IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

LABOUR REVISION NO. 239 OF 2022

(From the Award of the Commission for Mediation and Arbitration of Dar es salaam at Ilala dated 17th day of June 2022 in Labour Dispute No. CMA/DSM/ILA/564/2020/326/20 (By Igogo: Arbitrator)

STANDARD CHARTERED BANK.....APPLICANT

VERSUS

FIDELIS MWEMBESA.....RESPONDENT

JUDGMENT

K. T. R. MTEULE, J.

23rd February 2023 & 10th March 2023

This is an application for revision seeking for this court to call for the record of **Labour Dispute No. CMA/DSM/ILA/564/2020/326/20** from the Commission for Mediation and Arbitration of Dar Es Salaam, Ilala (CMA). So as to revise the proceedings and the award issued therein and satisfy itself as to its legal and evidential validity. The Applicant further prays for the Court to nullify the proceedings and set aside the said award.

From the record of CMA, the affidavit of the Applicant and the submission in support of the Application, it appears that the Applicant employed the Respondent as a Senior Manager from 22nd October 2019

for unspecified period contract. The Respondent was suspended from the work for an alleged misconduct (sexual harassment). A disciplinary process was conducted against him, which resulted into his termination. Being aggrieved, the Respondent lodged a complaint in the CMA claiming for unfair termination. After the failure of mediation, the matter went to arbitration where the award was issued in Respondent's favor. The arbitrator ordered for the respondent to be reinstated without loss of remuneration which meant that shall the arbitrator not opt reinstatement then the applicant to be paid TZS 342,000,000. The Applicant being dissatisfied by the CMA award, preferred the present application.

The applicant's affidavit in support of the application contains 8 legal issues which were framed by the Applicant. The issues are: -

i) Whether the trial arbitrator was correct to hold that the dispute was referred before the CMA within 30 days.

ii) Whether the trial arbitrator was correct to hold that the respondent passed his probation period and duly confirmed into his position.

iii) Whether the trial arbitrator properly ordered for reinstatement while the respondent testified that even if reinstated, he is not

ready to follow group code of conduct and group diversity and inclusion standard.

iv) Whether the CMA had jurisdiction to determining dispute of unfair termination for employee worked for less than six months.

v) Whether the trial arbitrator was correct to allow filing of additional documents even after raising of the preliminary objection.

vi) Whether the trial arbitrator was correct to refuse admission group code of conduct and group diversity and inclusion standard.

vii) Whether the applicant failed to follow the procedure of terminating the applicant.

viii) Whether the trial arbitrator properly evaluated the evidence presented before the Commission.

The application was argued by a way of written submissions, where the Applicant was represented by Mr. Frank Kilian, Advocate while Respondent was represented, by Mr. Johnson Johannes Kachenje, Advocate. I appreciate their rival submissions which will be considered in drafting this judgement.

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 exercise its revisional power to interfere with the CMA Award** and secondly, **to what reliefs are parties are entitled**?

In addressing the first issue, all grounds of revision raised by the applicant will be considered. Since timeliness goes to the issue of jurisdiction, I will start with **whether the arbitrator was correct to hold that the complaint was timely filed in the CMA.**

Mr. Frank Kilian, the applicant's counsel, averred that the original CMA Form No.1 indicates that the dispute was firstly admitted in the CMA on 9th August 2020 while the dispute arose on 10th June 2020. According to him, the dispute was filed out of time contrary to **Rule 10 (1) of the Labour Institution (Mediation and Arbitration) G.N No. 64 of 2007** which requires disputes relating to unfair termination to be filed within 30 days. Supporting his assertion, he cited the case of **Barclays Bank Tanzania Limited v. Phylisia Hussein Mcheni,** Civil Appeal No. 19 of 2016, Court of Appeal of Tanzania, (unreported). He further added that there was a forgery to justify delay of filing labour dispute.

On the other hand, the Respondent's Counsel Mr. Johnson Johannes Kachenje denied the fact that the matter was filed on **9th August 2020**. According to him, it was filed on **9th July 2020** which was the date the referral form was served to the applicant. He relied on the evidence of the summons issued by CMA on 10th July 2020. Regarding the allegation of forgery, Mr. Kachenje is of the view that there was no such an issue properly raised by the applicant in the CMA so as to be addressed by expert opinion or more evidence and therefore it cannot be dealt with at this level of revision.

In addressing the question whether the complaint was lodged in CMA out of time, I had to visit the CMA record including **CMA Form No.1** to see what transpired regarding the date of filing. The record bears two endorsements of date of filing. The first one is a handwritten acknowledgment indicating that the CMA Form No. 1 was received on 9th August 2020. The second one is a CMA official stamp which sealed it to have been received on 9th July 2020. The two aspects of dates on CMA Form No. 1 caused a confusion, as they left a question as to which is the correct date of receiving CMA Form No. 1 between 9th July 2020 and 9th August 2020. To resolve this myth, I had to explore on further details of the recorded including service of processes to see which information is

more relevant regarding the time within which the CMA proceeding operated. I found a document, CMA Form No. 3 which is a summons to the respondent to appear in the Commission. The said summons appears to have been issued on 10th July 2020 and received by one Ayoub Rashidi on the same 10th July 2020.

The Applicant's counsel alleged some alterations in the CMA Form No 1 to forge the date of filing. Nevertheless, the counsel did not comment on the CMA Form No. 3 and the acknowledgement of receipt done by Mr. Ayoub Rashid.

Further to lack of comment on the CMA Form No. 3 issued on 10th July 2020, the issue of timeliness of the complaint in the CMA appears for the first time at this level of revision. With such a serious allegation of forgery, this issue ought to have been dealt with by the CMA so that evidence could be collected to clear the uncertainties. I have to conclude that, since the Labour dispute appeared to have been serving within July 2020 and that the issue could not be raised at the earliest possible opportunity in the CMA, it is my finding that the applicant's allegation regarding forgery lacks merits.

The aforesaid leaves the balance of probability to rest in favor of the respondent concerning the time of lodging the CMA Form No. 1 because

it appears that there were processes concerning the matter which operated prior to the said 9th August 2020 which the applicant considers to be out of the date required.

From what transpired in the record, it remains that the most probable date of filing of CMA Form No 1 is 9th July 2020 and not on 9th August 2020. In such circumstances I am of the view that the matter was timely filed.

Before embarking on the third issue, I find it worth at this point to consider another issue of law, which is on ground **four** of the revision concerning jurisdiction of the CMA. The said issue is **whether the CMA had jurisdiction of determining a dispute of unfair termination for an employee who worked for less than six months**.

The applicant's argument is that the Respondent was employed on 22nd October 2019 and on 28th January 2020 he was suspended from employment and subjected to disciplinary action. Referring to page 52 of the CMA proceedings, he quoted the respondent testifying that he did not go the work for six months physically and that he worked for only three months and no assignments were given to him when he was on suspension.

In resolving this issue, the applicable provision is **Section 35 of Sub Part E of the Employment and Labour Relations Act, Cap 366 R.E 2019 Employment and Labour Relations Act** which provides; -

> *"35. The provisions of this Sub-Part shall not apply to an employee with less than 6 months' employment with the same employer, whether under one or more contracts".*

From the above provision for someone to be covered by SUB PART E of Cap 366, that person must have the same contract of employment for the period of not less than six months with same employer. In this matter the record reveals that the applicant was employed on 22nd October 2019 and he was terminated on 10th June 2020 as per **Exhibit D-6** (termination letter). This period constitutes more than six months. The applicant wanted the CMA to minus the months when the Respondent was on suspension and consider the employment to have 3 months on the ground that while on suspension the respondent did not work. This is vehemently disputed by Advocate Kachenje who opined that the respondent had 8 months in the employment and therefore he is not covered by **Section 35 supra**. My interpretation to Section 35 supra is that it exempts employee with less that 6 months in

employment from being covered by the provision of unfair termination and not who worked consistently for that period. I agree with the Respondent's counsel that to assign a duty to an employee is the responsibility of the employer. Failure to assign such duties does not render the person not to be an employee. Therefore, the assertion that the arbitrator did not have jurisdiction to entertain the dispute of unfair termination is unfounded.

As well, I want to make it clear that section 35 does not aust the jurisdiction of CMA on employment matters involving employees who worked for less than six months but it removes those employees from enjoying the legal benefits falling under this part. These employees can be dealt with by other provisions of Labour Laws relevant to the status of those employees.

The **second** issue is **whether the arbitrator was correct to hold that the respondent passed his probation period and duly confirmed into his position.** The arbitrator found that the Respondent was confirmed to his employment vide **Exhibit A1** which was an email sent from the Respondent's line manager which informed him that he passed his probation and that his role there was officially confirmed. The arbitrator was not convinced by the applicant's assertion

that the confirmation email was sent accidentally by the systems which were automated during the Covid 19 pandemic which made communication to be more automated. The arbitrator questioned the lack of specific declaration by the line manager Victor Makere to whom the email was supposed to be copied who could testify if he had never received a copy of the said email and whether he disproved the said email alleged to have been sent accidentally to the Applicant. The arbitrator considered that DW1's denial of the email when the matter was already in the CMA as an afterthought.

In this application, Advocate Killian maintained the same assertion that the confirmation email was sent to the Respondent accidentally by the automated Bank systems. Advocate Kachenje challenged this assertion by insisting that the email was channelled to the respondent by the applicant after the system acted as was initiated by the employer together with the respondent's performance.

Section 39 of ELRA places a burden of proof upon the employer in case of unfair termination. In the CMA, the employer (Applicant) failed to explain why he failed to bring witness for the clarification on how the system acted strange and who initiated the mischief on such a sensitive issue. I find relevance in the case of **Peter Mwafrika v. Republic,**

Criminal Appeal No. 413 of 2013, Court of Appeal of Tanzania, citing the case of **Aziz Abdallah v. Republic,** (1991) TLR 71. Although it is a criminal matter, its principle is relevant in the instant matter. The Court of Appeal held thus: -

> *"...the general and well-known rule is that the prosecutor is under a prima facie duty to call those witnesses who from their connection with the transaction in question are able to testify on material facts. If such witnesses are within reach but are not called without sufficient reason being shown, the court may draw an inference adverse to the prosecution..."*

In this matter, the applicant failed to bring competent witness to prove that the email was accidentally generated by the system. Since it is undisputed that, one of the means of the communication between applicant and respondent during COVID -19 was by way of email as per DW-1, DW-2 and AW-1, the Confirmation email cannot be denied. Further to that, it is certain that the employer was the Custodian of the email and the same was issued by employer's authority, then her allegation of non-confirmation cannot stand.

From the aforesaid, I would subscribe to the arbitrator's position that the respondent was confirmed to his employment, and he was not a probationer at the time of his termination.

Ground five of the revision is another ground based on point of law. It challenges the arbitrator's admission of additional documents even after the preliminary objection raised in the CMA. Advocate Killian referred to **Annexure F.9** which was intended to defeat the second ground of preliminary objection as one of the documents. According to him, this contravened the principle in **Bahadurali E. Shamji and Another versus The Treasury Registrar and Others, Civil Applea No. 4 of 2003 CAT Dar es Salaam. (Unreported)**, which held that a party cannot defeat a preliminary objection which is already lodged. He added the case of **Mtale versus Karmali 1983 TLR 50** which held that once a preliminary objection is lodged, the time to current the defect had already lapsed. In response, Advocate Kachenje denied the relevance of the filed documents to the existed preliminary objections. He considered the preliminary objection to had been lodged prematurely.

In this point, neither of the parties mentioned which preliminary objection were they addressing. I was insufficiently equipped with enough information to enable me to deal with this issue. Since it is the

applicant who has raised it, she had a duty to make it clear by mentioning the point of objection which was defeated.

In addition to this, **Rule 19 of G.N No. 67 of 2007** gives power to the arbitrator on how arbitration should be conducted, including ordering the person to produce book or documents which may assist in resolving dispute. I could not grasp from the submission how the added documents interfered with the determination of a point of preliminary objection. The Applicant's counsel had to make this clearer. From the above position of law, I find nothing wrong for the arbitrator to allow filling of additional documents at the evidence stage and I find no sufficient clarification of the point of objection as to what was defeated and how. In short of this, I have to find this ground unfounded.

All other issues, that is issues No 3, 6, 7 and 8 will all be considered together to address whether the termination was fair in-terms or reason and procedure. Starting with the reasons or substantive aspect, I will focus on whether there was a fair reason to justify the termination of the respondent's employment.

Mr. Killian argued in ground **eight** that the arbitrator did not properly evaluate the evidence presented before the Commission. According to him the respondent admitted having committed an offence of sexual

harassment and asked for apology. He referred to different incidents in which the respondent made such admission. He referred to page 3 of the last paragraph of the minutes of disciplinarily hearing stating that the Respondent admitted to have grabbed the ribs of his colleague and raise a defense that he did it casually. He further referred to page 54 of the CMA proceedings where the respondent admitted having touched his colleague's manhood and raise a defense that he intended to touch his stomach but he accidentally touched his manhood. Mr. Killian further referred to page 56 of the CMA proceedings where the respondent admitted having grabbed his fellow staff's manhood and asked for an apology which was rejected by the victim.

Mr. Killian submitted that the disciplinary hearing was just an additional step prior to termination. In his view, the Respondent's admission to the disciplinary offence was enough justification to terminate the employment. He referred to the case of **Levina and Another v. Chodawu, Revision No. 302 of 2010, High Court of Tanzania, Labour Division, at Dar es Salaam**, (reported in Tanzlii) stating that the High Court in this case held that there is no need of conducting investigation when an employee pleads guilty to a disciplinary offence. The Respondent's Counsel insisted that the respondent's touch to his

fellow employee was in a casual way and not intended to sexually harassing him.

In ground **six**, Advocate Killian challenged the arbitrator's decision to refuse admission of **group code of conduct and group diversity and inclusion standard.** Advocate Killian submitted that the trial arbitrator refused admission of those documents on the reason that the said codes operates in different countries which the applicant operates his business hence not applicable in Tanzania. According to him, the Respondent signed his contract which made mandatory the compliance of the respondent with the code and the diversity standards. In his view, there is no law which prohibits application of the two codes here in Tanzania. He submitted that since the respondent admitted to have been supplied with the said code of conduct and the diversity and inclusion standard, the arbitrator should not have admitted that contract and reject the codes and the standards.

On the Respondent's side, Mr. Kachenge sustained that the arbitrator did not only consider that the two instruments are not applicable in Tanzania but also considered the fact that the two documents were electronically generated but not properly tendered in compliance with the procedures to tender electronic evidence under **section 18 (2) (a)**

(b) (c) and (d) of the Electronic Transactions Act, 2015. Mr. Kachenge is of the view that the assertion that the arbitrator rejected the codes because of being inapplicable in Tanzania as a cooked story of the applicant.

The Applicant rejoined that the there is no need of filing an affidavit in electronic evidence if the witness tendering it is under oath. He cited the case of **EAC Logistics Solutions Limited vs. Falcon Marines Transportation Limited, Civil Appeal No. 1 of 2021**. He further rejoined that it was unnecessary to file an affidavit for the Group Code of conduct because the two documents formed part of the Respondent's employment contract.

Having enough time to peruse the CMA proceedings, the record at page 23 shows that the applicant's Counsel conceded on non-compliance of tendering electronic evidence. He was given enough time to file it properly, but she failed to comply with the Court order. In such circumstances I am of the view that his allegation regrading admission of codes lacks legal stance because the documents were rejected due to non-compliance with **section 18(2)(a)(b)(c) &(d) of the Electronic Transactions Act.**

I resolving as to whether there was a fair reason to terminate the Applicant, I have to be guided by the law concerning Termination of employment. Section 37 of the Employment and Labour Relation Act , Cap 366 R.E 2019 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."

Article 4 of the C158 of the Termination of Employment Convention, 1982 (No. 158) as well provides: -

"Article 4: The employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operation requirements of the undertaking, establishment or services."

Again, in the case of **Tanzania Revenue Authority V. Andrew Mapunda,** Labour Rev. No. 104 of 2014 it was 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, 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."

From the above legal position, internationally and nationally, termination of employment must be accompanied by fair reasons and procedure.

Sexual harassment is one of unacceptable behaviour in a workplace. Internationally, The ILO Declaration on Fundamental Principles and Rights at Work, adopted in 1998, consist expression of commitment by governments, employers' and workers' organizations to uphold basic human values at the work place. According to ILO, one of the forms of Sexual harassment is existence of a hostile working environment in

which the conduct creates conditions that are intimidating or humiliating for the victim.

In finding whether the Applicant managed to prove that the Respondent did commit the offence of sexual harassment, I had to go through the record of the CMA to see what transpired therein. I read **Exhibit D4** which is the report of investigation which found three staff members complaining to have been sexually harassed by the Respondent. The report found prima facie evidence to warrant holding of the disciplinary hearing regarding one of the staff who was complaining to have been unusually touched by the Respondent three times in different occasions in a manner which indicated sexual gestures. I went through **Exhibit D5** which is disciplinary hearing minutes. As submitted by the Applicant's counsel, the Respondent admitted all the three incidents of touching the beard, manhood and the grabbing of ribs of the victim who complained but made a defense that all these incidents were not intended to occasion sexual harassment.

A situation where an employee complains about unusual touch which indicates sexual gestures from a fellow employee cannot be underestimated. Such a complaint must be taken seriously and investigated. The Applicant initiated investigation (**Exhibit D4**) which

made prima facie finding that there was sexual harassment in the scenario. It was this finding which prompted disciplinary hearing as per **Exhibit D5**. It should be noted that during disciplinary hearing, the respondent admitted having done all the three incidents of touching beard, grabbing ribs and touching a manhood of the victim (DW1) but with some excuses such as "it was done accidentally", "it was done casually" and "it was not sexually driven." The victim complained to have found hostile working environment due to these acts. In my view, the employer could not have any reason to ignore this kind of a situation. Accordingly, and expectedly the employer conducted a disciplinary hearing. Whether the hearing was in accordance with the required procedure, this is an issue to be discussed later on the fairness of procedure.

Not only the investigation and the disciplinary hearing became the testimony of sexual harassment but also the evidence of DW2 who was the victim of the harassment, testified in the CMA to reveal some crucial information. According to him, the first experience of the respondent's touch on his ribs caused unpleasant feeling and he told the respondent not to repeat it because he thought that the respondent did it in sexual manner. DW2 continued to explain that he had more unpleasant feeling

with the second incident of touching the beards and again he warned the respondent informing him that, the act was sexually motivated and asked him not to repeat. Yet another incident came with touching of a manhood. It was so testified by DW2 that on another occasion, while seated on the office chair with his legs crossed tight, the respondent forced open the legs and touched DW2's manhood, the act which got him mad and blew the last straw which caused him to report the incidents.

All the above could not influence the arbitrator in finding the fairness of the reason for termination. The arbitrator concluded that there was no fair reason for termination.

The arbitrator was convinced by the respondent's questioning on how possible can someone conduct sexual harassment in front of other colleagues without any fear or shame or else such a person must have mental disorder. She was further influenced by other grounds which included failure to prepare charge sheet prior to disciplinary hearing and failure to give outcome of the disciplinary hearing, as well as failure to bring CCTV cameras.

In my view, sexual harassment whether done in open or in camera does not change its status. It is on testimony that the respondent's acts

sexually offended the victim who gave serious warning in the two first scenarios. Things became worse when the respondent touched the victim's manhood. Touching a fellow man manhood cannot be a normal act which can just be given an excuse of it being done accidentally. The evidence of CCTV camera as claimed by the Respondent's counsel was not necessary where the respondent admitted having done what was alleged to have been done. In my further view, the arbitrator's reasoning based on failure to prepare charge sheet and failure to give the respondent the outcome of the disciplinary hearing cannot vitiate the evidence given by the two witnesses of the applicant including the actual victim of the alleged sexual harassment and the admission made by the Respondent plus the investigation report **(Exhibit D4)**. In my view, these reasonings are more procedural than substantive. This concludes my view that the arbitrator ought to have evaluated the procedural aspect separately from the substantive aspect in finding the fairness of the reasons. It is on this assessment I find that the arbitrator did not properly evaluate the evidence given on ascertaining the fairness of the reasons for termination.

The respondent's admission to have touched the victim's beards, grabbed his ribs and touched his manhood, and the evidence of **DW2** to

testify on these three acts and the investigation report, all prove by balance of probability that there was a sexual harassment committed by the Respondent to DW2 which cannot be ignored by a simple defense of having done accidentally, with no sexual intention. It is not in dispute that sexual harassment constitutes disciplinary offence which can be used to terminate an employee.

It is from the above reasons I agree with Advocate Killian that there was a fair reason to terminate the respondent.

Now coming to ground seven **regarding procedural aspects**. Advocate Killian argued that the Applicant complied with all procedures in exercising the termination. According to him, a complaint was raised, the respondent was suspended, the investigation was conducted, notification on disciplinary hearing was issued and the disciplinary hearing was conducted. Mr. Killian further added that the composition of the committee was never challenged by the Respondent. On that basis he is of the view that procedure for termination was complied with.

On the other hand, Advocate Kachenje maintained that even though the investigation was conducted, its report was not availed to the respondent according to law. Supporting his stand, he cited the case of **Savero Mutageki & Another v. Mamlaka ya Maji Safi na Usafi wa**

Mazingira Mjini Dodoma (DUWASA), Civil Appeal No. 343 of 2019, Court of Appeal of Tanzania, at Dodoma, (unreported). He added that there was no impartiality as the Chairperson of Disciplinary Committee was also the prosecutor of the case which violated the principle of fair hearing. He further added that the outcome of the disciplinary hearing was never issued, and the Respondent was not given the charge sheet and that the termination letter was issued to the respondent after 60 days which is contrary to procedure. He is of the view that there was no fair hearing.

It is an established principle that for termination to be procedurally fair under misconduct, the employer must adhere to the procedures laid down under **Rule 13 of the Code, G.N No.42 of 2007 and the Guidelines for Disciplinary, Incapacity and Incompatibility Policy and Procedure of G.N. No. 42 of 2007 (The Guidelines of G.N. No. 42 of 2007).** According to Rule 13, the employer shall conduct an investigation to ascertain whether there are grounds for a hearing to be held. Case Law made it mandatory for the investigation report to be availed to the employee to be subjected to such disciplinary hearing (**See Savero Mutageki supra**).

Contrary to the above legal requirement, in this application, the Applicant contended in the rejoinder to have issued the investigation during the disciplinary hearing.

It is a principle that an employer must conduct the investigation and avail it to the employee and failure to do so will amount to denying the respective employee a right to defend himself from the allegations (see. **Severo Mutegeki and Another vs. Mamlaka ya Maji Safi na Usafi wa Mazingira Mjini Dodoma (DUWASA), Civil Appeal No. 343 of 2019, Court of Appeal of Tanzania at Dodoma**).

Availing the report to the employee intends to give him opportunity to prepare for hearing. If the said report was availed to the Respondent during the hearing, I have view that it is as if it was not availed because there could be no time to for him to prepare for hearing. In my view, this was a violation to procedure.

For that reason, I agree with the respondent's Counsel regarding the principle in ***Severo Mutegeki's Case (supra).*** Since the investigation report was not availed to the respondent, then that the procedure was violated.

Regarding the impartiality of the chairperson of the Committee, the suspension letter **(Exhibit D-2)** and termination letter were both signed

by the same person namely Victor Makere who was the chairperson of Disciplinary Committee (line Manager). This contravenes **Guideline 4 (2) of the Guidelines of G.N. No. 42 of 2007**. It provides: -

> *"4. (2) The chairperson of the hearing should be impartial and should not, if possible, have been involved in the issues giving rise to the hearing. In appropriate circumstances, a senior manager from a different office may serve as chairperson."*

Having the chairperson involved in the matter previously, he was a disqualified person to handle the disciplinary hearing. Although the Respondent did not challenge the composition of the Committee on the date of hearing, this does not exonerate the duty to comply with the law. In my view, the procedure was not adhered to in constituting the Committee chairperson.

In such circumstance of not complying with two procedures one, on the impartiality of the Committee and the second one on failure to avail the investigation report to the Responded, I find unfairness in the procedure.

From the foregoing, it is my findings that the there was a fair reason for termination of the Respondent's employment but the procedure was no

fair. The next issue is whether the Respondent was entitled to what was awarded in the CMA.

The arbitrator found unfairness in terms both reasons and procedure and awarded re-instament of the respondent without loss of remuneration of TZS 228,000,000.00 and 12 moths salaries for unfair termination to the tune of TZS 114,000,0000.00. The arbitrator added that shall the employer opts not to reinstate the Respondent, then he shall pay a total of TZS 342,000,000.00.

The Applicant objected the reinstatement of the Respondent who had already stated in the CMA that if reinstated, he will not be able to follow the Group Code of Conduct and Group Diversity and Inclusion Standards, the compliance of which, formed part of the Respondent's contract of employment.

I have already found that the termination was unfair only on some procedural aspects. Under Section 40 (a) of the Employment and Labour Relations Act, Cap. 366 R.E 2019 an employee who is terminated unfairly is entitled to compensation of not less than 12 months. The provision does not provide for a situation when the unfairness is only on procedural aspects. In the case of **Felician Rutwaza versus World Vision Tanzania, Civil Appeal No. 213 of 2019** the Court of Appeals

categorically was of the view that when there is only procedural unfairness with substantive fairness, then an amount lesser than the minimum prescribed in **Section 40 (1) (c) of Cap 366** can be awarded. Guided by the same principle, since in this case, the unfairness is found only on some few aspects of procedure, I will allow 3 months remuneration as compensation to the respondent.

From the foregoing, the issue as to whether the applicant adduced justifiable grounds for this Court to exercise its revision power against the decision of the CMA is answered in affirmatively.

Consequently, I revise the decision of the CMA and vary the award by setting aside the order of reinstatement without loss of remuneration. The order of compensation is varied by reducing the monthly remuneration from 12 to 3 months. Therefore, the Respondent shall be paid a compensation 3 months remuneration which is **TZS 28,500,000.00** only.

Dated at Dar es Salaam this 10th Day of March 2023.

KATARINA REVOCATI MTEULE

JUDGE

10/03/2023