between applicant and Oryx.

iv. The arbitrator seriously misdirected himself when held that the Disciplinary Hearing Committed was not properly constituted.

v. The arbitrator seriously misdirected himself when held that the respondent was denied a copy of Control and Auditor General Investigation Report and other sought documents for his defence.

Mr. Laurian Kyarukuka a State Attorney from the applicant argued the application. On the first issue, he submitted that the decision of the commission was wrong. It failed to consider the evidence of five witnesses tendered to prove that, even though the decision in the tender board is collective, each member has the contribution. He submitted that, charging the respondent was based on the contribution made during the tender board meeting as reflected in the minutes of the board meeting.

Submitting on the second, it was the learned Attorney's view that the respondent was a superior officer who headed the department of finance and human resources. He submitted, the respondent had the duty to supervise subordinates and if they are not properly doing their duties to initiate disciplinary proceeding against them, which he did not.

Thirdly, it was submitted that the respondent did not properly supervise the terms of the contract with Oryx. Payments made, were against conversion rates. In his view, the amount of fuel received did not commensurate the amount of money paid. He went on saying, the respondent heading the department of finance was charged with the duties of counter-checking LPOs before signing them.

He argued, although evidence was given showing failure of the respondent to properly discharge his role, the commission did not consider the same. It was his view that the applicant got a loss to that effect.

The fourth ground is about constitution of the disciplinary hearing. Mr. Laurian was quick to comment that the committee was duly constituted, contrary to what the commission held. He submitted that according to rule 4(2) of the Code of Good Practice, GN No. 42 of 2007- disciplinary hearing guidelines, members of the committed may be from the same institution or from other places. He argued further, evidence was given to show the need to call members from outside the institution. In his view, the commission was wrong in holding otherwise, since the disciplinary authority of the respondent was the board of directors.

Lastly, the Attorney was of the argument that the respondent was afforded the right to be heard. According to him, he was given all important documents needed. Some of them, he said, were extracted from the Controller and Auditor General's Report (CAG). He further submitted that the respondent was not given the entire CAG's report because it was used elsewhere but he was given all the materials he needed from it. Mr. Laurian was therefore of the view that the respondent's right to be heard was not in any way infringed.

To oppose, this application, Mr. Ngudungi advocate for the respondent submitted that, firstly, that the applicant argued issues not averred in the affidavit supporting the application. He cited as an example, issue number two which does not in his opinion, feature in the affidavit. The learned advocate asked this court to disregard the same.

Secondly, the learned counsel submitted on whether, the disciplinary hearing was fair. He argued that the dispute on conversion of the dollars, as stated was done out of contract, was not proved. He said, the applicant did not give the respondent important documents for the defence. As argued, it was said that the respondent was told that the same was premature, and documents requested were not relevant. The learned advocate concluded; the

respondent was not given a chance to properly make his defence before the Committee. Further, the learned advocate submitted that the evidence about the CAG report and minutes of the tender board meeting featured at the commission. He said, the same were not given to him at the disciplinary hearing.

On legality of the committee, it was stated that the chairman of the hearing committee for instance was headed by a person from PPRA. He went on saying that PPRA is by law supervising the contracts which the respondent was dealing with. In his view, that committed was no properly constituted as it had interests in the same. According to Mr. Ngudungi, there is no evidence as to who appointed the committee. He argued that the commission convicted him before the hearing and was only required to mitigate and show cause why he should not be terminated.

The learned counsel was of the submission that the respondent in the tender board was a mere member. The decisions of the board, he said, were made by more than 10 members. In his view, since all heads of department were in the board, they were therefore responsible for technical issues.

Based on the above, he said, the respondent was just targeted. No evidence, he added, was called to prove the errors alleged committed by the respondent.

On the remedies available, it was the respondent's counsel's view that the commission having found termination was unfair, failed to consider that the respondent was employed by the applicant in 1994. He worked with the applicant, he said, until 2011 when he was promoted to the post. He went on submitting that it was a promotion in service and it was a contract for three years. It was his view therefore that the commission ought to order terminal benefits as compensation for unfair termination or reinstate him to the position he had before promotion. The learned advocate was clear that reinstating him to the position he had before is not a new phenomenon, he said it had happened to one Mramba.

Invited to rejoin, Mr. Laurian, was of the submission that, since reinstatement was not viable, it was proper for the commission to prefer compensation as it was done. In his view, the respondent was not re-employed. He only got a promotion and upon being terminated after the promotion, it was not possible to reinstate him in any of the positions held.

He further said that, the respondent was a professional and accredited person, he was to approve payment that was correct and so was above the user department. He was supervision of all, he submitted. He said, the CAG report had shown who ought to be disciplined and the respondent admitted so at the commission, that some other people were also dealt with as well. He said further that according to the second schedule to the Public Procurement Act, item 6(3), it is the dissenting opinion which is recorded. If there is no such opinion, the decision of the majority is considered. It was his view that, it was according to the minutes of the board.

Furthermore, Mr. Laurian submitted that the disciplinary committee heard the evidence and made a decision. The board was only to hear mitigation and impose the penalty. He argued that the chairman of the committee was not a supervisor of the respondent because he came from another institution. He said, he therefore had no interest.

The respondent, was allowed to rejoin on the issue of reliefs, which was the main issue, in revision No. 680 of 2019. It was Mr. Ngudungi's view that the respondent was appointed and not promoted. But his appointment did not alter other terms he previous had. It was his view that, reinstatement was to be ordered by the commission to the post he had before.

Having heard the rival submission of the learned advocates, there is no dispute that in deciding labour revisions on merit, one cannot avoid to determine fairness of termination in terms of substance and procedure. But before doing so, it is important as well to note that the commission found that termination was not grounded. It was of the view that the applicant did not have justification to charge the respondent based on the collective decision of the tender board. Further that the decision to terminate the respondent was made in discriminatory way against the respondent alone.

I have to say here that in as much I agree with the commission that under rule 12(5) of the Code of Good Practice, GN No. 42 of 2007, the employer has to apply such sanctions to employees without discrimination. In so holding, I agree with the applicant that the commission was not right. Evidence available does not suggest that other people were not charged. But according to the submission of the applicant, the report suggested that the same should also be charged. Above all, the respondent was charged according to the contribution that he had to guide the tender board as an expert. Failure to perform his role led to the charges.

Having so held, I think I have to deal with whether termination was fair. Starting with the reason for termination, the relevant provision is section

37(2) of the Employment and Labour Relation Act, [Cap 366 R.E 2019] which provides that; -

> *A termination of employment by an employer is unfair if the employer fails to prove-*
>
> *(a) That the reason for 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."*

From the provisions, termination must be grounded on not only valid reason but also reasons for termination have to be fair.

This must be proved to the required standard. This duty, however is cast on the employer as explicitly propounded under section 39 of ELRA. The record shows the respondent was senior officer of the applicant. He had served for at least 15 years before being promoted to the rank of deputy Manager director of corporate services. He was definitely experienced in the field. In the tender board among other duties was to guide fellow members as an expert to arrive at a decision which is beneficial to the employer. There is

also evidence that the tender board did not pass a proper decision that benefited his employer. Still, as senior officer, he did not properly supervise his subordinates or process for their discipline. In all, there is not dispute based on the report that the applicant suffered loss of billions of moneys. This, I can hold with certain that the applicant had valid reasons to prosecute the respondent. I therefore do not accept the commission's finding that the respondent charged without reason.

On whether termination was procedurally fair. In this point, fairness of procedure is a question of fact and law. The applicant as a matter of procedure is required to prove the law was followed. It is therefore the duty of the applicant to prove the fairness of procedure. The procedure started by investigation. This was done by the CAG, following the complaints from different sources that were not disclosed. But after investigation, the respondent was suspended. Following his suspension, he was charged of all 10 counts. The respondent on his evidence complained that he was not availed with documents he needed for defence. For instance, there is no evidence suggesting that the CAG report was given to the respondent.

What the applicant did, was to extract some documents thought the respondent was to use. This in the first place was wrong. The email exchanges by the respondent, showed there was no readiness for the applicant to provide sufficient information for him to defend his case. It can be safely held therefore that, failure to furnish the report, CAG report, the basis of the whole process, to the respondent, was denying him his right of defending his case. It is so, since, it formed the basis of the entire process of prosecuting him. As if that was not enough, it has been clearly shown that some information was just extracted from at the choice of prosecutor. This is good as saying, the applicant preferred the charges against the respondent and then mode in which the respondent should make his defence. I take it that the CAG report, being the source of disciplinary measures, that upon being out, the respondent was suspended and later charged was an important tool for his defence. Failure to issue it him was breach, as I said, of fundamental right of defending his case. That being the cases therefore, the commission was to find that termination procedure was not fair.

Having so held, I think, I have to deal with reliefs sought by the respondent. In his prayer, he asked this court to reinstate him to a post he held before being promoted. This argument is not backed law. He admitted that he was

not employed but rather promoted. He was promoted and the contract of three years was clear that it did not intend to alter his previous terms. It is for a simple reason that the 1994 contract was for a long term and was to be terminated on compulsory or voluntarily retirement. He was therefore working in the other capacity but with the same employer.

The position could be proper if the new contract of three years would have ended without renewal or termination. For whatever reason, he would have been returned to his former position. In the event of their relationship being so hostile, the commission was right in only awarding terminal benefits without reinstatement. I agree with that finding. For the foregoing reasons, both applications have no merit. They are hereby dismissed. No order as to costs.

A.K. Rwizile

Judge

06.12. 2021