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INSURBODINATION UNDER THE LABOUR LAWS: KNOW THE FACTS

The Employment and Labour Relations (Code of Good Practice) G.N. NO. 42 of 2007 under Rule 12 (2)(3)(f) pronounces insubordination as a serious misconduct, that makes a continued employment relationship intolerable.

The 10th Edition of Black's Law Dictionary, defines the term insubordination as a disregard of an employer's instructions, especially a behavior that gives the employer cause to terminate a worker's employment or, an act of disobedience to proper authority; especially a refusal to obey an order that a superior officer is authorized to give.

As a general rule, for insubordination to constitute a misconduct to justify dismissal of an employee, it has to be shown that, the employee deliberately refused to obey a reasonable and lawful order by the employer, as it was stated in the case of **Ntsibande vs. Union Carriage & Wagon Co. (PTY) Limited (1993) 14 ILJ 1566 (1).**

The same was evidenced in the case of **Poly Oak Packaging (PTY) Limited vs. Siquibo NO &Others (unreported) case No.236/2008, it was held that;**

> *as a general principle it may be stated that, the breach of rules laid down by an employer or the refusal to obey an employer's lawful and reasonable order, is to be viewed in a serious light and may in given circumstances even justify summary dismissal, however the presence of certain prerequisites is required. In the first place it should be evident that the order was given, in the second place the order must be lawful, and thirdly the reasonableness of an order should be beyond reproach and will be inquired into.*

Furthermore, in the case of **Vedastus S. Ntulanyenka & others vs. Mohamed Trans. Limited, Revision No. 4 of 2014,** High Court Labour Division at Shinyanga it was held that;

"acts of an employee of disobeying a lawful order of the employer constitutes a gross insubordination".

Despite the inclusion of insubordination in the **Employment and Labour Relations (Code of Good Practice) G.N. NO. 42 of 2007** as a possible justification for dismissal, employers might be wrong to assume that the refusal to obey a lawful and reasonable instruction will always justify termination of employment contract by the employer. As a matter of fact, refusal to obey a lawful and reasonable instruction may, in some cases, not even constitute misconduct.

Reliance is made in the case namely **Consolidated Revision Application No. 65 and 114 of 2019 between Registered Board of Trustees of LAPF, Dodoma vs. Jamal Mruma;** where the trial Judge upheld the CMA decision that rendered the employer's decision to terminate the employee's employment contract due to gross insurbodination unfair, and stated that:

I agree with both parties that insubordination is the act of the employee of not adhering to the directive of the employer. It also involves disrespect and abusive language addressed to senior officers in disrespectful manner. In the present case the words alleged to create the offence is the act of the employee Jamal Mruma through Exhibit D I to doubt the competence of DIA and all staff members in the directorate on the field of technical auditing. And his recommendation that some measures to be taken 20 to train DIA staff or employ an expert on the technical audit, and perhaps restructure of the Directorate to improve efficiency. Reading through those words I do not see any word or phrase or a sentence amounting to be disrespectful, abusive language or disregarding to the directive of the employer. The employee was explaining his observation after his interview with DIA during the inquiry on the causes for the fund to incur unnecessary storage cost of furniture. The employee stated that his observations are honest and should in no way be misconstrued as an attempt to molest anyone. I agree that recommendation of the employee that perhaps the authority may restructure the Directorate to improve efficiency is a strong word which shows that the directorate was not efficient. But the employee made it clear in what area he was doubting the competence of the directorate. The area is on the field of technical auditing. And he gave his reasons for the doubts. It is my opinion that what was written in exhibit D1 does not amount to insubordination. Further, there is no evidence whatsoever in the record to show the seriousness of the misconduct in the light of the nature of the job, the circumstances in which it occurred and the likelihood of repetition. The circumstances of the incident shows that the reason for the employee to write his explanation to the Director General of the Fund as found in Clause 21 1.8 and 1.9 of exhibit D1 is that DIA and her subordinate told him during the interview that he mismanaged the matter due

to negligence thus leading to loss incurred. Therefore, the employee decided to write the explanation - Exhibit D1 in order to defend himself as it was clear that DIA was accusing him for the mismanagement. There is no evidence in the record which dispute this testimony of the employee. Moreover, it is in record that the employee's employment record, length of service, previous disciplinary record and personal circumstances were not considered in disciplinary hearing held by ADC and the board. All of these are in contrary to rule 12(4) of the GN No. 42 of 2007. Therefore, I agree with the Trial Arbitrator findings that there was no insubordination which was committed by the employee. From above, it is my finding that the employer failed to prove that the reason for termination was fair.

It is clearly seen in the above stated case, the Judge considered that, despite the fact that the employee's statement might sound strong, but the High Court still found the employer's decision to terminate the employee was unfair due to the following reasons;

- There was no any lawful directive or instruction from the employer that the employee refused to adhere to.
- There was no any word, phrase or sentence amounting to be disrespectful, abusive language or disregarding to the directive of the employer.
- The employee's statement originates from an interview with the DIA during the inquiry on the causes for the fund to incur unnecessary storage cost of furniture.
- The employee made it clear in what area he was doubting the competence of the directorate, gave reasons for his doubts and he even went further to state that his recommendations were his honest opinion and in no way should be misconstrued as an attempt to molest anyone.

Another remarkable case is that of **MITUSA obo Clarke vs. National Ports Authority (2006,9 BALR 861)** the employee, a Tug Master, was dismissed for refusing to obey a lawful and reasonable instruction from the tugboat's Pilot. The pilot had instructed the Tug Master to tie the tug's rope to the bow (front) of the ship to be boarded. However, the employee refused to do so on the grounds that It would be dangerous to follow the instruction. As the employee had already received a final warning for insubordination she was fired.

The arbitrator found, amongst other things, that:

- In terms of the employer's policy and international practice, Pilots carry out boarding operations at their own discretion.
- Decisions of Pilots as regards boarding operations are final.
- The instruction given by the Pilot had been both lawful and reasonable.
- However, when maneuvering their vessels to carry out the Pilot's instructions Tug Masters must avoid risks.
- According to standing orders, should the safety of the tug be at risk, the Tug Master may disregard the Pilot's instruction.
- Had an accident occurred after the rope had been secured to the front of the vessel the Tug master would have been blamed.

- While the Pilot's instruction was lawful and reasonable and may have been seen by others as being a safe one, the Tug Master had the right to a different opinion and to act on that differing opinion because she was responsible for the tug's safety.
- Contrary to the subsidiary charges the employee had neither been argumentative nor had behaved in an unprofessional manner.
- Despite the validity of the Pilot's instruction the Tug Master had not committed insubordination; she had exercised her professional discretion as she had been entitled to do.
- The Pilot's demeanor during the arbitration indicated that his view of female Tug Masters contributed to his attitude and all the events of the case.
- The dismissal was substantively unfair.
- The employee was to be reinstated with full back pay which amounted to eight months' remuneration and benefits.

The remarkable aspect of this case is that the arbitrator found the dismissal to be unfair despite the fact that the employee had clearly disobeyed a lawful and reasonable instruction. The reason for this unusual finding was based on the unique circumstances of the case. These were:

- The employee did not believe the instruction to be reasonable on the grounds that it was unsafe.
- Her opinion was based on her own view of what was dangerous practice.
- Her opinion was within the bounds of rationality.
- Her refusal to obey the Pilot's instruction was based, not on a desire to flout authority, but rather on her professional opinion relating to safety which, according to orders, was paramount.
- There appeared to be a personal issue influencing the dismissal.

CONCLUSION

In a nutshell, employers should be aware of the fact that, not all refusals to obey a lawful and reasonable instruction amount to misconduct. Hence, before concluding that the refusal to obey the employer's instruction is a misconduct, the employer should consider the motive behind the employee's refusal to obey the said instruction and establish whether it is based on a desire to flout authority or rather based on professional opinion and rationality.

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FURTHER INFORMATION:
This article is intended to give you a general overview of the Law. If you would like further information and clarification on any issue raised in this article, please contact.

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