IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 49 OF 2021

SHELYS PHARMACEUTICAL LIMITED ..... APPLICANT

VERSUS

GODSON TEMENAO.....1st RESPONDENT

ANOLD WILLIAMS.....2nd RESPONDENT

AULALIA MARANDU.....3rd RESPONDENT

AISHA MUSA MSHIHIRI.....4th RESPONDENT

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

(Hilary: Arbitrator)

Dated 24th December 2020

in

REF: CMA/DSM/KIN/608/19/289

JUDGEMENT

13th June & 29th July 2022

Rwizile J

This application is for Revision intending to challenge the decision of the Commission for Mediation and Arbitration (CMA) in Labour Dispute No. CMA/DSM/KIN/608/19/289 dated 24th December 2020. Actually, I have been asked to call for its records and revise the same.

In brief, its apparent that before termination by retrenchment, the respondents were employed on permanent terms by the applicant. They

worked in different posts and stations upcountry. Sometimes in June 2019, the respondents were issued with notices of retrenchment in particular on 4th July 2019. One day thereafter on 5th July they were issued with retrenchment letters grounded on reason that the applicant was rationalizing the scale of operations that resulted in staff reduction. They were paid some terminal benefits. Not in agreement with the conduct of the applicant, the respondents filed a dispute with the CMA, claiming for payment of terminal benefits equal to 60 months' salary and compensation of the sum of TZS 50,000,000.00 each. The respondents were successful but the amount of payment reduced to TZS 21,698,837.00 to all. The CMA decision and finding rested on the fact that the respondents were unfairly terminated.

The applicant was not happy with the decision and hence this application. In the affidavit supporting the notice of application, the applicant has raised 4 grounds for determination as hereunder;

1 *That the trial Arbitrator erred in law and in fact by deciding that the applicant had no substantial reasons to retrench the respondents' herein.*

2 *That the trial arbitrator erred in law and fact for failure to base his decision, in addressing the first issue in Labour Complaint*

No. CMA/DSM/KIN/608/19/289, on the labour laws guiding the Honourable Arbitrator.

3 *That the trial arbitrator erred in law and in fact in awarding an exorbitant amount of compensation to the respondent's when the applicant had substantial reasons to terminate.*

On agreement, the application was argued by written submission. But it is unfortunate the respondents did not heed to the court directive to file submissions as directed. Hence, the decision is just based on the submission of the applicant only.

Mr. Emmanuel Augustino learned advocate appeared for the applicant and Mr. William Evans was for the respondent.

Submitting on the issues, it was stated by the learned counsel that it was proved that the reasons for retrenchment was due to decrease in operations of the company and an increase of machines to improve operations. In his views, this constitutes valid reasons for retrenchment as it is in compliance to rule 23(2)(b) of the Code of Good Practice GN No. 42 of 2007.

The learned counsel also argued the second issue, it was his view that the arbitrator simply relied on section 37 (2) (a)(b)(ii) and 38 (1) (d) (iii) of

the ELRA, which are too general. In his view, more elaborate provisions were to be applied. He named them as part 2(b), Rules 23-25 of the Code of Good Practice, GN. 42 of 2007. He was clear that, rule 23(2) (b) among other things, points out that introduction of new technology is a good reason for retrenchment as it affects the employment relationship.

Lastly, it was his submission that, having proved that retrenchment is grounded on procedure, awarding 12 months compensation was on high side. It was his view that at least 6 months remuneration could have met the justices of this case. He prayed, the application be granted as prayed.

This application raises matters of validity of reasons for retrenchment and procedure. All these are governed by law. Plainly speaking, it is the duty of the applicant as an employer to prove he fully observed the law.

To recapitulate, I have to state position of the law before going into details of the application itself.

It is an established principle that, termination of employment or retrenchment must be based on a valid reason or reasons and stipulated procedures. For instance, consultation and notification procedures of the workers or percentage of the total workforce. Notice is meant for providing the employees or representation with good time with relevant

information including the reasons for the termination contemplated, number of workers and the categories likely to be affected and the period over which the retrenchment is intended to be carried out. It also gives workers or their representatives as early as possible an opportunity for consultation on measures to be taken to avert or minimize the chances of retrenchment, the measures to mitigate the adverse effects of any termination on employees concerned such as finding alternative employments.

Consultation normally provides an opportunity for an exchange of views and establishment of a dialogue which can only be beneficial for both the employer and employees, by protecting employment as far as possible and hence ensuring harmonious labour relations and a social climate which is proportionate to the continuation of the employer's activities. Indeed, transparence is a major element in moderating or reducing the social tensions inherent in any termination of employment for economic reasons.

In the instant matter the dispute is valid reasons and procedure for retrenchment. According to respondents' testimonies before CMA, they said, they were not notified on the reason for retrenchment neither did they know if there was any retrenchment. The applicant has admitted that

the respondents were working outside Dar- es- salam and were called for the training, when termination met them. The applicant, as well, is clear that he did not consult any employee but dealt with TUICO as trade union at the work place. It was not well established if, TUICO fully informed the workers upon its agreement with the applicant. But the evidence of Dw2, a leader of TUICO at the workplace did not recall if the meeting with the employees done involved the respondents. Still, he did not tender any proof of the consultation itself. I have gone through the record, it shows, the respondents were all working upcountry. But the notice to retrench exhibit D1 was placed on the notice board. Dw1 said, it was on 28th June 2019 and that workers saw it.

Moreover, it is not known, if the same was placed on the notice boards in all the places where the respondents worked. I think, the allegation that the respondents were not involved in the exercised is valid. The applicant has not shown if they were aware of the process. On the reasons for retrenchment, the evidence of Dw1 and Dw2 simply alleged that the reasons were to rationalize the scale of operations. There is no where else in the documents tendered apart from exhibit D1, which is a notice contemplating retrenchment, that shows the respondents were clearly informed of the process. There is no evidence in my view, showing if the

applicant had communicated enough to the respondents, the reasons leading to retrenchment

On the second limb of fairness of termination that is the procedural fairness of retrenchment. The legal position is that, even if the employer has reasons to retrench its employees, she has to comply with mandatory stipulated procedures for retrenchment.

In labour laws the procedure for termination on retrenchment is provided for under section 38 of the Employment and labour Relations Act, Rule 23 and 24 of the Employment and Labour Relations (Code of Good Practice) GN. 42 of 2007, for easy reference, I quote the relevant parts;

> *"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:- 10 (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; (v) severance pay in respect of the retrenchment.*

The above position was also clarified in the book Titled Employment Law Guide for Employers by George Ogembo, 2018, where at page 339, it is states as follows: -

> *"In determining the legality of a redundancy, the court examines the bona fides and integrity of the entire process. Even if it is a fair reason, the dismissal can still turn out to be unfair if the employer fails to act reasonably and follow the steps required to effect fair redundancy".*

From the extract, I am not afraid, it is safe to hold that the applicant did not take with integrity the whole process. I am saying so because, it is in record that the respondents appear to have known about retrenchment two days before it indeed occurred.

They have testified that they were called for a training and when they arrived, they were issued with the notice of retrenchment D4. The notice was plain, their employment was to come to an end on the next day, that is 5th July. It seems, the letters were prepared on 1st of July. This therefore confirms that there was no consultation with the respondents. Retrenchment in itself is in essence a no-fault termination. It has adverse effect on the employees. That is perhaps why, the Code of Good Practice, GN No. 42 of 2007, requires courts to scrutinize the process to ensure

rules of fairness are strictly complied with. This is as per rule 23(3) of the Code.

Retrenchment, if I may restate, can be done for reasons of operational requirements. However, the term refers according to section 4 of the ELRA and rules 23(1) of the Code of Good Practice, to be based on, economic, structural, technological or similar needs of the employer. But for retrenchment to hold, three principles as shown before, must be met namely, **one,** give notice of intention to retrench, which was not given to the respondents. The notice, it has also been stated should be sufficient and be supplied to the workers. This has not been proved. **Two**, disclose all relevant information for the intended retrenchment. There is no suggestion in evidence that the respondents had such information. This stage is important because it lays a good ground for the **third** step, which is consultation. Consultation stated here should not only be done to the intended employees but also to the trade union registered at the work place if it exists.

In the evidence of Dw1 and Dw2, it is clear that no employee was consulted but the trade union. The trade union consulted did not prove it informed the respondents. Then an agreement must be reached, if not

other steps have to follow. In all, it is the duty of the employer therefore, to prove that the procedure stated were wholly complied with.

Having said what I have said, I share the stage with the CMA that the applicant did not prove validity of reason for retrenchment and the procedure was not followed. It is safe to dismiss this application. It is dismissed with no order as to costs.

A.K. Rwizile

JUDGE

29.07.2022