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CASE LAW

DIGEST VOL 1

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AGNESS B. RUHERE V. UTT MICRO FINANCE PLC, HIGH COURT, LABOUR DIVISION, DAR ES SALAAM (2017)

Termination of a probationary employee -probational period - unfair labour practice relating to probation - substantive and procedural fairness -purpose of probation - negative employment reference check.

- An employee who is under probational period when terminated cannot sue or file a dispute for unfair termination.
- Termination of a probationary employee without following the legal requirements amounts to an unfair labour practice.
- A probationalemployee whose employment has been terminated can sue or file a dispute for an unfair labour practice relating (or concerning) to probation.
- Entitlements of a probational employee.
- Before terminating or resorting to termination of the probationer or extending the probationary period, the employer must invite the probationer to make representations and consider them. Such representation may also be made on behalf of the probationer by a trade union representative or co-employee.

- Substantive and procedural fairness in the termination of a probationary employee.
- Tanzanian labour laws are more or less in *parimateria* with the labour laws of South Africa.
- Definition of unfair labour practice.
- The purpose of probation is to put the employer in a position to take aninformed decision about the capacity and suitability of an employee to do a certain job.
- Termination of a probational employee on the basis of information that the employee was terminated by the previous employer for gross misconduct.
- Probational employee who was terminated as a result of unfair labour practice was awarded compensation of twelve months salaries.

AIRTEL TANZANIA LIMITED V. EARL MATTHYSEN, HIGH COURT OF TANZANIA, LABOUR DIVISION (2017).

Non-citation of enabling provisions - non-citation of sub-paragraphs - application for extension of time - non-endorsement of documents - firms and partnerships cannot practice as advocates.

- Non-citation of enabling provisions of the law.
- Non-citation of sub-paragraphs.
- An application, before the Labour Court, for an extension of time which does not cite sub-paragraphs (a), (b), (c) and (d) to Rule 24 (3) of the Labour Court Rules is defective.
- Non-endorsement of documents
- Firms and partnerships cannot practice as advocates, legally sign and or file any pleading in Court.
- Sections 2, 6 and 8 of the Advocates Act.
- *RamadhaniSoodBalenga v. Hans AingayaMacha; James Charles LubwaVs Gold Star Paints(T) Limited* followed.

CONSOLATA & 2 OTHERS V. MANSOOR DAYA AND CHEMICAL CO. LIMITED, HIGH COURT OF TANZANIA, LABOUR DIVISION (2017)

Procedural fairness guidelines - non-compliance with procedural fairness guidelines -mechanical checklist approach.

- The procedural fairness guidelines under Rule 13 (1) - (13) of the Code of Good Practice GN. No. 42 of 2007 are more or less in parimateria with the guidelines of the Code of Good Practice of South Africa where our labour law is heavily borrowed from.
- Non-compliance with one or more of the procedural fairness guidelines will not necessarily render a dismissal procedurally unfair. It will be procedurally unfair only if, on balance, an employee is not given a fair opportunity to state a case in response to the factual allegations against him or her. (*Mutual Construction Co.TVL (Pty) Ltd. V. Nombela [2010] 5 BLLR 513 [LAC] followed.*)
- Procedural fairness guidelines should not be applied in what is called "a mechanical check list approach" that every guideline should be complied with the employer.

EDEN MAEDA V. HOTEL AND LODGES (T) LTD, HIGH COURT OF TANZANIA, LABOUR DIVISION (2017).

An employment contract of an indefinite period - absenteeism from work for two days - reasonable time to prepare for hearing and respond to any allegations from the employer - termination of employment by the disciplinary hearing committee - compensation for unfair termination - 12 months salaries -

- An employment contract of an indefinite period cannot be terminated without fault.
- Absenteeism - procurement officer was absent from work for two days on grounds that he travelled to perform a task which he was not assigned to do - the reason is unacceptable.
- Absenteeism from work for two days does not justify termination.
- It is a command of the law that employees be availed with reasonable time to prepare for the hearing and respond to any allegations from employer, and reasonable time is termed to be not less than 48 hours.
- Employer was given a letter of allegations against him and was ordered to respond on the same day - it was held that the employer was not availed with reasonable time to respond.

- Termination letter was signed by a member of the disciplinary committee (human resource director)-wrong.
- The role of the disciplinary hearing committee is to hear and find the employee guilty/not guilty and recommend the best penalty to the higher authority to make decision.
- An issue which was not raised before the Commission for Mediation and Arbitration cannot be raised during the revision stage.
- Chairman of the disciplinary hearing committee should not have been involved in the circumstances giving rise to the case.
- Compensation for unfair termination - compensation of not less than 12 months salaries, one month's salary leave, one month's salary in lieu of notice, severance pay and clean certificate of service.

EDWIN NTUNDU V. PLAN INTERNATIONAL TANZANIA, HIGH COURT, LABOUR DIVISION (2014).

Unfair termination - compensation - section 40 of the Employment and Labour Relations Act - twelve months remuneration.

- Once the termination of employment is adjudged unfair, the arbitrator may award remedies to the affected employees as prescribed by the law in section 40 of the Employment and Labour Relations Act.
- The law provides for an award of not less than twelve months remuneration upon unfair termination.

MUSSA JAMES MNYETI V. REGISTERED TRUSTEES OF TRADE UNION AND OTHERS, HIGH COURT, LABOUR DIVISION, DAR ES SALAAM (2017).

Defects in a chamber summons - omission by court registry - right of a member to challenge a federation or organisation which does not comply with its Constitution.

- Chamber summons lack name of Judge and date - the applicant cannot be penalized since the omission was occasioned by the Court registry.

- Employment and labour relations - re-course to the Court of law against the Federation or the Registered Organization which acts against the Constitution - right of a member to challenge the federation and/or registered organisation in court upon failure to comply with its Constitution - section 53 of the Employment and Labour Relations Act.

NATIONAL MICROFINANCE BANK V. NEEMA AKEYO, HIGH COURT, LABOUR DIVISION, ARUSHA (2017).

Absenteeism from work - discrimination in the work place on ground of religion - insubordination - investigation - disciplinary hearing conducted without justification - an award of 36 months salaries for unfair termination.

- Employee was terminated because she went to worship on Saturday only during worship time - allegations of absenteeism but no attendance list was brought to establish that the respondent was not in the work place - unfair termination.
- Definition of discrimination.
- Insubordination - termination letter mentions insubordination but employer did not prove the offence.
- Procedure for termination of employment - failure to conduct investigation prior to disciplinary hearing - disciplinary hearing conducted without any justification.
- In a literal meaning of Section 40(1)(c) of the Employment and Labour Relations Act, the arbitrator has powers to grant more than 12 months salary compensation.
- Employee was awarded 36 months compensation since she was terminated as a result of discrimination on ground of religion.

SAFARI MAKERS LTD V. MOSSES MZIRAY, HIGH COURT, LABOUR DIVISION, ARUSHA (2017).

Clerical mistake - clerical error -constructive termination - making employment intolerable -onus to prove constructive termination - imperative questions for determining constructive termination.

- Correction of a clerical mistake or error – arbitrator cited a wrong year of enactment of a statute in an award – the error is curable and will not cause the award to be revised by the Labour Court.
- Constructive termination - imperative questions for determining constructive termination.
- Constructive termination – the onus to prove constructive termination rests on the employee to prove that resignation was not voluntary and that it was not intended to terminate the employment relationship.
- Employee resigned because, allegedly, he was insulted by the director – that does not make the employment intolerable, hence no constructive termination.

STANLEY NYAKUNGA AND FOUR OTHERS V. MOFED TANZANIA LTD, HIGH COURT, LABOUR DIVISION, (2017).

Wrong citation of the law section, sub-section and/or paragraphs or non-citation – enabling provision for revision before the Labour Court – ass and scare crow of the law.

- Non-citation of a subsection or subparagraph of the enabling provision is tantamount to non-citation
- Revision before the Labour Court - non-citation of sub-paragraphs to Rule 24(2) and (3) of the Labour Court Rules is fatal.
- wrong citation of the law section, sub-section and/or paragraphs or non-citation is fatal.
- Ass and scare crow of the law.

TANZANIA REVENUE AUTHORITY V. GODFREY KAJETANI DIMOSO, HIGH COURT, LABOUR DIVISION (2016).

Arbitrator's powers to grant relief not prayed for – CMA form No. 1, poor work performance – misconduct – unfair termination – right to work – disclosure of reason for termination in the termination letter – denial of right to appeal against decision of the disciplinary hearing.

- The arbitrator has powers to grant a prayer which has not been prayed for in CMA form No. 1, after making a finding of unfair termination regard being had to Rule 32(1), (2) and (5) of the Labour Institutions (Mediation and Arbitration Guideline) Rules.
- CMA form NO. 1 acts as a guide and cannot be taken as sacrosanct form.
- CMA form No. 1 cannot be compared to a plaint in normal civil cases.
- A recommending officer was terminated for poor work performance and misconduct for the recommendations he made while those recommendations were subject to approval by the approving officer - that amounted to unfair termination.
- Termination letter does not disclose reason or termination - amounts to an unfair labour practice.
- Right to work.
- Denial of right to appeal against decision of the disciplinary hearing - denial of the employee's right to appeal to the higher authority against his employment termination pollutes and "chills" the whole process of termination.

WALLAFRID ANTHONY MGINA V. GRUMETI RESERVES LIMITED, HIGH COURT, LABOUR DIVISION (2017).

Gross violation of company procurement procedure due to working under pressure - definition of dishonesty - chairperson of the disciplinary hearing - senior manager from a different office - compensation of not less than twelve months.

- Gross violation of company procurement procedure leading to financial loss is a valid reason for termination - employee admitted to have violated the procedure, so whether or not the company had procurement procedure and policy is immaterial.
- Employee's excuse that she violated the procurement procedure because of work pressure is not justifiable.
- Definition of dishonesty.

- Complaint that the disciplinary hearing was improperly constituted since the chairperson of the disciplinary hearing, who was coming from a different office, was a private advocate and was not a senior manager in his office - the complaint was rejected because it was not backed up by evidence indicating qualifications and position of the chairperson.
- The arbitrator found that termination of employment was unfair but awarded compensation of 3 months salaries - the labour court held that the arbitrator was wrong because the law specifically demands that the compensation should be of not less than 12 months.

WALK WATER TECHNOLOGIES V. RECHO CHARLES, HIGH COURT, LABOUR DIVISION (2017).

Fair reason for retrenchment - alternatives to retrenchment - fair procedure for retrenchment - consultation before retrenchment.

- Meaning of fair reason for retrenchment.
- Failure of the employer to consider alternatives to retrenchment.
- Retrenchment - employer failed to prove that retrenchment was properly and genuinely justified.
- Employer violated the fair procedure for retrenchment.
- Meaning of consultation prior to retrenchment.
- Consultation has to be as early as possible - consultation process must commence as soon as possible as the employer contemplates a reduction or retrenchment.
- Tanzanians labour laws are heavily borrowed from South Africa.

WILSON CHACHA V. MENEJA MKUU DAWASCO, HIGH COURT, LABOUR DIVISION (2017).

Right to be heard - audialterampartem - powers of deputy registrar to overrule decision of deputy registrar - faulting registrar's decision.

- Right to be heard on issues which the court raises *suomotu* - *audialterampartem* - natural justice.

- The Deputy Registrar of the Labour Court cannot overrule the decision of a fellow Deputy Registrar.
- The faulting of the Registrar's decision is the domain of the domain of the High Court Labour Division.

TANZANIA BUREAU OF STANDARDS V. ANITA KAVEVO MARO, HIGH COURT, LABOUR DIVISION, 2017.

Exclusive jurisdiction of the Commission for Mediation and Arbitration and the Labour Court - exhaustion of local remedies in employment and labour disputes - evaluation and assessment of the employees performance - performance appraisal - probation of a senior employee - confirmation of a probationary employee - procedure for termination of a probationary employee - unfair labour practice - entitlements of a probationary employee - unfair work performance review - general damages for suffering and illness caused by unfair labour practice and unfair work performance review.

- Tanzanian labour laws are heavily borrowed from South Africa.
- Only the CMA and the Labour Court has jurisdiction to determine labour matters, questions or issues arising from such disputes, like of unfair labour practices. This right and exclusive jurisdiction cannot be taken away easily by simple allegations that the employee has not exhausted local remedies or non-confirmation and related matters.
- Requirements for evaluation and assessment of the employees performance.
- Guidelines for handling probationary employees - Rules 10(5), (6), (7), (8), and (9).
- Probationary employee was not informed about employer's concerns on her performance until after two years and eight months - employee was not given an opportunity to respond to those concerns.
- Employers have a duty to be fair even to senior managers who are under probation and able to judge themselves whether they are meeting the standards set by the employer.
- Confirmation of a probationary employee has to be at least two months towards the end of the probation period.

- A probationary employee is not required to submit his/her tangible achievements for assessment by the employer.
- Termination of a probationary employee without due regard to procedure and guideline amounts to unfair labour practice.
- Meaning of unfair labour practice.
- Entitlements of a probationary employee.
- Employer terminated a probationary employee without inviting the probationer to make representations - the representations may be made on behalf of the probationer by the employer.
- Employer, top official, suffered stress and illness due to an unfair work performance review and unfair labour practice regarding probation - testimonies of two doctors confirmed that - awarded general damages in the sum of TShs. 100,000,000/-.

TANZANIA UNION OF INDUSTRY AND COMMERCIAL WORKERS V. KILOMBERO SUGAR COMPANY AND OTHERS, HIGH COURT, LABOUR DIVISION (2017)

Jurisdiction - complaint arose in Morogoro but was filed in Dar es Salaam without leave of Court - the complaint should be filed in Morogoro where it arose.

TLL PRINTING AND PACKAGING LIMITED V. MELKIORI STANLAUS, HIGH COURT, LABOUR DIVISION (2017).

Revision before the labour court - Respondent failed to file written submission without an excuse - court entered default judgment against respondent.

WORLD VISION TANZANIA V. RACHEL LAIRUMBE & 13 OTHERS, HIGH COURT LABOUR DIVISION, 2017.

Award issued after expiration of 30 days - using retrenchment as pretext for termination - discretion - compensation for retrenchment.

- An award of the Commission for Mediation and Arbitration issued after expiry of 30 days contrary to Section 88(9) of the Employment and Labour Relations Act (ELRA) is not fatal.

- Some unscrupulous employers are using retrenchment as pretext for termination.
- Discretion should be exercised judiciously.
- Arbitrator found that retrenchment was for valid reasons and awarded employees compensation of 4 months' salary - wrong. That award is not provided for under the relevant labour laws or parties' agreements.