



**In the Court of Magistrates (Malta)
as Court of Criminal Judicature**

(D.I.E.R. Sitting)

Magistrate Dr. Donatella M. Frendo Dimech LL.D., Mag. Jur. (Int. Law)

Today, the 25th day of January, 2021

**The Police
(Inspector Sarah Magri)**

-vs-

Omissis;

Andrew Beane, holder of British passport number 761248676;

Gordon Cordina, holder of identity card number 93272M;

Omissis 1;

Omissis 2;

Andrew Muscat, holder of identity card number 132457M;

Savour sive Sonny Portelli, holder of identity card number 605344M;

Maryanne sive Sue Vella holder of identity card number 244067M;

John Bonello, holder of identity card number 599148M;

Omissis 3;

Philip Farrugia Randon, holder of identity card number 48049G;

Juanito Camilleri, holder of identity card number 476266M;

George Brancaleone, holder of identity card number 136061M and

Caroline Buhagiar Klass holder of identity card number 63876M

The Court,

Having seen the charges brought against the persons charged namely, **Omissis, Andrew Beane, Gordon Cordina, Omissis 1, Omissis 2, Andrew Muscat, Saviour sive Sonny Portelli, Maryanne sive Sonny Vella, John Bonello, Omissis 3, Philip Farrugia Randon, Juanito Camilleri, George Brancaleone and Caroline Buhagiar Klass** in connection with the following:

Where several acts committed by them, even if at different times, constitute violations of the same provision/s of the law, and are committed in pursuance of the same design:

In their capacity as Director/s and/or judicial representative/s and/or company secretaries and/or manager/s or other similar officer/s of the company HSBC Bank Malta plc (C-3177) having its registered address at 116, Archbishop Street Valletta, Malta, and/or being the persons responsible and appointed by said company to pay wages as well as Omissis itself as a body corporate according to law:

They have failed to pay the Basic Wage due for the period commencing on 1st January 2017 up to 21st June 2018 amounting to €84,251.03; they have also failed to pay the Weekly Allowance due for the period commencing on 1st January 2017 up to 21st June 2018 amounting to €360.25; they have also failed to pay the Statutory Bonus due for the period commencing on 1st January 2017 and ending on 21st June 2018 amounting to €397.48 which globally amounts to the sum of eighty-five thousand and eight Euro and seventy-six cents (€85,008.76), including tax and national insurance owed to their employee Mark Anthony Muscat (I.D. 409077M).

The Court is respectfully being asked, in accordance with Article 18 of Chapter 9 of the Laws of Malta, precisely, where the several acts committed by the offender, even if at different times, constitute violations of the same provision of the law, and are committed in pursuance of the same design, such acts shall be deemed to be a single offence, called a continuous offence; in accordance with Article 45(1) of Chapter 452 of the Laws of Malta, to order the accused to pay the penalties established by law of not less than two hundred and thirty-two euro and ninety-four cents (€232,94) and not exceeding two thousand and three hundred and twenty-nine euro and thirty-seven cents (€2,329.37); and in accordance with Article 45(2) of Chapter 452 of the Laws of Malta, having failed to pay wages, having made any illegal deduction, having failed to make payments of any bonus, having withheld any remuneration or any payment in lieu of notice, having failed to allow paid holidays, having failed to effect payment of any money due to an employee under Chapter 452 of the Laws of Malta or under any national standard order or sectoral regulation order made under Chapter 452, and according to Regulation 22 of Legal Notice 247 of 2003 as emended by Legal Notices 427 of 2007 and 259 of 2012, to pay a minimum fine of four hundred and sixty-five euro and

eighty-seven cents (€465.87); and to order the accused to pay Mark Anthony Muscat (I.D. 409077M) the sum of eighty-five thousand and eight Euro and seventy-six cents (€85,008.76), for the reasons specified above.

Having seen that before the start of the proceedings against the present defendants, on the 2nd April, 2019, the prosecution withdrew criminal proceedings against Omissis 1, Omissis 2 and Omissis 3, whilst on the 29th October, 2019, criminal proceedings were also withdrawn against Omissis as a separate corporate entity bearing corporate responsibility;

Having heard witnesses.

Having seen all the acts and documents exhibited;

Having read the note of submissions filed by the parties;

Having heard the prosecution and defence counsel make their submissions;

Considers,

This case concerns a claim for wages, bonuses and allowances totalling eighty-five thousand Euros which the prosecution claims were unduly unpaid to HSBC Bank plc employee Mark Anthony Muscat.

L.P. Quentin Tanti presented documentation¹ which shows that the persons charged, apart from Buhagiar Klass, occupied positions of directors, secretary or legal and judicial representative within the corporate entity in the time-frame indicated in the charges. Farrugia Randon had resigned in April, 2017, whilst Camilleri had resigned in February 2017.

Joseph Saliba in representation of Jobsplus explained that Muscat was employed as Clerk B with HSBC until 21st June 2018 as **Clerk B**.² The **reason for termination is that for not reporting for work**.³ Muscat never lodged an appeal with the National Employment Agency to contest the reason for termination "*He has never lodged an appeal with NEA*".⁴

¹ **Doc. QTZ** afol.182 et seq

² Fol.169

³ Fol.170

⁴ Fol.171

Hence, Muscat never contested the fact that he absented himself from work with the bank; in fact nor was there any such contestation when he testified *viva voce*,

Dr. Mark Anthony Muscat, previously employed with HSBC Bank as private manager human resource A24C, in fact testified how following a number of disputes with the bank - which disputes led to the institution of legal proceedings⁵ both in his personal capacity as well in his role as representative of the MUBE (Malta Banks Employees Union) - **he had decided not to turn up for work in the new position he was offered** - premier relationship manager (PRM) - as he deemed this to be in violation of the pre-existing collective agreement which he claims was unilaterally changed by the bank's management. Muscat explained, making reference to the various legal proceedings which he, as well as MUBE, had instituted against the bank contesting the bank's decision to amend the collective agreement, that **his decision not to report for work** stemmed from his belief that the new position he was offered was not even provided for in the new collective agreement which, as results from the documents exhibited by the same Muscat, the Bank had been given authorization by the Courts to proceed with.

Moreover, he contends *"that the new role that they wanted me to take up, even if they call it executive premier management de facto was non-existent"*. He did not want to end up like his colleague Darren Mangion who had *"ended up doing work of level 2 PRM which is far lower in grade.... I did not feel that I could join that role that status. I felt humiliated had I joined that role as Darren felt, in spite of the fact that I was afraid that as soon as I re-joined, I would be thrown out. And in fact, even though I did not join I was actually thrown out."*⁶ Dr. Muscat admits that **he was warned by the bank that failure to report for work was going to lead to loss of salary:** *"After that decision [wherein the Court had concluded collective agreement with MUBE could be changed] in less than a month, the bank decided to stop my pay, the pay was stopped back dated, on the twenty fifth of January is the day when we normally get our pay. I was informed that the January pay was not going to be given to me, and that I would not be paid, I would not be given any salary until I re-join the bank in the conditions of the new position which they had set up. In the mean time they filed criminal complaint.... In despite of this criminal complaint, I never went back to work. February two thousand and seventeen they sent me another letter informing me that apart from my pay, they are not going to pay me any bonus back dated by six months. This is how things remained, then this application started*

⁵ Defence exempted prosecution from requiring authentication of the documents exhibited by Muscat; vide fol.176

⁶ Fol.39

*running and then in June two thousand and eighteen she threw me out. I am not sure whether it was seventeen or eighteen because now I am confused.”*⁷ This communication is dated the 21st June, 2018.⁸

Thus, there is no contestation regarding the fact that Muscat, now a lawyer, **failed to report for work, even if merely under protest. Nor can it be argued that the bank failed to warn Muscat of the consequences which his failure, to report for work, would entail** as can evidenced by the documentation Muscat himself exhibited.⁹ In a letter dated the 24th January, 2017, the bank’s head of human resources informed Muscat as follows: “...*the bank has kindly asked you to return to work on the 5th July 2016 and a reminder was sent to you on the 30th November 2016.....As a result since you have not returned to work to date, the Bank has no option but to inform you that any absence going forward is being treated as unauthorised absence and therefore as from 25th January 2017 all salary payments are being suspended in line with Maltese law.*”¹⁰

Under cross-examination Dr. Muscat admits that when he was offered the post of executive premier management, his former post of private client manager in the wealth management department, was no longer existing.¹¹

The Court questions the logic of this reasoning:

⁷ Fol.37-38

⁸ Fol.98

⁹ Fol.92-97

¹⁰ Fol.95

¹¹ Fol.199

a). How could Muscat expect to return to a position within a structure which had been changed following an agreement between the bank and MUBE on the 12th April, 2013; an agreement which the bank reached with the union after obtaining the Court's authorization to embark on a new agreement?¹²

b). How could the department for employment and industrial relations seek to prosecute an entity for not paying wages when a person persistently refused to turn up for work and ignored the entity's calls to do so as Dr. Muscat himself confirms¹³ and which formed the basis of the reason for his termination as attested by Jobsplus; a decision which remained uncontested with the NEA?

Dr. Muscat continues to explain that whilst under the previous agreement his earnings were calculated on the basis of a formula (similar to a commission) from which amount his salary would be deducted, under the new agreement his salary had increased but with the way the newly introduced formula would work out, he was ultimately receiving €50,000 less per annum.¹⁴ **Muscat agrees that the sum of €108,000 was given in consideration of the newly introduced structural changes.**¹⁵ At the time he received these funds he was suspended from work.¹⁶ A meeting took place in April, 2016, where the bank was represented by its CEO Andrew Beane and the banks' lawyers. Although the bank had told him he could return to his duties he knew this was not possible since the structure had changed.¹⁷ Muscat admits that he was offered to go back as a private client manager and subsequently as an executive, yet he chose not to return to work since he considered those posts as being inexistence coupled to the fact that there was a prohibitory injunction pending.¹⁸ He admits that had he been asked to return to his old position he would have had no issue in so doing.

This rightly was pounced upon by learned defence counsel since the logic of Muscat's declaration undermines his own contention that it was the prohibitory injunction which prevented him from going to work!! It was apparent that in the cross-examination which ensued, Muscat found himself in a quandary and concedes that the **real reason** underlying his refusal to report for duties in the new

¹² **Doc. MM** a fol.69 et seq

¹³ Fol.219

¹⁴ Fol.2034-205

¹⁵ Fol.205

¹⁶ Fol.207

¹⁷ Fol.209-210

¹⁸ Fol.211

post which had been created under the new agreement, was that he perceived the work performed in this new position as **humiliating since it was performed by persons in lower grades.**¹⁹

Dr. Muscat admitted that he had taken out documents belonging to the bank before exiting the bank on the eve of what he describe was to be an “*indefinite strike*”.²⁰ This had led to disciplinary issues and a criminal complaint filed against him.

It results that the issue in dispute had been resolved between the bank and MUBE in April, 2013.²¹ **A compromise agreement which saw employees receiving significant financial compensation had been reached between the bank and a number of employees,** and although he personally, never signed this agreement he **nevertheless accepted €108,000 deposited by the bank in his account by virtue of the said compromise agreement,** claiming that it was merely “*as a part payment*” of a much higher amount he maintained was due to him.²²

It is worth considering that despite the statement that this was a ‘*part payment*’, **no evidence was produced to manifest that, in reality, Muscat took the money on condition that it was “part payment”!** From the only evidence before it, what the Court finds as irrefutable evidence is that the sum of €108,000 offered to Muscat²³ - in compensation for the termination of ‘*the Sales Force and Sales Management Agreements regulating the terms and conditions of the Wealth Management employees who are in Grades A21 to A26, with effect from the 31st December, 2012.*’,²⁴ dated the 15th April, 2013 – was indeed taken up by Muscat **unconditionally and unreservedly!**

Given Muscat’s own argument, reiterated on several occasions in the course of these proceedings, that his turning up for work would have been construed as accepting his new position which he found to be humiliating, the Court would similarly have expected Muscat to apply the same reasoning to what taking up the bank’s offer of €108,000 was tantamount to! After all the agreement in consideration, saw employees, *inter alia* Muscat, receiving monies in compensation

¹⁹ Fol.212

²⁰ Fol.200

²¹ Fol.202. Vide **Doc. MM6** a fol.69

²² Fol.203

²³ Fol.75

²⁴ Fol.73

for the new structure which had resulted in various grades, amongst which the A24 grade which Muscat had occupied, being removed: “*ii. The existing grades of A21 to A26 will cease to exist and will be substituted by the new group grades for the new roles above*”.²⁵.

Of greater significance to the merits of the charge brought against the defendants, given that the compensatory sum was also partly made in consideration of the changes in salary brought on by the new structure, in its zeal to prosecute the bank **no effort was made by the department to factor in such an amount in its calculations of the employee’s claim despite its awareness that the employee had been absenting himself from the workplace!** This fact will be considered in further depth below.

Darren Mangion, explained how he used to occupy the grade A24, similar to Muscat, which had two segments A24C top tier and A24. Mangion had returned to work in February, 2013, after being locked out together with his team in 2012.²⁶ He knew that Muscat had been, and still was, suspended for having misplaced his briefcase “*bagalja tax-xoghol*”.²⁷ In 2014 the role changed to executive relationship manger. By 2015 he was the only one left in his own grade but he ended up doing work which was not commensurate to his grade since the work he was performing used to be performed by colleagues in lower grades. However, by mid-2018 he was given a new role, VIP Premier, servicing top tier clients of the bank, namely CEOs of the largest corporations and corporate companies in Malta.²⁸ Evidently, Mangion’s resolve to continue working within the new structure despite any initial misgivings, had in time paid off!

Mariella Caruana, from the department of industrial and employment relations, testified that Muscat filed a complaint with their department because his employer was not paying him his wages. She explains: “*Mr. Muscat stressed that he could not return to work because he would not be returning to the job he had at the time of the suspension and he would be relegated to an inferior role with reduced earnings. Mr. Muscat insisted that the bank’s behaviour was in bad faith and he also explained how the bank was in breach of the collective agreement since it was not sanctioning an unauthorised absentees under the disciplinary proceedings for gross misconduct. So he presented various documents, amongst which was a letter from Gareth Williams who had informed*

²⁵ **Doc.MM6** a fol.69

²⁶ Fol.112

²⁷ Fol.113-114

²⁸ Fol.112-113

on the 5th of July 2016 had informed Mr. Muscat that he was being asked to return to work and Mr. Williams sent several reminders to Mr. Muscat to return to work because the bank had revoked the disciplinary proceedings against Mr. Muscat. Mr. Muscat did not agree with the bank's position for the reasons I mentioned before and on the 26th of January 2017, Mr. Williams notified Mr. Muscat by email that the bank was very concerned with his behaviour for other reasons related to posts on Facebook which according to the bank were defamatory and the comments were made against the bank's CEO and other executives, Senior Executives of the bank. Then in August 2017, DIER decided through its legal office to proceed with a claim for wages so the first claim for wages was sent to the bank in August 2017 and the bank replied that Mr. Muscat had actually accepted the sum of hundred and eight thousand euros as compensation for the changes in the conditions of work of Mr. Muscat and his colleagues who were in the same position as he was andalso explained how the changes made had nothing to do with Mr. Muscat as such but had to be put in place because of the regulatory obligations of the bank..... In May 2018, DIER notified with an updated claim for wages and again the bank replied this time through Dr. Matthew Brincat, they stated the same reasons why they were not in agreement with the claim.”²⁹

Under cross-examination Caruana confirms that the change in Muscat's job description was a result of restructuring done by the bank in agreement with the unions.³⁰ She confirmed that Muscat had received compensation and used it to address his family's needs as well as of the fact that Muscat had informed her he was following a full-time course at university.³¹ More importantly when she presents a revised statement of accounts dated the 27th March, 2019,³² she admits that **the amount of €108,000 was not taken into account by the department when calculating that, which it deemed to be owed to Muscat** and for which amounts the persons charged are facing prosecution! The witness further confirms that she was unsure whether to bring charges in this case because of the issues involved.³³ When she issued claim letters to the bank, the bank duly explained its position on the matter.³⁴ Towards the end of her cross-examination, the witness confirmed that she had never come across a case where a person who refuses to go to work makes a claim to be paid his wages.³⁵

²⁹ Fol.116-117

³⁰ Fol.228

³¹ Fol.229

³² **Doc.MCZ** a fol.233-234

³³ Fol.121

³⁴ Fol.125

³⁵ Fol.126

It is baffling how despite being made aware of the payment of no less than €108,000, the department decided not to factor in this amount when calculating what it deemed to be owed by way of salary to Muscat. Given that this amount was meant to address the new structure and salary, an amount which Muscat appears to have unconditionally accepted, **the department ought to have given due consideration to this amount, in its calculations as to what in actual fact was owed by the bank to Muscat.** After all, its calculations were based on the basic wage for the period running from January, 2017 and June, 2018. Instead, this amount was totally disregarded by the department in its calculations of the amount it perceived as being owed to Muscat and for which it sought the prosecution of the defendants.

However, what the Court finds truly concerning, is the manner in which the department proceeded to make its calculations. Apart from the fact that the payment of €108,000 was totally ignored, Caruana admits that the department's calculations³⁶ were based on **a payslip belonging to another employee and not to Muscat**, "*This was based on a payslip which was provided by Mr. Muscat of his colleague who was in the same position and for 2018, ... [Court: The payslip was pertaining to another person?] Yes, but in the same position and Mr. Muscat stated that this would be his wage for the month of January 2017³⁷..... [Court: So, this is the final according to you document relating to his claim which is based on a salary and payslips of another employee] Yes".³⁸ This is **hearsay at its finest!***

Whilst it is obvious that in the realm of criminal proceedings one cannot rely on projections and suppositions but only on actual facts proved in accordance with the rules of evidence, it is truly baffling how the department, in pursuing this prosecution, relied on a payslip pertaining to an employee other than the person making the claim. Nor does it result that the department sought to verify same with the bank itself!

The issue assumes greater significance considering that one of the most fundamental rules of evidence, the **best evidence rule**, was totally disregarded in these proceedings.

In fact, the proceedings are **wanting of any form of admissible evidence which attests to Muscat's basic wage.** Given that the department's calculations hinge and

³⁶ Doc.MC a fol.129-131; fol.133-134

³⁷ Fol.117-118

³⁸ Fol.120

are largely dependent on the basic wage, it was expected that proof as to what this amounted to, be produced.

From an examination of the evidence brought forward, the court notes that the documentation which Muscat passed on to Caruana,³⁹ which formed the basis of the department's calculations and consequently the object of these proceedings, **was not confirmed on oath by Muscat, nor did Muscat testify as to what his monthly wage amounted to.** Muscat merely read out the global amount indicated on the charge sheet stopping short of declaring what his basic wage consisted in. Under cross-examination, Muscat only refers to the emails at fol.144-146 and to his communications with the bank, stopping short of confirming on oath the documents and emails he passed on to the department found at fol.135-142, illegible as they may well be, which refer to his salary and income.

Reference is made to the judgement by the Court of Criminal Appeal, **Il-Pulizija (Spettur Elliot Magro) vs Samir Lofti Fahim Tadrus:**⁴⁰

.....Fl-atti processwali hawn skrutinati, kienu esebiti kopji fotostatici ta' dawn l-ordnijiet u dan jaghti ragun lill-appellant ghaliex dawn ma jikwalifikawx bhala prova la darba ma humiex awtentikati skond il-ligi. Tajjeb li in rigward issir referenza ghas-sentenza ta' din il-Qorti fl-ismijiet **Il-Pulizija vs Concetta Charles** tas-27 ta' Lulju 2012 citata ricentement mill-Qorti tal-Magistrati fis-sentenza taghha **il-Pulizija vs Christian Demanuele** tal-10 t'Awwissu, 2017;

11. F'din l-ahjar sentenza, il-Qorti tal-Magistrati spjegat hekk:

Illi jibda biex jinghad li uhud mix-xhieda tal-prosekuzzjoni prezentaw diversi dokumenti waqt id-deposizzjoni taghhom. Hafna minn dawn id-dokumenti, fil-maggoranza atti gudizzjarji, huma fotokopja mhux awtentikata u lanqas konfermata b'gurament mir-Registratur tal-Qorti.

Illi ai termini ta'l-artikolu 636 tal-Kodici tal-Organizzazzjoni u Procedura Civili (rez applikabbli ghall-proceduri penali permezz ta'l-artikolu 520(1)(e) tal-Kodici Kriminali) kopja ta' att gudizzjarju titqies bhala awtentikata u konsegwentement tista' tingieb bhala prova jekk maghmula fil-forma li trid il-Ligi mill-ufficjal li ghandu huwa merfugh l-original.

Illi huwa principju ben stabbilit li fil-kamp penali l-prosekuzzjoni hija obligata tressaq l-ahjar prova. B'applikazzjoni ta' dan il-principju u tad-disposizzjonijiet tal-Ligi hawn fuq kwotati, kull dokument, mhux fil-forma originali, irid ikun awtentikat minn persuna kompetenti, altrimenti ma jissodisfax il-kriterju ta'l-ahjar prova.

³⁹ Fol.135-142

⁴⁰ Per Hon. Mr. Justice Dr. Giovanni Grixti; Decided 9th July, 2020. Appeal No. 536/16

Illi dan il-principju huwa ben assodat fil-gurisprudenza taghha. Fis-sentenza moghtija fil-kawza **II-Pulizija vs Concetta Charles** (27.7.2012)⁴¹ il-Qorti ta' l-Appell Kriminali, skartat fotokopji bhala prova ghaliex mhux awtentikati; dik il-Qorti qalet hekk:

Ma hemmx dubju illi d-dokumenti mhux awtentikati provduti mill-appellanta, ghal dak li jirrigwarda fotokopji, ma jistghux jigu accettati bhala prova minn din il-Qorti.

In **II-Pulizija vs Daphne-Anne Vella** the same Court, differently presided, made the following considerations:⁴²

16. Dan qiegħed jingħad ukoll għaliex l-artikolu 520(d)(e) tal-Kodiċi Kriminali jirrendu applikabbli għal Qrati ta' Ġustizzja Kriminali d-disposizzjonijiet tal-artikoli 558 sa 662 tal-Kapitolu 12 tal-Liġijiet ta' Malta; u b'mod partikolari inkluz dawk id-disposizzjonijiet li għandhom x'jaqsmu mal-provi dokumentarji jiġifieri l-artikoli 627 sa 633 u l-artikoli 635 sa 637 tal-Kapitolu 12 tal-Liġijiet ta' Malta.

17. Taħt dawn id-disposizzjonijiet ċivili applikabbli wkoll għal din listanza, Qorti ta' Ġustizzja Kriminali għandha tiċħad li tinġieb kull prova li jkun jidhrilha li mhix l-aħjar prova li l-parti tista' ġġib.⁴³ F'dan il-każ fejn l-aħjar prova kellha tkun kopja awtentika tal-kuntratt relattiv, ma nġiebet ebda prova li turi li l-Prosekuzzjoni jew il-parti civile ma kienetx tista' minħabba ħsara jew telf tad-dokument riferit tipprezentah bi prova quddiem il-Qorti tal-Maġistrati matul it-trattazzjoni tal-kawża hemmhekk, b'mod li l-Qorti setgħet teħles lil dik il-parti milli ġġib dik il-prova jew li tagħti dawk l-ordnijiet loħra li jinħtieġu fiċ-ċirkostanzi.⁴⁴ Wara kollox prova ta' fatt tmiss dejjem lil min jallegaha.⁴⁵

18. Apparti minn hekk, u b'mod aktar speċifiku l-artikolu 645 tal-Kodiċi Kriminali jirrendi operattivi għall-Qrati ta' Ġustizzja Kriminali l-artikolu 570 tal-Kapitolu 12 tal-Liġijiet ta' Malta. B'hekk xhud setgħa jiġi mħarrek li jġib miegħu kotba, dokumenti jew ħwejjeġ oħra li jkunu tal-partijiet fil-kawża jew ta' waħda minnhom jew li jkun qiegħed jieħu ħsieb tagħhom ix-xhud jew li jkunu taħt kustodja tiegħu jew inkella, skont il-Liġi, x-xhud ikun fl-obbligu li jġib.

19. Aktar minn hekk l-artikolu 638 tal-Kodiċi Kriminali jzid li :

(1) Bhala regola, għandu jitqies li tinġieb il-prova l-aktar sħiħa u sodisfaċenti illi l-każ ikun jagħti, u li ma jifhalla barra ebda xhud li x-xieħda tiegħu tkun importanti.

(2) B'dan kollu, f'kull każ, ix-xieħda ta' xhud biss, jekk emmut minn min għandu jiġġudika fuq il-fatt, hija biżżejjed biex tagħmel prova sħiħa u kompluta minn kollox, daqs kemm kieku l-fatt ġie ippruvat minn żewġ xhieda jew aktar.

⁴¹ Per Hon. Mr. Justice Dr. Michael Mallia, Appeal No. 267/2011

⁴² Per Hon. Mr. Justice Dr. Aaron M. Bugeja; Decided 15 October, 2019; Appeal No. 130/2019

⁴³ Artikolu 560(1) tal-Kapitolu 12 tal-Liġijiet ta' Malta.

⁴⁴ Artikolu 560(3) tal-Kapitolu 12 tal-Liġijiet ta' Malta.

⁴⁵ Artikolu 562 tal-Kapitolu 12 tal-Liġijiet ta' Malta.

20. Din il-Qorti, tikkonċedi li l-parte civile xehed f'dan il-każ, u li kien xhud tajjeb. Iżda dan ma jnaqqas xejn minn dak li l-Liġi teħtieġ bħala l-aħjar prova meta din tkun waħda dokumentali u ma tkunx impossibilitata milli tista' tinqieb. [sottolinejar ta' din il-Qorti]

The Court shall refrain from commenting any further as to what led the department to calculate Muscat's claim to wages and salary/allowances partly based on information pertaining to another person. From the email trail it appears that this person was no one other than Darren Mangion,⁴⁶ who similarly to Muscat, also failed to confirm on oath the email apparently sent to Muscat. Nor did this witness testify as to what his basic wage amounted to. Moreover, the email sent by Mangion to Muscat appears to have been sent in July, 2017. In that same trail Muscat states "*As for the bonus, the exact amount which I was going to be paid in January is 4066 euros, however I have nothing official to show this*".⁴⁷

Hence the evidence regarding the amounts due as wages to Dr. Muscat, fails the best evidence requirement, remains hearsay evidence and is thus, **inadmissible**.

Although the Court is perfectly entitled to dismiss the charges based on this serious *lacuna* which undermines irreparably the prosecution's case - a case which is entirely based on its calculations as to what is owed to the employee - it will nonetheless consider the evidence given by the defendants and by witnesses for the defence.

Rowena Leontijevic, in representation of the Faculty of Laws within the University of Malta, testified how Mark Muscat followed three courses in the period 2014-2019 when he graduated LL.B. and L.P., a one-year prep programme and a final one year leading to the Masters of Advocacy, "*it was a complete five year*", which was made up of consecutive courses.⁴⁸ The courses were full time with lectures held between 8am and 8pm Monday to Friday throughout the five years. No information was received that the student had not been attending lectures.⁴⁹

This evidence proves to the Court that when the bank was calling upon Muscat to turn up or work, Muscat was already far along on the road to graduating with a law degree, a course which he was following on a full-time basis. Hence, this Court believes that Muscat's 'requests' to return to work in a position that no longer

⁴⁶ Fol.135

⁴⁷ Fol.135

⁴⁸ Fol.426-427

⁴⁹ Fol.427-429

existed, a fact he was so aware of that he had accepted a payment of €108,000 in token thereof, were superficial and a ploy!

Profs. Andrew Muscat testified how during a board meeting the directors were informed by the bank's counsel that Muscat, who had been suspended, had been asked to return to work after his suspension was withdrawn. Since Muscat had refused to return to work the board was told that his salary would be stopped, a decision the board was subsequently informed had been taken.⁵⁰ The board was not involved in the decision-making process but was informed of the decision taken by the human resources department.⁵¹ The board found no reason to question the decision which was taken by human resources, a department which not only was manned by competent individuals but which had also sought outside legal advice.⁵² **Dr. Gordon Cordina**, a non-executive director, explained he had come to know of the decision taken to terminate Muscat's employment from a reading of the board meeting's minutes. The legal department which was operated by competent individuals, had alerted the board of this case.⁵³ Previous to that, he was present in meetings when the board had been informed of the matter.⁵⁴ The board's role was one of oversight and did not have an ultimate say in the actions of the bank's executives.⁵⁵ Cordina states that he had no reason to doubt that he had been given sufficient information as to why Muscat's employment was terminated given that he was asked to return to work and failed to do so.⁵⁶ Throughout his testimony Cordina made reference to the fact that the bank's board of directors does not enter into the detailed operations of the bank's day to day management. Moreover, he felt he had been given sufficient information to find that the bank had acted correctly in seeking Muscat's dismissal as ultimately, he had been asked to go to work and failed to do so.⁵⁷ **Saviour Portelli** explained that as a board member he was informed of ongoing litigation with the bank by the legal department's head who regularly gave the board updates. He also stressed that the legal and human resources departments were competently manned and the board is only informed of decisions taken by these departments and not

⁵⁰ Fol.239

⁵¹ Fol.239-240

⁵² Fol.242-243

⁵³ Fol.245-246

⁵⁴ Fol.249

⁵⁵ Fol.250

⁵⁶ Fol.253-256

⁵⁷ Fol.257-260

involved in taking them.⁵⁸ As non-executive director he did not partake in the executive running of the bank.⁵⁹ The board's work was to set out the bank's policies and make sure it is provided the necessary resources but did not involve itself in the bank's executive work.⁶⁰ **Maryanne Vella** also confirmed that as a board member she had no reason to doubt that the actions taken in Muscat's regard, which had relied on legal advice from both within and outside the bank, had been diligently taken.⁶¹ This witness also made reference to the board's remit highlighting the distinction between the role of oversight and the mistake of overstepping its functions.⁶² She had no reason to ask for specifics and details and had every faith in the human resources competence to take the right decisions.⁶³

John Bonello also testified that he had no reason to doubt the legal advice received in this case.⁶⁴ The board's and indeed its directors' responsibility was that of exercising oversight and to ensure that the structures are in place and competent people man the said structures. *"It is not the role of the non-executive director to be involved in the executional or executive activities"*.⁶⁵ It was the bank's executives who decided that Muscat should have his salary stopped and from the information supplied to the board, the decision was the right one.⁶⁶ **Philip Farrugia Randon** confirmed that he had no reason to doubt the legal advice the bank was given and of which the board of directors was informed.⁶⁷ **Profs. Juanito Camilleri** testified to the same effect, adding that he relied on the legal advice which diligence dictated be sought.⁶⁸ The witness maintained that he felt he was sufficiently informed of the situation namely, which saw Muscat being asked to turn up for work and his refusal to do so for a period of nine months.⁶⁹ **Dr. George Brancaleone** explained that he got to know of the case with Muscat when the matter was discussed at board level, wherein the board was told that following legal advice, sought internally and externally, the executives were going to

⁵⁸ Fol.264--265

⁵⁹ Fol.269

⁶⁰ Fol.275-276

⁶¹ Fol.279-280

⁶² Fol.281

⁶³ Fol.283

⁶⁴ Fol.288

⁶⁵ Fol.290

⁶⁶ Fol.293

⁶⁷ Fol.301-302

⁶⁸ Fol.303-305

⁶⁹ Fol.308

terminate Muscat's employment.⁷⁰ The witness recalls receiving documents as part of a legal report "*it was a good summary for the board to have the right information on the case*".⁷¹ **Caroline Buhagiar Klass**, head of human resources, explained she was informed by the bank's legal advisors of the case with Muscat.⁷² By the time she joined the bank a decision had been taken to terminate Muscat's employment.⁷³ Had Muscat turned up for work she would gladly have started paying him, but he had instead failed to turn up for work.⁷⁴ She recalled correspondence wherein Muscat was asked to return to work in the wealth management team although not the exact job title he would have.⁷⁵ Buhagiar Klass adds, addressing Muscat in his cross-examination, "*You were asked to return in the same department with the same salary nothing was going to be taken away and even a role which was similar with the one that you had, that's what I knew [Court : The salary was the same] Yes of course we cannot I mean reduce a salary it would be illegal*⁷⁶.... *From what I recall if he had returned back to work obviously, he would have the same remuneration that he had and obviously what we agreed in this compromise agreement obviously people in that department also were paid a sum.*"⁷⁷ hinting at the compensation amount of €108,0000 the bank paid Muscat.

Andrew Beane stated that "*it's a basic principle that those that come to work get paid a salary and those that don't shouldn't*".⁷⁸ He spoke of a meeting held in good faith with Muscat wherein the latter was asked to return to work in the office of the wealth management department in consideration of the bank dropping disciplinary charges against him.⁷⁹ He had learnt that Muscat was following a full-time course in university which he found strange as he was still on the bank's payroll, bit he was looking to overlook this and move forward.⁸⁰ **After requesting Muscat to turn up for work several times and his refusal to do so, and following also external legal advice received by the bank, it was decided not to continue paying a person who had abandoned his role.**⁸¹ Referring to the position Muscat

⁷⁰ Fol.311-312

⁷¹ Fol.314

⁷² Fol.318

⁷³ Fol.320

⁷⁴ Fol.322-323

⁷⁵ Fol.329

⁷⁶ Fol.339

⁷⁷ Fol.341

⁷⁸ Fol.355

⁷⁹ Fol.356-357

⁸⁰ Fol.358

⁸¹ Fol.359-360

was asked to occupy upon his return to work⁸² Beane cites that Muscat would have taken up the same responsibility in the wealth management department: *“To manage wealth, that is what the wealth management department can claim”*.⁸³ Throughout his testimony, Beane stresses that he intervened personally in the matter as a sign of good faith after the bank had resolved its issue with the union, and thus hoped that **Muscat who had already received €108,000 in compensation for the changes in the bank’s structure would return to work**. He had even spoken to the manager of the wealth management department, to prepare for Muscat’s return to work in the said department. After Muscat failed to return to work, relying on advice from the legal and human resources department as well as having consulted external lawyers, Muscat’s employment was terminated.

Considers,

Having already established that the prosecution failed in making its case against the defendants given the **lack of admissible evidence regarding Muscat’s basic wage and in turn the entire amount it deems is owed to Muscat**, it would be amiss for the court not to consider that the case also fails as it is unfounded in law.

Learned defence counsel submits that before determining the criminal responsibility of the defendants, the Court must determine that an offence was indeed committed by the bank. This is completely correct. Just as learned counsel for the department is correct in submitting that for purposes of establishing criminal responsibility under Article 46 of the Employment and Industrial Relations Act, hereinafter referred to as ‘the Act’, it serves no purpose to distinguish between executive and non-executive directors.

Article 46 of provides:

46. Where an offence against the provisions of this Act or of any regulations or orders made thereunder is committed by a partnership, company, association or other body of persons, every person who, at the time of the commission of the offence, was a director, manager, secretary or other similar officer of such partnership, company, association or other body of persons or was purporting to act in any such capacity shall be deemed to be guilty of that offence unless he proves that the offence was committed without his knowledge and that he exercised all due diligence to prevent the commission of the offence

⁸² Vide documents a fol.88-89

⁸³ Fol.368

It is imperative for the vicarious responsibility of the defendants to subsist under this article, that it is shown that **an offence has been committed** by the body of persons, in this case the bank, the defendants are representing.

Thus, it must be established whether in not paying wages to a person who, instead of turning up for work (despite repeated calls to do so) opted to follow a full-time course at University, constituted the commission of an offence by HSBC Bank plc.

A preliminary consideration in this regard militating against such a finding, is the fact that the whole process was wrought with prolonged and extensive legal issues thereby undeniably introducing more than a reasonable doubt which pervaded the bank's actions.

The prosecution could most certainly have exercised greater caution before instituting proceedings against the bank and a number of individuals it deemed represented the bank and/or were responsible for the non-payment of Muscat's salary.

Yet, strangely enough, before witnesses started being heard and before the proceedings against the bank's representatives had kicked off, the same prosecution **withdrew charges against the very same bank it alleged committed the offence**. Thus, the Court is faced with the prosecution requesting the prosecution of individuals for an offence it deemed was committed by the bank which from day one it exonerated from any criminal responsibility!

Considers,

In considering whether the bank committed an offence under Article 46 of the Act, by not paying Muscat for wages, bonus and allowances, when the same Muscat had ceased to report for work, regard must be had to Article 2 thereof which lays down a number of definitions which spell out the fact that **wages are paid in consideration of services rendered and the performance of work to an employer**. In this case Muscat was bound under a collective agreement to work for the bank:

"collective agreement" means an agreement entered into between an employer, or one or more organisations of employers, and one or more organisations of employees regarding conditions of employment in accordance with the provisions of any law in force in Malta;

"wages" means **remuneration or earnings**, payable by an employer to an employee and includes any bonus payable under article 23 other than any bonus or allowance related to performance or production;

"conditions of employment" means wages, the period of employment, the **hours of work** and leave and includes any conditions related to the employment of any employee under a contract of service including any benefits arising therefrom, terms of engagement, terms of work participation, manner of termination of any employment agreement and the mode of settling any differences which may arise between the parties to the agreement;

"period of employment" means the **time in any day during which employees are available for service to the employer**, but inclusive of the intervals allowed for meals and rest;

"contract of service" and "contract of employment" means an agreement, (other than service as a member of a disciplined force except as may be provided in or under this Act) whether oral or in writing, in any form, whereby a person binds himself to **render service to or to do work for an employer, in return for wages**,

Thus, how can the prosecution expect to have reached the threshold of the beyond reasonable doubt requirement, in its case against the defendants for non-payment of wages to an employee who performed no work for the bank, when the very same definitions in the Act provide that **remuneration and earnings are inextricably linked to the performance of work and the rendering of services?**

Both learned counsel for the department as well as Dr. Muscat contend that the court must have due regard to the fact that Muscat was impeded by a "just cause" as is specified in article 19 from returning to work and thus, the bank was at fault in not paying Muscat wages.

This argument fails not only from a legal aspect, as will be considered hereunder, but also because both the department and the employee fail to understand that the role of this court is solely to determine whether the bank (as represented by the defendants) can be held criminally responsible for not having remunerated an employee for not reporting for work. Other considerations accounting for this absence fall outside the purview of this court's decision.

Now article 19(2) of the Act provides:

(2) Notwithstanding the provision of subarticle (1), where an employee fails without just cause to give to his employer the total number of hours of work as bound by the terms of any contract of service applicable to him, the employer shall not inflict on the employee any fine for such loss of work but

may deduct from the total wages due to the employee that part thereof which corresponds to the work so lost.

One cannot but observe how the **pervading principle** regulating employment laws, and in turn the claim for wages, is that **payment of the said wages is conditional on the performance of a number of hours of work**.

Article 2 of the Act provides:

"hours of work" means the time on any day during which employees are available for **service to the employer**, exclusive of the intervals allowed for meals and rest;

It is thus very confusing that the department, in making its final submissions on the case, chose to cite a provision which offers justification to the bank's action to stop paying Muscat wages since he was giving the said bank zero (0) hours of work!

However, the department's contentions in trying to link this provision to Article 46 of the Act (and article 45 of the Act for that matter), is incorrect and legally unfounded.

The whole article 19 of the Act regulates limitedly the issue of fines imposed by an employer on an employee to which that employee may become liable in respect of an act or omission. **In no way can this provision be construed as meaning that an employee, arbitrarily decides for himself, what constitutes a just cause for him not to turn up for work and yet seeks the payment of his salary.** This is in effect what both the prosecution and the employee contend in their submissions, both orally and in written form.

Nor is learned counsel for the department correct in giving this provision a wider interpretation; extending the situation it addresses and going as far as creating an obligation on an employer to continue paying a person for not turning up for work in the event the latter person decides, solely acting upon whim, that there is a just cause not to go to work. **Article 19(2) deals with the employer's right to deduct wages in lieu of imposing a fine, no more no less!!** It is legally incorrect for the prosecution and the employee to claim that this provision offers the employee with a legal basis for justifying unilaterally his absence from work and expect to be remunerated in the same manner as other employees who turn up for work.

Extending the application of a provision regulating the imposition of fines between employer and employee (Article 19) in a bid to eradicate a legitimate

defence under Article 45(1) and in turn, Article 46 of the Act, is legally untenable as a submission; *ubi lex voluit dixit, ubi noluit tacuit!*

Considers,

In concluding, reference has already been made that the prosecution's case cannot succeed on the basis that its calculations, whilst omitting the compensatory amount of €108,000, were based on another person's wages and on Muscat's projections as stated to the department, the amounts of which were never confirmed on oath!

For evidence to be admissible it needs to be based on facts; **facts which are confirmed on oath and documents which are duly authenticated**. Muscat also fails to authenticate the illegible documents exhibited by the department thus depriving them of any probative value.

The agreement⁸⁴ on the basis of which Muscat received the €108,000 indicted as "Contract Buy Out for Private Client Managers",⁸⁵ a sum it has been proven Muscat received (without providing any evidence that he received same conditionally and/or as 'part payment' as he contends), states very clearly in para (ii) "*The existing grades of A21 to A26 will cease to exist and will be substituted by the group grades for the new roles above*".⁸⁶ Muscat himself testifies he used to occupy the A24 grade and thus in terms of this agreement entered into between MUBE and HSBC, his previous post ceased to exist on the 1st January, 2013. It is this same agreement which provided for the new salaries and the new structure the latter commencing as of April, 2013.⁸⁷

This Court will not enter into the merits as to whether by accepting the amount of €108,000 Muscat was accepting the new structure and new salary, but this fact is undoubtedly a consideration the department ought to have factored in not merely when deciding whether to bring forward charges against the bank but more importantly in its calculations of any sum it perceived as owed to Muscat.

⁸⁴ **Doc.MM6** a fol.73-76

⁸⁵ Fol.75

⁸⁶ Fol.69

⁸⁷ Ibid.

To the Court, this fact coupled to Muscat's repeated non-show at his place of work even if under protest, are tantamount to the reasonable doubt element which militates against any finding of guilt on the bank's part and consequently a finding of guilt against the defendants.

Learned counsel for the department in the course of oral submissions concedes that absenteeism from work constitute *"Yes, those are legal justifications"*⁸⁸ whilst the employee claims that the defendants are *"at fault only because they requested me to return to work in a work that was inferior and not in line with the agreement.....demeaning, and my dignity and there is a lot involved"*⁸⁹.....*I did not want to submit myself to inhuman and degradable [recte: degrading]..."*⁹⁰with the latter considerations falling well outside the decision which this Court, as a court of criminal jurisdiction, is called upon to determine!

Consequently, in view of the above-made considerations, the Court, whilst abstaining from taking further cognisance of proceedings against Omissis, Omissis 1, Omissis 2 and Omissis 3, acquits the persons charged from the charges brought against them.

**Dr. Donatella M. Frendo Dimech LL.D., Mag. Jur. (Int. Law).
Magistrate**

⁸⁸ Fol.553

⁸⁹ Fol.556-557

⁹⁰ Fol.558