

IN THE HIGH COURT OF TANZANIA

Muhimbi
Sana

LABOUR DIVISION

AT DAR ES SALAAM

failure to
follow proper
procedure
in termination

LABOUR REVISION. NO. 282 OF 2009

BETWEEN

EDNA ROBERT - APPLICANT

AND

TANZANIA REVENUE AUTHORITY - RESPONDENT

24/02/2011 & 18/03/2011

S.C. MOSHI, J:

RULING

This is a Revision application emanating from C.M.A award which was procured by the Commission for Mediation and Arbitration on 12/10/2009. The applicant was awarded four (4) months salaries compensation due to employer's (respondent's) failure to follow a fair procedure i.e a right to call a representative to assist him and represent her during her defence before the disciplinary proceedings. The arbitrator found that there was a valid reason for termination, hence substantially, the termination was fair. He reasoned that the applicant, had committed a "Misconduct". He found so because the applicant had failed to carry adequate examination of customed goods for the purposes of Revenue assessment. The arbitrator reasoned also that the TRA Regulations sanction for such an offence is

termination because the applicant has to inspect the container twice before the team does. Hence, these was intended to prevent such negligence.

The applicant was not satisfied with the award. He was aggrieved and feels that the arbitrator erred to find that the termination was substantially fair, as he did not commit gross negligence as it was the first mistake done since 1999 when she was employed. The whole procedure of a right to be heard was not observed by the management committee before termination and that the arbitrator erred for not stating clearly that she is entitled to 12 months salaries; instead of the 3 months.

Mr. Nchimbi submitted for the applicant and on the other hand, Mr. Adelard submitted for the respondent. The main issue is whether the arbitrator's award has been improperly procured i.e it has been obtained illegally, there is an error, C.M.A has acted without jurisdiction or in excess (jurisdiction not vested on it) or there is material irregularity.

For the applicant, three main points were raised;

- i) that the termination was substantially unfair
- ii) The procedure for termination was not fair
- iii) The compensation of 4 months' salary was not lawful

Mr. Nchimbi submitted among other things that the applicant committed negligence, it was a 1st mistake; whereby a loss of T.Shs. 547,000/= was occasioned. That the employer failed to prove that the misconduct was a "gross mis-conduct" or "gross negligence". The misconduct had to be proved in accordance with **R.12 (2) G.N. 42/2007**. He too quoted the case of **Tanzania Distributors Vs. Athumani Abdallah**, Rev.No.274/2008 (Labour Case) where it was held that employer has to show that there is a valid reason and it has to be proved. The stated loss of T.Shs. 1,782,683.00 was not proved.

Mr. Adelard's submission on response to this point was that there was enough evidence to prove mis-conduct on part of the employee. Thus the employer complied with Section 37(2)(a) of the E.L.R.A that the reason for termination was valid; and validity of termination can be counted on the applicant's failure to carry out examination of customed goods for the purposes of Revenue assessment. As, for TRA Rules are not contrary to Labour Laws.

Having heard both counsels on this point and having considered the facts as presented before the arbitrator, I find that the arbitrator was right to find that the applicant had committed a misconduct due to his negligent Acts. I have taken into consideration Rule 12 (1) (2) and (3).

As discussed by the arbitrator, the TRA rules, by the nature of the Organization do not contravene, the Labour Laws; because the applicant was to inspect twice (2 times) before certifying. Although a first offence of misconduct under Rule 12 (2) shouldn't justify termination however under the same law, Rule 12(3) the act may justify termination in certain circumstances. For example in our case, the case is a clear case of gross negligence; See R.12(3)(d).

Regarding Procedural issues. It is true that the (the applicant) did not or was not represented. The applicants cited the case of **N.B.C. Ltd. MWANZA VS. JUSTA B. KYARUZI LAB. REV. NO. 207/2008** where the Court held that the applicant was entitled as per R. 13 of the Code i.e G.N. 42/2007; that it was employers duty to observe the code. In this case, the arbitrator found that she was not availed with the assistance to get a Representative. I find that Arbitrator's finding was correct and in accordance with the Law. That termination was procedurally unfair.

Now turning back to the issue of Remedies. Whether the 4 months salary compensation was in accordance with the law; after finding that the termination was procedurally unfair?

I wish to state at the outset that Mr. Nchimbi submitted of reinstatement; he prayed for reinstatement with all entitlement. I on this point, agree with Mr. Adelard that this is a new issue which was never stated in their application nor in the applicant affidavit. I therefore drop it out right.

Another thing, which ought not to waste our precious time is the citation of S.40 (II) (c) by the arbitrator. As conceded by one of the counsels, it is a typing error; as the proper law is S.40(1)(c); and the Court can take judicial notice of it as it's S.40(1) (c) which provides for a compensation of not less than 12 (twelve) months remuneration. S.40(1) (C) provides that:-

“ If an arbitration or Labour Court finds a termination is un fair the arbitrator or Court may order the employer to pay compensation to the employee of **not less than twelve months' remuneration.**”

Therefore as the law is once the arbitrator decided that the applicant ought to be paid compensation for unlawful termination, then, he was mandatorily required to order a compensation of **not less than 12 months remuneration.**

Having discussed as I did, and for the foregoing reasons, I find that the arbitrator's award was improperly procured for the reasons explained above. The irregularity is, as indicated, on the compensation. I therefore rectify and Revise the award to the extent that the

Date: 18/3/2011

Coram: Hon. S.C. Mushi, J

Applicant: Edna Robert - Present

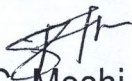
For Applicant: Anifa Kapinga – TUICO Legal Officer

Respondent: -

For Respondent:-Mr. Alerdald Advocate - Present

CC. J. Kalolo

Court: Delivered on this 18/3/2011


S.C. Mushi
JUDGE
18/03/2011

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