INDUSTRIAL TRIBUNAL

Decision Number 2661

Case Number: 3611/JG

In the employment issue

between

Dorianne Bartolo Vella (I.D. 574478M)

and

Web International Services Limited (C 56551)

Subject matter: alleged unfair dismissal

Today 12th June, 2020

Chairman: Mr Joseph Gerada FCIPD, M.A.(Mediation), IUKB Suisse, Dip.Applied Soc.Stud.,MAAT

1 Introduction

This case was referred to the Industrial Tribunal by means of a petition dated 25th January, 2018 by advocate Dr Carina Bugeja Testa on behalf of Ms Dorianne Bartolo Vella I.D. card 574478 M. On the other hand the company Web International Services Limited C 565511 filed its reply in the court's registry bearing the date of the 5th April, 2018 and signed by advocate Dr Michael Calleja.

In view that the process included foreign and local nationals and who both have a working understanding the English language, this decision is being served in the English language to facilitate communication.

This case is being decided by the undersigned after the parties made their final submissions in the sixteenth sitting of the Tribunal dated 6th December, 2019 and following the retirement of the presiding Chairperson Mr Richard Matrenza.

With regard to article 78 of chapter 452 of the laws of Malta the Tribunal could not decide this case within the stipulated period due to several deferments requested by both parties.

2 Facts of the Case.

Ms Dorianne Bartolo Vella (ID card 574478M) was employed as a housekeeper on a full time 40 hours a week basis, with Web International Services Limited (C 56551) on the 1st June, 2016. This arrangement was covered by a contract of employment dated 31st May, 2016 signed on one hand by the Plaintiff and on the other by an unnamed company officer. During the proceedings of the case, it was established that the unnamed company officer was the then secretary of the employer Mr Paul Scheuschner. The employment contract was changed and a second contract came into force some time later where the hours of work were changed to a full time reduced hours, of 130 hours per month. This change took place by solely changing the working hours while all other terms and conditions, even the date of the contract, remained unchanged. This time the signatories on the second contract were the Plaintiff Ms Dorianne Bartolo Vella and the defendant Mr Paul Scheuscher as per acts.

On the 6th September, 2017 Ms Bartolo Vella was served with a termination letter informing the plaintiff that her employment shall be terminated as from the 28th September, 2017 on the basis of redundancy. The acts produce no less than four copies of the termination letter yet only one is signed by Mr Paul Scheuscher. The copy that is certified as a true copy of the original by the legal counsel Dr Michael Calleja dated 1st June, 2018 who at the time was assisting Mr Scheuscher, is unsigned– reference Dok – Web International Services

Limited 2. This copy is also signed by Ms Dorianne Bartolo Vella following the text “received and accepted by”.

3 Considerations of the case

The Tribunal had before it a situation where the Plaintiff was claiming that she had a contract of employment during which she did not only perform her duties consistently well but which she carried out duties that went above and beyond those listed in her contract of employment. On the other hand the defendant is claiming that he had no option but to make the plaintiff redundant because he claims he had not enough function for her anymore to justify a full time employment with the company.

In this regard, the Tribunal needed to establish whether the conditions that constitute redundancy were present, what the process employed in such situation was and finally decide whether the termination was actually one of genuine redundancy or unfair dismissal.

Chapter 452 of the laws of Malta does not give a definition of redundancy. However the following jurisprudence quoted by both parties offer rich insights for the case before the Tribunal and which informs this decision.

The following are the cases cited by the parties;

1. Remmie Armani vs Francis Busuttil & Sons dated 28th June, 2011 reference 40/ 2010
2. Joseph Baldacchino vs FS Engineering & Plastics Ltd dated 6th November, 2014 reference 3142 CCG
3. Tonio Calleja vs Vitafoam Ltd – Appeals’ Court 2/2005
4. Victoria Spiteri vs St Catherine’s High School – Appeals’ Court dated 18th October, 2006
5. Ronald John Pace vs Laurence Barran – Commercial Court dated 4th October, 1976
6. Hotels Section GWU vs Messrs A Buttigieg Ltd dated 18th November, 1970
7. John Bartolo vs International Machinery Ltd – Appeals’ Court dated 9th May, 2007

8 Andrew Barbara vs PE Trading Ltd – Appeals' Court dated 5th March, 2010

In addition the English legislation which for obvious reasons also offers valid insights, presents a rich resource for more informed decision making.

In situations of redundancy, employers have obligations to ensure that they respect the rights of the afflicted employee/s and follow procedures consistent with demonstrating the right intent, fairness, transparency, justice, sensitivity and dialogue.

Redundancy should be a last resort in an organization's restructuring or re-engineering. As opposed to chattels or moveable possessions that may be bought and disposed of with ease and with no material consequence, the loss of employment for a person shall have far reaching consequences. It therefore requires sensitive handling by the employer to ensure fair treatment of the employee at risk of redundancy as well as the productivity and morale of the remaining workers.

In English law, redundancy is considered as a special form of dismissal which happens when an employer needs to reduce the size of its workforce. In this regard an employee is made redundant when:

1 the employer has ceased, or intends to cease, continuing the business, or
2 the requirements for employees to perform work of a special type, or to conduct it at the location in which they are employed has ceased or diminished, or is expected to do so.

In this regard, if, and only if, one of these situations has arisen will the redundancy be a genuine one.

Therefore the role must disappear for there to be a true redundancy. The common reasons for redundancy include:

1 new technology or systems reducing the need for employees,
2 the need to cut costs resulting in a reduction in staff numbers,
3 the business closing down altogether or moving.

A genuine redundancy only arises if the dismissal is attributable to the fact that the employer requires fewer employees to carry out work of a certain kind or expects that the requirements for employees has reduced.

Considering the above the Tribunal asserts that to dismiss fairly for redundancy an employer must establish that the role is genuinely redundant, follow a fair consultation procedure with the employee at risk of redundancy and consider whether there is suitable alternative employment.

In this case, the plaintiff Ms Dorianne Bartolo Vella was employed on the 1st June, 2016 following an interview conducted by an external recruiter by the name of Andrea. Ms Bartolo Vella testifies that during the interview the interviewer namely Andrea informs the plaintiff that her duties shall include the cleaning of the offices and of the private apartment of Mr Scheuscher – reference Tribunal sitting of the 15th June, 2018. However Andrea generalized the role and described it as the role of a "Maltese mummy" as according to her the employees at the office including the employer, are mostly foreign nationals.

The contract of employment dated 31st May 2016 which was signed by the secretary for and on behalf of Mr Scheuscher states in article 1 that, quote:

" The Employer shall employ the employee, who accepts his appointment, as Housekeeper".

The Tribunal does not understand why a female should be referred to as "his appointment" but the Tribunal is quoting verbatim. The term "housekeeper" is wide ranging in description which apart from the actual cleaning it also includes all other activities that keep a working environment pleasant and comfortable to work in. In fact article 4.1 re-enforces the notion of a wide ranging role and, quote;

" The Employee shall perform his duties in a flexible manner and shall be expected to carry out all duties as required in the operation of the Employer. The Employee is hereby agreeing and accepting that he/she is fully conscious of the responsibilities involved and related to this position".

The Tribunal notes the correlation between these wide ranging clauses in the contract of employment and the colloquial phase “Maltese mummy” that was used by the recruiter in the interview. Both denote a collection of tasks.

Ms Bartolo Vella testified, - reference Tribunal sitting of the 15th June, 2018, that she started her typical day at 07.30 am by attending to Mr Scheuscher’s private apartment at Block 31 at Portomaso. She said that she cleaned the place and washed, ironed and put away his clothes. She also cooked breakfast for him and did his shopping. This work usually ended circa at 10.30 am when she would go shopping for fruit and other consumables for the office. Ms Bartolo Vella says that her employer had given her a Cashlink VISA card to pay for the goods.

She would then go to the office known as the Penthouse at Portmaso and her first task was to peel some 4 kilos of fruit to prepare smoothies for all the staff at the office. This was followed by cleaning the place which has 350 sq feet of office space and a large terrace - Exhibit Dok DB1 refers. The duties that Ms Bartolo Vella attended to at the office are listed under the same exhibit Dok DB1 which includes cleaning of the kitchen, the offices of the PA & SEO manager, the office of the employer, the conference room, the four WC spaces, the editorial office, the social room, the web development office, the project manager’s office and the corridor space. At about 11.45 she would return to the kitchen to cook lunch for the staff, serve them and afterwards clean the kitchen.

Ms Bartolo Vella describes how she used to check on the consumable needs for the office and follow Mr Scheuscher’s instructions regarding his preferred brands, as well as, the price options of the consumables. She said that he also would ask her to do some odd maintenance work such as aligning the kitchen cupboard door or have her carry a consignment of drinking water to his apartment.

Therefore it is clear for the Tribunal that from the outset, the intention of the employer was not to engage the employee strictly for cleaning duties at the offices but to have a person who would be at his beck and call whether the needs concerned the business or his private residence.

When asked why these tasks were not included in the contract, Mr Scheuscher exclaimed that he forgot to include a number of duties that he expected Ms Bartolo Vella to perform - reference the Tribunal sitting of the 13th July, 2018. Nonetheless he felt that they were adequately covered by the clause number 4.1 of the contract of employment.

Ms Bartolo Vella reminds that during the interview for the position of housekeeper, the impression that she was given was that she would only be responsible to clean the office and the private apartment of the employer. She claims that none of the ancillary tasks that in actual fact were assigned to her were ever raised by Andrea, the recruiter. Notwithstanding she said that she took them in her stride and soldiered on up to the day of termination.

Mr Scheuscher challenges this claim and despite the fact he does not remember when he instructed her to clean his private apartment, he claims that he did so when he realized that the plaintiff was not fully occupied with work available. Asked to provide the name of the company that employed Andrea as a recruiter in order for the Tribunal to verify this version, Mr Scheuscher could not remember the company details - reference Tribunal sittings of the 13th July 2018 and 16th November, 2018. On the other hand the plaintiff was consistent in her testimony and when asked by the counsel for the defense whether she kept cleaning the private apartment up to the last day of her employment she was unequivocal in her reply and in no uncertain terms said and quote

" Iva,. Qeghda fuq gurament. U nibqa' nghidlek li iva sa' l-ahhar".

The Tribunal finds Ms Bartolo Vella's reply believable.

The Tribunal points out that even when Mr Scheuscher reduced the working hours of Ms Bartolo Vella to 30 hours a week to accommodate her family needs, he did so, without reducing her salary but also without reducing her tasks, proportionally. In this regard, it is reasonable to conclude that the new working schedule eliminated any slack if one ever existed while at the same time retaining the same level of output obligations from the plaintiff.

In fact Ms Bartolo Vella said that Mr Scheuscher had even extended her obligations to include the cleaning of the apartment of a friend in Sliema, as

well as, the apartments of some of the office employees. Ms Bartolo Vella informs the Tribunal that after a couple of times she refused to continue with this practice of cleaning the apartments of third parties.

Ms Bartolo Vella was right in refusing to do the cleaning work for third parties as this went above and beyond what her contract covered and such demands on the plaintiff were abusive.

The Tribunal concludes that;

1 the plaintiff had a full schedule of work assigned to her,
2 the requirements of the work of the redundant employee did not change,
3 she continued performing the scheduled tasks up to the end of her employment.

Ms Bartolo Vella asserts that during her employment with Web International Services Limited she was never ever served with a warning about her performance on the job, - reference the Tribunal sitting of the 15th June, 2018. This was corroborated by Mr Scheuscher in his testimony of the 16th November, 2018 when he said and quote; " Yes, I was happy with her work".

The Tribunal concluded that;

the work performance of the plaintiff was a good one and did not have any bearing with regards to her termination of employment.

The Tribunal is informed by Mr Scheuscher that at a point in time he decided that it was unethical to charge the company with expenses for private services such as the cleaning of his apartment. Such practices are legitimate only if they are covered by the necessary documentation such as invoices issued by the company debiting Mr Scheuscher for services rendered or covered as fringe benefits in his contract of employment. No such documentation was produced by the defendant.

When citing ethical consideration one has to be careful as the standards in ethics are higher than in law. The famous American Philosopher Emmanuel Kant said that "At law a man is guilty if he violates the right of another in ethics he is guilty even if he thinks about doing it."

In this case the act of charging private expenses to the company was not only thought of but actually carried and therefore there is no merit in doing what you were obliged to do in the first place.

A good employer would never use the legitimate services of his employees to circumvent the law and in this case, part of the employee's service was wrongfully applied. Notwithstanding, the defense argued that the regularization of the legal position of the employer meant that he would no longer use the services of the plaintiff in his private apartment and therefore justified the redundancy.

The Tribunal rejects this argument as the cost of righting a wrong should be borne by the actor and not a third innocent party. This in itself does not change the function of the "Housekeeper" nor the need for housekeeping at the office and therefore it cannot be used as a genuine reason for redundancy.

Ms Bartolo Vella testified that Mr Scheuscher wanted to change the stores where she bought the consumables from and upon his instructions gave him a choice of stores to choose from including Lidl. In view that Lidl is located at a distance, she pointed out that she would need to be paid for the fuel cost if requested to drive to this store with her private car.

While Mr Scheuscher admits that Ms Bartolo Vella was never informed of the fact that she shall be required to do outside shopping and in that case use her private car, he never offered to reimburse her for the expenses and even when she asked to be reimbursed he did not oblige. His reply was that if she raised the issue, he would order the foodstuff on-line. In other words if Ms Bartolo Vella was not ready to fork out the fuel cost from her own pocket, not to mention the wear and tear of the car, he would take this function away from her.

Such maneuvering can never be used to justify withdrawing the legitimate work functions of an employee and then use it to argue that the employee had reduced work functions. Such behavior has to be called by its real name, manipulation and abuse of power and authority and can never be accepted as a genuine reason for redundancy.

Redundancy is one of the most distressing events an employee can experience. The employer is expected and needs to handle the redundancy situation as sensitively as possible to reduce the negative impact especially on the mental health of the individual. Therefore a genuine redundancy is framed in continuous information to the employee at risk of redundancy, discussions to explore ways of avoiding redundancy, exploring alternative ways of working or employment with the employer, support to re-train or to find alternative employment. Such measures are indicative of a genuine process to mitigate a difficult situation for both the employer and employee.

The Tribunal noted that the letter of termination of Ms Bartolo Vella was left on the desk by Mr Scheuscher, unsigned and in full vision of the plaintiff who was usually the first person to enter his office to clean and have ready for her employer to start the day. The defendant knew that Ms Bartolo Vella would see it and knew that this information would stress her tremendously. Further stress was added when the defendant called her to his office demonstrating irate behavior and choosing to deal with a petty operational issue instead of the crisis that had just landed on the plaintiff.

Ms Bartolo Vella describes how the defendant Mr Scheuscher told her that she was not cleaning the place well enough and therefore he was dismissing her, quote “inti daqshekk ghax inti hawnhekk ma initx tnaddaf”. When the plaintiff exclaimed surprise and requested an explanation, the employer called her “crazy” quote “ajjarni mignuna”. He then asserted, quote; “ha niktiblek il-karta ghal barra”. When the plaintiff challenged him on the use of the word redundancy as a reason for termination when he had just cited poor performance as the reason for termination, he insisted on the word redundancy. Ms Bartolo Vella adds that at that point he told her that he will soon replace her, quote: “ Kif titlaq inti nqabbdu lil haddiehor” - reference Tribunal sitting of the 15th June, 2018.

This was corroborated by the defendant’s testimony when he said that the functions of the plaintiff are currently provided by a freelancer cleaner. The evidence produced by the defendant is a number of declarations of receipts for a cleaning fee printed on a letterhead of the Web International Services Limited, - reference Tribunal sitting of the 16th November, 2018 and Dok PS3 to PS77.

The Tribunal asserts that if redundancy was the true reason for termination, why should an employer engage in such behaviour and use such derogatory and hurtful words? If the defendant claims that there was a diminution of function, why would he say that once the plaintiff is terminated, he would get a replacement? In actual fact he did and he even contracted a second person to clean his private apartment - reference Tribunal sitting of the 16th November, 2018.

The Tribunal concludes that the employer did not fulfil his obligation to enter into a meaningful dialogue to explore alternatives and exercise basic sensitivity in the circumstances. The Tribunal concludes that the employer did not have the intention of stopping the housekeeping function.

The Tribunal notes that the certified true copy of the original termination letter is not signed by the employer. It is reasonable to ask why is the person who is losing the job asked to sign and the person effecting the termination does not. Mr Scheuscher testifies that Ms Bartolo Vella signed the letter out of her own free will - reference Tribunal sitting dated 16th November, 2018, while the plaintiff argued that he implored her to sign.

The plaintiff testified that she did not even know what the word “redundancy” meant and signed the letter not because she accepted the notion of redundancy but because as far as she could comprehend, she was being terminated because of poor performance. It is a plausible explanation - reference Tribunal sitting of the 15th June, 2018.

When probed Ms Scheuscher could not recall whether he explained to the plaintiff what redundancy meant but argued that, quote “ Well, she signed that she confirmed and received and agreed with the termination so I guess it was the case”, - reference Tribunal sitting of the 16th November, 2018.

The Tribunal asserts that it is the responsibility of the employer to inform the employee and explain the details and ensure that the employee is fully aware of the implication of the situation.

The Tribunal concludes that the plaintiff was unaware of the implication of the situation when she had the right of being informed and placed in a situation where she could make an informed decision. Therefore the signature on the

termination letter carries no liability for her but burdens the defendant with the responsibility for this failure.

The Tribunal notes that at no point in time was there any indication that the organization had any operational or financial difficulties that necessitated re-structuring or cutting back on the number of employees or reducing the salaries or working hours.

Therefore, the Tribunal rejects the notion that the defendant was carrying out a re-structuring exercise to ensure the sustainability of business. Terminating the housekeeper to replace her with fragmented assignments does not constitute re-structuring in the business sense of the word.

In fact during the period of employment of the plaintiff at Web International Limited the organization continued to grow in terms of new recruits and in this regard one can reasonably conclude that the profitability of the organization improved. Mr Scheuscher testified that, quote; "Yes, we employed other people for doing operational work such as maintaining our business as such", - reference Tribunal sitting dated 16th November, 2018.

However the defendant makes the argument that a director has responsibilities toward the shareholders and needs to make sure that he creates value and a return on investment. Therefore the defendant argues that the director was duty bound to cut down on costs if that helped to improve the bottom line.

The Tribunal reminds that the director of a company has responsibilities toward all stake-holders including the customers, suppliers and the workers and not only the shareholders. This responsibility assumes greater importance when the director is a one member company. In this case the one member happens to be Mr Scheuscher, himself, - reference Tribunal sitting of the 16th November, 2018. Therefore his decisions needed to be balanced and taken into consideration the interests of the person involved namely Ms Bartolo Vella.

The Tribunal concludes and finds no evidence that;

1 the employer intended to cease continuing the business, or
2 the business was experiencing difficulty, or

3 the requirements for the plaintiff services ceased or diminished.

4 Decision

Having examined and evaluated the statements of case, testimonies, documents and submissions presented and made by both parties, and having made the aforementioned considerations, the Tribunal, taking all the aforementioned elements in their totality and complexity, deems the Defendant's decision to dismiss the Plaintiff Ms Bartolo Vella to have been unjust.

5 Compensation

The Defendant Web International Services Limited shall by way of compensation pay the Plaintiff Ms Bartolo Vella, Fourteen Thousand four hundred euros (€14,400) within four weeks from the decision of this case. The Tribunal directs that the employment records of Ms Bartolo Vella are changed to read that the reason of termination was unfair dismissal.

In accordance with Legal Notice 48 of 1986 of the laws of Malta the representation fees for each party shall be € 93.17. Each party in the case shall pay the respective fees to their legal counsel.

Tribunal Decision deems this Case closed.

(signed)

Joseph Gerada
Chairperson

TRUE COPY

Graziella Spiteri
F/Secretary