ASSESSMENT OF THE LEGAL AND INSTITUTIONAL FRAMEWORK GOVERNING TERMINATION OF EMPLOYMENT CONTRACT IN PRIVATE SECTOR IN TANZANIA

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A DISSERTATION SUBMITTED IN PARTIAL FULFILLMENT OF THE REQUIREMENTS FOR THE DEGREE OF MASTER OF LAWS (LL.M)

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CERTIFICATION

The undersigned certify that they have read and hereby recommend for acceptance of by the Open University of Tanzania, a dissertation entitled, *"**Assessment of the Legal and Institutional Framework Governing Termination of Employment Contract in Tanzania's Private Sector"*** in partial fulfillment of the requirements for the Degree Award of Master of Laws (LL.M) of the Open University of Tanzania.

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DECLARATION

I, **Nassoro Ally Mkwama** declare that, the work presented in this dissertation is original. It has never been presented to any other University or Institution. Where other people's works have been used, references have been provided. It is in this regard that I declare this work as originally mine. It is hereby presented in partial fulfillment of the requirement for the Degree Award of Master of Laws (L.L. M) of the Open University of Tanzania.

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Date

DEDICATION

This work is wholeheartedly dedicated to my beloved wife, Hadija Omary Musa for her tireless and invaluable love, care, guidance, and prayers throughout the entire period of my study. Thank you and May Almighty God bless you.

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ABSTRACT

This study assessed the legal and institutional framework governing termination of employment contracts in the private sector in Tanzania. It specifically examined the adequacy and the effectiveness of the section 40(3) of the Employment and Labor Relations Act, 2004 and institutions in protecting the right to work to employees and ensuring fair termination practices in the private sector. The study employed a doctrinal analysis, where relevant domestic legislations, international instruments, and reports were examined to position the discussion to a broader perspective. This approach ensured a thorough analysis of the complex socio-legal issues surrounding the employee's rights and termination of employment contracts in the private sector. A comparative approach was also employed to benchmark the existing legal and policy frameworks against international best practices and standards. The study revealed that Section 40(3) of the ELRA not only contradicts the Constitution, particularly the right to work and the right to receive fair remuneration, but also violates Article 4 of the ILO Convention and Section 37(2) of the ELRA. These laws require termination of employment only for valid reasons and through fair procedures. This section creates a loophole that wealthier employers in the private sector can exploit to terminate poorer employees without valid reasons.

Consequently, the study recommends the provision of section 40(3) to be modified in such that an employer is obliged to reinstate an employee with no option of an employer to refuse reinstatement and domestication of ILO conventions to enhance the legal and institutional frameworks thereby, promoting fair labour practices in the Tanzanian private sector.

LISTS OF LEGISLATIONS, CONSTITUTION, AND INTERNATIONAL INSTRUMENTS

CONSTITUTION

Constitution of the United Republic of Tanzania [Cap.2 R.E 2008]

PRINCIPAL LEGISLATIONS

Law of Limitation Act, [Cap.89 R.E 2019]

The Civil Procedure Code, [Cap.33 R.E 2022]

The Employment and Labour Relation Act, [Cap.366 R.E 2019]

The Labour Institutions Act, [Cap.300 R.E 2019]

The Law of Contract, [Cap.345 R.E 2022]

The Security of Employment Act, 1964 as amended by Act, No.1 of 1975.

SUBSIDIARY LEGISLATIONS

Labour Court Rules, 2007, (G.N. No. 106 of 2007)

Labour Institutions (Ethics and Code of Conduct for Mediators and Arbitrators) Rules, 2007 (G.N. No. 66 of 2007)

Labour Institutions (General) Regulations, 2017, (G.N. No. 45 of 2017)

Labour Institutions (Mediation and Arbitration Guidelines) Rules, 2007 (G.N. No. 67 of 2007)

Labour Institutions (Mediation and Arbitration) Rules, 2007 (G.N. No. 64 of 2007)

The Employment and Labour Relations (Code of Good Practice) Rules, 2007 (GN No. 42 of 2007)

The Employment and Labour Relations (General) Regulations, 2017 (GN 47 of 2017)

INTERNATIONAL INSTRUMENTS

The African Charter on Human and Peoples Rights of 1981

Universal Declaration of Human Rights of 1948

Termination of Employment Convention No.158 of 1984

ILO Conventions on worst forms of Child Labour No.182 of 1999

Discrimination (Employment and Occupation) Convention, No. 111 of 1958

Right to Organize and Collective Bargaining Convention, No. 98 of 1949

Freedom of Association and Protection of the Right to Organize Convention, No. 87 of 1948

LIST OF CASES

Deogratus John Lyakwipa and Another v. Tanzania Zambia Railway Authority Revision Application No. 68 of 2019, HC, LD, DSM (unreported).

Director Usafirishaji Africa v. Hamis Mwakabala and 25 others Labour Revision No. 291 of 2009 (unreported)

Distributors Nufaika v. Charles Tafsiri, Revision No. 185 of 2009 (unreported).

Doosan Babcock Ltd v. Commercializidora de Equipos v. Materiales Mabe [2013] EWHC 3010

Emmanuel Urassa and 10 others v. Shared Networks Tanzania Limited, Labour Revision No. 467 of 2019, High Court of Tanzania at Dar es Salaam (unreported)

Elizabeth Silayo v. Halmashauri ya Manispaa ya Morogoro (Labour Revision No. 11 of 2019) [2020] TZHCLD 3821 (8 December 2020)

Fedlife Assurance Ltd v. Wolfaardt [2001] 12 BLLR 1301 (SCA)

Florence Munuo v. Chui Security Company Limited, Labour Revision No. 27 of 2019, HC, DR, Moshi (unreported) at p. 6.

Geita Gold Mine v. William Swai

General Market Co. Ltd V.A.A. Shariff [1980] TLR 61

Humphrey Ngalawa v. Coca Cola Kwanza Limited, Labour Revision No. 18 of 2017, HC, DR. Mbeya (Unreported) at p. 6.

John Elias v. The Registered Trustees of Chama cha Mapinduzi Revision No. 175 of 2019, HC, LD DSM (Unreported)

Katavi and Kapufi Limited and another v. Emmanuel Dotto Ibrahim and 8 Others Labour Revision No. 4 of 2020. HC. LD, Sumbawanga (unreported) at p. 46

[1] Labour application No.2 of 2018, HC, DR at Moshi [un reported].

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LIST OF ABBREVIATIONS

ADR - Alternative Dispute Resolution

ACHPR - The African Charter on Human and Peoples Rights

CAP - Chapter

CAT - Court of Appeal of Tanzania

CURT - Constitution of the United Republic of Tanzania

CMA - Commission for Mediation and Arbitration

CESCR - Committee on Economic, Social, and Cultural Rights

CRPD - Convention on the Rights of Persons with Disabilities

CERD - Convention on the Elimination of All Forms of Racial Discrimination

CEDAW - Convention on the Elimination of All Forms of Discrimination against Women

CO. - Company

CROC - Convention on the Rights of the Child

DIV. - Division

DSM - Dar es Salaam

ED - Edition

ELRA - Employment and Labour Relations Act

G.N - Government Notice

HC - High Court

ICCPR - International Covenant on Civil and Political Right

ICESCR - International Covenant on Economic Social and Cultural Rights

MCC - Mediation and Conciliation Commission

NO. - Number

LIA - Labour Institution Act

LC - Labour Court

LRA - Labour Relations Act

LTD - Limited

LD - Labour Division

LAB - Labour

ILO - International Labour Organization

LIMA - Labour Institutions Mediation and Arbitration

MISC - Miscellaneous

P - Page

R.E - Revised Edition

SEA - Security of Employment Act

TLR - Tanzania Law Report

TZ - Tanzania

TZHC - Tanzania High Court

TZHCLD - Tanzania High Court Labour Division

UN - United Nations

UNDRIP - United Nations Declaration on the Rights of Indigenous Peoples

UDHR - Universal Declaration of Human Rights

URT - United Republic of Tanzania

V - Versus

V - Volume

CHAPTER ONE

INTRODUCTION AND BACKGROUND TO THE STUDY

1.1 Introduction

Best labour practices demand the existence of robust legal and institutional frameworks designed to protect employees from unfair labour practices. In recognition of this, Tanzania has enacted several laws incorporating international labour standards, streamlining the labour regime in the process. These laws establish minimum standards that must be observed by the respective parties from the moment of engagement, throughout the duration of the contract and upon conclusion of the contractual relationship.[2]

Significantly, in relation to termination of employment contracts, the law prescribes both substantive and procedural requirements to ensure fair termination of employment contract.[3] Termination is deemed unfair if the employer cannot prove that the reason for termination is valid[4], and that the employee was terminated in accordance with fair procedure.[5]These principles apply directly to the employee in private sector and have indeed, curtailed the employer's power to hire and fire the employees at their discretion. However, the prevalence of cases of unfair termination in the Tanzanian private sector suggests otherwise. According to the CMA Annual

[2]These standards in terms of Section 13 (2) (a)-(c) of the ELRA are nothing other than a set of benchmarks established by employment laws below which no employment relation should fall.
[3]See Section 36 and 37 of the ELRA
[4]Termination will be valid if it is based on the ground of incapacity, operational requirements, misconduct and incompatibility as they can be gleaned from Section 42(3) (a-c) of The Employment and Labour Relations Act and Rule 9(4) of the Employment and Labour Relations (Code of Good Practice) Rules, 2007 (GN No. 42, 2007). See also the International Labour Organization (ILO) Convention No.158 on termination of employment.
[5]See Section 37 (2) (a), (b) (I) (ii) and (c) of ELRA and the case of *Tanzania International Container Terminal Services (TICTS) Ltd v. Shabani Kagere*, Misc. Application No. 188 of 2013: High Court of Tanzania (Labour Division) at Dar es Salaam (Unreported).

Statistical Report, between 2016-2020 37,573 cases were registered before the CMA, with 39% of these cases involving unfair termination of the employment.[6]This clearly indicates that the employer in private sector often fails to follow the prescribed procedures, even where they have a valid reason to terminate an employee. This results in the infringement of employee rights enshrined under Article 22 of the Constitution of the United Republic of Tanzania.[7]

1.2 Background to the Problem

The right to work can be traced in 1940s when workers began forming trade unions despite colonial resistance.[8] The current challenging position of employees and the working class in Tanzania's private sector can only be fully understood through a historical perspective. During the independence struggle, workers' rights continued to be a focal point as unfair termination of employment becomes rampant. Therefore, during the colonial era in Tanganyika, the law governing the termination of employment contracts has been a critical issue, raising several concerns. The colonial government regulated labour through legislation that primarily served their interests.[9] These laws provided no protection to workers and were characterized by harsh penal sanctions for non-compliance.[10] Importantly, these laws embraced the common law doctrine of hire and fire, allowing employer to terminate employee at their

[6]Commission for Mediation and Arbitration Statistical Report, 2021
[7][Cap.2 R.E 2008]
[8]Shivji, I.G. (1985). *Law, State, and the Working Class in Tanzania*. James Currey Publishers
[9]The legislation passed by the colonial government includes for instance The master and Native Servant (Written Contracts) Ordinance Cap.79; The Master and Native Servants Ordinance Cap.78; the Master and Native Servant (Recruitment) Ordinance Cap. 80; Employment of Women and Young Persons Ordinance Cap.82; and The Porters (Restriction and Employment) Ordinance Cap.171
[10]Labour in the Mandated Territory of Tanganyika in 1929 Reports and Enquiries 24 International Labour. Retrieved April 27, 3034 from http://heinonline.

discretion.[11] This doctrine was incorporated into our laws through Section 2 (3) of the Judicature and Application of Laws Act[12], serving as a colonial instrument to oppress African labour. This doctrine for example, was evident in the Master-Native Servant Ordinance[13] and the Employment Ordinance.[14] The enactment of the Security of Employment Act in 1964 could not salvage the situation, as it still permitted the employer to summarily dismiss employees for misconducts.[15]

Further, the Security of Employment Act contained another contentious provision. Section 40A (5) of the Act permitted the employer to compensate an employee compensation instead of reinstating them, as ordered by the minister. The spirit of this provision caught the attention of the High Court judges, resulting in divergent views on whether it encroaches upon the fundamental right to work enshrined in Article 22 of the Constitution. The first school of thought maintained a conservative stance, interpreting this provision to mean that an employer has the right to refuse to reinstate the employee and terminate their service after payment of full terminal benefits. They argued that the right to work has been curtailed by the dictates of section 40A (5) of SEA.[16] Their arguments seem to be supported by the doctrines of freedom to contract and sanctity of the contract.

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[11]The doctrine however has been outlawed by the current labour regime. See the case of *Macmillan Aidan Limited v. Blandina Luca Mohamed Revision no 292 of 2008, High court of Tanzania (labour division) at Dar-es-salaam (unreported).*

[12][Cap.358 R.E 2019]

[13]See Section 42 of the Master Native Servant Ordinance

[14]See Section 37 of the Employment Ordinance, Cap. 366. Noteworthy this law adopted this doctrine but rather under the name of "summary Dismissal."

[15]See Section 21 (1) of the Security of Employment Act, 1964

[16]See the decision of *Kisanga, J in Mahona v. University of Dar es Salaaam*, and the case of *Scolastica Samwel Mfilinge v. Shirika La Umeme Tanzania (TANESCO)* (Labour Revision 1 of 2022) [2023]

Conversely, other High Court judges adopted a liberal interpretation of this provision and argued that employer has no right to terminate the service of an employee where there is an order of reinstatement. According to them, an employer cannot unilaterally choose to compensate an aggrieved employee as an alternative to complying with reinstatement order by the minister. This was the stance taken, for instance, by Biron J in *General Market Co. Ltd v. A.A. Shariff*[17], where he held that when the Minister for Labour has ordered reinstatement, then the same must be effected and the employer cannot terminate the employee or re-engage him as if he was a fresh employee.

Subscribing himself to this school of thought, Prof. Emeritus Chris Maina Peter argued that section 27 of the Security of Employment Act provides the court with the power to ensure that an order of reinstatement by the Minister is implemented. Thus, the first school of thought interprets section 40A (5) in isolation, ignoring the existence of section 27 of the same Act. He opined that, interpreting section 40A (5) as entitling the employer to terminate an employee at will would render section 27 superfluous.

Mwalusanya, J (as he then was) expressed a similar view in the case of *Obadiah Salehe versus Dodoma Wine Company Limited*[18], stating that the provision of section 40A (5) of the Security of Employment Act, 1964, which gives an employer the option to reinstate or pay terminal benefits to an employee, negates the constitutional right of an employee to work under Article 22 (1) of the Constitution. In his written

[17][1980] TLR 61
[18][1990] TLR 113

judgment, Mwalusanya J further opined that the provisions of section 40A (5) of the Security of Employment Act are so broad that they include even employees who have committed no offence at all. He described such a provision as a rattrap, indiscriminately ensnaring both rats and humans. He argued that a provision of this nature attempts to protect society but actually endangers it. He went on to declare the provision of section 40A (5) void, stating that it needs to be revised so that an employer is obligated to reinstate an employee without having the option to refuse reinstatement. The arguments put forth by the two schools of thought generally summaries the state of the law regarding the termination of employment contracts during both the colonial and post-colonial periods.

Moreover, the institutional framework established by the old labour regime made the procedures for referring and resolving labour disputes cumbersome. [19]Disputes were handled by five or more institutions: Labour Officers, the Labour Conciliation Board, the Industrial Court of Tanzania, the Labour Commissioner, and a fifth avenue for injuries under the Workers Compensation Act. This made dispute resolution procedures lengthy and complex, denying employees in the private sector the ability to seek redress in cases of unfair termination.[20]

The issue of unfair termination eventually caught the attention of the International Labour Organization (ILO). In its response, the ILO adopted rules establishing

[19]Mtaki, C. K. (2005, September 12). *The new labour law in Tanzania: Implications for employers, employees and the economy*. Paper presented at a Policy Dialogue Seminar on New Labour Laws in Tanzania, Conference Hall of the Economic and Social Research Foundation p. 3
[20]Mwalongo, F (nd). Labour disputes handling in Tanzania p. 2

binding standards aiming at protecting and promoting workers' welfare.[21] In 1982, Termination of Employment Convention No. 158, and Termination of Employment Recommendation No. 166 were adopted.[22] These instruments presented international standards for best practice in employer initiated termination.[23] Following this significant development, Tanzania amended her Constitution in 1984 to include a Bill of Rights[24], giving special protection to the right to work under Article 22 of the Constitution, by making it an imperative human right that is over and above ordinary legislation.[25]

The constitutional amendment was complemented by labour sector reforms that commenced in the mid-1980s.[26] Responding to pressure from the ILO and its own desire to reform the labour sector, Tanzania recognized the need to overhauling her labour regime to incorporate standards established by core ILO instruments. Consequently, a task force formed in October 2001 recommended the enactment of new labour laws, leading to the passage of the Employment and Labour Relation Act and the Labour Institution Act in 2004.[27] These Acts streamlined the labour regime by establishing basic employment standards and mechanisms for resolving labour

[21]Ismail, O. A. (2022). *Unfair termination of employment contract in light of international and EU standards: An approach to review Iraqi labour law* (Doctoral dissertation, University of Debrecen) p. 10

[22]Much as Tanzania is a member of ILO, the Tanzania law on termination of employment largely absorbs the standards provided under the Convention and Recommendation No. 166.

[23]See the preamble to the International Labour Organization ILO. (1982), Termination of Employment Convention, No.158

[24]Vide Constitution (Fifth) (Amendment) Act, 1984

[25]Per Mwalusanya, J in *Masatu versus Mwanza Textiles Ltd*, High Court of Tanzania at Mwanza, Civil Case 3 of 1986 (unreported)

[26]Mtaki, C. K. (2005, September 12). *The new labour law in Tanzania: Implications for employers, employees and the economy*. Paper presented at a Policy Dialogue Seminar on New Labour Laws in Tanzania, Conference Hall of the Economic and Social Research Foundation p. 3

[27]Mtaki, C. K. (2005, September 12). *The new labour law in Tanzania: Implications for employers, employees and the economy*. Paper presented at a Policy Dialogue Seminar on New Labour Laws in Tanzania, Conference Hall of the Economic and Social Research Foundation p. 2

disputes.[28] One of the key features of the ELRA is its recognition of various categories of employment contracts, including contracts for specific task, thereby protecting vulnerable employee who works on temporary basis from being hired and fired at the will of their employers.[29]

However, Section 35 of the ELRA provides no remedy for unfair termination of employment for employees who have worked for less than six months. The case of *Mwaitenda Ahobokile v. Interchick Co. Ltd*[30]*and Chabruma v. National Microfinance Bank*[31] suffice to illustrate the point. In the former case, a complaint of unfair dismissal was dismissed by the Court because the complainant, who had worked for two months and nine days, was a probationary employee and therefore could not benefit from Section 35 of ELRA. Furthermore, the Act under section 40 (3) gives the employer the power to 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, if they choose not to reinstate or re-engage the employee despite a Court order to do so. This provision appears to carry forward the spirit of Section 40A (5) of the Security of Employment Act, 1964.[32] The upshot is that the current laws on employment termination, particularly for private sector employees, adopt the spirit of the overhauled labour regime, especially the Security of

[28]The ELRA was passed on 14th April 2004 and assented on 4th June 2004 while the LIA was passed on the 15th day of April 2004 and assented by the president on 6th day of June 2004.
[29]According to section 14 Section14 (1)(a)(b) and (c) the other types of employment contract includes the contract for unspecified time (otherwise known as permanent contract) and fixed term (reserved for professionals and managerial cadre)
[30]*Mwaitenda Ahobokile Michael v. Interchick Co. Ltd*, Labour Dispute No. 30 of 2010, High Court of Tanzania (Labour Division) at Dar es Salaam (unreported).
[31]Labour Revision no. 159 of 2010, High Court of Tanzania (Labour Division) at Dar es Salaam (unreported).
[32]Amended by Act, No. 1 of 1975 (now repealed)

Employment Act of 1964, while also incorporating unequal bargaining power in employment contracts.

Against this backdrop, the question arises as to whether the existing legal and institutional framework governing employment termination is comprehensive enough to uphold workers' right to work. This study therefore aims to evaluate the existing legal and institutional gaps in Tanzania's private sector, particularly in relation to the alignment with constitutional provisions and international best practices. By assessing the adequacy and effectiveness of the current legal and institutional framework, the study seeks to propose recommendations for reforms to enhance the protection of employees' rights and promote fair labour practices in the private sector.

1.3 Statement of the Problem

The right to work is fundamental to the well-being and dignity of individuals, protected under Article 22(1) of the Constitution of the United Republic of Tanzania, 1977. The court in the case of *Augustine Masatu versus Mwanza Textiles Ltd*[33] affirmed this right, highlighting its status as an imperative human right that supersedes ordinary legislation. However, the existing legal and institutional framework governing employment termination in Tanzania's private sector appears inadequate in safeguarding this right.

Section 40 (3) of the Employment and Labour Relation Act, 2004 which mirrors the

[33]Civil Case 3 of 1986, High Court of Tanzania at Mwanza, Civil Case 3 of 1986 (unreported)

outdated principles of the Security of Employment Act of 1964 seems to encroach upon the right to work enshrined under Article 22 of the Constitution. This provision, like Section 40A (5) of the repealed Security of Employment Act, introduces a scenario where an employer may opt to 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 in lieu of reinstating or re-engage the employee as ordered by the court. This effectively subjects the fundamental right to work to the employer's discretion, enabling them to choose not to reinstate or re-engage an employee even when the termination is deemed unfair by the court.

The controversy lies in the potential abuse of these discretionary powers, creating unhealthy environment where the right to work is undermined by arbitrary decisions of the employers without necessary statutory safeguards, leaving employee vulnerable to unfair termination practices. Furthermore, institutional framework disproportionately impedes private sector employees, limiting their ability to secure fair and just remedies for unlawful termination. This imbalance of power between employers and employees in the resolving employment disputes challenges the principles of justice, equality, and the constitutional right to work. Given this, the question on whether the existing institutional and legal framework is comprehensive enough to protect workers in private sectors emerges.

1.4 Objective of the Study

1.4. 1 General Objective

To assess the legal and institutional framework governing the termination of employment contracts in Tanzania's private sector, focusing on laws, regulations, and

their implications on employer-employee relationships, rights, and obligations.

1.4.2 Specific Objectives

(i) To identify legal gaps in Tanzania's employment laws and assess their alignment with constitutional provisions guaranteeing the right to work.

(ii) To compare Tanzania's legal framework for terminating employment contracts in the private sector with international best standards.

(iii) To provide recommendations for reforming the legal framework governing the termination of employment contracts in the private sector.

1.5 Research Questions

This research endeavored to answer the following sets of questions;

(i) What are the existing legal gaps in Tanzania's laws governing termination of employment contracts in the private sector?

(ii) How do international best practices and standards regard the termination of employment contracts in the private sector compare with Tanzanian legal framework?

(iii) How can Tanzania strengthen protection of workers' constitutional right to work and improve the environment for terminating employment contracts in the private sector?

1.6 Significance of the Study

This study is significant in a number of ways. Firstly, this study provides insights on

the existing legal and institutional framework governing termination of employment contract in private sectors, illuminating important dynamics in ensuring fair labour practices. Secondly, by comparing Tanzania's legal framework with international best practices, the study can identify areas where improvements are needed to align with global best standards. This will help in promoting Tanzania's adherence to international labour norms. Thirdly, the study's findings can serve as a basis for recommending reforms or amendments to existing laws and institutional practices. Fourthly, the study will bridge the existing knowledge gap and will be helpful to future researcher. Lastly, this study sheds lights and awareness to the employees and public at large on their rights.

1.7 Literature Review

The issue of employment contract termination is not new; however, there is paucity of literatures linking termination of employment contract to constitutional right to work. This knowledge gap necessitated the undertaking of this study. Consequently, the literature reviewed below is indicative rather than exhaustive.

Mabula,[34] discusses the termination of employment contract as the ending of employer-employee relationship. He points out that just as parties are free to enter into contracts, they are equally free end their contractual relationship by mutual agreement. Termination can be initiated either party and can take different forms. The learned author emphasizes that anyone seeking to terminate an employment

[34]Mabula, J.B. (2020). *Course manual for labour laws*. Dar Es Salaam: University of Dar es Salaam Press p. 41

contract must adhere to both the contractual terms and relevant labour laws. The author also highlights remedies for unfair termination, which include reinstatement without loss of remuneration, re-engagement, and compensation of at least twelve months' salary. He acknowledges that under current Tanzanian labour law, an employer may choose to pay twelve months' salary in lieu of reinstatement or re-engagement, as outlined in Section 40(3) of the Employment and Labour Relations Act, No. 6 of 2004. The learned author's work is relevant to this study as it recognizes reinstatement and re-engagement as remedies for unfair termination. However, he does not address the implications of the employer's discretionary power to opt for compensation instead of reinstatement or re-engagement on the employee's constitutional right to work, a gap this study aims to fill.

Peter,[35] in his work, discusses the importance of the right to work, stating that such right is crucial for the survival of both individuals and society as a whole. He likens it to the right to life and emphasizes the need for legal protection and judicial intervention to uphold it. The author argues that the right to work has been the result of many years of struggle against capital and labour exploitation, encompassing fair wages, the right to strike, among others. Despite the constitutional protection of right to work, the author asserts that employees in Tanzania are inadequately protected in practice. His work focuses on Section 40A (5) of SEA which allows employers to refuse reinstatement and instead terminate employees. He argues that this discretionary power is overly broad; affecting even those who have committed no

[35]Peter, M. C. (1997). *Human rights in Tanzania: Selected cases and materials*. Köln: Köppe. p. 169

offence, and likens it to a rattrap that indiscriminately endangers society.[36] His study is relevant for the reasons that it provides a historical context for understanding current labour laws and highlights the implications of employers' discretionary power under Section 40A (5) in realizing employees' constitutional right to work. However, his analysis falls short in several areas. First, the author's perspective is rooted in the 1960s, while this study addresses current circumstances that have evolved over time. Second, he does not propose solutions for rectifying the problem, given the fundamental nature of the right to work in human survival. These gaps are addressed in the present study.

Pastory[37], argued that once an arbitrator or judge finds that an employee was unfairly terminated, they have the authority to order the employer to reinstate, re-engage or pay compensation to the dismissed employee under Section 40(3) of the ELRA. He opines that, Section 40(3) allows the court or arbitrator to order reinstatement or re-engagement, ultimately leaves it to the employer's discretion whether to compensate or re-engage the wrongfully terminated employee. The author further argues that an employer can currently terminate an employee without adhering to substantive and procedural fairness, and the employer still has the option to choose whether to compensate the terminated employee. This holds true even when a lawful order from the court or tribunal mandates reinstatement or re-engagement, as the law provides room for the employer to object to the lawful order in Tanzania. Moreover, he asserts that section 40(3) undermines the right to work for

[36]Peter, M. C. (1997). *Human rights in Tanzania: Selected cases and materials*. Köln: Köppe p. 176-177.
[37]Pastory, S. M. (2019). Unfair termination and conundrum surrounding the remedy of compensation in Tanzania. *BiLD Law Journal*, *4*(1), 137–153.

an employee who has been unfairly terminated. The provision's wording reflects a legislative intent that places the right to work in Tanzania at risk due to the employer's unfair practices against an innocent employee. While the author's views on Section 40(3) are appreciated, he fails to offer solutions to rectify the situation. This omission will be addressed by this study.

Kamuli,[38]argues that the right to work is fundamental to the survival of the working class, as employees need employment to meet their basic living needs. Denying this right through unfair termination is akin to violating their constitutional right to life. The right to work secures the possibility of continued employment, crucial for individual survival. Additionally, he asserts that this right encompasses entering employment and not being unfairly deprived of it. As a signatory to the UDHR, Tanzania is obligated to uphold the right to work. While his work highlights the importance of this right, it fails to address the discretionary powers given to employers in deciding whether to comply with Court or tribunal orders for reinstatement or re-engagement, a gap this study aims to fill.

Tulia[39], acknowledges that in the pursuit of profit, many employers seek flexible employment relations, which can dilute employment standards to fit global business models. The learned author argued that current labor laws protect only formal sector employees, neglecting those in informal sectors such as street vendors and domestic

[38]Kamuli, R. (2019). *Human rights in Tanzania: Standards and international obligations*, Mwanza: Gunewe Publishers.
[39]Akson, T. (2002). *Regulating working conditions in a globalizing world: Recent trend in Tanzania.* Paper presented at the ILO Conference on Regulation for Decent Work – Innovative Labour Regulation in a Turbulent World, 8-10 July 2009, ILO, Geneva

workers, despite inclusive definitions in national employment policies and laws. She finally recommends extension of protections offered by labor law to informal sector employees. However, the author did not discuss the implications of the discretionary powers under section 40(3) of the ELRA on the right to work, an issue covered in this study.

Mashamba[40] argues that economic liberalization has jeopardized workers' rights in Tanzania due to inadequate legal protection. His publication focuses on the protection of permanent public sector employees, overlooking temporary employees in the private sector. Furthermore, he does not provide recommendations to address the discretionary power of employers against employees' right to work, which this study addresses.

Posner[41] contends that employees can leave their jobs freely to work elsewhere, assuming a free employment market supply and demand balances out after layoffs or redundancies. He argues that layoffs do not stigmatize workers as commonly believed, and that legal compensation often leads to expensive litigation. This management perspective relies on classical capitalism principles from Adam Smith's era, justifying employer power through property rights. This view emphasizes the employer's property interests over the employee's, framing the employer as the owner with the power to fire employees. Consequently, managerial control is valued more than job security, as jobs are not seen as property interests, whereas workplace

[40]Mashamba, C. (2001). The promotion of basic employee rights in Tanzania. *African Human Rights Law Journal*, 475-495.
[41]Posner, R. (1989). Hegel and employment at will: A comment. *Cardozo Law Review, 10*, 1625

control is an aspect of ownership. Managers and owners, having more political power, are better able to protect their control. The author's findings are relevant to this study, as they highlight the power of the employer. This research will build upon these insights to demonstrate how these discretionary powers of employers encroach on workers' right to work.

1.8 Research Methodology

The study focused on assessment of the legal and institutional framework governing termination of employment contract in private sector in Tanzania. The researcher analyzed the legal, policy, and institutional frameworks in place on the protection of employee's right to work in private sector. This research has employed the doctrinal and comparative legal research methods. The choice of these methods largely depended on the nature of the study and the type of data required.

1.8.1 Doctrinal Legal Research Methods

This approach is also sometimes referred to as the "black letter" method. According to **Ngwoke, R. A., Mbano, I. P., &Helynn, O[42],** doctrinal research entails a comprehensive and critical examination of legal rules, doctrines, principles, and concepts. It involves a systematic exposition, analysis, and evaluation of legal rules, principles, and philosophies, as well as their interrelationships. Given that this study involves an in-depth examination of statutory provisions, case laws, and regulatory frameworks governing the termination of employment contracts in Tanzania's

[42]Ngwoke, R. A., Mbano, I. P., &Helynn, O. (2023). A critical appraisal of doctrinal and non-doctrinal legal research methodologies in contemporary times. *International Journal of Civil Law and Legal Research*, *3* (1), 8-17.

private sectors, doctrinal legal research was deemed ideal. This approach enabled the researcher to collect, analyze and interpret primary and secondary data obtained from legislation and conventions applicable to the termination of employment contracts in Tanzania's private sector. Data was also obtained through review of relevant judicial decisions that have interpreted and applied these laws in practice. Additionally, scholarly articles, textbooks, conference papers, and online resources were consulted. Content analysis was employed to analyze these documentary data. The relevant instruments, legislation, and case laws and scholarly works were meticulously analyzed to identify provisions gaps in the current legal and institutional framework governing termination of employment contracts. Literal and purposive rules of statutory interpretation were utilized to interpret the legal texts' provisions. The analyzed secondary and primary data were then evaluated and interpreted in alignment with the research objectives and questions.

1.8.2 Comparative Legal Research Methods

According to **Bhat, P. I.**[43]**,** comparative legal research is a methodology that involves examining the laws of one jurisdiction in relation to those of another. It is a structured and complex process aimed at analyzing and understanding the similarities and differences between various legal systems. Through a documentary review, the researcher analyzed the legal and institutional framework governing termination of employment in the three-selected jurisdiction: Kenya, Uganda, and South Africa. These countries were chosen because they are developing countries just like

[43]Bhat, P. I. (2015). Comparative method of legal research: Nature, process and potentiality. *Journal of the Indian Law Institute*, 147-173.

Tanzania with well-established legal responses to job security, particularly in cases of unfair termination. Benchmarking was thus necessary for identifying some lessons and best practices that Tanzania can adopt to improve her legal framework governing termination of employment. Comparatively, the researcher picked best practices from these selected jurisdictions as the basis for gauging Tanzania labour practices.

1.8.3 Organization of the Research

This research is organized into five prominent chapters each building on previous one to provide a comprehensive assessment of the legal and institutional framework governing the termination of employment contracts in Tanzania, culminating in actionable recommendations for legal reform. **Chapter one,** provides an introduction to the study, outlining the background, statement of the problem, literature review, research questions, objectives and significance of the research. It also details the methodologies employed, with a focus on comparative legal research methods and doctrinal analysis. **Chapter Two** defines various key terminologies related to employment and discusses the theoretical foundations of employment law. It explores different theories of employment and their relevance to the study. **Chapter Three** examines international best practices and standards for termination of employment as demonstrated through ILO conventions and recommendations. It compares Tanzania's labour practices with those of South Africa, Kenya, and Uganda, highlighting strengths and weaknesses. **Chapter Four** provides a detailed analysis of the legal and institutional framework governing the termination of employment contracts in Tanzania. It assesses the effectiveness and adequacy of current laws and regulations. **Chapter Five** offers valuable insights and

recommendations for reforming the laws on termination of employment contracts in Tanzania. It proposes changes aimed at aligning Tanzania's legal framework with international best practices and enhancing the protection of employees' rights.

CHAPTER TWO

CONCEPTUAL AND THEORETICAL FRAMEWORK

2.1 Introduction

This chapter focuses on understanding the fundamental concepts related to the termination of employment contracts in the private sector in Tanzania. It includes a series of assumptions, values, and definitions, each with detailed explanations. The chapter clarifies the relationships among key concepts such as employment contracts, termination of employment contracts, employers, employees, reinstatement and re-engagement, the private sector, employment standards, and the distinctions between fair and unfair termination of employment, as detailed below.

2.2 Definitions of the Key Terms

2.2.1 Employee

Black's Law Dictionary defines an employee as an individual who serves another under any contract of hire whether express, implied, oral, or written where the employer has the right to control and direct the details of how the work is performed.[44] This differs from an independent contractor, who uses their own methods for completing work, with the employer only controlling the final product or outcome.[45] According to Section 4 of the ELRA, an employee is defined as a person who has entered into a contract of employment or any other contract under which they undertake to work personally for the other party to the contract. This other party is not a client or customer of any profession, business, or undertaking carried on by

[44]Black, H. C. (1991). *Black's Law Dictionary* (6th ed.). West Publishing Co. p. 363
[45]Ibid

the individual. The term employee also includes the deemed under section 98(3) of the ELRA.

Therefore, an employee is someone who works for an employer under a contract of service. Moreover, in the case of *Director Usafirishaji Africa v. Hamis Mwakabala and 25 others*[46], the Court defined an employee as a person who renders service to another and is presumed to be an employee unless proven otherwise, particularly if one or more scenarios outlined under Section 61 of the Labour Institution Act becomes evident. Essentially, understanding who qualifies as an employee is crucial for comprehending the protections provided by the relevant labour laws in Tanzania.

Defining an employee has proven complex. In *Ottelo Business Corporation Ltd v. Baraka Andrea Sanga and Others*[47], the court explicitly recognized this complexity, stating:

> "The issue of determining the existence of employment relationships is a complex one. Adjudicators must exercise due diligence, especially given the increase in private sector activities, which also increases incidents of disguised employment relationships. To address the complexity of employment relationships, the law under Section 4 of the Employment and Labour Relations Act clearly stipulates who is an 'employer' and who is an 'employee.' This section must be read together with Section 61 of the Labour Institutions Act, which outlines the factors for presuming the existence of an employment relationship." [Emphasis added]

2.2.2 Employer

Section 4(c) of the Employment and Labour Relations Act, Cap.366, defines an

[46]*Director Usafirishaji Africa v. Mwakabala and Others*, Labour Revision No. 291 of 2009 (unreported)
[47]Ottelo Business Corporation Ltd v. Baraka Andrea Sanga and Others, Labour Revision 14 of 2018 (unreported).

employer as any person, including the government and an executive agency, who employs an employee. An employer is a person who engages the services of an employee; thus, an employer can be a natural person or a juristic person who is empowered to direct the work of their employees, including dictating when, where, and how the given work is to be performed. Moreover, in the case of *Clackamas Gastroenterology Association versus Wells*[48], the Court defined an employer as any person or group of persons who own and manage an enterprise through which other persons supply their labor power under an employment relationship, in exchange for remuneration.

2.2.3 Contract

A contract is defined as a legally binding agreement between two or more people to do or refrain from doing something. Each participant places themselves in a position to demand performance from the other party, and anyone who does not fulfill their part of the agreement is in breach. Under the Law of Contract Act, a contract is defined as an agreement that is legally enforceable.[49]

2.2.4 Employment Contract

An employment contract refers to a formal, legally binding agreement between an employee and an employer. It encompasses the rules, responsibilities, and expectations for the work relationship. Such agreements typically establish a relationship between the employer and the employee, binding both parties to the

[48]538 U.S. 440, 450 (2003)
[49]Section 2(1) (h) of the Law of Contract, [Cap. 345 R.E 2022]

terms of the contract or any other relevant employment laws.[50] An employment contract, also known as a contract of service, comes into existence when the employee freely agrees to supply their labor power, skills, care, and diligence to the employer, who, in return, signifies their intention to remunerate the employee.

The employment contract is fundamentally based on the general principles of contract law. In the case of *Elizabeth Silayo v Halmashauri ya Manispaa Morogoro*[51], the importance of a contract of service and its formation was highlighted. The Court had this to say;

> "[B]before answering the issue, it is necessary to explain a little bit on contract of employment. The Employment and Labour Relations Act, Act No. 6/2004, has not defined what an employment contract is. However, it is important to note that the employment contract forms the basis of the relationship between the employer and employees. This relationship was historically referred to as a 'master' and his 'servant."

The employment contract is based on the usual law of contract; therefore, the same conditions for agreement, consideration, and intention apply. Employment contracts are controlled by broad principles of contract law, which include the criteria of offer, acceptance, consideration, desire to form legal relations, and the absence of vitiating elements such as illegality.

The employment contract is governed by the usual law of contract principles. Therefore, the requirements of offer, acceptance, competency, consideration,

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[50]Test Gorilla, what is a contract of employment? Retrieved May 9, 2024 from https://www.testgorilla.com/blog

[51]Elizabeth Silayo v. Halmashauri ya Manispaa ya Morogoro (Labour Revision No. 11 of 2019) [2020] TZHCLD 3821 (8 December 2020)

intention to form legal relation are squarely applicable. The law provides that an employment contract must observe certain formalities to be valid. Section 14(2) of ELRA stipulates that a contract with an employee shall be in writing if the contract provides that the employee is to work within or outside the United Republic of Tanzania. Thus, a written employment contract must be executed to evidence the employer-employee relationship, and such a contract cannot validly be made orally.

The researcher found understanding the employment contract and its formation fundamental to appreciating the nature of the rights and obligations accompanying the contract, especially when labor disputes arise. It is important to note that an employment contract can only be presumed to have been formed if all the contractual ingredients are present, such as the qualified acceptance of an offer, the intention to create a legal relationship, consideration that benefits all parties, and clear terms. Generally, determining the termination of an employment contract must be preceded by the existence of a valid employment contract. Therefore, the researcher found it imperative to provide insight into what constitutes a valid employment agreement.

2.2.5 Termination of Employment Contract

Termination of employment refers to the act of ending an employer-employee relationship, whether voluntarily or involuntarily.[52] This can occur when an employee resigns or retires, or when an employer dismisses an employee. In other words, termination can be initiated by either party to the contract and can take

[52]Ardean Law Chamber, *Termination of Employment Contract in Tanzania*. Retrieved May 9, 2024 from https://www.ardeanattorneys.co.tz.

various forms. Termination of an employment contract involves circumstances or specific actions that bring the contract to an end, thereby extinguishing the rights and obligations arising from the employment contract. In the case of *Yara Tanzania Ltd v. Athuman Mtangi & others*,[53] it was observed that "it is a principle of contract law that, just as parties are free to enter into contracts; they are equally free to bring their contracts to an end by consensus. This principle is also applicable to contracts of employment."

Section 36 of the ELRA and Rules 3 to 7 of the Employment and Labour Relations (Code of Good Practice) Rules, 2007, provide different forms of termination of employment contracts and their attendant incidents. These include lawful termination; constructive termination, where the employer makes continued employment intolerable for the employee; failure to renew a fixed-term contract on the same or similar terms if there was a reasonable expectation of renewal; failure to allow an employee to resume work after maternity or paternity leave; and failure to re-employ an employee when the employer has terminated the employment of multiple employees for the same or similar reasons but has offered re-employment only to some of those terminated.

Labor legislation dictates that anyone wishing to terminate an employment contract must observe the contractual terms and labor laws. The parties, especially the employer, are statutorily obliged to fully observe the legal requirements when terminating the contract of employment. Sections 41 to 44 of the ELRA provide

these mandatory requirements, which include the requirement of notice of termination, payment of severance entitlements, and transport to the place of recruitment, payment of other entitlements, and issuance of a certificate of service. This includes any annual leave pay due to an employee for leave not taken, any annual leave pay accrued during any incomplete leave cycle, severance pay, transport allowances, and other entitlements such as a golden handshake, which depends on the employer's discretion.[54] Termination of an employment contract may be regarded as fair and lawful when it is done in accordance with the law or as unfair termination when it is done without following the prescribed procedures, such as the non-issuance of sufficient notice and lack of reasonable grounds.

2.2.6 Contract of Service and Contract for Services

Industrial interactions can be classified into two types: those with employees and those with independent contractors. When an individual is hired through a contract for service, they become an independent contractor. The researcher found that distinguishing between the two is important because it determines, among other things, the statutory protections that apply. The rights, privileges, duties, obligations, and remedies provided under labor law, such as the ELRA, only apply to employees under a contract of service but also to the employee under contract for service. Moreover, employers are only held vicariously accountable for actionable torts committed by employees under a contract of service, not a contract for service. Independent contractors under a contract for service are responsible for their own torts.

[54]Emmanuel Urassa and Others v. Shared Networks Tanzania Ltd, Labour Revision No. 467 of 2019 (unreported)

2.2.7 Private Sector

This is a part of a country's economic system that is operated by individuals and companies, rather than by a government entity. It constitutes the segment of the economy that is not under state control and is operated by individuals and companies with the goal of making a profit. Therefore, most organizations in the private sector are oriented towards profitability. The part of the economy controlled by the government is known as the public sector.[55] The private sector is a significant contributor to socio-economic transformation through the creation of decent employment, household incomes, and improvement in welfare. Examples of the private sector in Tanzania include sole proprietorships, partnerships, and companies where the majority shareholders are not government entities.

2.2.8 Right to Work

The right to work is guaranteed under Article 22 of the Constitution of the United Republic of Tanzania. In the case of *Stanbic Bank (T) Ltd v. Iddi Halfani*[56], the Court defined the right to work as encompassing the right to security and stability of employment. This implies that employees have the right not to lose their jobs unfairly. Industrial relations are therefore essential to provide legal protection against unfair dismissals. In cases of unjustified and unlawful termination, employees have the right to compensation or reinstatement. Securing the right to work is crucial as it ensures continued employment, providing income for individuals, fostering personal development and dignity, and promoting societal harmony. It is central to the survival of both the individual and the community. This right is closely

[55] Retrieved April 7, 2024 from https://www.techtarget.com>whatis>definition>priva
[56] Revision No. 858 of 2019 (unreported)

interconnected with other rights such as fair remuneration and freedom from slavery. Similarly, in the case of *Simon Mwita Mlagan and another v. Kiribo Limited*[57], the Labour Court ruled that: "Under current labor laws, employers cannot simply hire and fire at will. While they have the right to hire employees as needed, termination can only occur for valid reasons and must adhere to prescribed procedures. Both procedural and substantive fairness must be observed before an employee is terminated."

2.2.8 Reinstatement and Re-engagement

The terms 'reinstate' refer to restoring the employee to the same role they held before termination, maintaining identical terms and conditions. The objective is to place the employee in the position they would have occupied had the dismissal been fair. This measure protects the employee's job by reinstating the employment contract. If employees are reinstated, they resume work under the same terms and conditions that existed at the time of their dismissal. Reinstatement and re-engagement thus refer to an order issued by a Judge or arbitrator to restore the contractual relationship between an employer and an employee. When a termination is deemed unfair both procedurally and substantively, the remedy available to the employee is reinstatement or re-engagement. In the case of *Michael Kirobe Mwita v. AAA Drilling Manager*[58], it was affirmed that Section 40 of the ELRA grants authority to the Labour Court or arbitrator to order reinstatement.[59] Essentially, reinstatement

[57]*Simon Mwita* Mlagani& *Another v. Kiribo Limited* (Execution 56 of 2020) [2022] TZHC 602 (15 March 2022)
[58]*Michael Kirobe Mwita v AAA. Drilling Manager*, Lab. Div. DSM, Revision (2014) LCCCD p. 215
[59]See the case of Registered Board of Trustees of LAPF Dodoma versus Jamal Mruma (Consolidated Revision Applications No. 65) [2020] TZHCLD 42 (15 May 2020)

entails returning the employee to their previous job or position under the same terms and conditions of employment as if the dismissal had never occurred. This includes reinstatement from the date of the award or judgment, maintaining continuous employment. Lastly, Section 40(3) of the ELRA stipulates that if an arbitrator or court orders reinstatement or re-engagement but the employer chooses not to comply, the employer must compensate the employee with 12 months' wages, in addition to any owed wages and benefits from the date of unfair termination until the final payment date.[60]

2.3 Theoretical Framework

A theory is a collection of variables, concepts, and logical relationships intended to explain an occurrence in a consistent and adequate manner. Essentially, a theory comprises a set of logical assumptions proposed to elucidate a phenomenon, aiming to establish an understanding of reality. Theories constitute various approaches to understanding why a phenomenon has occurred, or not, and the manner in which it has transpired. Employment relationships encompass numerous theories due to their multidisciplinary nature. This diversity has resulted in the absence of a general or grand theory in the field, with a multitude of theories being accepted to explain various issues within the subject. Scholars recognize that existing theories strive to encapsulate the meaning of employment relations in the most appropriate and logical way.

[60]See Section 40 (3) of the ELRA

The primary objective of this section is to explore the body of knowledge proposed by notable theorists on the subject. It should be noted that none of these theories are inherently good or bad; their adequacy depends on their explanatory strength, empirical support, extent of generalization, and accuracy of prediction. The central aim of this part therefore is to explore the available body of knowledge that has been put forward by remarkable theorists on the subject. It must however be clear to us that none of these theories is bad or good but that their adequacy depends on their explanatory strength, the empirical support they receive, the extent of generalization and the accuracy of its prediction.

2.3.1 Employment Discretion and Workers' Rights Theory

The Employment Discretion and Workers' Rights Theory is rooted in the works of Richard A. Epstein and Hugh Collins. Epstein. In Defense of the Contract at Will, argued that employment at will is crucial for economic efficiency and that employer discretion in hiring and firing should remain largely unrestricted. In contrast, Collins, in Justice in Dismissal: The Law of Termination of Employment, critically examined labor laws, explaining how unchecked employer discretion could lead to unfair labor practices. This theory emerged in the late 20th century as scholars debated the tension between employer flexibility and worker protections, influencing labor law reforms across different legal systems.

The Employment Discretion and Workers' Rights Theory contends that while employers require a degree of discretion to manage their workforce efficiently, excessive discretion without legal safeguards undermine workers' rights and job

security. The study on the termination of employment contracts in Tanzania's private sector is directly linked to this theory, as it examines the legal and institutional weaknesses that allow employers to terminate employees at will, even in cases where the termination is deemed unfair.

In Tanzania, Section 40(3) of the Employment and Labour Relations Act, 2004, allows employers to pay compensation rather than reinstate employees unfairly dismissed. This mirrors outdated provisions from the repealed Security of Employment Act, 1964, which similarly granted broad discretionary powers to employers. This study argues that such legal provisions compromise Article 22(1) of the Tanzanian Constitution, which guarantees the right to work. The Employment Discretion and Workers' Rights Theory supports this argument by asserting that laws should prioritize job security and fair labor practices rather than enabling arbitrary employer discretion.

The study also shows weaknesses in institutional mechanisms, such as the Commission for Mediation and Arbitration (CMA), which often fails to provide adequate remedies for unfairly dismissed employees. The theory reinforces this concern by emphasizing that excessive employer discretion, combined with weak institutional oversight, creates an environment where labor rights are inadequately protected

One of the strengths of this theory is that it highlights the risks of excessive employer discretion, which directly supports the study's argument that Tanzania's employment

laws allow arbitrary and unfair dismissals. By focusing on how employer discretion can be abused, the theory strengthens the call for legal reforms that protect workers from unjust termination practices.

Another strength is its alignment with international labor standards, particularly those established by the International Labour Organization (ILO). The theory supports ILO conventions advocating for fair employment termination practices, which aligns with the study's recommendation to domesticate these conventions and enhance labor protections.

This theory also provides a strong foundation for legal and policy reforms. The study's suggestion to amend the Employment and Labour Relations Act, 2004, aligns with the theory's argument that employment laws should prioritize worker protections over excessive employer flexibility.

However, a major weakness of this theory is that it overlooks the operational needs of businesses. While the theory assumes that employer discretion is always harmful, businesses need flexibility to terminate employees for economic, performance, or restructuring reasons. The study recognizes this gap and aims to address it by assessing how to balance labor protections with business flexibility, ensuring that legal reforms do not discourage private sector growth while still safeguarding worker rights. This involved analyzing case studies from other countries that have successfully balanced these interests.

Another weakness is that the theory does not provide concrete solutions for resolving employment disputes fairly and efficiently. The study highlights that Tanzania's dispute resolution system disproportionately favors employers due to limited access to legal representation for employees. To fill this gap, the study examined institutional reforms, such as strengthening the Commission for Mediation and Arbitration (CMA) and increasing employee access to legal aid and representation in termination disputes.

The theory also assumed that all employer discretion leads to unfair dismissals, which is not always the case. In some instances, termination is necessary for company survival or due to gross employee misconduct. The study aims to differentiate between justified and unjustified employer discretion by analyzing real cases where fair dismissal practices exist, while also identifying cases of abusive termination that require legal intervention.

2.3.2 Labor Market Segmentation Theory

The theory was developed in the 1970s by Michael J. Piore (1979) and Peter B. Doeringer (1971), this theory explains how the labor market is divided into two sectors: the primary sector, which offers job security, good wages, and career growth, and the secondary sector, characterized by instability, low wages, and weak worker protections.

This theory aligns with the study at hand, as Tanzania's private sector largely operates within the secondary labor market, where employees face uncertain job

conditions and unfair dismissals. The study seeks to address how the existing legal framework allows employers to exercise excessive discretion in termination, leading to job insecurity. Strengthening labor laws could help reduce segmentation, ensuring more jobs provide stability and fair treatment.

One strength of this theory is its structural explanation of labor market inequalities, showing that workers in the secondary sector face systemic disadvantages. This supports the study's argument that Tanzania's labor laws need reform to protect employees. Additionally, the theory promotes policy interventions to shift jobs from informal and insecure arrangements to more stable employment conditions.

However, the theory's limitation is that it focuses on labor market structures but does not address individual employer-employee relationships. The study filled this gap by analyzing real cases of unfair termination and examining how employer discretion affects workers' rights. Additionally, while the theory assumes that segmentation is rigid, the study provided how legal reforms can create pathways for upward mobility, allowing employees to transition into more stable jobs.

2.3.3 Social Contract Theory

This theory was developed by John Locke (1689) and Jean-Jacques Rousseau (1762), the theory argues that governments and institutions have a duty to protect citizens' fundamental rights, including the right to work. The study aligns with this theory by examining how Tanzania's labor laws should reflect a social contract where employees are guaranteed fair treatment in employment termination, in line with constitutional rights.

The strength of this theory lies in its emphasis on fairness and justice, supporting the study's call for legal reforms that limit employer discretion in termination decisions. However, its limitation is that it focuses on broad principles without addressing specific labor market dynamics. The study bridged this gap by analyzing legal provisions, international standards, and employer practices to develop concrete recommendations for reform.

2.5 Conclusion

This chapter aimed to provide a comprehensive overview and detailed set of assumptions, values, and definitions, supported by credible justifications. It clarified and connected key concepts such as employment contracts, termination of employment contracts, employers, employees, employment standards, and fair and unfair termination of employment. Additionally, it briefly discussed the roles played by the parties involved in an employment contract. The law was broadly interpreted, extending beyond legal codes to include the legal spirit manifested in state practices. The focus was on the practical application of the law rather than its abstract concept. The chapter highlighted the imbalance between employee rights and the powers granted to employers, exploring the underlying causes of employee grievances.

CHAPTER THREE

INTERNATIONAL PRACTICES AND EXPERIENCE FROM OTHER JURISDICTIONS

3.1 Introduction

The International Labour Organization (ILO)[61] has established core labour standards that serve as a set of recognized and universally accepted minimum best practices aimed at safeguarding basic labour rights in the workplace.[62] These standards are binding for states that have ratified them and include protections against forced labour, child labour, and ensure freedom of association.[63] Recognizing the importance of these standards, the ILO encourages its member states to reform their labour laws by incorporating these core international labour standards into their domestic legislation.[64] Countries that demonstrate best labour practices have designed their labour laws in compliance with these standards. Essentially, these standards serve as a benchmark for evaluating a country's labour practices. Relevant to this study are the Termination of Employment Convention, 1982 (No. 158), and Recommendation No. 166, which complement relevant human rights instruments such as the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR). These instruments provide for among others the right to work. The provisions of these instruments are detailed in this chapter.

[61]A principal international institution (UN Agency) established in 1919 under the League of Nations' mandate to advance 'employment justice' through setting minimum labour standards.

[62]Chowdhury, M. S. (2017). Compliance with core international Labor standards in National Jurisdiction: evidence from Bangladesh. *Labor Law Journal*, *68*(1), p. 78

[63]Protection against discrimination at work (C-100,111), freedom of association (C-87), protection against forced or compulsory labor (C-29,105), right to collective bargaining (C-98), and abolition of child labor, (C-138,182).

[64]The ELRA seems to give effect to the core Conventions of the International Labour Organization as well as other ratified conventions (See Section 3 (1) (g)).

3.2 Promotion and Protection of Right to Work under International Human Rights Instruments

Understandably, the right to work is significant in fostering a person's dignity and well-being. It is an important right that underpins the realization of other human rights, such as housing, education, and culture.[65]For this reason, it has been argued that the unfair termination of employment is akin to tampering with one's right to life. As part of their obligation to protect and promote human rights, states have adopted and ratified several human rights instruments at both regional and international levels.[66] The labour standards enshrined in ILO instruments are grounded in these core human rights instruments. Consequently, international labour standards aim to ensure that the right to work remains focused on improving human life and dignity.[67] The key international human rights instruments that protect the right to work include the UDHR and the ICESCR[68], whose relevant provisions are discussed below.

3.2.1 Universal Declaration of Human Rights, 1948

The UDHR was adopted in 1948 following the horrors of the Second World War.[69] It was the first attempt by all states to agree on a comprehensive catalogue of human

[65] Retrieved June 24, 2024 from https://tikatangata.org.nz/human-rights-in-aotearoa/right-to-work
[66]Ogunbanjo, B. (2024). The role of regional human rights Instruments in the protection and promotion of human rights. *Human Rights Quarterly, 7(*1), 164-190.
[67]Peter, C. M. (1997). *Human rights in Tanzania: Selected cases and materials*. Köln: RüdigerKöppe.
[68]Other international instruments affirming the right to work include the Convention on the Rights of Persons with Disabilities (CRPD), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the Convention on the Rights of the Child (UNCROC), the Declaration on the Rights of Indigenous Peoples (UNDRIP), and the International Convention on the Elimination of All Forms of Racial Discrimination (CERD). These instruments outline the employment rights specific to each of these constituent groups.
[69]Chowdhury, A. R., Shasthri, V. S., & Bhuiyan, M. J. H. (2010). Role of regional human rights instruments in the protection and promotion of human rights. In *an Introduction to international human rights law* (pp. 255-287). Brill Nijhoff.

rights in a single document.[70] Article 23 of the UDHR provides that everyone has the right to work, the free choice of employment, favorable working conditions, and protection against unemployment. Article 23(2) states that everyone, without discrimination, has the right to equal pay for equal work. Article 23(3) stipulates that everyone who works has the right to just and favorable remuneration, ensuring an existence worthy of human dignity for themselves and their family.

The UDHR calls upon state parties to ensure that the rights contained in the instrument are a living reality, known, understood, and enjoyed by everyone, everywhere. It urges all member states to take the necessary positive steps and efforts to achieve the goals of justice, liberty, and human rights for all. Article 8 recognizes the right to an effective remedy by competent national tribunals for acts violating fundamental rights. This entails that any person whose right, including the right to work, has been violated can seek legal recourse in any established tribunal of a member state.

Essentially, this instrument underscores the fundamental nature of the right to work as stipulated in domestic legislation, thus facilitating its appropriate status in domestic legal systems. Although the declaration itself is not legally binding, it contains principles recognized as legally binding upon states by virtue of customary international law or general principles of law.[71]Therefore, the declaration can be relied upon, particularly where a particular state has not yet ratified the ILO core conventions.

[70]Moyn, S. (2014). The Universal Declaration of Human Rights of 1948 in the history of cosmopolitanism. *Critical Inquiry*, *40(4)*, 365-384.
[71]Baderin, M. A., & Ssenyonjo, M. (2016). Development of International Human Rights Law before and after the UDHR. In *International Human Rights Law* (pp. 19-44). Routledge.

3.2.2. International Covenant on Economic, Social, and Cultural Rights

The ICESCR, enacted in 1966, entered into force in 1976 after nearly two decades of drafting deliberations.[72] All States Parties are obligated to report to the Committee on Economic, Social, and Cultural Rights (CESCR) on how the rights are being implemented in their territories.[73]This instrument contains the most comprehensive provisions on the right to work.

Article 6 of the ICESCR affirms the right to work, which includes the freedom to choose or accept a job. According to the covenant, everyone has the right and opportunity to earn a living through work. Article 2(2) of the ICESCR requires States Parties to ensure that the right to work and all other rights set out in the Covenant are exercised without discrimination of any kind based on race, color, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status.

State parties are urged to take action to ensure that this right is fully realized, including guaranteeing equality in employment protection and non-discrimination in employment and occupation. Article 7 of the ICESCR recognizes the right of everyone to just and favorable working conditions. This includes equal remuneration for work of equal value, providing a decent living for workers and their families; safe and healthy working conditions; equal opportunities for promotion; and the right to

[72]Equality and Human Rights Commission (2023). International covenant on economic, social, and cultural rights *United Nations Audiovisual Library of International Law, disponívelem https://legal. un. org/avl/pdf/ha/icescr/icescr_e. pdf*, *acessoem*, *11*(01).
[73]Human Rights Committee (1989), General Comment No. 18: Non-discrimination (paras. 11-12).

rest, leisure, reasonable limitations on working hours, periodic holidays with pay, and remuneration for public holidays.

The provisions of Articles 6 and 7 of the ICESCR, which guarantee the right to work and related aspects are more comprehensive than those of Articles 22 and 23 of the Constitution. Article 8(3) includes a saving clause referring to the ILO Freedom of Association and Protection of the Right to Organize Convention, 1948 (No. 87). It specifies that "nothing in this article shall authorize States Parties to the ILO Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or apply the law in such a manner as would prejudice, the guarantees provided for in that Convention." This reference to ILO Convention No. 87 demonstrates that various international human rights agreements must be applied comprehensively, with the most protective clauses taking precedence. Additionally, in countries that have ratified ILO Convention No. 87 and where the ICESCR enjoys constitutional status, Article 8(3) can be interpreted as extending that status to ILO Convention No. 87.

The CESCR defines the right to work as a fundamental right in General Comment No. 18[74], encompassing the rights to be free from discrimination in employment, occupation, and protection against unfair termination of employment. Thus, in nations where domestic law does not specifically provide for this right, Article 7 of the ICESCR may be cited as a legal foundation. The ICESCR is also valuable because it establishes the general principle of equal pay “for all work of equal value”,

[74]See the Committee on Economic, Social, and Cultural Rights, in its general comment No. 18 (2005) on the right to work.

without limiting this distinction to gender differences. Indeed, the ICESCR establishes a robust framework for the right to work. However, its effectiveness is undermined by several factors, the most significant being the lack of strong enforcement provisions, non-justifiability, and limited mechanisms for individual redress.[75]

Despite the comprehensive provisions under both the UDHR and ICESCR guaranteeing the right to work, there is a prevailing argument within academic circles that this right has been neglected in human rights discourse.[76] The development of specific policies addressing the human rights obligations of states regarding this important right has seen limited progress. Given the rapidly changing work landscape shaped by current technological advancements, there is a pressing need to adopt specific legal and policy frameworks to affirm and uphold this right.

3.3 Protection Against the Termination of Employment Contracts under ILO Labour Instruments

Worker's right to enjoy secured employment is provided under the International Labour Organization (ILO) Convention on Termination of Employment (Convention 158) and Termination of Employment Recommendations in 1963.[77] These instruments set minimum standards for termination of employment contract at the instances of the employer thereby coordinating the minimum levels of job security in

[75]Odusote, A. (2014). Addressing the impediments to the realization and enjoyment of socio-economic rights under the ICESCR. *RelationesInternationales*, *7*(2), 74-106.

[76] Retrieved June 24, 2024 from https://tikatangata.org.nz/human-rights-in-aotearoa/right-to-work

[77]Tanzania joined the ILO in 1962 and so far has ratified the 36 ILO Conventions

the laws of ILO member states.[78] The provisions of these instruments are detailed hereunder;

3.3.1 ILO Termination of Employment Convention (No.158)

This convention consists of three parts with a total of 22 articles.[79] It excludes fixed-term contract employees, probationary employees, and casual employees from its provisions.[80] Article 4 of the convention prohibits the termination of an employee unless there are valid reasons connected to the employee's capacity or conduct, or based on the operational requirements of the undertaking, establishment, or service. Article 7 states that in the case of individual terminations, an employee must be given the right to defend themselves against allegations of incapacity or misconduct justifying termination. It is significant for employees to have the opportunity to defend them prior to termination to minimize the detrimental effect on them and the employment relationship if the accusations are unfounded.

Article 8 of the convention provides that an employee who considers their employment unjustifiably terminated shall be entitled to appeal to an impartial body, such as a Court, labour tribunal, arbitration committee, or arbitrator. Article 8(2) stipulates that the right of appeal may vary according to national law and practice if termination has been authorized by a competent authority. However, this provision does not impair the employee's right to appeal to an impartial body against termination.

[78]See the preamble to the Termination of Employment Convention, 1982 (No. 158)
[79]This convention is supplemented by the non-binding instrument that is R-166, Termination of Employment Recommendation, 1982 (No. 166) which makes several recommendations for state parties.
[80]See Article 2 (2) and 2 (4) of Termination of Employment Convention, 1982 (C. 158)

Article 10 of the convention provides that compensation for an employee in the event of unjustified termination may consist of: (i) an order or proposal to reinstate the employee, or (ii) payment of adequate compensation or other appropriate relief. The wording of Article 10 clearly shows that the convention favors' the annulment of termination and reinstatement as compensation for unjustified dismissal. If the courts do not have the power or do not consider it possible to annul the termination, they can order appropriate financial compensation. The question of what constitutes fair compensation for improper termination regularly arises in domestic courts. The positions of the ILO supervisory bodies on this matter may provide valuable guidance. The Committee of Experts believes that compensation for termination impairing a fundamental right should aim to fully compensate the worker for the prejudice suffered, both financially and occupationally. The best solution is generally reinstatement in the job with payment of unpaid wages and maintenance of acquired rights.

Notably, Article 10 of the convention, similar to Section 40(3) of the ELRA, does not compel the reinstatement of an employee in cases of unfair dismissal. Instead, it emphasizes the payment of appropriate compensation or other suitable reliefs. The researcher contends that merely providing monetary compensation for the violation of the right to work, without actual restoration of employment, constitutes a violation of the right to work as enshrined in Article 22 of the Constitution.

3.3.2 Termination of Employment Recommendation, 1982 (No. 166)

The Termination of Employment Recommendation, 1982 (No. 166), strengthens and

supplements several key provisions of Convention No. 158 and can serve as a valuable guide for domestic legal frameworks. The International Labour Organization is committed to setting labour standards, developing policies, and creating programs aimed at promoting decent work and job security for its member states.

Firstly, the Recommendation makes several practical suggestions for fair termination procedures, including providing a written statement of the reason for termination, offering a conciliation procedure before or during appeal proceedings against termination, allowing a reasonable amount of time off without loss of pay for seeking other employment during the notice period, and giving workers a 'second chance' to improve their performance. Additionally, the Recommendation expands the list of reasons for which employment should not be terminated to include age and absence from work due to compulsory military duty.[81]

In cases where employers have fulfilled all their obligations but still need to consider collective terminations, the Recommendation proposes several measures to avoid or minimize such terminations. Paragraph 21 suggests hiring restrictions, spreading workforce reductions over time to allow for natural attrition, internal transfers, training and retraining, voluntary early retirement with appropriate income protection, overtime restrictions, and reduction of normal working hours.

Paragraph 24 specifies that workers whose employment has been terminated for economic, technological, structural, or similar reasons should be given preference for

[81] See paragraph 5 of the recommendation

rehiring within a certain time frame if the employer hires people with comparable skills again. Employers should also assist affected workers in finding suitable alternative jobs, for example, through direct interactions with other employers. Regarding part-time workers, Article 7(b) of Convention No. 175 stipulates that state parties must ensure that part-time workers receive conditions equivalent to those of comparable full-time workers in the event of termination of employment.

In conclusion, the analysis of the ILO instrument indicates that Tanzania has made significant progress in incorporating labour standards established by core ILO conventions on the termination of employment contracts. However, the provisions under the ELRA remain inadequate, as they dilute the scope of the right to work and the freedoms guaranteed by the constitution and international legal instruments. Therefore, the researcher concludes that the existing laws on termination of employment violate the constitutional right to work.

3.3.3. Right to Organize and Collective Bargaining Convention (No. 98)

Convention No. 98 was adopted in July 1949 and entered into force in July 1951. It protects employees against acts of anti-union discrimination in respect of their employments and rights to exercise trade union's activities. It equally prohibits employer's acts of interference and dominance in the trade union's activities[82] convention No.98 also requires state authorities to respect the right to organize and the same proceed to put more emphasis on voluntary negotiation and collective

[82] Article 1 and 2

agreements[83]. The Employment and Labour Relations Act, Cap. 366 has broadly incorporated the provision of this convention in respect of the right to organize and collective bargaining; part V of the act is a true reflection of the convention.

Part V specifically provides for organizational rights, in that, among others any authorized representative of a registered trade union is entitled to enter the employer's premises order to recruit members; communicate with members; meet members in dealing with the employer' hold meetings of employees on the premises, and the right of a trade union to establish a field branch at any workplace where ten or more of its members are employed there at[84] the employer is equally required to deduct dues of a registered trade union from an employee's wages if that employee has authorized the employer to do so in the prescribed form, and remit the deduction to the trade union within seven days after the end of the month in which the deductions are made this position was equally emphasized in the case of *Tanzania social services industry workers union v. Machame Lutheran hospital*[85] at p 5-6.

It is important to note that Convention No. 98 also stresses on voluntary negotiation and collective bargaining as a catalyst of peacefully industrial relations in this regard therefore, part VI of the Act reflects the spirit the convention: for example, section 68 obliges the employer employer's association to bargain in good faith with a recognized trade union and the attendant collective agreements are binding. In

[83] Article 3 and 4
[84] Section 60
[85] Labour application no.2 of 2018, HC, DR at Moshi [un reported].

Tanzania Leaf Tobacco Company limited v Mohamed Issa Ihuka.[86] The Court held that in terms of section 71[2] of the Employment and Labour Relations Act, Cap 366 a collective agreement is binding upon the parties unless the agreement states otherwise. Davies and Freeland summarize the essence and purpose of collective bargaining in the context of the convention No.98 in the following terms

"In the light of what we have said it is not Difficult to summarize the purpose of collective Bargaining; by bargaining collectively with Organized labour, management seeks to give Effect to its legitimate expectation that the Planning of production, distribution, etc. Should not be frustrated through interruption of work. By bargaining collectively with management' Organized labor seek to give effect to its Legitimate expectations that wages and other Conditions of work should be such as to Guarantee a stable and adequate form of Existence and as to be compatible with the Physical integrity and moral dignity of the Individual, and also that job should be reasonably secure. This definition is not intended to be exhaustive. It is intended to Indicates (and this is important for the law) that the principal interest of management in collective bargaining has always been the Creation and the maintenance of certain standards over a given area and period, standards of distribution of work, of rewards and of stability of employment."

3.5 Experiences from other Jurisdictions

3.5.1 South Africa

Notably, Tanzania's labor laws have heavily borrowed from South Africa, making

[86] Labour Application no.2 0f 2018 HC DR at Moshi [unreported]

the South African experience on termination of employment contracts particularly relevant. South Africa has developed a comprehensive legal framework to protect employees from unfair dismissals, enacted through the South African Constitution of 1996[87] and the Labour Relations Act 66 of 1995 (LRA).[88]

Chapter Two of the South African Constitution includes valuable provisions related to employment and labor relations. Article 23 explicitly guarantees the right to fair labor practices, which has been interpreted by courts to include the right not to be unfairly dismissed.[89] Article 39 also empowers courts and tribunals to consider international law when interpreting the provisions of the Bill of Rights. Consequently, fair labor practice is a constitutional right in South Africa.[90]The explicit recognition of fair labor practice in the South African Constitution is a best practice, providing constitutional protection that is absent in the Tanzanian Constitution. The enactment of the LRA in 1995 was largely intended to give effect to the right to fair labor practices as enshrined in Section 23 of the Bill of Rights.[91]

According to Section 188(1) of the LRA, a dismissal is unfair if the employer fails to provide a fair reason related to the employee's conduct or capacity, or based on the employer's operational requirements, and if the dismissal was not carried out in accordance with fair procedures. This means an employer is required to give valid

[87]It was approved by the Constitutional Court on 4 December 1996 and took effect on 4 February 1997.
[88]This law was passed in 11th November 1996, repealing and replacing the Labour Relations Act 28 of 1956 and thereby codified the law of unfair dismissal in South Africa.
[89]See the case of *Fedlife Assurance Ltd v Wolfaardt* (2001) 12 BLLR 1301(SCA)
[90]Article 39(1) of the Constitution of the Republic of South Africa Act, No 108 of 1996
[91]Cokile, S. (2009). *The remedies for unfair dismissal* (Master thesis, Nelson Mandela Metropolitan University) at p. 1

reasons for the termination of an employee's employment. This provision, similar to those in the ELRA, aligns with Article 4 of ILO Convention 158. It can also be said that the convention is more rigorously applied in South Africa due to the broad scope of the definition of "employee" under the Act.[92]

The provision that caught the researcher's attention is Section 193 of the LRA, which outlines various remedies available for employees who have been unfairly dismissed. This provision is articulated as follows:

> ‘‘The Labour Court or the arbitrator must require the employer to reinstate or re-employ the employee unless–(a) the employee does not wish to be reinstated or re-employed; (b) the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable; (c) it is not reasonably practicable for the employer to reinstate or reemploy the employee; or (d) the dismissal is unfair only because the employer did not follow a fair procedure.’’ (Emphasis added)

The above quoted provision outlines various remedies re-employment, reinstatement, and compensation as remedies that available for employees who have been unfairly dismissed. This provision states that reinstatement, re-employment, and compensation are the remedies that can be granted to employees whose dismissals are found to be unfair. A closer examination of this provision reveals that reinstatement and re-employment are the primary remedies for unfair dismissal. Compensation is considered an alternative remedy, only applicable when the exceptions in subsection 2 (a) to (d) are present.[93] The use of the word "or" after

[92]Section 21(3) of ELRA defines an employer as any person excluding an independent contractor, who works for another or for the state and who receives or is entitled to any enumeration.
[93]Cokile, S. (2009). *The remedies for unfair dismissal* (Master thesis, Nelson Mandela Metropolitan University) p. 17

Section 193(1)(b) indicates that compensation cannot be ordered together with reinstatement and re-employment, as these are mutually exclusive remedies.[94]

In the case of *SBV Services (Pty) Ltd v. CCMA*[95], the South African Court interpreted this provision, affirming that if an employee's dismissal is found to be substantively unfair, they are entitled to reinstatement unless they have waived this right. This waiver can occur if the employee opts for compensation instead of reinstatement, if continued employment would be intolerable, or if it has become impractical to reinstate the employee to their previous position. In such cases, compensation should be ordered.[96]

A comparison between Section 40(2) of the ELRA and Section 193 of the South African LRA shows that the South African approach is a best practice, as it was enacted with the constitutional right to work in mind. Unlike Tanzanian labour law, which places reinstatement or re-engagement under the discretionary power of the employer, leaving the employee's right to work at the mercy of the employer, the South African LRA places reinstatement under the wishes of the employee, thereby securing the employee's constitutional right to work.

It is submitted that Section 40(3) of the ELRA should be amended to make reinstatement and re-engagement the primary remedies for unfair dismissal. This

[94]Ibid p. 5
[95]*SBV Services (Pty) Ltd v. National Bargaining Council for the Road Freight and Logistics Industry and Others* (JA6/16) [2018] ZALAC 5
[96]See the case of Mzeku and others versus Volkswagen SA (Pty) Ltd and others (PA3/01) [2001] ZALAC 8 (22 June 2001)

amendment would align with the objectives of the ELRA under Section 3(a), which aims to advance economic development through economic efficiency, productivity, and social justice.

3.5.2 Uganda

The law governing the termination of employment contracts in Uganda is primarily regulated by the Employment Act of 2006 and the Ugandan Constitution of 1995. The Employment Act outlines the rights and obligations of both employers and employees during employment and upon its cessation. The Constitution of Uganda, as the supreme law, renders any law inconsistent with it null and void.[97] It also contains specific provisions that uphold the right to work, and thus promoting favorable employment standards.[98]

The current level of enjoyment of the right to fair labor practices in Uganda is derived from Article 7 of the ICESCR and the Ugandan Constitution. Article 7 of the ICESCR recognizes the right of everyone to enjoy just and favorable conditions of work, which include: (a) remuneration providing all workers with fair wages and equal pay for work of equal value without discrimination, with women guaranteed conditions of work not inferior to those enjoyed by men; (b) safe and healthy working conditions; (c) equal opportunity for promotion, subject only to seniority and competence; and (d) rest, leisure, reasonable limitation of working hours, and periodic holidays with pay.

[97] Article 2 of The constitution of Uganda as amended 1995
[98] Article 40 (2) (3) of the constitution of Uganda as amended

Article 40(1) of the Ugandan Constitution reflects the provisions of the ICESCR but falls short in one respect: it guarantees equal pay for equal work but does not codify the entitlement to fair wages. Uganda's new Employment Act goes a long way in protecting these rights in the private sector. It includes provisions that directly protect employees and establish the Labour Advisory Board, which advises the Minister responsible for labor matters and develops employment service policies to prevent unfair termination of employment.

Section 71 (6) of the Ugandan Employment Act, 2006, is similar to Section 193 of the South African Labour Relations Act 66 of 1995 (LRA). This provision requires the Court to order the reinstatement or reemployment of an employee if it finds the termination was unfair, except in cases where continued employment would be intolerable. This provision is consistent with the right to work enshrined in Article 40(1) (a) of the Ugandan Constitution, which seeks to protect labor rights, including the right to work under satisfactory, safe, and healthy conditions.

3.5.3 Kenya

The Republic of Kenya protects employment contracts through its Constitution and the Employment Act of 2007[99], among other laws governing employment relations. Article 41 of the Constitution of Kenya, 2010, guarantees the right to fair labor practices. Under the Constitution, every worker has the right to fair remuneration, reasonable working conditions, the ability to join and participate in trade union activities, and the right to strike.[100]

[99]Cap. 226 of the Laws of Kenya, R.E 2012
[100]Section 141 of the Kenyan constitution, 2010

The Employment Act mandates that no employee can be unfairly dismissed, placing the problem of proving the reasons for termination on the employer. If the employer fails to do so, the termination is deemed unfair. Termination is considered unfair if the employer cannot prove the validity of the reasons for termination or if the reasons are not based on operational requirements or related to the employee's conduct, capacity, or compatibility.

Unlike in Tanzania, a distinctive feature of the Kenyan Employment Act is found in Section 47(5), which places the problem on the employer in any complaint of unfair termination or wrongful dismissal. This implies that the employee initially must prove to the Court that unfair termination has occurred. Once this is established, the onus shifts to the employer to convince the Court of the fairness of the reason for the dismissal. If the employer fails to justify the dismissal, it will constitute unfair termination. Unlike in Tanzania, one of distinctive features of the Employment Act can be captured in section 47(5) which places the problem on the shoulder of the employer in any complaint of unfair termination of employment or wrongful dismissal, the problem of proving that unfair termination or wrongful dismissal has occurred. This implies that the employee has the initial problem of proving to the Court that unfair termination of his employment has taken place after which the onus shifts to the employer to convince the court of the fairness of the reason for the dismissal, but if the employer fails to justify the dismissal that will constitute unfair termination.[101]

[101]Section 141 of the Kenyan constitution, 2010

Section 49 of the Employment Act, provides for the remedies available to an employee in cases of unfair termination. Unlike the provisions under the ELRA in Tanzania, Section 49(4) of the Kenyan Employment Act outlines factors that the court must consider when deciding whether to order reinstatement or re-engagement, these factors include the wishes and expectations of the employee, meaning that if an order for reinstatement or re-engagement is made, the employer must comply unless the employee does not wish to continue working for that employer. The court will also consider if the employment relationship has deteriorated to such a degree that continued employment is intolerable or if it is no longer reasonably practicable for the employee to return to their previous position.

3.5 Conclusion

The practices exhibited by South Africa, Uganda, and Kenya concerning the law on termination of employment are commendable for two main reasons. Firstly, the recognition of the right to fair labor practices under these countries' constitutions is a good practice that ensures to safeguarding of employees' rights to work. Secondly, the limitation of the employer's discretionary power to reinstate or re-engage employees, compelling them to do so unless there are compelling factors that render such an order impracticable, is significant. This limitation goes a long way in protecting the constitutional right to work. The practices demonstrated by South Africa, Kenya, and Uganda are therefore applauded. They should form the basis for the Tanzanian parliament to amend Section 40(3) of the ELRA, thereby limiting employers' powers. Such a change would be crucial in protecting employees' right to work as enshrined under Article 22 of the Tanzanian Constitution.

CHAPTER FOUR

LEGAL AND INSTITUTIONAL FRAMEWORKS FOR TERMINATION OF EMPLOYMENT CONTRACT IN TANZANIA

4.1 Introduction

Tanzania has established legal and institutional framework to regulate employment relations in both the private and public sectors. The established framework ensures that employment contract terminations are conducted fairly and without prejudice to employees, thereby fostering trust in the labor market. The primary legislation governing employment relationships in Tanzania is the Employment and Labour Relations Act, 2004 (ELRA), which is supplemented by various other subsidiary and principal legislation.

The institutional framework for terminating employment contracts includes several key bodies responsible for enforcing and adjudicating labor laws. These institutions include the Commission for Mediation and Arbitration (CMA) and the Labour Court, among others. This chapter explores the various components of Tanzania's legal and institutional framework concerning the termination of employment contracts. It examines the relevant legislation, key institutional roles, procedural requirements, and the rights and obligations of both employers and employees.

4.2. Legal framework

4.2.1 Constitution of the United Republic of Tanzania, 1977

The Constitution of the United Republic of Tanzania is the supreme law of the land and recognizes the right to work. Article 22(1) state, "Every person has the right to

work." Additionally, Article 22(2) affirms that every citizen is entitled to equal opportunity and the right to equal terms for holding any office or performing any function under state authority.

The Constitution incorporates Alternative Dispute Resolution (ADR) mechanisms for civil cases, including labor disputes. It mandates that courts encourage mutual settlements and, in delivering decisions in civil matters, observe principles that promote and enhance dispute resolution among the involved parties. Consequently, the Constitution of Tanzania obliges courts to support and promote ADR methods, making mediation and arbitration constitutionally recognized means of resolving labor disputes.

Tanzania's labour laws derive their legitimacy from the Constitution, aiming to protect the employee's right to work. In the case of Augustine Masatu versus Mwanza Textiles Ltd[102], Justice Mwalusanya (as he then was) addressed section 40A (5) of the then Security of Employment Act, 1964 (now section 40(3) of the ELRA). He stated that when the Minister for Labour (now the CMA and Labour Courts) orders the reinstatement of an employee who is ready and willing to work, the employer has no choice but to comply. Failure to do so is at the employer's own risk. The Court reasoned that any other interpretation would render section 27 (currently section 40(3) of the ELRA) meaningless, and since the Constitution guarantees the right to work, no ordinary statute can infringe upon such a fundamental right.

[102]High Court of Tanzania at Mwanza, Civil Case 3 of 1986, (unreported)

4.2.2 Employment and Labour Relation Act, 2004

The law regulates all employer-employee relationships, providing core labor rights, basic employment standards, and mechanisms for preventing and settling disputes. The ELRA addresses unfair termination, stipulating that it is unlawful for an employer to terminate an employee's employment unfairly.[103]

The Employment and Labour Relations Act (ELRA) confers jurisdiction on the Commission for Mediation and Arbitration (CMA) to arbitrate matters with pecuniary limits below those of the High Court.[104] It empowers the Labour Court to adjudicate complaints not designated for arbitration, clearly demarcating which complaints are to be resolved through arbitration and which through the Labour Court.

Mediation aims to reconcile the parties involved, allowing them to agree or refuse reconciliation voluntarily. The resultant decision from mediation is owned by the parties as it represents their voluntary resolution to the dispute. However, the ELRA seems to contradict this notion. It mandates the mediator to decide a complaint if the respondent does not attend the mediation hearing, and further requires the High Court Labour Division to enforce this decision as if it were a decree of a competent court.[105] This provision appears improper and contradictory, as it conflicts with the essence of mediation, where it is the parties, not the mediator, who decides the resolution.

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[103]Section 37 (a) of ELRA
[104]Section 88 (1) (b) (ii) of the Employment and labour Relations Act, 2004
[105]Berkely Electric Limited v. Christopher Musa and Another Labour Revision No. 236 of 2020 (unreported)

Under section 40(3), the ELRA provides three remedies: reinstatement, re-engagement, and compensation. Compensation involves paying the employee not less than twelve months' remuneration, in addition to wages and other benefits due from the date of unfair termination to the final payment date. This order for compensation is supplementary to any other amounts the employee may be entitled to under any law or agreement.[106] In the case of *Augustine Masatu versus Mwanza Textiles Ltd*[107], the Court held that allowing such provisions renders them superfluous. Since the Constitution guarantees the right to work, such contradictions can undermine this fundamental right.

4.2.3 Labour Institutions Act, 2004

The Act established the Commission for Mediation and Arbitration (CMA) in 2007.[108] This commission, functioning as an independent government department, is empowered to mediate any dispute referred to it and to arbitrate if a labor law requires the dispute to be resolved through arbitration. The jurisdiction of the CMA is outlined in various provisions that must be read together.

The Labour Institutions Act (LIA) assigns the CMA the primary function of mediating disputes and determining disputes through arbitration. Additionally, upon request, the CMA provides employees, employers, and registered organizations and federations with advice and training related to the prevention and settlement of disputes.[109]

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[106]Section 40 of ERLA
[107]High Court of Tanzania at Mwanza, Civil Case 3 of 1986, (unreported)
[108]Section 12 of Labour Institution Act, 2004
[109]Section 14(1) of the Labour Institutions Act, 2004

Section 61 of the LIA outlines several criteria for presuming the existence of an employment contract or employment relationship when there is ambiguity. These criteria are used to determine whether an employment relationship exists. For the purposes of labor law, a person who works for or renders services to another person is presumed, until proven otherwise, to be an employee, regardless of the form of the contract, if any of the following factors are present: The manner in which the person works is subject to the control or direction of another person; The person's hours of work are subject to the control or direction of another person; The person is part of an organization if they work for that organization; The person has worked for the other person for an average of at least 45 hours per month over the last three months and The person is economically dependent on the other person for whom they work or render services. Under Section 61 of the LIA, employment is presumed based on the nature of the relationship. This presumption helps define employment by setting criteria to determine whether an employment relationship exists.

4.2.4 Civil Procedure Code, 1966

In Tanzania, there are numerous institutional frameworks through which Alternative Dispute Resolution (ADR) is upheld as a legitimate means of dispute settlement. ADR was introduced in Tanzania via a Government Notice that amended the first schedule of the Civil Procedure Code Act, making it an integral part of the country's legal system.[110] The Commission for Mediation and Arbitration (CMA) employs ADR as a modern method for resolving labor disputes, serving as an alternative rather than a replacement for formal labor courts or customary systems.

[110]Government Notice No.422 In 1994

Many people in Tanzania choose to resolve their labor conflicts through ADR. However, the choice of the appropriate process depends on the specific circumstances of each case. Each justice system, formal courts, customary systems, and modern ADR has its own strengths and weaknesses in resolving labor conflicts. Formal justice systems, such as the courts of law, are often inefficient and unable to meet the needs of people in both urban and peri-urban areas, particularly in developing countries like Tanzania.[111]

On the other hand, informal systems, such as customary justice, also have their limitations. The modern ADR system stands as an alternative to both formal courts and customary systems, without replacing them. Analysts in the field suggest that these justice systems could be enhanced and developed to support and complement each other, creating a more effective overall justice system.[112]

4.2.5 Labour Institutions (Mediation and Arbitration) Rules of 2007

Under the Rule of Labor Institutions (Mediation and Arbitration) Rules, the Commission for Mediation and Arbitration (CMA) may schedule combined mediation and arbitration proceedings on the same date, which can be conducted by the same individual.[113] Parties also have the option to elect the same person as both mediator and arbitrator.[114]

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[111]Sackey, G. (2010). *Investigating justice systems in land conflict resolution: A case study of Kinondoni Municipality, Tanzania* (Master's thesis, University of Twente) p. 5
[112]Lendita, S. W. (2013). *Investment and land disputes in Tanzania: A vehicle for investment legal reform* (Master's dissertation, Mzumbe University) p. 1
[113]Rule 18 of Labor Institutions (Mediation and Arbitration) Rules (Government No. 64 of 2007)
[114]Ibid Rule 30

Most arbitrators are legal practitioners familiar with mediation. However, they are often hesitant to refer matters to mediation due to a lack of confidence in the process from the parties involved.[115] For mediation of labor disputes under the CMA, the Employment and Labour Relations Act (ELRA) and Labour Institutions Act (LIA) require the aggrieved party to file a prescribed form, including a summary of the dispute, to initiate mediation proceedings. Additional procedural requirements include summoning the respondent and notifying both parties of the hearing date.

The mediation process itself is flexible, allowing parties to agree on a mediation procedure. This flexibility permits the mediator to assess the situation and hold meetings with participants in a manner conducive to constructive dialogue. According to the ELRA, CMA mediators must issue a certificate within 30 days or any longer period agreed upon by the parties.

International standards can apply without restrictions in Tanzania, as there are no special considerations for international mediation proceedings. Rule 15 requires mediators to address any jurisdictional issues before conducting mediation, ensuring that the jurisdiction of the CMA binds both the mediator and the arbitrator.

4.2.6 Labour Court Rules GN No. 106 of 2007

The Labour Court has the authority to execute not only its own decisions but also those of the CMA, the Labour Commission, and other bodies making enforceable decisions but lacking execution powers.[116] Along with execution, the Labour Court

[115]Labour Institutions (Mediation and Arbitration) Rules GN 64 of 2007
[116] Rule 48(3) & (4) of the Labour Court Rules GN No. 106 of 2007.

has the power to interpret the decisions of the CMA, Labour Commissioner, and other bodies. These interpretation powers are essential for rational execution.[117]

Judge Rweyemamu clarified that the Registrar has the power to execute CMA awards but not to adjudicate issues arising during execution. If awards are unclear or unenforceable, parties can apply for revision or necessary orders from the Labour Court, which can direct the CMA to clarify the decree.[118] However, the Registrar's orders made without authority were quashed and set aside.[119] The judge's ruling highlighted that while the Registrar is not included in the definition of the Labour Court, he can execute CMA awards, but they not determine issues during execution. The law does not explicitly grant the Registrar execution powers, so his role should be limited to executing awards without adjudicating related matters.

4.2.7 Labour Institutions (General) Regulations, 2007

These regulations address the qualifications of commission members and related issues. Regulation 4 specifies that the qualifications for the appointment of the Chairman and members of the Council, as outlined in section 16(1) and (2) of the Act and regulation 3, apply to the Chairperson and Commissioners of the Commission. This regulation, together with the LIA, sets the qualifications for the chairman of the commission.

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[117] Ibid Rule 48 (8)
[118] Rule 49 of the Labour Court Rules, 2007
[119] *Distributors Nufaika v. Charles Tafsiri* Revision No. 185 of 2009 (unreported), also in *Mary Mwalufunga versus TPC Ltd* Execution No. 186 of 2010 (unreported).

4.3 Mode of Dispute Resolution in CMA

From the outset, it must be understood that the principal objects of the Employment and Labour Relations Act, cap. 336 are to regulate the resort to industrial action as a means to resolve dispute and to provide a framework for the resolution of dispute by mediation, arbitration and adjudication.[120] As such, dispute resolution is an important intent of the Labour law regime in mainland Tanzania. The term dispute is any dispute concerning a Labour matter between any employers or registered employer's association on the one hand, and any employee or registered trade union on the other hand, and includes an alleged dispute. A dispute of interest is equally defined as any dispute except a complaint.[121] The section defines a complaint as any disputes arising from the application, interpretation or implementation of an agreement or contract with an employee, or a collective agreement, or under any written law. It is therefore important to note that a dispute of interest is not based on any existing statutory or contractual right employees or trade unions must approach the employer in order to establish a new right while a complaint or dispute of right is based on existing statutory or contractual right.

A labour dispute is thus a disagreement between and employer and employee with regard to term of employment.[122] In the case of *Nyota Tanzania Limited v. Onesmus D. Onyango and another*[123] the Court had an opportunity to comment on what amount to a labour dispute and jurisdiction of relevant institutions in resolving labour

[120] Section 3 (d) and (e) of ELRA CAP 336
[121] Ibid, section 4.
[122] Zaitseva, L.., et al. (2019). Intermediary in a collective Labour Dispute Resolution. *BRICS Law Journal, 6* (2), 33-59
[123] Civil Appeal No. 224 of 2018, HC, DSM DR (unreported) at pg. 16,17, &18

disputes, it held that: "Section 4 of the Employment and Labour Relations Act defines the term Labour matter" to mean any matter relating to employment or Labour relations and resolution of disputes fall under the exclusive jurisdiction of labour dispute resolution forums constituted of the Commission for Mediation and Arbitration (CMA), the High Court and the Court of Appeal. Subject to pecuniary jurisdiction, these disputes compulsorily commence at the CMA which is at the bottom of the labour dispute resolution forums ladder. Where the claims involved in the dispute are fully detached from the parties' employment relationship and are of such nature that determines independent from the parties' employment related rights and interest it can be actionable in ordinary courts. Conversely if the claims are predicted on the employment relationship between the parties it will inevitably fall under the description of a labour matter and will consequently be subject to the exclusive jurisdiction of the labour dispute resolution forums as they are also vested with jurisdiction of tortuous liability.

Disputes are therefore part and parcel of human nature and always manifest everywhere including in the employment arena. It is this inevitability of disputes that warrant measures to be in place so as to effectively and without delay, resolve them in order to realize industrial peace commenting on the nature of labour dispute, the Labour Court observes that: "Labour disputes are of their own nature, they affect the parties to dispute as well on those who depended on the employment as a means of their livelihood. To my view, the spirit of extending jurisdiction to all judges is that labour disputes be disposed expediently and timely, this is my view does not prejudice justice to the other parties rather it saves time to both parties and ensures

speed determination of the dispute''[124] As such, by their nature labour disputes must be resolved expeditiously and brought to finality so that the parties can organize their affairs accordingly as they tend to affect the economy and labour peace. It is in the interest of the public that Labour disputes be resolved speedily.[125]

Dispute resolution is the term that refers to a number of processes that can be used to resolve a conflict, dispute or claim. It is a process of resolving disputes between different parties in the employment industry in mainland Tanzania; the labour law regime recognizes both Alternative Dispute Resolution (ADR) and adjudication as a means of resolving labour disputes among different stakeholders.

4.3.1 Dispute Resolution Method

As eluded above, ADR i.e. Mediation, Arbitration and other similar method as well as adjudication are official method in resolving labour dispute in mainland Tanzania the law provides for the manner and circumstances of deploying every method.

4.3.2 Mediation

Rule 3 of the Labour Institutions (Mediation and Arbitration Guidelines) Rules, 2007 (GN No. 67 of 2007) define mediation as a process in which a person independent of the parties is appointed as a mediator and attempts to assist them to resolve a dispute and may meet with the parties either jointly or separately, and though discussion and facilitation, attempt to help the parties to settle their dispute. The same law also

[124] *Humphrey Ngalawa v. Coca Cola Kwanza Limited*, Labour Revision No. 18 of 2017, HC, DR. Mbeya (Unreported) at p. 6.
[125] *National Education Health and Allied Workers Union (NEHAWU) v. University of the Cape Town (UCT) and Others*, (CCT2/02[2002] ZACC 27, para. 31.

makes it clear that the mediator may make the recommendations to the parties suggesting for settlement if the parties to the dispute agree or the mediator believes it will promote settlement, the suggested recommendation are not binding on the parties rather it is only persuasive and aims to assist the parties to settle their dispute. Rwodzi defines mediation as a process by which a mediator assists disputants to resolve the disputes between them by facilitating the dialogue and the term mediation stems from a Latin expression mediate which means to occupy the middle position thus acting as an intermediary suggesting possible solutions.[126] Here, the mediator acts only in adversary and consolatory capacity meaning he has no decision making powers to impose settlement on either of the parties.[127]

Equally Mnookin observes that: "Mediation involves the use of third party i.e. the mediator, but the mediator unlike the arbitrator or judge has no authority to impose resolution on the parties instead, the mediators go to facilitate negotiation and let the parties themselves to reach the mutually acceptable settlement of their own dispute mediation is typically a voluntary process where the parties themselves may choose the person who react as an outside facilitator. It is private and confidential, and not open to the public. Although the mediator is typically responsible for managing the mediation process, there are no standard procedures or fixed rules. The process by which the mediator to facilitate the negation is open informal and unstructured. The

[126] Rwodzi, N.T. (2017). *The use of alternative dispute resolution mechanisms in labour relations in the workplace in South Africa* (LL.M dissertation, University of Fort Hare), p. 80

[127] See also Feng, J, and Xie, P, (2020). Is mediation preferred procedure in labour dispute resolution systems? Evidence from employer – employee matched data in China," Vol. 62(1) *Journal of Industrial Relations*, *62* (1), 81-103 and McKenzie, D.M (2015). The role of mediation in resolving workplace relationship conflict. *International Journal of Law and Psychiatry*, 39, 52-59.

actual practices of individual mediators vary greatly.[128] Section 86 through section 87 of the Employment and Labour Relations Act, Cap 366 provides for mandatory mediation of any labour dispute before CMA and a party to dispute may be represented by a member or an official of that party's trade unions or employer's association or an advocate, or a personal representative of the parties on their own choice. The laws also make it clear that where the mediator fails to resolve the dispute within 30 days or any longer period as agreed by the parties in writing then any party to the dispute may if the dispute is the dispute of interest, gives them a notice of his intention to commence a strike or lockout in accordance with the relevant provisions of the law; or if the dispute is a complaint then refer the complaint in arbitration or to the Labour Court as the case may be.

It should be noted that each mediation session varies depending on the parties involved, the style of the mediator the nature of the dispute and the circumstances involved but generally each session has four stages, namely; introduction, gathering information, exploring options and developing consensus as well as conclusion.[129] The mediator is obliged to issue a certificate at the end of the mediation identifying the nature of the dispute and stating whether the dispute has been resolved or not the law directs that such certificate may be issued within 30 days if the mediator decides that the mediation has failed.[130] Commenting on the overall nature and attributes of mediation, the Labour Court has this to say:

[128] Mnookin, R, "Alternative Dispute Resolution," Harvard Law School John M. Olin Center for Law, Economics and Business Discussion Paper Series, 1998, paper 232 at p.5
[129] Rule 9 of the Labour Institutions (Mediation and Arbitration Guidelines) Rules, 2007.
[130] Ibid., Rule 3(50.

> "Mediation is defined in the *Black Law Dictionary* as a method on non-binding dispute resolution involving a neutral party who tries to help the disputing parties reach a mutually agreeable solution. Generally, the mediation process is done when mediators meet jointly or separately with the disputing parties and explore ways to help the parties reach an amicable agreement. It is a private and a confidential process often helps the parties to resolve the disputes quickly since in the due course, the parties may share information and suggests ways of settling the dispute themselves. The mediator may also suggest and explore settlement ideas. The settlement agreement reached binds the parties and may be executed as a decree in labour court. This process is mandatory before the dispute is referred for arbitration".[131]

On the mandatory nature of arbitration, the Court in *Secularms (T) Limited v. Sauli Awaki Nada*[132] at pp. 7-8 ruled that "[t]he law under section 86(3) of the Employment and Labour Relations Act , No. 6 of 2004 states that, 'on the receipt of referral made under subsection (1) the Commission shall (a) appoint a mediator to mediate the dispute, (b) decide the time, date and a place of the mediation hearing and (c) advise the parties to the dispute of the details stipulated in paragraphs (a) and (b) . Now looking at this provision, it has been couched in mandatory word 'shall' to mean that what is provided therein must be performed. It cannot be interpreted in any other way except full compliance. This means failure to observe what is provided is fatal for this reason, I find this ground for revision meritorious in the sense that it was improper for the CMA to embark on Arbitration before attempting to mediate the parties as provided by the law. Mediation of a dispute is mandatory before referring the same to arbitration.[133] It should also be noted that the mediation settlement agreement is binding between the parties See *Benedict Komba v Knight Support (T)*

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[131] Florence Munuo v. Chui Security Company Limited, Labour Revision No. 27 of 2019, HC, DR, Moshi (unreported) at p. 6.
[132] Labour Revision No. 11 of 2020, HC, DR, Moshi (Unreported).
[133] *Cable Television Network (CTV) Ltd Athumani Kuwinga 7 Others* , Labour Revision No. 94 of 2009, HC, LD, DSM (unreported)

Ltd, Revision No. 270 of 2009, [2011-2012] LCCD 34] & *Otieno Roche & others v. Kariakoo Market Corporation*, Labour Cause No. 22 of 2011 [20131 LCCD 90].

4.3.3 Arbitration

Arbitration is a procedure of resolving disputes whereby the parties' dispute is submitted to one or more arbitrators who make a binding decision on the dispute upon receiving evidence from each party.[134] Steadman defines arbitration as a process in which an independent third party hears the parties' respective cases, determines the dispute between them and issues an 'award' or 'decision'. The award or decision is typically final and binding, subject to review or revision but not to appeal.[135] It important to note that, "arbitration involves a neutral third party the arbitrator who is responsible for running the process and making the decisions necessary to resolve the dispute. Unlike the judge who is a public official the arbitrator is normally a private person chosen by the parties. The person chosen to arbitrate the dispute often has specialized expertise in the subject matter of the dispute; legal training is required only if the parties so specify. A dispute that might otherwise go to Court becomes subject to binding arbitration only by the agreement of the parties."[136] Section 88 of the Employment and Labour Relation Act, Cap, 366 among others direct that where the parties fail to resolve a dispute referred to mediation then the CMA must: (a) Appoint an arbitrator to decide the dispute; (b)

[134] Finkin, M. W. (1990). Commentary on Arbitration of Employment Disputes without Unions. *Chicago- Kent Law Review, 66*(3), 799-815.
[135] Steadman, F (2017)., *Handbook on alternative labour dispute resolution*. Geneva: ILO, p.21-22
[136] Mnookin (1998) at p. 2; See also Rwodzi (2017) at p. 82 who defines arbitration as a process whereby parties make presentations to a mutually third party and commit themselves to abide by that person's ruling acknowledging it as final and binding. Equally see Almutairi, A. (2018). Labour dispute resolution process and its impact on the rights of low-skilled temporary foreign workers in the absence of labour court in Saudi legal system: A critique. *Vol. 7(1) International Law Research*, 7(1), 199-212.

determine the time, date and place of the arbitration hearing; and (c) advise the parties to dispute about all necessary matter relating to arbitration. The law also makes it clear that the CMA is barred from appointing an arbitrator before the dispute has been mediated.[137] Mediation is therefore a mandatory procedure before arbitration the latter cannot be effected unless there is a proof of a failure of mediation. In the case of *Katavi and Kapufi Limited and another v. Emmanuel Dotto Ibrahim and 8 Others*[138] the Court ruled that it is a spirit of the labour laws that once mediation fails, the dispute is referred to the stage of arbitration – see also rule 19-28 of the Labour institutions (Mediation and Arbitration) Rules, 2007 (G.N. No. 64 of 2007).

In the same vein, the law directs that within 30 days of the conclusion of the arbitration proceedings, the arbitrator is obliged to issue a signed award with reason thereof.[139] An arbitration award is binding on the parties to the dispute and the same may be executed on the Labour Court as it if were a decree of a court of law.[140] The law stipulates further that any part to an arbitration award who alleges a defect in any arbitration proceedings under the auspices of the CMA may apply to the Labour Court for a decision to set aside an arbitration award but he must do so within 6 weeks of the date that the award was served unless the alleged defect involves improper procurement, of which a party claiming defect must approach the Labour Court within 6 weeks of the date that such party discovers that fact. The Court may thus set aside an arbitration award on grounds that there was misconduct on the part

[137] Section 88(3)
[138] Labour Revision No. 4 of 2020 HC. LD, Sumbawanga (unreported) at p. 46.
[139] Section 88(11).
[140] Section 89.

of the arbitrator; the award was improperly procured or the award is unlawful, illogical or irrational. The Labour Court has power to stay the enforcement of the award pending its decision. In the event that the award is set aside, the Labour Court may proceed to determine the dispute in the manner it considers appropriate; or make any order it considers appropriate about the procedures to be followed to determine the dispute.[141] Regarding the conduct of arbitration proceedings in its totality, see rule 18 through 29 of the Labour Institutions (Mediation and Arbitration Guidelines) Rules 2007, (G.N. No. 67 of 2007).

4.3.4 Combined Approach

A combine approach is a method of resolving labour disputes that include both mediation and arbitration. Rule 18 of Labour Institutions (Mediation and Arbitration Guidelines) Rules, 2007 (G.N No. 67 of 2007) gives the discretion to CMA to set down a combined mediation-arbitration process on the same date to be conducted by the same person as the case may be. However, the CMA obliged to give parties at least 14 days' notice in writing informing them that a dispute has been set down as a combined mediation-arbitration procedure, the notice must specifically state that the process is a combined session. The Labour Court has extensively ruled on what amount to a combined approach and basic tenets that must be observed in carrying out this approach; for example, in the case of *AUMS Tanzania Limited v. Ambrose Ka Yombo*[142] It was ruled that "now it is true that a procedure of combined mediation and arbitration in resolving labour disputes is not strange, it is provided

[141] Section 91.
[142] Labour Revision No. 79/2018, HC. I.D, Mwanza (unreported) at pp.8-9

under Rule 18 of the GN.64 of 2007 provides that, subject to section 19(7) of the Labour Institution Act, No. 7 of 2004 and section 88(3) of the Employment and Labour Relation Act No. 6 of 2004, the Commission may set a combined mediation arbitration process on the same date which may be conducted by the same person. Looking at the wording of the provisions, it goes without saying that it is the Commission which may appoint a person, to perform a combined procedure." Thus, the mediator or arbitrator has no power to choose himself he must be appointed by the Commission and that even if he does so the parties must be informed, failure to observe the same the award is deemed to be improperly procured.[143]

On what to should be done in a combined approach, the court in *Geita Gold Mine v.Wiliam Swai* (Supra) at p.6 ruled that reading the rules: one clearly understands that what is not the process but the person who combined both processes, and did not even complete the relevant form under section 16, which evidence the finalization of the medication, I agree and therefore it was Irregular, *In the case of Tanzania coffee Board v Killi M. Masawe*[144] the Court observed that in proceedings where the same person acted in both capacities, that is Mediator and Arbitrator, such proceedings would not be vitiated if parties had a choice in the matter. In *Blue Financial Services v. Vesting Masaga*[145] the mediator consulted parties on whether he should proceed with the arbitration of the dispute in which he mediated. Parties consented to, however, the applicant raised on revision a complaint that by converting himself to an arbitrator, the mediator contravened the provision of section 88of the ELRA.

[143] *Aziz Ally, Aisha Adam v. Chai Bora* Ltd, Revision No. 04 of 2011(unreported)
[144] Labour Revision No. 21 of 2010 (un reported)
[145] Labour Revision No. 35 of 2013(unreported).

Responding to this, Aboud, J had this to say in his decision; “The arbitrator did not contravene the section 88(2) of ELRA because the parties had given their choice to proceed with the same person who was a mediator in arbitration proceedings.”

Generally, ADR i.e., mediation, arbitration and other similar means play an important role in restoring industrial peace at work places due to their usefulness and advantage such as confidentiality, efficiency, party autonomy, flexibility to name just a few.[146] Steadman comments that: “[t]he ways in which disputes between employer and employees resolved have changed dramatically over the past few decades. With a rapid advance of globalization and the competition for goods and services thus generated in the global marketplace, many countries have realized that improving their labour relations environment and enhancing the prospect of industrial peace is essential for successful economic endeavor and for attracting and retaining foreign and domestic investments. The effective management of conflict and the resolution of dispute have, as a consequence, assumed increasing importance. In countries where labour laws have been revised or developed in response of those changes, drafters have in many instances been influenced by the significant interest in and growth of alternative dispute resolution (ADR) movement.[147]

4.3.5 Adjudication

Rwodzi define adjudication as a formal process which takes place in the context of courts of law as opposed to quasi-judicial bodies; it is the process whereby the judge

[146] *Doosan Babcock Ltd v. Commercializidora de Equipos y Materiales Mabe* [2013] EWHC 3010
[147] Steadman, F, (2017). *Handbook on Alternative Labour dispute Resolution*. Geneva: ILO. p.7.

adjudicates the matter and then determines the dispute between the parties. Here, the judge decides who is right or wrong on the basis of evidence placed before him and issues an outcome in form of judgment.[148] Adjudication is tantamount to litigation. In Mnookin words "Adjudication is a voluntary process, in the sense that the court has power, once its jurisdiction it's a properly invoked to coerce any party into either participating in the process or suffering the consequences of default judgment. The, judge neutral third party appointed by the State, has the power and responsibility to run the proceedings and resolve the dispute. The judicial proceedings are highly structured, with formal rules governing pre-trial discovery and the trial itself i.e., what counts as evidence, the order in which the evidence is presented and how arguments are made. In reaching its decision, the adjudicator is responsible for making a principled and reasoned decision basing on legal norms. The trial judge's decisions are binding on the parties, subject to appeal to a higher court.

Finally, adjudication is a public process, the judge is a public official, and the proceedings themselves are ordinarily open to the public and not confidential.[149] Thus, adjudication is a method of resolving labour disputes that involves court's processes, Section 94 of the Employment and Labour Relations Act Cap. 366 ("the Act") provides that, in line with the Constitution of the United Republic of Tanzania Cap. 2 the Labour Court shall have exclusive jurisdiction over the application, interpretation and implementations of the provisions of the Act and over any employment or labour matter falling under common law, tortuous liability, vicarious liability or breach of contract and to decide: (a) appeals from the decision of the

[148] Rwodzi (2017) at p.83.
[149] Mnookin (1998) at p. 2.

Registrar made under part IV of the Act; (b) reviews and revisions of arbitrator's awards made under the Act and the decisions of the Essential Services Committee made under part VII of the Act: (c) equally to review decisions codes, guidelines or regulations made by the Minister; (d) complaints, other than those to be decided by arbitration under provisions of the Act; or (e)any dispute reserved for decision by Labour Court and entertain applications for declaratory order in respect of any provisions of the Act or an injunction thereof . However, the Labour Court has discretion to refuse to hear a complaint if, among others, the complaint has not been referred to mediation by the CMA. It is not important to note that adjudication is carried out by the Labour Court and Court of Appeal as provided under the Constitution, Cap. 2, and any other relevant laws.

4.4 Modality of Instituting Labour Disputes

Rule 12(1) of the Labour Institutions (Mediation and Arbitration) Rules, 2007 (G.N. No. 64 of 2007) and section 86(1) of the Employment and Labour Relations Act, Cap 366 lucidly direct that disputes before CMA must be initiated through a prescribed Form i.e. CMA F.1 "Referral of a Dispute to the Commission for Mediation and Arbitration," Commenting on this aspect, the Labour Court in *Coca-Cola Kwanza Ltd v. William Mhando*.[150] Observed that "it is important to state that the labour dispute before CMA is initiated by using Form no. 1(CMA F.1), neither the mediator nor arbitrator has power to make changes on what appears on the referral form. See *Power Roads (T) Ltd v. Haji Omary*, Labour Revision No. 36 of 2007. The dispute referred to the Commission is specifically stated in referred form above. The form

[150] Labour Revision No. 40 Of 2017, HC, LD, Mbeya (unreported)

requires the applicant at item 3 of the Form to specify type of the dispute which he intent to refer to the Commission. The same item provides clearly that if the dispute is on termination, the applicant who is filing the Form has to complete Part B of the Form."

Equally, in the case of *Dar es Salaam Institute of Technology v. Samson M. Makomba,*[151] It was ruled that "the dispute about the fairness of an employee's termination of employment must be referred to the Commission within thirty days from the date of termination or the date that an employer made a decision to terminate or uphold the decision to terminate. However, the Commission for Mediation and Arbitration has discretion to condone any failure to comply with time limitation which is provided by the rules under rule 31 of G.N No. 64 OF 2007." In *Tanzania Cigarette Company Ltd v. Reuben Carlo,*[152] The Court made it clear that CMA F.1 is the one used to initiate the dispute before CMA as per section 86 of Cap. 366. The CMA had no jurisdiction to award reliefs which were not claimed in CMA F.1.

4.5 Modality of Awarding Costs in Labour Disputes

The law makes it clear that costs in labour disputes are only awarded if the party to be condemned has been acted has acted frivolously or vexatious in bringing or defending the dispute. Costs are therefore in the discretionary province of the Labour umpire.[153] In the case of *Stanbic Bank(T) Ltd v. Iddi Halfan* (supra) at pp 22-234 the

[151] Consolidated Revision No. 707 of 2018 and 120 of 2020 at p. 13
[152] Revision No. 746 of 2019, HC, LD, DSM (unreported) at p.6
[153] See for example, rule 34(1) of the Labour Institutions (Mediation and Arbitration) Rules, 2007 (GN. No. 64 of 2007)

Court observed that "labour disputes are free of costs, interests and fees; however, costs are only allowed where there is a proof of frivolous and or vexatious proceedings. Issue of costs in labour cases was also discussed in the case of *Tanzania Breweries v. Nancy Maronie*,[154] where it was held that the law is designate to make sure that in making decisions on costs orders the CMA and Labour Court seek to strike a balance between employers on the one hand, not unduly discouraging employees, union, association from approaching the Commission for Mediation and Arbitration (CMA) and Labour Court (LC) to have their disputes dealt with and on other hand not allowing those parties to being frivolous and vexatious case.

The Court at pp.24-25 went on to rule that "cost- free labour litigation as contemplated by the International Instruments had good motive specifically in assisting the weaker party who have genuine claims to easily access the court and tribunal with aim of resolving the dispute fairly and quickly with the spirit of repairing the relationship between capital and labour. At the same time looking the way forward on how to increase efficiency through productivity at work and when doing so, social justice is upheld. The aim of cost-free was not to delay or deny or burry justice rather was to make sure justice is costless and time met. It should be understood that cost- free in labour matters is not a leeway or loopholes to the parties to waste time and other resource, either in the Commission or in Courts and once this is not observed the court or commission will regulate the situation by awarding costs where frivolous and vexation acts have been proved" It is therefore important

[154] Labour dispute No. 182 of 2015(unreported)

to note that, in labour proceedings, awarding costs is an exception rather a general rule, and it is not always that costs must follow the event.

4.5.1 Labour Institutional framework

The labour institution is statutory bodies established to administer and regulate the legislative intent of labour laws. These institutions among others oversee the implementation and enforcement of rights, privileges, obligations, and duties of different stake holders in the employment industry. In mainland Tanzania, there are a number of labour institutions constituting the labour law regime and established to perform various statutory mandates. The following below are the labour institutions in mainland Tanzania.

4.5.2 Labour, Economic and Social Council

The Labour, Economic, and Social Council is a statutory body established under section 3 of the Labour Institutions Act, Cap. 300.[155] Section 4(1) of the Act specifies that the Council comprises 16 members appointed by the Minister responsible for labour matters. These members include a chairperson who is not affiliated with any trade union, employers' association, federation, or public service employee; the Permanent Secretary; three members representing government interests; four members representing employers; four members representing employees; and four members appointed for their expertise in Labour, Economic, and Social Policy formulation.[156]

[155]Section 3 of the LIA, Cap. 300.
[156]*Id*, Section 4 (1)

The Council's primary functions are to promote economic growth, advise the Minister on labour market policies, prevent unemployment, develop a code of good conduct, address issues arising from the International Labour Organization (ILO), conduct necessary investigations and research into labour, economic, and social policies, and evaluate the effectiveness of labour legislation.[157] The Council is often considered the government's primary advisory body on national and international labour, economic, and social matters. It is also required to submit an annual report of its activities to the Minister by June 30 of the following year.[158] Section 5(2)(a)(b) of the LIA allows the Council to conduct research and formulate its own rules for performing its functions.[159] By providing annual reports, the Council alerts law makers that guarantees protections employment contracts according to international standards. However, the Council does not issue binding decisions to the legislature.[160]

4.5.3 Essential Services Committee ("Committee")

This Committee responsible for matters relating to essential services in the country, it is the Committee within the CMA.[161] The main function o of this Committee is to designated essential services in terms of the relevant labour law and determines disputes about whether or not an employee or employer is engaged in a designated essential service.[162] Essential services are services that are vital to the health and welfare of people and so are essential in the event of emergencies or calamities. For

[157] *Id*, Section 5 (2).
[158] *Id*, Section 11
[159] *Id*, Section 5 (2) (a) (b)
[160] *Id*, Section 5 (3)

[162] Ibid section 30

example, section 77 of employment and labour relations Act, cap.366 regulates strikes and lockouts on essential services; the law enumerates the essential services to include water and sanitation; health services and associated laboratory services; fire-fighting services air traffic control and civil aviation telecommunications; any transport services required for the provision of these services. The same law mandates the Essential Services Committee to designate a service as essential if the interruption of that service endangers the personal safety or health of the population or any part of it.

The Committee is composed of 5 members with knowledge and experience of labour law and labour relations- the members are appointees (in consultation with the Council)of the minister responsible for labour matters[163] in discharging its statutory functions, the Committee has mandate to summon for questioning any person to attend a hearing if the Committee considers such person's attendance assists in the performance of its functions; summon any person, who is believed to have possession or control of any book, document or object relevant to the performance of its functions to appear before the Committee to be questioned and to produce the book, document or object; administer an oath or accept an affirmation from any person called to give evidence; and question any person about any matter relevant to the performance of its functions

[164]**4.5.4 Wage Boards**

Wage Boards are statutory entities established to investigate minimum remuneration

[356] ibid section 31(1)
[357] ibid section32

and other employment conditions, promote collective bargaining between registered trade unions and employers, and make recommendations to the Minister on minimum wages and employment conditions.[165] Section 35(1) of the LIA empowers the Minister responsible for labour matters to appoint wage boards for specific sectors and areas to investigate remuneration and employment terms.[166]

In conducting investigation, the Boards are obliged to take into account the bill of right especially article 22 and 23 of the Constitution of the United Republic of Tanzania,[167] any applicable convention or recommendation of the ILO whether or not the United Republic of Tanzania is a signatory to the convention, all representations and other information submitted to it, all relevant factors including the ability of employers to carry on the business successfully, the operation of small, medium and micro- enterprises, the cost of living , the alleviation of poverty, the minimum subsistence level, the remunerations and terms and conditions of employee employed in Tanzania, any collective agreement in the sector, likely any proposed condition of employment on current or the creation of employment and any, other relevant matter.[168] It should be noted that in the performance of its functions within its terms of reference, Wage Boards has power to question any person who may be able to provide information relevant to any investigation, require in writing any person to furnish any information, book, document or object that is material to the investigation, conduct public hearings facilitate negotiations on a minimum

[165] Section 36 of the LIA
[166] Id, section 35(1).
[167] Cap 2 of CURT of 1977
[168] Section 37 of the Labour Institutions Act, cap 300

remuneration and conditions of employment between registered trade unions, employers and registered employers association in the sector.[169]

There are two types of bodies, namely wage body of private sector and for public sector respectively. Wage Board for the private sector is composed of the Chairman, the Secretary, four members recommended by the Council to present interest of employees, four members recommended by the Council to present interest of the employer, four members recommended by the council to represent interest of the government and three members nominated by virtual of professions, appointed by Minister responsible for labour. For public sector it is composed of the Chairman, the Secretary, four members recommended by Council to represent interests of the employee, four members recommended by the Council to represent interest of the government, and two members nominated by virtual of professions, appointed by the Minister responsible for public service.[170] It must understood that Wage Boards are vital labour institutions that attempts to balance the interest of employers and employees in work places and uphold the right to a fair remuneration.

4.5.5 Labour Administration and Inspection Department

The Labour Administration and Inspection Department is essential for administering and enforcing labour laws in Tanzania.[171] It includes the Labour Commissioner and Deputy Labour Commissioner, appointed by the President, and is responsible for

[169] Ibid, section 37
[170] Ibid, section 35(3)
[171] Edward, M.M, *the Law on Employment and Labour Relation in Tanzania*: A Comprehensive Student Training Manual, 2019, p. 199.

overseeing labour laws.[172] The department also consists of Assistant Labour Commissioners and labour officers who support the Labour Commissioner. Section 46(1) of the LIA empowers labour officers to issue compliance orders if they believe an employer has not complied with labour laws. Employers must comply with these orders within the specified period.[173] If they fail to do so, the Labour Commissioner may apply to the Labour Court to enforce the order.[174] In the case of *Naura Spring Hotel v. Labour Officer and another*[175], the Court ruled that the Labour Commissioner or their deputies may file execution applications for non-compliance with compliance orders. Under Section 48, employers have the right to appeal to the Labour Court against a compliance order within 30 days of receiving it. The Labour Court may suspend the order pending a final decision and can confirm, modify, or cancel the order, specifying the compliance period.[176]

4.5.6 Commission for Mediation and Arbitration

The CMA is an independent tribunal resolving labour disputes in Tanzania.[177] It was defined in the case of *AUMS Tanzania Limited v. Peter Ambrose Ka Yombo*[178] as a statutory body overseeing labour dispute resolution. The CMA is headed by a Chairman and Commissioners appointed by the President under section 16 of the Labour Institutions Act, Cap. 300, and functions as a mediation and arbitration institution. By 2011, the CMA had established offices in every region of mainland

[172] Section 43(1) of the LIA, Cap.300
[173] Id, section 46
[174] Id, section 47(1)
[175] Consolidated Misc. Labour Applications No. 83 and 84 of 2020, HC, DR, Arusha (unreported).
[176]Section 48(4) of the LIA
[177]The University of Dodoma (2024). Commission for mediation and arbitration. Retrieved May 19, 2024 from https://repository.udom.ac.tz>bitstreams>content
[178] Labour Revisions No. 79 of 2018, HC, LD, Mwanza (unreported) at p. 9.

Tanzania, providing accessible dispute resolution. The CMA operates independently of any political party, trade union, or employers' association. Its functions, outlined in section 14 of the LIA, include mediating disputes referred to it and arbitrating disputes as mandated by labour law or referred by the Labour Court.

In the case of *Daniel Mugittu and another v. Lonagro Tanzania Limited*[179], the Court affirmed the CMA's jurisdiction over labour disputes involving termination or breach of employment contracts. In *Deogratus John Lyakwipa and Another v. Tanzania Zambia Railway Authority*[180], the Court confirmed the CMA's power to mediate and arbitrate disputes when an employee is aggrieved by an employer's decision. The CMA aims to curb unfair labour practices such as discrimination, unlawful termination, and curtailment of the right to strike. It provides a forum for resolving industrial disputes and administering labour justice.[181] Rule 10 of the LIA (Mediation and Arbitration) Rules requires unfair termination disputes to be referred to the CMA within 30 days of termination or the employer's final decision to terminate. Section 19 of the LIA allows the CMA to appoint mediators and arbitrators on full-time or part-time bases. Labour disputes must first be referred to CMA mediation before being taken to the Labour Court, leading to an increase in employers settling disputes during mediation. The establishment of the CMA has strengthened industrial relations in Tanzania, providing access to dispute resolution without charge and promoting workplace peace and harmony. However, the CMA lacks the jurisdiction to enforce its own awards.

[179] Consolidated Revision No. 684 and 753 of 2018, HC, LD, DSM (unreported).
[180] Revision Application No. 68 of 2019, HC, LD, DSM (unreported).
[181] Section 14 of the LIA

However the CMA is composed of Chairperson, who is not a member, official office barrier of trade union, employers association or federation or an employee in a public service the Chairperson is appointed from the among persons who have knowledge, experience, and considerable degree of involvement in labour matters and six other Commissioners.[182] Besides, the CMA is mandated to appoint any many mediators and arbitrators as it considers necessary to perform its functions, it may appoint mediators and arbitrators on either a full time or part time bases in terms and conditions determined by it, in consultation with the public service management.[183] Equally it has a power to remove a mediator or arbitrator from office only for a serious misconduct relating to his functions, in capacity relating to work place functions and a material violation of the code of conduct. On the historical account of the CMA, see *John Elias v. The Registered Trustees of Chama cha Mapinduzi.*[184]

In order to implement its functions softly CMA mediators and arbitrators has statutory power to summon any person for questioning or to attend mediation or arbitration hearing if such persons assists in the resolution of the dispute, summon any person who is believed to have a possession or control of any book, document or object relevant to the resolution on the dispute, to appear before the mediator or arbitrator to be questioned and to produce, document or object, administer an oath or accept an affirmation from any person called to give evidence, and question any person about any matter relevant to dispute.[185] With regard to CMA territorial jurisdiction generally, the Labour Court has extensively ruled the CMA has wider

[182] Section 16 of LIA Cap 300
[183] Ibid, Section 19
[184] Revision No. 175 of 2019, HC, LD DSM (Unreported).
[185] Ibid, Section 20

jurisdiction in resolving industrial disputes through ADR. *In Zephania O. Adina v. GPH Industries Ltd*[186] at pp. 6-7 it was ruled that ‘’in labour cases, jurisdiction is exclusively conferred to labour institutions which include CMA as provided by Labour Institutions (Mediation and Arbitration) of Rules, and GN. No. 64 of 2007 it goes without saying that the dispute must be filled before the Commission established in the area in which the dispute arose.

In this case, it is not disputed that the dispute arose in Geita where the applicant was working, the Commission has already established his office in Geita which is responsible for settlement disputes arising from Geita Region therefore, in the circumstances the Commission with jurisdiction to entertain the dispute, to mediate and arbitrate the parties in Geita Region on in similar occasion, the Court in *John Elias v. The Registered of Chama cha Mapinduzi (*supra) at pp 9-10 ruled that: “the law is settled on where the dispute should be mediated and arbitrated by the Commission. Rule 22 of the Labour Institutions (Mediation and Arbitration) Rules, GN 64/2007 which provides that: “A dispute shall be mediated or arbitrated by the Commission at its office having responsibility for the area in which the cause of action arose unless the Commission directs otherwise.” Since the cause of action arose at Lindi where the respondent was working and Lindi being the territorial jurisdiction of the Commission which mediated and arbitrated the dispute in question, the argument that the Lindi Commission has no jurisdiction is not only misleading but pure misconception. I agree that the Lindi Commission has jurisdiction to entertain and adjudicate on labour dispute in question.

[186] Labour Revision No. 27 of 2020, HC, LD Mwanza (Unreported)

In the case of *Daniel Mugittu and another v. Lonagro Tanzania Limited*[187] the CMA has jurisdiction to entertain any labour dispute on termination of employment contract or breach of employment contract. In *Deogratus John Lyakwipa and another v. Tanzania Zambia Railway Authority*[188] the Court at p 5 made clear that the CMA is vested with power to mediate and arbitrate the dispute referred to it when an employee is aggrieved by the decision of an employer, as provided for under section 14 (a) and (b) of the Labour Institutions Act No. 7 OF 2004 provided that there is existence of employer employee relation. The CMA being a government department, it is obliged to observe the rules of accountability and transparency to the highest level, to achieve this section 28 directs that within six months after the end of financial year, the CMA is obliged to prepare and to submit to the National Assembly, through the Minister responsible for labour matters, an annual report in respect of that year containing the copy of audited account of the Commission, the auditor's report of those accounts, a report on the operations of the accounts and any other information that a Minister may require, the Minister is also directed to table the report with the National Assembly as soon as reasonable practicable.

4.5.7 Labour Court and Court of Appeal

The Labour Court is established under section 50 of the LIA and has exclusive jurisdiction over labour matters as outlined in section 51. Section 94 of the ELRA explain more the primary functions, including hearing appeals from trade union, federation, and employer association registrars, reviewing and revising arbitrator

[187] Consolidated Revision No. 684 and 753 of 2018, HC, LD, DSM (Unreported)
[188] Revision Application No. 68 of 2019, HC, LD, DSM (Unreported)

awards, and decisions of the Essential Services Committee. The Court is also vested with the powers of the High Court, and its procedures are governed by the Labour Court Rules of 2007, with resort to the Civil Procedure Code in case of procedural gaps.[189]

The Labour Court has jurisdiction to hear appeals from Registrar decisions under Part IV of the ELRA, review CMA arbitrator awards, and decide on Essential Services Committee decisions. It also reviews Ministerial decisions, codes, guidelines, or regulations under the ELRA and handles complaints not subject to arbitration under the Act.[190] The Labour Court enforces CMA awards and decisions as if they were decrees.[191] Section 57 allows parties to appeal Labour Court decisions to the Court of Appeal of Tanzania on points of law only, as per the Appellate Jurisdiction Act, Cap. 141, and Court of Appeal Rules, 2009 (G.N. No. 368 of 2009),[192] In *Muhimbili National Hospital versus Constantine Victor John*[193], the Court held that appeals could only be on matters of law, not fact, with the remedy being to invoke the Court of Appeal's revision powers.

The laws also direct that in the performance of its functions, the Labour Court have all the power s of the High Court, save that in making a judgment, ruling, decision, order or decree in so far as it relevant, the Court may take into account or consider the need to maintain a high level of domestic capital accumulation with a view to

[189]Section 52(1) of the LIA
[190]Section 94 of the ELRA
[191]Rule 49 of the Labour Court Rules, 2007
[192]Section 57 of the LIA
[193] Civil Application No.44 of 2013: Court of Appeal of Tanzania at Dar es Salaam.

increasing the rate of economic growth and to provide greater employment opportunities, to maintain and expand the level of employment, to develop payment by result schemes, or other wage incentive structures which will induce an employee to make greater efforts and increases in labor productivity, to prevent gains in the wages of the employees from being affected adversely by unnecessary and unjustified price increases to preserve and promote the competitive position of local products in the domestic market as well as in the global market, to establish and maintain reasonable differential in rewards between different categories of skills and levels of responsibility, to name just a few.[194]

In the case of Patrick *Tuni Kihenzile V Stanbic Bank (t) Limited*[195] the Court made it clear and that under provision of section 94 of The Employment and Labour Relations Act Cap. 366 the Labour Court has exclusive jurisdiction over any employment or labour matters falling under common law, tortuous liability, vicarious liability or breach of contract. With regard to the Court of Appeal, the law stipulates that any part to the proceedings in the Labour Court may appeal against the decision of the Labour Court to the Court of Appeal of Tanzania on point of law only as per the Appellate Jurisdiction Act, Cap 141 and Court of Appeal Rules of 2009 (GN.No.368 OF 2009).[196] The law also permits the Labour Commissioners to refer a point of law to the Court of Appeal if there are conflicting decisions of the Labour

[194] Section 52, Ibid
[195] Labour Revision No. 47 of 2011, HC, LD, DSM (unreported).
[196] Section 57 Ibid

Court in respect of the point of law, and the parties to the proceedings in those decisions have not appealed.[197]

4.5 Conclusion

This chapter evaluates the relevant legal framework, emphasizing the importance for both employers and employees to familiarize themselves with labour laws and the specific provisions in their employment contracts to ensure compliance when terminating an employment contract in Tanzania's private sector. Seeking legal advice can also be beneficial in effectively navigating the termination process. Additionally, it provides a detailed analysis of the institutional framework established to administer and enforce the rights, privileges, obligations, and duties of various stakeholders in the employment sector. The study examines a range of institutions within the labour law regime, each performing distinct statutory mandates.

[197] Section 58(1)(b).

CHAPTER FIVE

SUMMARY, CONCLUSION AND RECOMMENDATIONS

5.1 Summary

This study assessed the legal and institutional framework governing the termination of employment contracts in the private sector in Tanzania. It was revealed that while the policies, institutions, and laws protecting employees' rights to work are generally adequate and effective, significant challenges arise from Section 40 (3) of the Employment and Labour Relations Act of 2004. This section grants employers discretionary power to decide whether to reinstate, re-engage, or compensate employees in cases where a termination is deemed unlawful by the court. This discretion poses a direct infringement on the constitutional right to work enshrined in Article 22 of the Constitution of the United Republic of Tanzania (URT).

The core issue lies in the potential abuse or inconsistent application of this discretionary authority by employers. This creates an environment where the right to work is subject to arbitrary decisions, undermining its protection under the law. The situation disproportionately impedes employees from securing fair remedies for unlawful termination. The imbalance of power between employers and employees in resolving employment disputes contests the principles of justice, equality, and

constitutional rights. Thus, despite the law and institutions acknowledging employees' rights to work, the practical reality often contradicts this acknowledgment.

The study also highlights that Tanzania's dualist legal system hinders the state's ability to meet its treaty obligations. Although Tanzania has signed and ratified numerous international labour treaties, such as the Termination of Employment Convention No. 158 of 1984, these treaties are not enforceable unless incorporated into domestic law. Even when incorporated, the state often includes only select provisions it is willing to be bound by, as evidenced under the ELRA. Moreover, the state can enter reservations to exclude the legal force of certain treaty provisions. For instance, while ILO Convention No. 158 allows termination of employment only for good cause, Section 40(3) of the ELRA leaves a loophole for unfair terminations.

Lastly, Tanzania's institutional framework lacks binding decisions, especially when courts order reinstatement or re-engagement following a finding of unfair termination. Section 40(3) of the ELRA allows employers to choose whether to comply with the court order or to compensate the employee instead of reinstating or re-engaging them. This undermines the effectiveness of judicial remedies and the protection of employees' rights.

5.2 Conclusion

This study highlights significant issues with reinstatement and re-engagement, which are intended as principal remedies for unjust dismissal. Over the years, numerous

controversial decisions have emerged regarding these remedies. The analysis reveals that Section 40(3) of the Employment and Labour Relations Act (ELRA) of 2004 has been a major source of confusion. This section permits employers to arbitrarily overturn valid court or tribunal orders, which can be detrimental to employees in the private sector whose contracts have been unfairly terminated.

The findings indicate that Section 40(3) of the ELRA expressly undermines the right to work for employees unfairly dismissed from their employment contracts. The wording of this provision clearly demonstrates the legislature's intent, which jeopardizes the right to work in Tanzania if an employer engages in unfair practices against an innocent employee. This is likely the most harmful provision regarding the welfare of Tanzanian employees, as it blatantly violates the right to work, a fundamental aspect of human survival guaranteed by Article 22 of the Constitution of the United Republic of Tanzania.

Section 40(3) of the ELRA not only contradicts the Constitution, particularly the right to work and the right to receive fair remuneration, but also violates Article 4 of the ILO Convention and Section 37(2) of the ELRA. These laws require termination of employment only for valid reasons and through fair procedures. This section thus creates a loophole that wealthier employers in the private sector can exploit to terminate poorer employees without valid reasons.

Moreover, the interpretation of Section 40(3) suggests it places employers above the law. The legislature purposefully gave employers the discretion to enforce or ignore

lawful orders issued by the appropriate Court or Labor Tribunal. This means that employers can choose whether to comply with court orders, effectively undermining the legal protections for employees.

5.3 Recommendations

In order to improve the domestic labour standards, the study has come out with the following recommendations

5.3.1 Amendment of Section 40(3) of ELRA

Section 40(3) of ERLA, as the most offending provision to the employees and which paves the way for employers to terminate employment contract unfairly with impunity should be amended by the relevant authorities to include the Ministry of Constitutional and Legal Affairs, and the Parliament of Tanzania. Accordingly, the provision of section 40(3) needs to be modified in such that an employer is obliged to reinstate an employee with no option of an employer to refuse reinstatement.

5.3.2 Domestication of International Labour Standards

The Government of the United Republic of Tanzania should sign and domesticate all core labour and international human rights instruments pertinent to the right to work in order to promote policing standards. This is an obligatory step of curbing violation of the basic rights. It is only through domesticating indorsed international legal instruments to form part of the national laws. Indeed, experience shows that the Government of Tanzania has been signing international legal instruments without domestication attributing to poor implementation of the legislations.

5.3.3 Public Awareness and Education

Members of the public must take initiative to understand the laws that govern the right to work in order to eliminate unfairness and injustices that often occur in employment. Also, the relevant authorities such as the Ministry of Labour, Youth, Employment and Persons with Disability in collaboration with trade unions must facilitate awareness of the laws and regulations governing the industrial sector. Also, the Association of Tanzania Employers must develop a culture of training its members in order to be conversant of the laws and regulations relating to labour relations with a focus to avoid unfair termination of employees.

5.4 Limitations on the Remedy of Compensation

The remedy of compensation should only be ordered in a limited circumstance unless the employee does not wish to be reinstated or re-employed. The circumstances surrounding the dismissal include a continued relationship would be intolerable or where the relationship between the two has been irreparably broken-down aggravating impossibility that the two may again work together.

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