

IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

LABOUR REVISION NO. 382 OF 2021

*(From the decision of the Commission for Mediation and Arbitration of DSM at Kinondoni)
(Wilbard: Arbitrator) dated 23rd August 2021 in Labour Dispute
No. CMA/DSM/KIN/1065/18/1350*

DHL TANZANIA LTD.....APPLICANT

VERSUS

WILLIAM MSAFIRI & OTHERS..... RESPONDENTS

JUDGEMENT

K. T. R. MTEULE, J.

8th November 2022 & 01st December 2022

The applicant lodged this application for revision praying for this Court to call and revise the proceedings, quash, and set aside the award of the Commission for Mediation and Arbitration of Dar es Salaam at Ilala (CMA) in **Labour Dispute No. CMA/DSM/KIN/1065/18/1350** delivered on **23rd August 2021**. From the accompanying affidavit and counter affidavit together with the CMA record, the following are the facts of the case.

The respondents herein were employed by the DHL Tanzania Ltd (the applicant) in different dates and positions. They were terminated in 2018 for an alleged misconducts (gross negligence, failure to follow company procedure and breach of trust). The termination was preceded

by internal disciplinary processes coupled with a disciplinary hearing held around September 2018. **(See Exhibit DHL-6 minutes of Disciplinary Hearing)**. It was alleged that the respondents released shipments of customers without proper paper works confirming payments of taxes and duties from the customers as required under applicant's procedure, which resulted to a loss. Following the findings of the disciplinary hearing, the applicant terminated the respondents from the employment. Aggrieved by the termination, the respondents referred the matter to the CMA. The arbitrator found that the procedures were not followed and reasons for termination do not warrant termination to be a proper sanction hence awarded six (6) months in favor of the respondents. The CMA award aggrieved the applicant who made further reference to this court by this revision application.

In the affidavit sworn by Josephine Njoroge chief finance officer of the applicant, the deponent claimed that the respondents were terminated fairly in both procedure and reason. She challenged the arbitrator's findings that the respondents were unfairly terminated. According to her, the termination exercise was initiated with adherence to all procedures in accordance with the law and there was a valid reason as admitted by the respondents themselves.

Paragraph 3 of the affidavit advanced four grounds of revision to wit: -

"3.1 The Honorable Arbitrator erred in law and facts in holding that the termination was not procedurally and substantively fair.

3.2 The Honorable arbitrator erred in law and facts by ignoring the admission of all the allegation by the respondents and not properly evaluated the evidence relating to investigation report that identified the contributed loss of about 1 million Euros as testified and tendered by the applicant thus reaching an erroneous decision.

3.3 The Honorable arbitrator erred in law and facts by ignoring the admission of all the allegations by the respondents.

3.4 The Honorable arbitrator erred in law and facts by awarding the sum of Tanzania shillings 22,467,157 million to the respondents without any justifiable reasons."

The application was challenged by the respondents vide counter affidavit sworn by Mr. Lucas Nyagawa, the Respondent's counsel, who denied existence of fairness in terms of reason and procedure in the termination of the respondents' employment.

On hearing of this application, the applicant was represented by Mr. Philip Irungu, Advocate, whereas the respondent was represented by

Mr. Lucas Nyagawa, Advocate. The hearing proceeded by a way of written submissions. In his submissions, the applicant's Counsel consolidated ground 1,2 and 3 and argued them jointly.

Submitting on the fairness of the reasons for termination, Mr. Irungu averred that the testimony of DW1 and DW2 respectively was to the effect that the respondents were terminated due to **gross negligence, failure to follow procedure and breach of trust** all emanating from release of customers shipments from the applicant's gateway facility without necessary paperwork for that shipment or proof of payment of duties and tax prior to the release. He stated that this act, being gross negligence, amounted to misconduct to the extent that it resulted to late payment of government tax, after the consignment had been released in the process which shows that procedures were not adhered to. According to him, this amounts to breach of trust between the applicant and respondents.

According to Mr. Irungu, the applicant had a valid reason for termination of the Respondent's employment as provided under the **Employment and Labour Relations Act Cap 366 R.E 2019 Section 37 (2) (a) and (b) (i) & (ii) and Rule 12 of the Employment and Labour Relation (Code of Good Practice) Rules G.N. No. 42 of 2007**. He

added that, basing on the above provisions of the law, gross negligence, failure to follow procedure and breach of trust are valid reasons for an employee to be terminated.

Basing on the testimony of DW-1 and DW-2, and the minutes of the disciplinary hearing (**DHL-6**), and the contents of page 13 paragraph 5 of the award, Mr. Irungu submitted that the respondents admitted to have committed the offences as charged. He referred to the evidence of PW3 as indicated at page 11 paragraph 4 of the award and takes it as admission to the fact that the Respondent did not follow the procedures which resulted to the loss of some files relating to shipments. Mr. Irungu is of the view that that is sufficient to hold the employees/respondents liable for their acts and the termination.

Supporting his stand, he cited different cases including the case of **Nickson Alex v Plan International**, Revision No. 22 of 2014, High Court of Tanzania, at Mwanza (unreported). In this case, the High Court considered the employee's admission as sufficient evidence to prove valid termination.

According to Mr. Irungu, under the circumstances, termination was an appropriate sanction, as provided under **Rule 12 (4)(a) of G.N. No. 42 of 2007** since the seriousness of the offence amounted to a valid

reason for termination. He cited the case of **National Microfinance Bank vs Leila Mringo & Others**, Civil Appeal No. 30 of 2018, Court of Appeal of Tanzania, at Tanga, (unreported) where dishonesty and deception was construed as gross misconduct to warrant termination of employment.

On procedural fairness, Mr. Irungu submitted that the applicant, having noticed the commission of the offense, conducted an investigation and the Respondents were served with the charge sheet and a notice for disciplinary proceeding which were admitted as **exhibit DHL-5** collectively. He referred to the testimony of DW2 who testified that the hearing was conducted, and the minutes of the disciplinary hearing were admitted tendered as **exhibit DHL-6**. In his view, there was compliance with **Rule 13 of the Employment and Labour Relation (Code of Good Practice), G.N No. 42 of 2007** which guide procedures for termination to include investigation, notification of allegation and disciplinary hearing and the decision of the committee. He stated that in this matter the respondents were given four (4) days to prepare for the disciplinary hearing and at the hearing he was given an opportunity to defend himself and ask questions as testified by the respondents themselves.

Mr. Irungu further submitted that non-issuance of the investigation report to the respondents does not make fatal the procedures for termination as Respondent were aware of the investigation process and they were afforded with an opportunity of questioning the allegations and defending themselves. He supported his argument by the case of **Paschal Bandiho v. Arusha Urban Water Supply & Sewerage Authority (AUWSA)**, Civil Appeal No. 4 of 2020, Court of Appeal of Tanzania, at Arusha, (unreported) where it was stated that investigation is invariable and the central to that is that an employee must be afforded with an opportunity to be heard prior to dismissal.

Mr. Irungu submitted that the respondents were given the investigation findings and they proceeded to write their explanations as recorded in the minutes of the disciplinary hearing (**exhibit DHL-6**) at page 4. He is of the view that, since the respondents were informed about the findings of the investigation and were equally given an opportunity to defend themselves and admitted having committed the offences as charged then the Arbitrator was wrong to fault the procedures for termination.

He averred that, this Court in various decisions held that the procedures for termination are not applied in checklist fashion. In his view, so long

as the right to be heard was given to the respondents and that they exercised their rights accordingly, a single fact cannot fault the whole process of termination. Bolstering his position he cited the case of **Ramadhan Masoud vs Bank of Africa**, Revision No. 391 of 2020, High Court of Tanzania, Labour Division, at Dar es salaam, (unreported) which cemented the position that the code of good practice should not be applied as a checklist style.

On fourth ground as to whether the arbitrator erred in law and in fact by awarding the sum of **TZS 22,467, 157** to the respondents without justifiable reasons, Mr. Irungu submitted that since the applicant had a valid reason and followed lawful procedures in terminating the respondents, then the arbitrator erred in law in awarding TZS 22,467,157.00, as compensation for unjustifiable reasons and not in accordance with **Section 40 of the Employment and Labour Relation Act, Cap 366 R.E 2019**. He thus prayed for the award to be revised and set aside.

Replying to the applicants' submissions, Mr. Nyagawa took note of the procedure for termination provided under **Rule 13 of the Employment and Labour Relations (Code of Good Practice) GN 42 of 2007**. He submitted that when these procedures are applied, it

must be done in accordance with the principles of natural justice, and failure to do so renders the termination of employment to be procedurally unfair. He cited the case of **H.J. Stanley & Sons Ltd vs Joseph Chiwangu**, Revision No. 734 of 2018 High Court of Tanzania, Labour Division, at Dar es Salaam, (unreported) where adherence to the principles of natural justice was taken as an important aspect to be considered in determining the fairness of the procedure.

Mr. Nyagawa submitted that the respondents were suspended, and investigation was conducted by a company known as G4S but the Respondents were never availed/supplied with the investigation report before or during disciplinary hearing and the report was not tendered as evidence in the CMA. He stated that, it is fundamental right of the accused employees to be supplied with all the documents relating to their accusation/charges including investigation report before or during disciplinary hearing and failure to supply them is against the principles of natural justice which is right to be heard. Strengthening his stand, he cited several cases including the case of **Severo Mutegeki and Rehema Mwasandube vs Mamlaka ya Maji safi na usafi wa mazingira mjini Dodoma (DUWASA)**, Civil Appeal No. 343 of 2019, CAT at Dodoma (unreported), where the court of appeal stressed the importance of an investigation report for preparations of

the hearing. He added that in this matter the respondents claimed that they were not availed with the findings (report) of the investigation. He further cited the case of **Kiboberry Limited versus John Van Der Voort**, Civil Appeal No. 248 of 2021, CAT at Moshi (Unreported) where the court held it as serious irregularity the employer's failure to involve an employee in the investigation that led to the formulation of the report coupled with omission to share a copy thereof with that employee.

Regarding reasons for termination, Mr. Nyagawa submitted that according to **Section 39 of Employment and Labour Relations Act CAP 366 R.E 2019** it is the burden of the applicant/employer to prove that the termination was fair substantively and procedurally. According to him, in the instance matter the employer immensely failed to discharge that duty.

Mr. Nyagawa submitted that the Applicant failed to establish the loss contributed by each employee/respondent, in the total loss of one million Euros as it was alleged. In his view, the Arbitrator was right to rule out that the reason was too remote to justify the termination of the respondents' employment. He further added that negligence of not following procedure does not amount to gross negligence, which warrants termination to be a proper sanction.

Mr. Nyagawa refuted the assertion that the respondents admitted to have committed the charges leveled against them, neither during the disciplinary hearing nor in their reply to the letter to show cause. He stated that during the disciplinary hearing all the respondents pleaded not guilty that means they denied the charges. Mr. Nyagawa challenged the applicability of the case of **Nickson Alex vs Plan International** relied by the Applicant to cement her argument that the respondents admitted the charge. According to Nyagawa, this case is distinguishable in that, in the instant case, no any evidence to prove that the respondents admitted the charges while in the **Nickson Alex** case there is evidence that the accused employee wrote a letter to admit charges.

On reliefs, Mr. Nyagawa submitted that in CMA Form No. 1, the Respondents prayed for reinstatement to their position without loss of remuneration, but the Arbitrator after considering different factors, including failure to follow procedures for termination, non-clarity of the reason for termination was correct in awarding six months' salary compensation for each to the tune of TZS 22,467,157.00.

Mr. Nyagawa submitted alternatively that even if the reason for termination could be valid, the arbitrator would still be right in awarding

compensation of six months' salary, as there was a serious irregularity in terminating the respondents on procedural aspect.

Having considered parties submissions, this Court is called upon to address two issues which are; ***whether the Applicant adduced sufficient reasons for this Court to exercise its revision power to against the decision of the CMA*** and the second issue is ***what reliefs are parties entitled to?***

In addressing the first issue two aspect of fairness of termination which lie at the center of the parties' dispute need to be considered. The first one is the fairness of the reason for termination and the second one is the fairness of procedure for termination. By considering these two aspects, all the four issues raised by the applicant in the affidavit will be considered in the due course.

Fairness of termination is well guided by law. Termination is said to be fair if the employer observes **Section 37 of Cap 366 R.E 2019** in its implementation. It provides: -

"37 (2) - A termination of employment by an employer is unfair if the employer fails to prove: -

(a) that the reason for the 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."

It is the position of this Court that termination is fair only if it was fairly exercised in terms of both reasons and procedure. In **Tanzania Revenue Authority V. Andrew Mapunda**, Labour Rev. No. 104 of 2014 this court held: -

"(i) It is the established principle that for the termination of employment to be considered fair it should be based on valid reasons and fair procedure. In other words, there must be substantive fairness and procedural fairness of termination of employment, under Section 37 (2) of the Act.

(ii) I have no doubt that the intention of the legislature is to require employers to terminate employees only basing on valid reasons and not their will or whims."

The above position applies to this matter as well.

Concerning reason for termination, the arbitrator found that there was a reason for termination, but it was too general to convict the respondents with the offence. It is on record that the respondents were alleged and charged with having committed misconduct in clearing and releasing the

shipments, failure to confirm payments of taxes and duties from the customers as required under applicant's procedure and occasioning loss to the tune of one million Euro (£ 1,000,000). These were the reasons which led to termination which was based on gross negligence, failure to follow company procedure and breach of trust in shipments process.

It is undisputed that there was loss of euro 1 million resulted from shipments. It is further not in dispute that the respondents were employed on the same department and the shipments transactions were improperly handled to result to that loss. The arbitrator found this to constitute reasons for termination but wasn't sufficient to prove the disciplinary offence against the employees.

What amounts to a disciplinary offence which can lead to termination is provided for under **Rule 12 (3) the Employment and Labour Relations (Code of Good Practice) Rules, G.N. No. 42 of 2007 (Code of Good Practice)** where misconducts that may warrant a termination penalty include gross dishonesty and gross negligence.

But under the **Code of Good Practice, rule 12 (3)**, dismissal imposes a number of requirements on an employer who is contemplating dismissing an employee for misconduct. It provides: -

"Rule 12 (3) The acts which may justify termination are:-

(a) *gross dishonesty.*

(b) *NA*

(c) *NA*

(d) *gross negligence.*

I join hand with the arbitrator in adopting the definition of negligence as defined in the case of **Twiga Bancorp (T) Ltd. versus David Kanyika, Labour Division Dar es Salaam, No. 346/2013, Rweyemamu, J.** Guided by the case of **Twiga Bancorp** cited by the arbitrator, negligence need to be measured by **existence of a duty of care** and if a person **breached that duty** as a result of which, the other person **suffers loss or injury/damage**, and a person acts negligently, when he fails to exercise that degree of care which a reasonable man/person of ordinary prudence, would exercise under the same circumstances.

It is on record that the respondents were working under as Custom Clearance Agent as per their employment contract and **Exhibit DHL-6** (minutes of Disciplinary Hearing) with a duty of confirming payment of duties and taxes before discharging customers shipments. It is not in dispute that this duty was neglected. The issue is whether this constituted sufficient reason for termination.

In normal sense of reasonable man, it is not expected for a gateway supervisor or a person working as a clearance agent in a Clearance company to release customer shipments without confirming payment of duties and taxes something which is her primary responsibility. It is on this basis that I disagree with the arbitrator's opinion that the reason was too general, while the respondents owed duty of care to the applicant.

Basing on the nature of applicant's business of clearing and forwarding, I am of the view that the applicant ought to have performed his duty with much care to prevent the resulted loss to the employer. Therefore there is no doubt that what the applicants did in mishandling the shipments releases amounted to gross misconduct envisaged under **Rule 12 of the Code of Good Practice**. Therefore, it is my finding that the applicant had a valid reason which warranted terminating the respondents' employment after finding them guilty of misconduct.

Having found that there was valid reason for termination, the next question is on procedural fairness. At the CMA it was found that the respondent's termination was procedurally unfair as the respondents were not availed with the investigation report. In answering this question, since the termination was for misconduct, the guiding

provision is **Rule 13 of the Code of Good Practice**. I find worth to reproduce the provision thus: -

*"Rule 13 (1) the **employer shall conduct an investigation to ascertain whether there are grounds for a hearing to be held.**"*

The above provision speaks itself that the purpose of investigation is to establish whether there is a ground for initiating disciplinary hearing. In the instant matter it is no disputed that the investigation was conducted, and grounds of initiating hearing established as per Notice of Disciplinary Hearing and Charge sheet which were admitted as per **Exhibit DHL-5** collectively.

What is disputed is whether failure to avail the investigation report to the respondents rendered the procedure unfair. The applicant submitted that failure to avail the report is not a fatal irregularity. He relied on the authority in **Paschal Bandiho** cited supra on principle that investigation is invariable. I have gone through that case, although the Court of Appeal held investigation to be invariable, it did not specifically address the importance of availing the report to the employee subjected to such investigation. Although **Rule 13 of the Code of Good Practice** do not specifically provide for a mandatory requirement for the investigation to be shared, there are case laws which sets the position. I got guidance

from the case of **Kiboberry Limited and Severo Mutegeki** cited supra by the respondents. In that case the Court of Appeal held:-

"... we held in Severo Mutegeki (supra), the failure to involve the appellant in the investigation that led to the formulation of the report coupled with the omission to share a copy thereof with the respondent was a serious irregularity. Inevitably, we uphold the concurrent finding by the courts below that the appellant failed to demonstrate that the impugned termination was for a valid and fair reason."

From the above quote, it is apparent that sharing of the investigation report is fundamental for the purposes of affording fair hearing to the charged employees. It is therefore my findings that although most aspects of natural justice were adhered to by the applicant, where the respondents were properly charged, and given chance to reply thereon, and right to appeal exercised, the omission to share the investigation report in my view tainted the procedure with irregularity hence unfairness.

Regarding the appropriateness of the relief in the CMA, parties are contesting. The arbitrator awarded six months remuneration to each employee. I differ with her on this aspect taking into account the nature

of the irregularity found in the procedure which is only on the failure to share the report. Awarding six months may be excessive. Basing on the authority in **Felician Rutwaza v. World Vision Tanzania**, Civil Appeal No. 213 of 2019, CAT at Bukoba (unreported), I would reduce the number of the months awarded from six to three.

From the foregoing, the first issue as to whether the Applicant has established sufficient reasons to warrant revision of the CMA award is answered affirmatively.

As to what reliefs are parties entitled to, I have already stated that an award of six months for such a minor irregularity in procedure of termination is too excessive. In my view, an award of 3 months remuneration is sufficient to redress the unfairness to the respondents.

For that reason, the application for revision is partially allowed. I hereby revise and vary the CMA award by reducing the number of the month's remunerations awarded as compensation to the respondents from six to three months. It is so ordered.

Dated at Dar es Salaam this 01st Day of December, 2022.



KATARINA REVOCATI MTEULE

JUDGE

01/12/2022

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