IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

APPLICATION FOR REVISION NO. 183 OF 2022

(Arising from Labour Dispute No. CMA/DSM/TEM/218/19/104/19 from the Commission for Mediation and Arbitration of Temeke Dar es Salaam Zone)
(Hon. Batenga M, Arbitrator)

SETH MBENA.....APPLICANT

VERSUS

INTERTEK TESTING SERVICES (EAST AFRICA (PTY) LTD.....RESPONDENT

JUDGMENT

K.T.R. MTEULE, J.

13th December 2022 & 16th December, 2022

This is an application for revision made under **Rules 24 (1), (2) (a), (b), (c), (d), (e), 0); 24 (3) (a), (b),(c), (d);** and **Rule 28 (1) (d) and (e) of the Labour Court Rules 2007 (G.N No. 106 of 2007)** , read together with **Sections 91 (1) (a); 91 (2) (a), (b), 91 (4), (a) and (b) 94 (1), (b), (i) of the Employment and Labour Relation Act** (**CAP 366 R.E 2019**); The Applicant is seeking for this Court be pleased to revise both the proceedings and the award in **Labour Dispute No. CMA/DSM/TEM/218/19/104/19** and make an order quashing the said award against the applicant herein and set it aside, and replace with an order to compensate the applicant herein for unfair termination without loss of entitlements.

From the record of CMA, the affidavit of the Applicant and the submission in support of the Application, it appears that the Respondent employed the Applicant as SHEQ & Compliance Manager on a permanent contract which commenced from **2nd September 2014** with a monthly salary of **TZS 2,850,000/=**. Their relationship turned sour on **5th February 2020** when the applicant was terminated from employment for an alleged misconduct (absenteeism).

According to the record in the CMA, the applicant started to be absent from work from **13th December 2019** to **17th January 2020**. The reason of his absence forms the centre of dispute in this matter. While the applicant is claiming to have been restrained to enter the respondent's premises the Respondent is claiming abscondence by the applicant. Following the applicant's absence, disciplinary measures were taken which resulted to a disciplinary hearing which was conducted in the absence of the applicant. As to why the applicant was not involved in the disciplinary hearing, forms another point of controversy. The applicant claims to have been not informed about the hearing but according to the respondent, the show cause letter and the invitation to attend the hearing were emailed to the applicant. The applicant claimed that he was told by the security guard that there was an instruction that,

the applicant should not be allowed to enter the respondent's premises and from there, his access to all company systems was blocked including access to email addresses.

The termination aggrieved the Applicant who lodged a complaint in the CMA, where the matter commenced by a failed mediation and then arbitration proceedings. In the arbitration, the arbitrator considered the fairness of the reason and procedure in terminating the Applicant therein. The arbitrator found both the reason and the procedure to be fairly observed hence awarded nothing to the applicant. The arbitrator faulted the applicant for having not reported the failure to access the respondent's systems and held that the applicant was duly served with the notice to show cause and the letter of invitation to attend the disciplinary hearing. The matter having decided against the Applicant, triggered this application.

Along with the Chamber summons, an affidavit sworn by the applicant himself was filed, in which after expounding the events leading to this application as already stated above, alleged to have been unlawfully terminated after being restrained to have entrance at working place.

The application was challenged through a counter affidavit sworn by Ms. Amina Said Makunganya respondent's Principal Officer. The deponent in

the counter affidavit vehemently and strongly disputed applicant's allegation regarding unlawful termination.

The application was disposed of by a way of oral submission. After the applicant's oral submission, it was noted that it was more convenient for the same to change into written Submissions. Then the respondent supplied his written submission and the applicant got opportunity to bring a written rejoinder. The Applicant was represented by Mr. Adam Mwambene, Advocate, whereas the Respondent was represented by Mr. Fransisco Bantu, Advocate. I appreciate their rival submissions which are considered in determining this matter.

Having gone through the parties' submissions and their sworn statements together with the record of the CMA, I am inclined to address two issues. The first issue is **whether the applicant has adduced sufficient grounds for this Court to revise the CMA award** and secondly, **to what reliefs are parties entitled**?

In addressing the above issue, all the grounds identified in the affidavit will be taken into account. In the CMA, the arbitrator found that the applicant was fairly terminated in both aspects, procedurally and substantively. From the ten grounds of revision, I sum up two major

aspects to be considered, one being **procedural fairness** and the other one being **reasons or substantive fairness.**

Starting with the substantive fairness, the applicant's Counsel Mr. Mwambene contended that the arbitrator erred in law in holding that there was a valid reason in terminating the applicant's employment for the alleged abscondment of 35 days contrary to employer's policy.

He stated that the respondent did not take any legal action from **13th December 2019** until **31st December 2019** when one Amina wrote a text message to the applicant calling him to collect a letter to show cause on **2nd January 2020** and that she did not pay the applicant's monthly salaries of **December 2019** and **January 2020**. Mr. Mwambene considered these circumstances, with the view that the applicant was already terminated unfairly. He challenged the findings of the Arbitrator that abscondment does not amount to an offence which can lead to termination.

On the other hand, the respondent's Counsel maintained that the applicant absconded from work for more than 35 days, from **12th December 2019** to the date of termination on **4th February 2020**. He further argued that since the applicant absconded for more than 35 days with no reason, then termination was a proper sanction and the

applicant's demand about warning is irrelevant. According to the respondent's submissions the Abscondment is an offence which can lead to termination.

In resolving the above contentions, I will start with whether abscondment constitute an offence which can lead to termination of employment. **Guidelines 9 Item 1 of Guidelines for Disciplinary, Incapacity and Incompatibility Policy and Procedures of Employment and Labour Relations (Code of Good Practice) G.N No. 42 of 2007** categorizes absence of an employee from the work for more than five days without permission, under offences which may constitute serious misconduct and leading to termination of an employee. This is apparent in the provision. I do not agree with Mr. Mwambene that the arbitrator erred to hold termination as an offence which may lead to termination. His argument is unfounded.

Was there abscondment? This is the next question to be addressed. As to whether the applicant absented himself from the employment which necessitated his termination is a matter to be resolved at this stage. In the CMA, the applicant claimed that he was told by the security guard not to enter the office premise and from there, his access to office facilities and systems was blocked. It is on record that there was an

ongoing consultative process under which parties were discussing retrenchment. It was testified in the CMA by PW1 that when he attended the consultative meeting, he found a Mutual Separation Agreement already prepared but he asked for more time to finalize what he was doing in the office and handover but when he wanted to do so on 12th December 2019, he could not access the respondent's electronic systems including his email. He testified further that while going home the security guards told him that they were informed to tell him that, that was his last day in the office.

In his submission Mr. Mwambene questioned two things to justify that the applicant was denied access to the office from 13th December 2019. The **first** one is the silence of the respondent for more than 30 days while the policy required an action to be taken within 8 days. **Secondly,** the nonpayment of salaries for December and January if at all the respondent was not expelled from the work.

In this matter at hand, according to respondent's exhibits including Exhibits T-8 (outcome of disciplinary hearing) and Exhibit T-5 (message to collect a letter), it is apparent that the applicant is said to have absconded from 13th December 2019 and Legal action was taken 31st

December 2019, which means there was no legal action for more than 18 days from when the applicant absconded from the work.

The arbitrator found that the respondent took action to find out about the whereabout of the applicant as per exhibit T-5. I have read exhibit T5, it seems to be a message which wanted the applicant to collect his letter from Morocco, while making reference to their phone communications which informed DW1 that the Applicant was in Bukoba for burial and promised to collect the letter on 17th January 2020. The Applicant replied to the text message on 17th January 2020, the date he is said to have promised to go to collect the letter and informed DW1 that he could not make it to Morocco office to collect the letter due to unavoidable circumstances. In my view, I don't see if this communication questioned the whereabouts of the applicant, rather it was a step in the disciplinary action. Could the respondent asked why the applicant was not in the office, he could have been told that he was expelled by the information he received from the security guard and then the employer could have ascertained whether it was correct or not to resolve the matter. It is on this reason I differ with the arbitrator that the respondent took timely action against the abscondment.

Apart from the above position, the assertion of nonpayment of salaries calls for another point of consideration. It is not disputed by the respondent that the applicant was not paid with the salaries of December 2019 and January 2020. The reasons for nonpayment of the salaries are not stated anywhere in the record. I agree with Mr. Mwambene that the act of not paying the salaries indicate that the respondent knew that the applicant's employment ended since December 2019.

Further to the above, the applicant testified that there was a retrenchment process which resulted into a mutual separation agreement which the applicant declined to sign. It was this scenario which was followed by what the applicant claimed to be the information he received from the security guards that he should not come to the office. The applicant claimed further that this was the beginning of his failure to access the computer systems. The respondent's counsel Mr. Bantu argued that the applicant had a duty to prove that he could not access the systems. I disagree with this assertion because the custodian of the systems was the respondent and he was in a position to retrieve the actual status of the system. **Section 37 (1) to (3) and Section**

39 of Cap 366 requires the employer to prove the fairness of an employment. Section 39 provides:-

> *"39. In any proceedings concerning unfair termination of an employee by an employer, the employer shall prove that the termination is fair."*

This differ from the requirements of **Section 112** of the Evidence which requires a person alleging to prove the fact. For employment matters, it is the responsibility of the employer to prove the fairness of termination of an employment. This adds to the circumstances which suggest that the applicant was expelled from the respondent's work premises.

The existing retrenchment process, the delay to take action against the applicant's absence from work and the nonpayment of salaries all confirm the applicant being terminated by conduct from **13th December 2019**. Otherwise, the respondent was duty bound to prove the fairness of the applicant's termination by clearly indicating why the salaries were not paid, what was the status of the retrenchment exercise to the applicant and why was there a delay to take action against the alleged abscondment.

From the above discussion, I hold that abscondment being absence from work without employer's permission was not proved in the CMA. As such, there was no valid and fair reasons for terminating the applicant.

Regarding procedure, the applicant alluded that the arbitrator grossly misdirected herself to hold that the respondent followed the disciplinary procedure. From parties' submission, the dispute lies on the effectiveness of the procedure used to serve the applicant with the disciplinary processes. According to applicant's evidence (PW1) the applicant's access to office email was blocked. It is not disputed that the show cause letter and the invitation to attend the disciplinary hearing were all sent through emails. According to Mr. Mwambene, there was no proof of delivery for those emails to the applicant during hearing before the commission because the applicant did not have access to his email.

Disputing applicant's assertion the respondent's Counsels Lwijiso Ndelwa and Francisco Kaijage Bantu averred that the applicant received all documents including the show cause letter, invitation to attend the disciplinary hearing and outcome of the hearing.

I find it worth to inspect the disputed documents, including Exhibit T-5 (a massage to collect letter) and Exhibit T-9 (email to appear for disciplinary). Both were served to the applicant by using his email

address. The applicant claimed that he did not have access to office email but I have noted that the said email was also sent to his personal mail srekaza@yahoo.com. The applicant denied having received the emails. I have noted that the applicant testified in the CMA that his personal email was hacked, and he could not have access to it. This part of the evidence was not considered by the arbitrator. The arbitrator condemned the applicant for not having reported the access denial to the respondent. In my view, the applicant having alleged the respondent to have blocked his access to the office systems including email, then it was the duty of the Respondent to give evidence to counter that the applicant was denied access to the office systems. I agree with Mr. Mwambene that **Section 22 (1)** of the Electronic Transaction Act cited by the applicant do not remove the requirement of the factors to be used to prove electronic service which include identification of the origin, destination time and date of service, sending or delivery and acknowledgement of receipt of the documents. The respondent still had a duty to provide the evidence of delivery.

This being an employment matter, it was the duty of the employer to ensure that there was an effective communication of the process before proceeding with the disciplinary hearing in the absence of the applicant.

Generally, the employer has a duty to keep the applicant's record, including his place of domicile. The documents could have been served through the address of the applicant's place of residence or domicile.

From the foregoing, I differ with the Respondent's counsels that there was effective communication in serving the show cause letter and the invitation to attend the disciplinary hearing. I therefore agree with the counsel for the applicant that the principles of natural justice were not adhered to by the respondent in conducting the disciplinary hearing. I therefore differ with the arbitrators finding that, the termination was procedurally fair. There was a procedural unfairness.

The respondent asserted an issue of time limitation in the matter. In my view, it was not easy to ascertain the issue of time limitation in the CMA due to the nature of the claim. It was not easily ascertainable as to when the dispute arose. This was a matter of evidence in the CMA, since each party had his own date of termination. The actual letter of termination seems to have been done on 5th February 2020. With this controversy, in my view, time could start to count from 5th February 2020 although evidence may confirm a different date. A point of law could not have been determined in an issue which required evidence as the instant one.

Regarding relief of the parties, the arbitrator dismissed the dispute. Contrary to the arbitrator's findings, it is my finding that the termination was unfair in both substance and procedure. In my view, the applicant deserves compensation in accordance with **Section 40 (1) of Cap 366 of 2019 R.E**. The applicant prayed for reinstatement without loss of entitlement. Taking into account the relationship between the applicant and the respondent and the time lapse from the date of termination, reinstatement may not be a good remedy. Instead, I will grant compensation for the unfair termination.

The above analysis confirms the first issue that the applicant had established sufficient grounds to warrant revision of the CMA award. Consequently, I hereby revised, quash and set aside the CMA award. I award to the applicant a compensation of 12 months remunerations and other statutory benefits in accordance with **Section 44 of Cap 366 of 2019 R.E**, if not yet paid. No orders as to costs. It is so ordered.

Dated at Dar es Salaam this 16th Day of December 2022.

KATARINA REVOCATI MTEULE

JUDGE

16/12/2022