IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION APPLICATION NO. 248 OF 2022

(Arising from an Award issued on 24/6/ 2022 by Hon. G.M. Gerald, Arbitrator, in Labour dispute No. CMA/DSM/ILA/139/20/104/20 at Ilala)

EPIPHANIA HENRY SANDY..... APPLICANT

VERSUS

TANZANIA OCCUPATIONAL HEALTH SERVICE .....RESPONDENT

JUDGMENT

Date of Last Order:10/11/2022
Date of Judgment: 18/11/2022

B.E.K. Mganga, J.

On 1st September 2018, the parties herein signed a three-year fixed term contract of employment ending on 30th august 2021. Unfortunately, the contract did not come to end as agreed because respondent terminated it alleging that applicant committed gross misconducts. It was alleged by the respondent that applicant disobeyed instructions of the Managing Director requiring her to hand over Cashier's office and documents thereof to a newly appointed cashier by the name, Flora Massawe. It was further alleged by the respondent that applicant disobeyed instructions of the managing Director because she

did not immediately act upon the instruction and continued to perform other cashier's duties despite of the ban. Due to those allegations, disciplinary hearing was conducted and the disciplinary hearing committee recommendations that employment of the applicant should be terminated. Acting on that recommendation, respondent terminated employment of the applicant.

Feeling resentful with the termination, applicant decided to knock the doors of the Commission for Mediation and Arbitration (CMA) where she filed a labour dispute No. *CMA/DSM/ILA/139/20/104/20* claiming to have been unfairly terminated. On 24th June 2022, Hon. G.M. Gerald, Arbitrator, having heard evidence of both parties, issued an award in the respondent's favour that applicant's termination was fair both substantively and procedurally.

Further aggrieved, applicant filed this application imploring this court to revise and set aside the award. In the affidavit in support of the Notice of Application, applicant raised three issues namely:-

i. *Whether the CMA was correct to dismiss the application for want of merit?*

ii. *Whether arbitrator considered the evidence of the parties into his finding that the respondent had valid reason for terminating the applicant.*

iii. *Whether arbitrator considered the evidence of the parties into her finding that the respondent complied to the procedures for termination.*

In opposing the application, respondent filed the counter affidavit affirmed by Zuhura Nassor.

When the matter was scheduled for hearing, both parties were represented by Learned Counsels. Mr. Ambrose Nkwera represented the applicant whereas Mr. Isaac Zake represented the respondent.

Before submitting on the application, Mr. Nkwera prayed to abandon the first issue and submitted on the remaining. On the issue whether, respondent had valid reason to terminate employment of the applicant, Mr. Nkwera submitted that there was no valid reason. he submitted that; in termination letter (exhibit EHS7) it was alleged that applicant disobeyed orders of handing over her duties to the cashier. However, during the disciplinary hearing, respondent failed to prove that applicant committed the alleged misconduct. Counsel submitted that evidence shows that on 12th December 2019, applicant informed

the respondent through exhibit ES4 that she had handed over her duties to the cashier.

On the 2nd issue namely, whether procedure for termination was complied with, Mr. Nkwera submitted that no charge was served to the applicant contrary to Rule 13(2) of Employment and Labour Relations(Code of Good Practice) Rules, GN. No. 42 of 2007. He cited the case of ***Jimson Security Service v. Joseph Mdegela***, Civil Appeal No. 152 of 2019 (unreported) to support his submissions that failure to serve a formal charge to the employee is fatal and amounts to denial of right to be heard. He went on that that, the notice of disciplinary hearing was served to the applicant on 30th December 2019 but there were no formal charges that were served to the applicant and that on 03rd January 2020 applicant was heard in the disciplinary hearing.

Mr. Nkwera submitted further that; applicant was not afforded a right to put forward her mitigation factor contrary to Rule 13(7) of GN. No. 42 of 2007(supra). Not only that but also, applicant was not involved in investigation and was not served with investigation report. In all these, counsel for the applicant submitted that there was violation of

Rule 13(5) of GN. No. 42 of 2007(supra) and cited the case of ***Kiboberry Limited vs. John Van Der Voort***, Civil Appeal No. 248 of 2021, CAT (unreported) to the position that failure to serve investigation report to the employee is fatal. He added that investigation was conducted which is why, applicant was suspended to pave way investigation as evidenced by a suspension letter (exhibit EHS5).counsel for the applicant concluded his submissions by praying that the application be allowed, applicant be paid the unexpired period of the contract.

In opposing the application, Mr. Zake submitted on the 1st issue that there was valid reason for termination because applicant disobeyed orders of her Supervisor/ the Managing Director, as a result, on 6th December 2019, she was served with a show cause letter (exhibit TH1). Counsel went on that on 12th December 2019 applicant responded to that letter as per exhibit EHS4. Counsel for the respondent submitted further that respondent was not satisfied with explanations of the applicant, as a result, she was suspended to pave way investigation. He added that on 17th December 2019, the Investigation team exhibit EHS5 requiring applicant to cooperate.

Counsel for the respondent submitted that on 30th December 2019, applicant was served with a notice to attend the disciplinary hearing (exhibit EHS6) and was charged for gross insubordination and that the disciplinary hearing was conducted on 03rd January 2020 and found applicant guilty. He added that applicant was afforded right to appeal but she did, not instead, she referred the dispute to CMA. counsel for the respondent was of the firm view that applicant was terminated for gross misconduct and the offence was proved. In his submissions, counsel for the respondent conceded that initially the allegation that was levelled against applicant was gross insubordination, but in termination letter (exhibit EH7), applicant was terminated for gross misconduct. He was of the view that, gross misconduct is general term covering all misconducts while gross insubordination, is part or one of gross misconduct. He maintained that termination of the applicant was proper and cited the case of ***Daudi Migani vs. Mantra Tanzania Ltd,*** Revision No. 66 of 2019 HC (unreported) to the position that sometimes words can be used interchangeably but without affecting the employee to implore the court to hold that gross insubordination can be used interchangeably with gross misconduct.

On regard to the procedural issue, Mr. Zake submitted that applicant was served with formal charge that was incorporated in the notice of disciplinary hearing. He cited Rule 13(2) of GN. No. 42 of 2007(supra) and argue that what is required is notification to the employee and that the law does not require a charge like those in criminal cases to be served to the employee. He cited the case of ***Ovadius Mwangamila & 2 Others vs. Tanzania Cigarette Co. Ltd***, Consolidated Revisions No. 334 & 335 of 2020, HC (unreported). He distinguished **Mdegela's case** (supra) arguing that in the said case there was no notification while in the application at hand applicant was notified.

As regard to participation of the applicant in investigation and right to mitigate, Mr. Zake submitted that applicant participated in investigation as per exhibit EHS5. He added that in her evidence, applicant admitted that she participated in investigation and was served with summary of investigation. He went on that applicant was given chance to put forward mitigation factors.

In concluding his submissions, Counsel for the respondent submitted in the alternative that if the Court finds that termination was

unfair, then, applicant is only entitled to compensation of 12 months salaries and not the remaining period of the contract.

In rejoinder, Mr. Nkwera submitted that gross misconduct is a general term that includes other misconducts. He argued that the notice to attend disciplinary hearing shows that applicant was charged for gross insubordination but she was terminated for gross misconducts. He maintained that formal charge is a different document from the notice to attend disciplinary hearing. On the remedies for unfair termination, counsel contended that this Court has discretion to award even compensation for five (5) years.

I have carefully examined the CMA record and considered submissions of the parties in this application and find that it is undisputed that applicant's employment contract was terminated by the respondent on 17th January 2020 on ground of gross misconduct as evidenced by termination letter (exhibit TH4). It was the arbitrator's finding that respondent had a valid reason for termination and that she had complied with procedures for termination, hence termination was fair. The main contested issue between the parties, in my view, is whether termination was fair and remedies thereof.

For termination of employment to be fair in terms of section 37 of the Employment and Labour Relations Act [Cap. 366 R.E. 2019], an employer must have a valid reason and must follow fair procedure of termination. In the application at hand, applicant was terminated for gross misconducts though she was suspended for gross insubordination allegedly that she did not timely handover her duties to the newly cashier after she was asked by the Managing director of the respondent. Evidence in the CMA record shows that on 04th November 2019, applicant was served with a letter requiring her to handover the office and that on the same date she handed over all cashier duties to Ms. Florah Masawe save for the money from reception which she was given on 08th November 2019. This evidence was also adduced by by Ms. Florah Masawe before the disciplinary hearing Committee as reflected in the minutes (exhibit ES3 collectively). According to the evidence that was adduced during the disciplinary hearing, handing over was completed on 08th November 2022. Based on the evidence available, there is no iota of evidence proving or suggesting that applicant refused to hand over cashier duties within a reasonable time. Again, reasonable time is relative and it was not proved that under normal circumstances or according to the procedures in the respondent's

office, handing over is done within a certain period for the court to hold that applicant did not hand over her duties within a reasonable time. I have careful assessed evidence of the parties and I can safely conclude that there was no any act of insubordination committed by the applicant. It seems, respondent hand premeditated to terminate employment of the applicant without there being valid reason which is why she was gambling as what will serve that purpose between insubordination and gross misconducts. I am of the considered view that the respondent's evidence was insufficient to prove the alleged offence against the applicant, hence there was no valid reason for the applicant's termination. Arguments advanced by counsel for the respondent that gross misconducts include insubordination and that by serving the applicant with a termination letter on ground of gross misconducts while she was suspended for insubordination was proper, supports my findings that respondent was gambling as to what allegation will help her to terminate the applicant. Submissions by counsel for the respondent cannot be valid because charges must be certain otherwise the employee cannot enter a proper defence. The argument that applicant committed gross misconduct, even if assumed that she did, the question is what gross misconduct?. The employer is

not supposed to starch wide the net to cover the unintended or misconducts that were not committed. I therefore hold that there was no valid reason for termination hence termination of employment of the applicant was unfair substantively.

Regarding the procedure for termination, section 37(1)(c) of the Employment and Labour Relations Act[Cap. 366 R.E.2019] requires that for termination to be considered fair the employer must also comply with fair procedures of termination. Mr. Nkwera, advocate for the applicant submitted that termination was unfair because respondent failed to serve applicant with a formal charge, was not given a chance to mitigate and that she was neither involved in investigation nor being served with an investigation report.

I have gone through the CMA record and find that on 30th December 2019 applicant was served with a Notice to appear before the disciplinary hearing (exhibit TH2). The notice contained the offences that applicant was charged which. It is my view that the purpose of the charge is to notify the employee of his offence in detail so that she could be aware of what is before her and prepare for her defense. The particulars in the charge were sufficient for the applicant to enter her

defence. I therefore hold that in terms of Rule 13(2) of the employment and Labour Relations(Code of Good Practice)Rules, GN. No. 42 of 2017, the Notice that was served to the applicant, was sufficient to serve the purpose of a formal charge. I distinguish the **Mdegela's case** (supra) cited by Mr. Nkwera for the applicant because in that case, the employee was not notified of his charges which is not the position in the matter at hand.

On regard to failure to afford the applicant with a right to mitigate, Rule 13 (7) of GN. No. 42 of 2007(supra) is clear as it requires the Disciplinary Committee, after finding the employee guilty, to give the applicant an opportunity to put forward mitigating factors. The said Rule provides:-

> *"(7) Where the hearing results in the employee being found guilty of the allegations under consideration,* ***the employee shall be given the opportunity to put forward any mitigating factors before a decision*** *is made on the sanction to be imposed."*

I had a glance in the disciplinary hearing minutes (exhibit ES3) and find that it is apparent that prior the disciplinary committee recommending the sanction to be imposed to the applicant, they did not afford applicant with a chance to mitigate. That was procedurally improper and rendered termination procedurally unfair.

It was also alleged by the Applicant's counsel that the applicant was not involved in investigation and was not issued with a copy of the investigation report. Rule 13(1) of GN. No. 42 of 2017(supra) requires the employer to conduct investigation so as to establish the grounds for conducting a disciplinary hearing. The law does not state that the employee should be involved in such an investigation. To require an employee to be involved in investigation without explaining the limit of that involvement, in my view, is to go beyond what is required of by the law. More so, it may create conflict between the investigated employee and those who volunteer to give information against, especially in the circumstances where the employer finds that the allegations are unfounded and decide not to hold a disciplinary hearing. In that situation, in my view, my create animosity at work instead of harmony. This in my view, explains why the Rule provides that employer must conduct investigation to establish whether there are reasons to hold disciplinary hearing. But once investigation is conducted and an employer having formed an opinion that an employee committed a misconduct, then, she should serve the employee with sufficient information or the report to enable her to enter a defence. In the application at hand, respondent alleged that she conducted

investigation prior convening a disciplinary hearing but the said investigation report was neither tendered before the disciplinary hearing committee nor at CMA. Since the report was the basis of the disciplinary hearing, it is my view that, respondent was supposed to serve the applicant with the said investigation report. Respondent's failure to do so amounted to procedural irregularity as it was held by the court of appeal in the case of ***Kiboberry Limited vs John Van Der Voort*** ,Civil Appeal No. 248 of 2021 [2022] TZCA 620.

For the foregoing, I hold that termination of employment of the applicant was both substantive and procedural unfair. I thus allow the application and quash and set aside CMA award. Since applicant was employed for a fixed term contract, I hold that she is entitled to be paid salaries of the remining period of the contract. Evidence shows that the contract of the applicant commenced on 01st September 2018 and was expected to expire on 30th August 2021 but was terminated on 17th January 2020 that is to say 19 months prior to its expire. Therefore, applicant is entitled to be compensated salary for the remaining 19 months (i.e 850,000/= x 19=16,150,000/=). I therefore order

respondent to pay applicant TZS. 16,150,000/= being salary for the 19 months remaining period of the contract.

Dated in Dar es Salaam on this 18th November 2022.

B. E. K. Mganga
JUDGE

Judgment delivered on this 18th November 2022 in chambers in the presence of Ambrose Nkwera, Advocate for the applicant and Isaack Zake, Advocate for the Respondent.

B. E. K. Mganga
JUDGE