Unfair Termination and Conundrum surrounding the Remedy of Compensation in Tanzania

Shaibu M. Pastory[1]

Abstract

Once an arbitrator or the court finds that an employee was unfairly terminated, they are empowered to order the employer to reinstate, re-engage or pay compensation to the dismissed employee. In terms of section 40(3) of employment and Labour Relations Act (Act No. 6 of 2004) as hereinafter referred as ELRA, it states that "Where an order of reinstatement or re-engagement is made by an arbitrator or court and the employer decides not to reinstate or reengage the employee, the employer shall pay compensation of twelve months wages in addition to wages due and other benefits from the date of unfair termination to the date of final payment." Therefore, this section is to the effect that, where the court or an arbitrator may order the employer to reinstate or re-engage the employee whose dismissal was substantively unfair; but the arbitrator's or court's order is at the whims of the employer to decide whether or not to compensate or re-engage the wrongfully terminated employee. This article examines the extent to which the aforementioned provision infringes the fundamental right to work and receive remuneration to the employee. Firstly, it discusses the concept of unfair termination, followed by qualifying period of protection against unfair termination. This article also examines the ILO standards on unfair termination, more interestingly this study analyses the legislative framework concerning Unfair Termination in Tanzania. In the main this article focuses on the remedies of unfair termination particularly compensation as a remedy by reviewing a number of cases where the courts in Tanzania found termination were substantively unfair and order reinstatement or reengagement but the decision was rested to employer to decide. Finally conclusion was made before suggesting the ways forward.

Keywords: Unfair Termination, Statutory Remedies, Reinstatement, Re-engagement, Compensation.

Introduction

Unfair termination of employment refers to the process of dismissing employee in the absence of a substantial reason. It is the removing of someone

[1] The author is a Tutorial Assistant in Law at Mzumbe University (Main Campus), Tanzania and former Tutorial Assistant in Law at Eckernforde Tanga University, Tanzania. His email address is shaibukandoro06@gmail.com

from a work for reasons which are not legally accepted. Unfair dismissal normally cannot be valid in the grounds where an employee is dismissed for genuine redundancy, incapability, or misconduct and more importantly when the procedures prescribed by the laws are not adhered to.[2]

A termination of employment by an employer is unfair if the employer fails to prove that the reason for termination is valid; that the reason is a fair reason, related to the employee's conduct capacity or compatibility or based on the operational requirements of the employer, and that the employment was terminated in accordance with a fair procedure.[3] Unfair termination has also been defined in *Abubakar Haji Yakubu v Air Tanzania Co. Ltd*,[4] in this case, Rweyemamu, J. when considering unfair termination said '…refers to termination for an invalid reason and or using improper procedure as enumerated under section 37(2) of the Act'.[5]

Protection against unfair Termination of Employment

Before go into details as what constitutes unfair termination of employment, it is of a great importance to understand the position of the law on who may claim for unfair termination of employment both under ILO standards, ELRA and the Code of Good Practice Rules, 2007.

To start with, the International Labour Organisation (ILO) recommendation accepted that certain categories of work could legitimately be excluded from protection against unfair dismissal, such as those taken on for a specified rather than indefinitely, those on probation and those employed on a causal or temporary basis.[6] The same vein has been well stated under the ERLA whereby, only employees who have the right to claim unfair dismissal and they must have completed a minimum qualifying period of continuous employment which presently stands at one year.[7] For this reason an employee who has worked for less than six months cannot successfully claim for unfair

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2 Alexander S Madinda, 'Unfair Termination of Employment at Workplaces: The Case of Tanzania' (2014) 1(5) International journal of Emerging Trends in Science and Technology 764-82.

3 The Employment and Labour Relations Act No. 6 of 2004 (Tanzania), s 37(2).

4 Lab. Div., DSM, Rev. No162 of 2011, 24/10/2012.

5 The Employment and Labour Relations Act No. 6 of 2004 (Tanzania).

6 Gwyneth Pitt, *Employment Law* (6th Edition), Sweet & Maxwell, 2007, p. 227.

7 Section 35 of the ELRA which *inter alia* states that **'**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'. Also Rule 10(4) of the Employment and Labour Relation Act (Code of Good Practice), Rules of 2007, which *inter-alia* provides that 'the period of probation should be of a reasonable length of not more than twelve months, having regard to factors such as the nature of the job, the standard required, the custom and practice in the sector'. Further sub rule 5 of the same Code states that 'An employer may after consultation of with the employee, extend the probationary period further reasonable period if the employer has not yet being able to properly assess whether the employee is competent to do the job or suitable for employment'.

termination of employment as was in *Stella Temu v Tanzania Revanue Authority*,[8] the Court of Appeal held that:

> There was no right of hearing since there was no termination but rather non-confirmation……..that probation is a practical interview and reason is not given where one has failed in the interview.

The same view was taken by court in *Agness B. Ruhere v UTT Micro Finance Plc*,[9] under this case the court had this to comment, "An employee who is under probation period when terminated cannot sue or file a dispute for unfair termination, the court further stated Termination of probation employee without fallowing the legal requirements amounts to unfair labour practice".

ILO Standards on Unfair Termination

International Labour Organisation in its efforts to set standards of practice in the work place particularly relating to security of employment fashioned out recommendations concerning termination of employment and Convention on Termination of Employment.[10] The organization was influenced in its decision to fashion out the above recommendation and convention as a panacea to the ugly situation where an employer can dismiss his employee without any reason or motive. Such a situation is described as a violation of all things fair and just.[11] It is also said that such a situation amounts to violation of Article 4 of ILO Convention,[12] which provides that:

> 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 operational requirements of undertaking, establishment or service.

The thrust of the Convention is to ensure both substantive and procedural fairness before dismissal or termination of employment at the will of the employer. Thus, the employer is required to give a valid reason for the dismissal. A reason is valid if it is connected with the capacity or conduct of the employee. Such reasons that are connected with the capacity or conduct of the employee are reasons such as gross misconduct, incompetence, disobedience, negligence and such reasons that may be deemed to be

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8 (2005) TLR 178 at 189.

9 HC Labour Division at Dar-es-Salaam 2017.

10 Pitt (n 6) 312.

11 Emmanuel OC Obidimma, MI Anushiem and UMJ Ekeneme, 'Unfair dismissal in Nigeria: Imperative for a departure from the common law' (2016) 7 Nnamdi Azikiwe University Journal of International Law and Jurisprudence 136.

12 ibid 147.

connected with the operational requirements of an undertaking, establishment or [13] service such as transfer of undertaking.[14]

This makes it clear that the ILO only recognises three broad categories of permissible grounds upon which the employee's services may be terminated those related to misconduct, incapacity, or the employer's operational requirements. It is also clear that the termination must be based on a valid reason which can be classified within one of these categories. It is submitted that the degree or severity of a particular behaviour can play a role in determining whether the behaviour can be categorised as a valid reason for dismissal.[15]

More importantly, Article 5 of Convention C158 states that, a number of reasons shall not constitute valid grounds for termination. Included in the list are union membership; acting in the capacity of a workers' representative, race, colour, sex, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin, and absence from work during maternity leave.[16] Worth to note that labour laws in Tanzania have comprehensively covered the standards articulated under the Convention on Termination of Employment, the standards are covered under both the Employment and Labour Relation Act as well as under the Code of Good Practice.

Legislative Framework concerning Unfair Termination in Tanzania

As it stands in the above position of ILO, in Tanzania the legislative intent seems very clear under section 37(2) ELRA,[17] plainly envisage giving effect to the Article 4 of the Convention that:

> A termination of employment by an employer is unfair if the employer fails to prove that the reason for the termination is valid; that the reason is a fair reason, related to the employee's conduct, capacity or compatibility or based

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13 P Smit and BPS van Eck, 'International perspectives on South Africa's unfair dismissal law' (2010) 43(1) The Comparative and International Law Journal of Southern Africa 49.

14 ibid.

15 ibid.

16 ibid. The position under Article 5 of Convention C158 is quite similar to section 37(3)(a) (i) to (v) of ERLA, which inter-alia provides that "It shall not be a fair reason to terminate the employment of an employee for the reason that- discloses information that the employee is entitled or required to disclose to another person under this Act or any other law; fails or refuses to do anything that an employer may not lawfully permit or require the employee to do; exercises any right conferred by agreement, this Act or any other law; belongs, or belonged, to any trade union; or participates in the lawful activities of a trade union, including a lawful strike; (b) for reasons- related to pregnancy; related to disability, and that constitute discrimination under this Act."

17 Act No 6 of 2004.

> on the operational requirements of the employer, and that the employment was terminated in accordance with a fair procedure.[18]

It is evident that decided cases signalled a clear intention of the legislature in protecting the employees from unfair practices done by the employers. Thus the courts have been very instrumental in construing the provisions with respect to unfair termination. The spirit of the courts can be well evidenced in the case of *Naftal Nyangi Nyakibari v Board of Trustees – NSSF*,[19] the background of the dispute in brief is that the applicant (Naftal Nyange Nyakibari) was employed by the applicant, (Board of Trustees-NSSF) on 1st April, 1999 as a compliance clerk. On 3/3/2009 while the applicant was at Benefit Section received a letter from his superior which informed him to have been shifted from Benefit Section to Data Entry Section. On the same date, 3/3/2009 the applicant wrote a letter to the Director General of the respondent complaining of his transfer. He was charged of failure to comply with the instructions from his superior. The disciplinary hearing was conducted and at the end the respondent decided to terminate the applicant's employment effectively from 17th December, 2009 for misconduct contrary to NSSF Staff Regulations. The CMA found that the applicant's termination was fair both substantively and procedurally. Being dissatisfied with the CMA award the applicant knocked the doors of the High Court Labour Division, hence this application for revision:

> It is the established principle that for the termination of employment to be considered fair it should be based on valid reason and fair procedure. In other words there must be substantive fairness and procedural fairness of termination of employment, See Section 37 (2) of the Act. 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. This is also the position of the International Labour Organization Convention (ILO) 158 of 1982, Article 4.

From the above cited case, clearly has shown that as matter of law, the termination of employment for it to be valid needs to substantively fair in that the reasons for termination either be for misconduct, incapacity or operational requirements.

A similar line of thought was well articulated by labour court in *Tanzania Revenue Authority v Andrew Mapunda*,[20] the background of the dispute in brief is that the respondent (Andrew Mapunda) was employed by the applicant, Tanzania Revenue Authority (TRA) on 22nd May, 2002 as an Assistant Custom Officer on permanent employment terms. The respondent was terminated from employment on 10/5/2012 for misconduct based on

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18 ibid

19 Lab. Div., MZA, Revision No. 12 of 2014, 20/03/15.

20 Lab. Div. DSM, Revision No. 104 of 2014, 09/01/15.

fraudulent clearing of goods contrary to Schedule 2 (19) of TRA Staff Regulation of 2009 and demonstrating behavior contrary to schedule 2 (24) of the TRA Staff Regulation of 2009. Aggrieved by such decision, the respondent referred his complaint to the CMA on 11/6/2012. The CMA determined the complaint which revolved around unfair termination of employment in both substantive and procedural fairness. The CMA found that the applicant's termination was unfair both substantively and procedurally in that the reason was not valid and even procedurally not adhered too. Being dissatisfied with the CMA award the applicant knocked the doors of this court, hence this application for Revision:

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

In the same vein of a case the court when construing an aforementioned section in reflection with the ILO spirit, went on saying that:

> 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. This is also the position of the International Labour Organization Convention (ILO) 158 of 1982, Article 4. In that spirit employers are required to examine the concept of unfair termination on the basis of employee's conduct, capacity, compatibility and operational requirement before terminating employment of their employees.[21]

It is trite law that, for the termination of employment to be justifiable the procedural fairness is one of paramount consideration in that for the complaint which revolve around unfair termination to stand such a termination should be both substantively and procedurally unfair Also Article 7 of the Convention,[22] provide for the fair procedure before the termination of an employee, the article provides:

> The employment of a worker shall not be terminated for reasons related to the worker's conduct or performance before he is provided an opportunity to defend himself against the allegations made, unless the employer cannot reasonably be expected to provide this opportunity.

As it appears in the above position under ILO, correspondingly in *Stamili M. Emmanuel v Omega Nitro (T) Ltd*,[23] Aboud, J. took the same view and he had this to comment:

> It is the established principle that for the termination of employment to be considered fair it should be based on valid reason and fair procedure. In other

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21 Lab. Div. DSM, Revision No. 104 of 2014, 09/01/15.

22 Termination of Employment Convention (ILO) C158 of 1984

23 Lab. Div., DSM, Revision No. 213 of 2014, 10/04/2015.

> words there must be substantive fairness and procedural fairness of termination of employment, See Section 37 (2) of the Employment and Labour Relations Act, No. 6 of 2004.

He then went on to add that:

> On the issue as to whether the procedures for termination of employment was followed fairly, the law under Section 37 (2) (c) of the Act provides that a termination of employment by an employer is unfair if the employer fails to prove that the employment was terminated in accordance with a fair procedure. See also Article 7 of the Termination of Employment Convention (ILO) No. 158 of 1984.

Remedies for Unfair Termination in Tanzania

According to the ELRA, once a court or arbitrator finds that an employee has been unfairly terminated from employment, the Labour Court or arbitrator is empowered to order the employer to reinstate the employee,[24] or to re-engage the dismissed employee,[25] or to pay the dismissed employee compensation.[26]

Reinstatement

The term reinstatement it refers to an order that employer shall treat the complainant in all respects as if he had not been dismissed and must include benefits payable in respect of the period since dismissed and the rights and privileges must include seniority and pensions. This remedy was designed to be a primary remedy for unfair termination, an order akin to the specific performance which the common law refuses to grant.[27]

The employee may also be given the old job but without the rights which he used to enjoy in the old job. The attitude of the Labour court is that, if it finds that the employee has been unfairly terminated, the employee may be reinstated from a date not earlier than the date of dismissal. Reinstatement on its ordinary meaning suggests that the period of service between dismissal and resumptions of service is deemed unbroken. It has been observed that in practice and vast of majority cases, unfairly dismissed employees who returned to work are granted reinstatement. The term reinstatement also suggests an order that may not be conditional or coupled with any qualification, other than something less than full retrospectively.[28]

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24 ELRA, s 40(1)(a).

25 ibid s 40(1)(b).

26 ibid s 40(1)(c).

27 John Bowers, *A Practical Approach to Employment Law* (7th edn, Oxford University Press 2005) 391.

28 Kanego Ndobela and Kola O. Odeku, 'Revisiting the Remedies of Unfair Dismissal at the Workplace' (2015) 6(4) J Sociology Soc Anth 517- 524.

A finding that a termination is unfair is a conditional precedent for ordering a remedy. In this regard South African court when interpreted section 193 of LRA in *De Beers Consolidated Mines Ltd v CCMA and Others*,[29] where the court had the following opinions:

> The onus is on the employer to prove the fact upon which it relies for the dismissal. If the facts upon which the employer relies are not proven at the end of arbitration proceedings, then *cadit quaestio*, the employer has failed to prove the fairness of the dismissal. On the other hand if the employer does prove the fact upon which it relies, then the arbitrator must make a determination as to whether or not the dismissal is unfair and only if the arbitrator is so satisfied may he or she order reinstatement. The arbitrator is not at large to substitute what he or she considers being fair sanction in the circumstances. This intention of legislature is plain from a reading of section 193 as a whole. Moreover, an opinion that finds a particular decision unfair or not is quantitatively different from one concerned with whether it is fair or not. One hardly need to be a master of language to understand that to find that something is not unfair is not the same as finding it if fair.

The ELRA is silent on what constitute reinstatement, but reinstatement it means the restoration of the employment contract so as to ensure continuity of the employment relationship. An employee who has been unfairly terminated can only be reinstated if he or she is willing to avail him or herself to the employer. Reinstatement is interpreted to mean placing an employee back in service on the same or similar terms and conditions of employment enjoyed as if that the dismissal had never taken place.[30] Since reinstatement restores the *status quo* it may not be conditional or coupled by qualification which is contrary to full retrospectively. Where an employer is ordered to reinstate an employee, it does not bar the employer from changing the working arrangements of the reinstated employee in accordance with its contractual rights.[31]

The labour tribunal has considerable discretion about making such orders and there are tests of practicability and justice. The labour tribunal will take into account the complainant wishes and whether it is practicable for the employer to comply for an order of reinstatement. It will also take into account whether such an order would be just in the circumstances where the employee contributed toward the dismissal.[32]

The position can be well stated in *Lucy Kessy v National Microfinance Bank Plc Ltd*.[33] The background of the dispute in brief is that the applicant (Lucy

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29 (2000) 9 BLLR, 995(LCA) at 1007.

30 Jean Chrysostome Kanamugire and Terence Vincent Chimuka, 'Reinstatement in South African Labour Law' (2014) 5(9) Mediterranean Journal of Social Sciences 257-310.

31 ibid 280.

32 Malcolm Sargeant and David Lewis, *Employment Law* (Pearson Education Limited 2008) 160.

33 DSM. Revision No. 123 of 2015, 30/10/15.

Kessy) was employed by the respondent, NMB in 11/11/1990 as a Clerk II. The applicant was terminated from employment for gross misconduct based on first, failure to attend at work several times without permission from the employer and secondly, disobedience of her superior orders. Aggrieved by such decision applicant referred her complaint of unfair termination at the CMA. The CMA indeed determined the complaint which revolved around unfair termination of the employment in both substantive and procedural. The CMA found the applicant termination was fair both substantively and procedurally. Being dissatisfied with the CMA award the applicant knocked the doors of this court, hence this application for revision:

> In the result, I find that the Arbitrator incorrectly found that the termination of the respondents were substantively fair. I find the applicant's termination was substantively unfair and procedurally fair. Section 40 of the Act provides clearly the remedy once the termination of employment adjudged unfair among others order for reinstatement, re-engagement or compensation and other entitlements… In that regard I order the applicant be reinstated according to Section 40 (1) (a) of the Act without loss of remuneration from the date of termination to the date of reinstatement.

Re-engagement

The High Court Labour Division or court if it finds that an employee has been unfairly dismisses, the employee may be reinstated from a date not earlier than the date of dismissal or the court may order the employer to re-employ the employee back to the position occupied at the time of his or her dismissal or any other reasonably suitable work on any terms and from any date not earlier the date of dismissal. Re-employment means that the employment contract ended at the date of dismissal and resumed on the date of re-employment, re-employment is usually offered as alternative to dismissal to cater for forms of dismissal in which the employment relationship had terminated before the dismissal that is, where the employee was a victim of selective non-re-employment or where the employer refused to renew a seasonal contract.[34]

The term re-engagement was defined by this court in *Michael Kirobe Mwita's v AAA Drilling Manager*,[35] as follows:

> Re-engagement means that a new relationship had begun; this relationship of employment may be different from the old one. The employee may also be given the old job but without the rights which he used to enjoy in the old job.

If an employment tribunal finds that the employee has been unfairly dismissed, it shall explain to him that it has the power to make an order that may be reinstated or re-engaged, and shall ask him if he wishes the tribunal to make such an order. If he expresses such a wish the tribunal may make the

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34 Kanego Ndobela and Kola Odeku (n 28) 516.

35 Revision No. 194/ 2013, DSM

necessary order. The requirement for the tribunal to explain its powers to award reinstatement or reengagement is mandatory. However, if there is a failure to do so (and in practice many tribunals do so fail) this will not render any other award made nullity.[36]

Compensation

The position of compensation as remedy of unfair termination in South Africa, In South Africa the Constitution entrenches several fundamental rights concerning labour relations, the Constitutional rights to fair labour practices include the right not to be unfairly dismissed. Article 39(1) of South African Constitution,[37] requires the courts or arbitration tribunals to consider international law when interpreting the provisions of the Bill of Rights. The court have had recourse to the ILO, Termination of Employment Convention, 1982 (No.158), and Recommendation, 1982(No.166), when interpreting the right not to unfairly dismissed.[38]

The Constitutional right not to be unfairly dismissed is given effect to by South African Labour Relations Act, which under Chapter VIII provides a remedy for unfair dismissal.

Section 193 of the LRA determines: If the Labour Court or an arbitrator appointed in terms of this Act finds that a dismissal is unfair, the Court or the arbitrator may- order the employer to reinstate the employee from any date not earlier than the date of dismissal; order the employer to re-employ the employee, either in the work in which the employee was employed before the dismissal or in other reasonably suitable work on any terms and from any date not earlier than the date of dismissal; or order the employer to pay compensation to the employee.[39]

The Labour Court or the arbitrator must require the employer to reinstate or re-employ the employee unless, the employee does not wish to be reinstated or re-employed; the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable; it is not reasonably practicable for the employer to reinstate or re-employ the employee; or the dismissal is unfair only because the employer did not follow a fair procedure.[40] If a dismissal is found to have been unfair, unless the affected employee does not wish to continue working for that employer; the employment relationship had deteriorated to such a degree that continued employment is rendered intolerable; it is no longer reasonably practicable for

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36 Norman Selwyn, *Law of Employment* (13th edn, Lexis Nexis 2004) 424.

37 ibid 425.

38 Dhlamini, L, *Termination of Employment Legislation Digest* (ILO 2007) 1.

39 J Geldenhuys, 'The Reinstatement and Compensation Conundrum in South African Labour Law' (2016) 11(7) PER / PELJ 7-17.

40 ibid

the employee to return to the position that he or she had previously filled, or if the dismissal was found to have been procedurally unfair only. Compensation should, only in these instances be awarded. However, the failings of reinstatement as a primary remedy are evident from the scarcity of orders made to this effect. Awards for the payment of compensation are far more common, although this trend clearly contrasts with the policy considerations behind the enactment of the statutory remedies.[41]

The decision in *SBV Services (Pty) Ltd v CCMA*,[42] in attempts to bring more clarity regarding what the interpretation is that should be afforded to sections 193 and 194 of the LRA, in particular in the case of dismissals that are found to have been affected for an unacceptable reason (those that are substantively unfair).

"Even if the employee in the case did not wish to be reinstated, or in actual fact made no mistake when electing compensation, he would now be allowed to claim reinstatement with back-pay resulting in an order extending beyond the statutory compensation limits. The employee could then resign. Otherwise, the employee could return to work for the employer and to earn a salary, and if the working situation was - as he predicted - intolerable because of the serious allegations that had been made against him previously, he could even refer another dispute to the CCMA. It has long been accepted that employers are required to protect employees from physical and psychological harm. If an employee can prove that the employer had failed to take reasonable steps to prevent harm to his or her dignity, a claim based on constructive dismissal could ensue. Should this claim succeed, the cycle could continue."

The right to Work and Compensation as Remedy for Unfair Termination in Tanzania

The right to work has two aspects; first the right to work may entail a right against the state to maintain employment policies and to promote vocation training, so that unemployed can find suitable employment. Secondly, there is broad sense, regarding the right to work that represents the right of worker against a possible employer to be employed and to job security. Going by the wording to the right to work and the right to earn just remuneration in Article 22 and 23 of the Constitution, it is apparent that the said provision does not express a positive duty on the state to fulfil them.[43]

In contrast, South African Constitution as pointed above apart from providing for the right to work as it does the Constitution of the United Republic of

41 ibid 2.

42 2013, 34 ILJ 996.

43 Clement Mashamba, 'The Promotion of Basic Employee Rights in Tanzania' (2007) 7(4) African Human Rights Law Journal 476-485.

Tanzania under Article 22, Constitution of South Africa it goes further and explicitly provides for the right to an employee not to be unfairly dismissed from employment as per Article 29(1) of the Constitution.[44]

By plain interpretations of Articles 22 and 23 of the Constitution of the United Republic of Tanzania, it is apparent that the Constitution guarantees for the right to work and a right to receive remuneration equivalent to the work done. However the same constitution does not offer passable protection to employee against unfair termination as it does the South African Constitution for employee against unfair labour practice particularly unfair termination done the employer. In this regard the Constitution of the United Republic of Tanzania, it offers less or no protection at all to the employee against unfair termination of employment. It follows therefore that, having the right to work as a Constitution rights and without undue regard to the right not to be terminated unfairly is like the right is given in one hand and taken away by another hand.[45]

It has long been accepted that, in Tanzania despite the fact that the right to work it is Constitutional one, it is apparent that failure for our Constitution to entrench the right not to be unfairly terminated from employment it is of fatally important. This is evident that currently an employee may be terminated from employment by employer without undue regard of both substantive and procedural fairness, but the option will still be at the disposal whether to compensate the terminated employee or to see other available remedies aforementioned above. This is true even where a lawful order has made by the court or tribunal to reinstate or re-engage the employee still the law provides room for the employer to object the lawful order of court in Tanzania.

If an arbitrator or Labour Court finds a termination is unfair the arbitrator or Court may order the employer-to reinstate the employee from the date the employee was terminated without loss of remuneration during the period that the employee was absent from work due to the unfair termination; or to re-engage the employee on any terms that the arbitrator or Court may decide; or to pay compensation to the employee of not less than twelve months' remuneration.

"Where an order of reinstatement or re-engagement is made by an arbitrator or court and the employer decides not to reinstate or reengage the employee, the employer shall pay compensation of twelve months wages in addition to wages due and other benefits from the date of unfair termination to the date of final payment."

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44 ibid

45 Mashamba (n 43).

From the outset, a clear examination of case law before this one in question would demonstrate the judicial opinions have always been that compensation be a primary remedy where there the employer decides not to reinstate or re-engage the employee the employer shall pay compensation of twelve months wages *TTCL v Switbertus Rutahuga*,[46] The brief facts of this case were, the respondent was an employee of the applicant since 18/6/1983. He was terminated by the applicant in 2010. He referred the matter to CMA for unfair termination and claimed to be reinstated. The CMA decided in favour of the respondent and ordered the respondent to be reinstated to his position and payment of arrears of salaries from the date of termination to the date which he will return to work. The applicant then decided to file the present application.

> "Basing on the provision of the law, I am of the view that, if the applicant does not wish to reinstate the respondent as ordered by the arbitrator, the order which this court confirms, then they should opt the remedy provided under section 40 (3)."

Similar interpretation of section 40(3) has also been considered by the court in *Tarcis Kakwesigaho v North Mara Gold Mine Ltd*,[47] In short the facts of the case are that Applicant was employed by Respondent since 22/07/2005 in the position of Land Officer up to 16/03/2012 when his employment was terminated on ground of breach of organization rules and policy. The Applicant being dissatisfied with the decision by the Respondent filed labour dispute against employer's decision at the CMA. The labour dispute reference no. CMA/TRM/30/2012 was determined and the award was delivered on 10th April 2013. Applicant being aggrieved by award of the CMA has preferred this application for revision on grounds that it was wrongly procured.

> "There is no doubt that termination was substantively and procedurally unfair. The proper exercise of discretion to justify remedy is provided under Section 40(1)(c) of the Employment and Labour Relations Act No. 6 of 2004, where the Arbitrator or Labour Court finds termination is unfair the Arbitrator or Labour Court may order compensation to the employee of not less than twelve months' remuneration."

Additionally the court took the same spirit in *Azizi Ally Aidha Adam v Chai Bora Ltd*,[48] The background of this case was the ruling is pursuant to two applications for revision emanating from the CMA award which was procured by the Commission for Mediation and Arbitration (CMA) on 08/04/2011. Both parties applied for revision. Applicant's application was registered as Revision No. 5/2011; whereas the Respondent's application was registered as Revision No. 4.2011. The court consolidated the two Revision Applications;

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46 Lab. Div., DSM, Revision No. 2 of 2011, 12/7/13.

47 Lab. Div., MSM, Revision No. 6 of 2014, 16/03/15.

48 Lab. Div., IRNG, Rev. No. 4 of 2011, 16/11/2011.

hence one Revision application remains that is No. 4/2011. Where Moshi, J. said that:

> "Under law, substantive unfairness may attract a reinstatement order, and failure to obey such order attracts a mandatory payment of "compensation of twelve months wages" under S.40 (3) of the Employment and Labour Relations Act 6/2004 Act."

From the above pointed cases, it is evident that the Employment and Labour Relations Act, particularly section 40(3), it is clearly dispense with the right to work to an employee who has been unfairly terminated from his employment contract. This is true because the wording of that provision clearly reflects the legislative intent that the right to work in Tanzania be at a stake for unfair practices of the employer against an innocent employee. With due regard to the welfare of the employees in Tanzania, probably this is the most offending provision and more certainly it is as it clearly contravenes with the right to work of which is a basis for human survival and dully guaranteed by the Constitution of the United Republic of Tanzania under Article 22.

The right to work is very important to very survival of the individual human being and the society in general.[49] This fundamental right has well been articulated by late Justice Mwalusanya as he then was in *Augustine Masatu v Mwanza Textiles Ltd*,[50] where he had this to comment:

> The right to work is the important…right in the labour law of countries…Its ideological basis is the need and necessity of the working class. It aims of securing the possibility of continued employment. It is not an empty slogan but a survival for existence. For this right to exist in any real sense, it is necessary that the economic, political and legal orders of the society assure everybody who is capable of working of the possibility of participating in building of his society through work in accordance with his capacity and education and the right to earn an income proportional to the quantum of his work. And so job security is the hall-mark of the whole system.

As it stands provision of section 40 (3) of ELRA, apart from being contrary to the Constitution particularly to the right to work and the right to receive remuneration proportional to the work done, this provision it also goes contrary to Article 4 of International Labour Organisation and section 37(2) of ELRA of which they require termination of employment only based on valid reasons and fair procedure. It follows therefore that, it is not a legislative intent for the employer to terminate an employee from his employment at his own wishes or choices rather the termination should be such that based on both substantive and fair procedure. The motive behind Article of ILO and

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[49] Chris Maina Peter, *Human Rights in Tanzania: Selected Cases and Materials* (Rüdiger Köppe 1997) 169.

[50] High Court of Tanzania of Mwanza, Civil Case no 3 of 1986 (unreported).

Section 37(2) of ELRA, is well articulated in the case of *Tarcis Kakwesigaho v North Mara Gold Mine Ltd*,[51] where the judge said:

> It is the established principle that termination of employment is based on valid reasons and fair procedure, See Section 37 (2) of the Employment and Labour Relations Act, No. 6 of 2004. The law requires the employer to terminate an employee only with valid reasons and not at own choice. This position is also recognized by the International Instruments under the International Labour Organization Convention (ILO) 158 of 1984 under Article 4.

With the above spirits of ILO, ELRA, and the decision of a case, it is un disputed fact that, section 40(3) of ELRA, by giving the choice to the employer to decide whether to reinstatement, re-engage or to pay compensation to an innocent employee who may at times even be terminated for both substantively and procedurally unfair, this goes contrary to Article 4 of ILO Convention C185 and section, 37(2) of ELRA. Thus, it is clear that this is a loophole in labour law regime of which the richest employer may use it as a valve to terminate poor employees even where there is no a valid reasons for doing so.

Additionally, another turmoil which may be brought about by section 40 (3), of ELRLA, is that if we go by plain meaning of that provision, without a shadow of doubt it is as if the said provision empowers the employer stand above the law, this very true because the legislature intentionally vested the employer with a power to have an option on whether or not to enforce a legitimate order made by the competent court or labour tribunal. The aforementioned provision it gives discretion at the employer disposal to decide whether or not to reinstate, re-engage or to pay compensation the unfairly terminated employee. With this regard the provision of section 40(3) it is clearly ouster the courts' jurisdiction at the employer's disposal. Thus from reading of aforementioned section as a whole, it is clear that the said section does not assist in realization of the constitutional guarantee of a right to work, instead it complicates the situation and it renders the whole objectives of Employment and Labour Relations Act proved completely futile and illusory.

Conclusion

Reinstatement and re-engagement though as are primary remedies, is still a problematic in number of respects as show this article shown. There has been variety of contentious decisions over the years involving reinstatement and re-engagement as primary remedies for unfair termination, but what remains clear from the assessment done by this article is that, section 40(3) of Employment and Labour Relations Act, 2004, has been one of the stumbling

[51] Lab. Div., DSM, Revision No. 2 of 2011, 12/7/13.

block as it disposes the legitimate order of the court or tribunal at the employers whims to the detriment of innocent employees whose contract has been unfairly terminated by the employers. Plainly the wording of the said section it reveals a clear legislative intent that the life of innocent employees would at stake at all time in a working place, as it reads "*where an order of reinstatement or re-engagement is made by an arbitrator or court and the employer decides not to reinstate or reengage then employee, the employer shall pay compensation of twelve months wages in addition to wages due and other benefits from the date of unfair termination to the date of final payment*." Thus it is our considered opinion that, reinstatement and re-engagement be a paramount consideration for unfair dismissal or unfair labour practices as it ensures and maintains the right to work, the right to receive remuneration as well as job security. It follows therefore that, the remedy of compensation should only be limited when the employee does not wish to be reinstated or re-engaged back to work; or where the relationship between the two has been irreparably broken down and there is no possibility that two may again work together.

Recommendations

Although the legislative intent seems quite clear under section 40(3) of ERLA, to give a freedom of contract to the employer to terminate the employment contract without undue regard of law and procedure. In some instances as shown by majority of cases in this article employee have been prejudiced by unfair termination of an employer and yet employees ended being compensated because the employer does not wish to reinstate or re-engage the terminated employee. Thus, first and foremost, section 40(3) of ERLA, as the most offending provision to the employees and which paves the way for employers to terminated employment contract unfairly with impunity should be amended by the parliament. Secondly, the courts and tribunals in Tanzania are trying their best by meticulously applying the labour laws in a view to protect the right of employees against unfair termination, however, lack of Constitutional right in to fair labour practices particularly the right not to be unfairly dismissed as the case of South African under Article 39(1) it has also been as a stabling block, it follows therefore that there a need to entrench this fundamental right in the coming Constitution. Finally, statutory compensation remedy lacks clout and fails to provide sufficient protection to employees. This is true even if a maximum compensation is awarded , the employee could still not recover the loss that they actually suffered from resulting from unfair termination, thus the remedy of compensation should only be ordered in a limited circumstances unless the employee does not wish to be reinstated or re-employed; the circumstances surrounding the dismissal are such that a continued relationship would be intolerable; it is not reasonably practicable for the employer to reinstate or re-employ the employee; or the dismissal is unfair only because only the employer did not follow a fair procure.

REFERENCES

Legislations

- The Constitution of the United Republic of Tanzania of 1977, (as amended from time to time)
- Constitution of the Republic of South Africa, 1996.
- Termination of Employment Convention (ILO) C158 of 1984
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- Labour Relations Act 66 of 1995 (South Africa)
- The Employment and Labour Relation Act (Code of Good Practice), Rules of 2007.

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