MALTA

QORTI TAL-APPELL
(Kompetenza Inferjuri)

ONOR. IMĦALLEF
LAWRENCE MINTOFF

Seduta tat-13 ta' Ottubru, 2021

Appell Inferjuri Numru 70/2020 LM

Nagihan Ozer (K.I. nru 60906A)
('l-appellat')

***vs*.**

Datalogic Limited (C 62773)
('l-appellanta')

Il-Qorti,

<u>Preliminari</u>

1. Dan huwa appell magħmul mis-soċjetà intimata **Datalogic Limited (C 62773)** [minn issa 'l quddiem 'is-soċjetà appellanta'] mid-deċiżjoni [minn issa 'l quddiem 'id-deċiżjoni appellata'] mogħtija mit-Tribunal Industrijali [minn issa 'l quddiem 'it-Tribunal'] fl-1 ta' Ottubru, 2020, fil-Kwistjoni tax-Xoghol nru 3456,

fejn iddikjara li d-deċiżjoni tagħha sabiex ittemm l-impjieg tar-rikorrenti **Nagihan Ozer (K.I. nru 60906A)** [minn issa 'l quddiem "l-appellata"], kienet waħda inġusta *ai termini* tas-subartikolu 78(3) tal-Kap. 452 u ordna sabiex fi żmien sittin jum mid-data tal-pubblikazzjoni tad-deċiżjoni appellata, hija tħallas lill-imsemmija appellata s-somma €4,200 bħala kumpens *ai termini* tal-para. (a) tas-subartikolu 81(2) tal-istess liġi.

Fatti

2. Il-fatti ta' din il-kawża jirrigwardaw it-tkeċċija allegatament inġusta tal-appellata minn mas-soċjetà appellanta. Hija kienet daħlet f'impjieg indefinit *full-time* ma' din tal-aħħar bħala *Customer Service Agent* permezz ta' ftehim[1] iffirmat bejniethom fis-6 ta' Awwissu, 2014. Fil-15 ta' Frar, 2016[2] hija kienet ġiet mgħarrfa li l-impjieg tagħha kien qed jiġi tterminat minħabba raġuni ta' *redundancy.* Iżda permezz ta' ittra oħra tal-25 ta' Frar, 2015[3], is-soċjetà appellanta infurmat lill-appellata li l-avviż ta' tmiem tal-impjieg tagħha kien qed jiġi mħassar wara li l-imsemmija appellata kienet ikkontestat ir-raġuni bħala waħda mhux ġustifikata, filwaqt li qaltilha li kienet qiegħda ttemm il-ftehim tal-impjieg għal raġunijiet ta' dixxiplina.

Mertu

3. L-appellata istitwiet proċeduri quddiem it-Tribunal fil-5 ta' April, 2016, permezz ta' rikors fejn talbet sabiex l-imsemmi Tribunal jiddeċiedi li t-tkeċċija

[1] Ara kopja tal-kuntratt a *fol.* 6 *et seq.* tal-atti quddiem it-Tribunal.
[2] Ara kopja ittra tas-soċjetà appellanta Dok. NOZ 2 *a fol.* 12.
[3] Ara kopja Dok. NOZ 3 *a fol.* 13 u 14.

tagħha mix-xogħol kienet waħda inġusta u msejsa fuq raġunijiet mhux tajba u suffiċjenti fil-liġi, u sabiex konsegwentement jordna li jittieħdu l-miżuri meħtieġa u skont il-liġi, wkoll billi jiġi impost kumpens xieraq u adegwat, u bl-ispejjeż kontra s-soċjetà appellanta.

4. Is-soċjetà appellanta wieġbet fid-29 ta' Settembru, 2016 fejn eċċepiet li t-terminazzjoni tal-impjieg tal-appellata kienet waħda ġusta u għal raġuni valida fil-liġi, iżda jekk it-Tribunal kien jidhirlu mod ieħor il-kumpens kellu jkun wieħed minimu meħud inkonsiderazzjoni ż-żmien qasir tal-impjieg tal-appellata.

Id-deċiżjoni appellata

5. It-Tribunal ikkonsidra u ddeċieda kif ġej:

> ***Considerations***
>
> 1. *The grounds for the termination of employment of the claimant were changed from those of redundancy to those of discipline. The Tribunal has to establish the definite grounds for dismissal.*
>
> *The Tribunal is convinced that the defendant had had enough of the claimant. To the defendant, redundancy, although not reflecting the actual situation, seemed to be the smoothest reason, also to safeguard the claimant's possible future prospects with the gaming industry; so it issued a letter of termination on grounds of redundancy. But when the defendant learnt that the claimant wasn't going to settle for it, they changed the reason of termination to one of discipline and registered it as such with Jobsplus. So, the Tribunal establishes that legally and officially there exists only one reason for dismissal – a disciplinary one.*
>
> *The Tribunal is treating the case as one of dismissal on disciplinary grounds for the following reasons:*

1.1. *the reason for the termination of employment is registered with Jobsplus as being that of discipline;*

1.2. *the initial reason for termination of employment was changed within two days from the defendant's receipt of objection – a reasonably short interval confirming that the change was due to the claimant's reaction to the original reason of termination of her employment;*

1.3. *the entire evidence and testimony submitted by the defendant consisted exclusively in matters of discipline;*

1.4. *the reason given by the defendant for initially declaring the reason of termination as being one of redundancy is not extraordinary in employee relations, albeit normally the fudging of the actual reason of termination results from a request by the employee; the Tribunal condemns such practice;*

1.5. *the* prima facie *justification of termination on disciplinary grounds given in the letter of termination render the grounds of discipline rather than those of redundancy to be plausible, albeit subject to the necessary substantiation of facts and to the employer's honouring of the duty to act fairly; and*

1.6. *whereas it is illegal to give a reason that is untruthful to Jobsplus, there is nothing in the law that prohibits the changing of the reason of termination. (fn. 3 Article 41 of chap. 452 binds the employer under certain circumstances to give the employee a certificate stating the reason for the termination of the contract)*

2. *The Tribunal has to establish if the disciplinary grounds presented by the defendant in its letter of termination of employment of the claimant (fn. 3 Dok. NOZ 3) did actually exist and if so whether they constituted a good and sufficient cause for dismissal and if so whether the processing of the dismissal was fair.*

The disciplinary grounds consist of six types of offences, viz. poor timekeeping, abuse of sick leave, substandard quality of work, disruptive behaviour, damaging of Company property due to negligence, and overall negative influence on the team.

2.1. Poor timekeeping

(a) *According to the testimonies, reports on Ms Ozer's latecoming to work started in February 2015 when Ms Ewa Kazmierska, Head of Marketing and Customer Service, received complaints from the claimant's supervisor about the claimant's arriving for work late on several occasions. (fn. 4 Page 1 of the transcript of the sitting of 20th October 2016). The Tribunal notices that February 2015 was the month that whereas it was the month when the Company introduced,* "an adequate system" *to appraise*

the performance of employees (fn. 5 Page 7 of the transcript of the sitting of 26th January 2017), and by when the Officer who employed the complainant, by the name of Nick, had left the defendant (fn. 6 That Nick had left the Company is the Tribunal's deduction. The claimant referred to him as, "the Director at the time" *during her testimony at the sitting of the 13th September 2018 (p. 4 of the transcript) and Ms Muge Mifsud, Affiliate Manager, referred to him as one of the Marketing Managers who hired the claimant (p. 5 of the transcript of the sitting of 9th May 2020). There is no other reference to him throughout the Tribunal proceedings) it was also the month when the claimant's probationary period expired and the claimant was retained in employment indefinitely. (fn. 7 Since there is no clear official date when the claimant commenced her employment with the Company the Tribunal took the claimant's own letter of request for a salary raise, wherein she indicated that she was submitting that request after nine months in employment with the Company; the letter was dated 24th April 2015 (Doc. EK 1). The probation period was of six months (Doc. NOZ 1, page 2)*

(b) *In April 2015 Ms Kazmierska received another complaint from the claimant's supervisor about the claimant's persistent lateness.*

(c) *The claimant alleged that her direct supervisor, Mr Erol Kankaya, was awkward in his relationship with her and so his assessment of Ms Ozer's performance at work was prejudiced.*

But Ms Pettersson, the Head of Customer Service and the direct superior but one of the claimant, rebuffed such an allegation because Mr Kankaya's assessment had to be ratified by her.

The Tribunal is not convinced about such prejudice also because, when Mr Kankaya wrote to the claimant implying that she ignored his written instruction not to process any transactions during the night, he wrote in Turkish so that the email might not be understood by his, and therefore Ms Ozer's, superiors. (fn. 8 Doc. DL1) For the Tribunal, in this context this showed prudence on the part of Mr Kankaya towards Ms Ozer.

(d) *In April 2015 the claimant submitted a request for a salary raise. The Head of Customer Service, confirmed to Ms Ozer a salary raise that was conditioned to the claimant's improving on her timekeeping. (fn. 9 Doc. EK 2)*

(e) *In November 2015 both Mr Kankaya and the claimant's Head of Dept, Ms Pettersson, reported to Ms Kazmierska that the claimant was arriving late and leaving early from work. (fn. 10 Page 4 of the transcript of the sitting of 20th Occtober 2016)*

(f) *In February 2016 Mr Kankaya, and the Head of Dept informed Ms Kazmierska and the Executive Director, Avv. Dott Daniel Degiorgio, that the claimant was not compensating for the hours that she did not work due to bad timekeeping. (fn. 11 ibid)*

(g) *Ms Ozer's immediate superior testified that, "We had so many times warned her verbally … for being late too many times. She was given permission to leave twenty minutes early every day on condition that she makes up for them because that was not fair for the others. She disagreed to make up for the twenty minutes …." (fn. 12 Page 7 of the transcript of the istting of 20th October 2016)*

(h) *Dr Degiorgio testified that he received reports, once or twice a week (fn. 13 Page 5 of the transcript of the sitting of 6th April 2017, that the claimant used to arrive late and leave early from work several times a week …. (fn. 14 Page 7 of the transcript of the sitting of 26th January 2017; page 5 of the transcript of the sitting of 6th April 2017)*

(i) *Ms Ozer herself testified that,* "I didn't have an agreement with Mr Daniel for being late; for leaving early. … I accept that I was being late a few times … and it was only for a few minutes." *(fn. 15 Page 4 of the transcript of the sitting of 21st March 2019)*

(j) *The claimant's testimony carried an incongruency regarding timekeeping. She testified that the lateness issue was brought to her attention a few months before she was terminated, whereas in fact her Head of Dept had written to her about lateness in April 2015, almost a year before she was dismissed. (fn. 16 Doc. EK 2)*

(k) *It was the claimant herself who testified that "… me and Daniel (Degiorgio) had an agreement that I could leave early like fifteen twenty minutes early* ***and cover up for it later****. So that's what I was doing." (fn. 17 Page 3 of the transcript of the sitting of 13th September 2018)*

The Tribunal found no convincing proof whatsoever that Ms Ozer was compensating for the shorter hours that she was working. She presented to the Tribunal an affidavit by Ms Muge Mifsud, who at the time of the claimant's dismissal was Affiliate Manager with the defendant, but who since then left the defendant, and who declared in her affidavit (fn. 18 Doc. NG 1), made three and a half years after the claimant's dismissal, that, "I also know for a fact that she made up for the lost time." *The Tribunal does not accept this evidence to be sufficient to dispute the consistent testimony given throughout the Tribunal hearings by the defendant that the claimant did not compensate for the time that she reported late for, and left early from, work. It is insufficient because Ms Mifsud declared also in the same affidavit that,* "… afterwards we were totally separated in different departments." *Therefore Ms*

Mifsud could vouch only for the period during which she worked with the claimant in the same department and in the same shift whereas her superiors were interested in the general trend, including the period after Ms Mifsud worked in a different department to the one in which the claimant was attached.

The Tribunal is satisfied from the collective testimonies and evidence that the accusation of poor timekeeping (2.1) is proven.

2.2. Abuse of sick leave

This accusation centred around two particular incidents, as well as a generic offence viz.:

2.2.1. taking sick leave in lieu of unauthorized optional leave;

2.2.2. asking for and being granted a meeting with the defendant's Executive Director, such meeting being held at a restaurant, because Ms Ozer did not want to meet on the defendant's premises, on a day when she had reported sick, without making the Director aware that she was on sick leave; and

2.2.3. being in "neighbouring areas" (fn. 19 Dok. NOZ 3) on several occasions during sick leave.

Re 2.2.1.

(a) *The merits of this accusation centre around whether the request for the optional leave in question was for August or October 2015. The claimant argued that it was for October whereas the defendant maintained that it was for August.*

(b) *That the claimant requested optional leave for October is not in doubt. The defendant refused granting the leave and the claimant reported for work during the requested period. (fn. 20 Page 6 of the transcript of the sitting of 13th September 2018 – claimant's testimony. Doc. No. 1 shows a confirmation from Turkish Airlines that the plaintiff did not fly to Turkey in October 2015 notwithstanding that there was a reservation for her.)*

(c) *So the accusation of abuse of sick leave could not have been referring to October.*

Also, the claimant testified that, "**my original leave request** was for October." *(fn. 21 Page 7 of the transcript of the sitting of 13th September 2018; emphasis is in the Tribunal's) So there must have been another request for leave!*

(d) *The claimant testified further that it was in September 2015 that she requested leave for October. (fn. 22 Page 6 of the transcript of the sitting of 13th September 2018). But it was in* ***July*** *2015 that she raised with Dr Degiorgio her complaint about her request being rejected! (fn. 23 Page 8 of the transcript of the sitting of 26th January*

2017) There lies an inconsistency in Ms Ozer's testimony! If the original leave request was made for October and such request was made in September Ms Ozer could not have complained about the rejection in July! Therefore the original leave request must have been for August; it was rejected, and in July she complained with the Director. This lends credibility to the defendant's consistent testimony that Ms Ozer did request leave for August, was refused and she defied the defendant by utilising the unauthorized period as sick leave.

(e) *Also, due to the claimant's absence from work, a colleague of hers who was on optional leave was constrained to work two shifts to provide the required coverage of the clients' requests. (fn. 24 Page 3 of the transcript of the sitting of 24th November 2016; and Doc. MP 1) This was not disputed.*

(f) *The unreliability of the testimony of the claimant was repeated when she insisted that she did not fix an appointment with the clinic that she attended during the August sick leave because her condition was an emergency one. In fact she said that hers was a* "walk-in case". *(fn. 25 Page 13 of the transcript of the sitting of 21st March 2019*) *To the Tribunal's remark that it was rather odd for a clinic of the nature attended by the claimant to see clients without an appointment, the claimant's lawyer said that that could be easily verified by accessing the clinic's website. (fn. 25 Page 15 of the transcript of the sitting of 21st March 2019) The defendant accessed the website and,* "The services it (the clinic) offers specifically require planning and premeditated appointments and action." *(fn. 26 Page 15 of the defendant's final submission) The Tribunal accessed the website of the said clinic and searched for* "walk-in". *The response was,* "No results." *Indeed, the clinic's website indicated very clearly that attendance at the clinic was by appointment.*

Re 2.2.2.

Ms Muge Mifsud, then Affiliate Manager with the defendant, a witness presented by the complainant, under cross-examination testified that, "Yes she (Nagihan) was on sick leave (when she, the Director, and the complainant had lunch together and during which meeting she complained about the rejection of her request for optional leave)." *(fn. 28 Page 3 of the transcript of the sitting of 9th May 2020)*

Again, this testimony confirmed the consistent testimonies given by the defendant.

Re 2.2.3.

This accusation was not proven; nor was it disputed by the claimant.

The Tribunal is satisfied that the claimant's abuse of sick leave (2.2) is proven.

2.3. Substandard quality of work

(a) *Mr Kankaya testified:* "Two Support Agents sent me the conversations between her and them. One of these Agents reported her to the other Agent saying that she did not log off the chat again." *(fn. 29 Page 3 of the transcript of the sitting of 9th May 2020*) *This allegation was not refuted.*

(b) *According to Ms Michaela Pettersson, the October 2015 Employee Evaluation Survey showed that the claimant did not reach the defendant's required standard knowledge of the defendant's procedures, and back office systems, which knowledge is expected of Customer Service Agents. (fn. 30 Page 3 of the transcript of the sitting of 24th November 2016; and Doc. MP)*

(c) *Re productivity, the claimant presented evidence (fn. 31 Doc. No. 4) showing that out of five employees in her Section she was the best or second best performer in terms of volume of work produced. But the evidence covers only three of the nineteen months (fn. 32 The claimant's court application received by the Tribunal on 7th April 2016) that the claimant was employed with the defendant. She produced payslips that show that she earned bonus in four of the nineteen months of her employment with the defendant. (fn. 33 Doc. No. 5) This evidence is meaningless because it lacks indications on how difficult it was to earn a bonus; if most of her work colleagues earned a bonus and if they did so almost every month, then she would be expected to match such performance. (fn. 34 She described the allowance appearing on the document relating to January 2016 as bonus, but the other payslips of the same document 5 refer to the bonus by its name as such, ie "bonus". Allowance does feature on the December 2014 payslip; the same payslip features also the bonus earned in that month; so there must be a distinction between an allowance and a bonus. Therefore, in the absence of information to the contrary, the Tribunal counted only the instances when she earned what the payslips show as a "bonus".*)

(d) *And in any case, the claimant was advised not to work outside the standard office hours. The defendant interpreted the situation as Ms Ozer leaving early and then making up outside the standard hours to inflate her production.*

The defendant stopped the working day at eleven p.m. If a Customer Service Agent remained available for clients after that time, the clients expected to be served; the defendant was not organized to provide services after eleven at night. Clients get disappointed if closing time is erratic; this gives the defendant a bad reputation in terms of customer service. For this reason the defendant was considering changing the basis of the bonus from one of quantity to one of quality. (fn. 35 Doc. DL 1)

(e) *Ms Ozer was advised in writing by her superior about her poor work performance. (fn. 36 Doc. DL 1)*

(f) *The defendant presented the Tribunal with proof of two instances, occurring on 1st January 2016, and 16th November 2015, when clients took exception to what they considered as the claimant's rudeness. (fn. 37 Doc. DL 2)*

(g) *Ms Ozer did not admit her shortcomings. In the self-evaluation exercise carried out one month before dismissal, while identifying bet setting as the only area that she reckoned she needed to improve upon, the claimant still rated herself as outstanding in each of the twenty-six criteria. (fn. 38 Doc DD 4a). She did not attempt to identify her weaknesses so that a training plan could be prepared with the assistance of her superiors. Hers was not a constructive attitude towards self development as an employee.*

(h) *The letter of termination mentions,* "spending your working hours watching television and doing other non work related chores".

The claimant disputed the allegation by providing an affidavit (fn. 39 Doc. NG 2) from Ms Ayral saying that, " … to my knowledge this (the claimant' watching movies) was not the case." *But Ms Ayral testified also that,* "Our (the claimant's and Ms Ayral's) shifts always changed. … if I work let's say nine to five she (the claimant) works from five to ten, or she's off that day …" *(fn. 40 page 3 of the transcript of the sitting of 7th November 2019)*

While the defendant did not prove the allegation the Tribunal dismisses the aforementioned reference to Ms Ayral's affidavit as insufficient contradiction of the defendant's allegation since Ms Ayral did not work the same shifts as the claimant.

(i) *The Tribunal is satisfied that the claimant's substandard quality of work (2.3) is proven.*

2.4. Disruptive behaviour

(a) *The defendant's assertion in the letter of dismissal that the claimant spoke negatively about the defendant in the presence of Ms Ozer's superior was not proven but nor was it questioned by the claimant.*

(b) *Dr Degiorgio testified that,* "F'Lulju 2015 qaltli 'Jimporta tghid lill-impjegati u kollegi tieghi li ma jistgħux jidħlu kmieni għax-xogħol?'" *(fn. 41 Page 8 of the transcipt of the sitting of 26th January 2017) This testimony was not denied by the claimant.*

Dr Degiorgio's testimony reflected the claimant's poor work ethic, which does not contribute to smooth interpersonal relationships at work, but as such does not prove that the claimant caused disruptive behaviour since no proof was submitted to confirm that Ms Ozer attempted to discourage her colleagues from reporting early for work.

(c) *Ms Kazmierska testified that the claimant's,* "addressing … issues directly was (sic) Managing Director not through Supervisor or Head of Department"*, (fn. 42 page 5 of the sitting of 20th October 2016) was one of the reasons for dismissal.*

(d) *But the Executive Director testified that,* "Jiena, specifikament lilha partikolari għedtilha jekk ikollok problema l-bieb tiegħi avolja ghandha l-Head of Department taghha, dejjem miftuħ. Tkellimt magħha kemm -il darba, kemm fuq Skype kemm verbalment." *(fn. 43 Page 7 of the transcript of the sitting of 26th January 2017) So the Executive Director gave her the permission to refer grievances directly to him. Her other superiors, naturally, resented such an arrangement. Certainly, the claimant cannot be blamed for creating bad blood with her more-direct superiors for going over their heads.*

(e) *Dr Degiorgio testified also that,* "… qaltli, 'Jien kelli x'ingħid ma' Erol ilbierah. Jien m'inix dieħla għax-xift.' Għedtilha, 'Almenu nfurmahom illi m'intix dieħla … għax jekk ma tinfurmahomx ma jkun hemm ħadd ghax ħadd ma jaf li inti m'intix ħa tkun hemm.' Qaltli, 'Issa mbagħad nara.'"[4] *This is no proof that the claimant did not call for work, but it shows an attitude towards her superior, which is disruptive, also because it was a matter of concern for the Executive Director, who had to devote some of his time to deal with her negative attitude.*

(f) *The letter of termination and the defendant's final submissions declared that the claimant,* "raised senseless requests and demands, such as working from bars and getting a non-taxable cash bonus". *The defendant did not prove these allegations, but nor were they denied by the claimant.*

(g) *Offences 2.1 to 2.3 constitute disruptive behaviour because they violate the defendant's instructions. But since they in themselves constitute sufficient grievousness to justify disciplinary action the Tribunal will not reconsider them under a different aspect ie the aspect of disruptive behaviour, because then it would be considering the same behaviour to be subjected to multiple disciplinary action for the same offence, which it shouldn't. If anything, the same offence should assume increased grievousness.*

The Tribunal is satisfied with its Considerations 2.4 (a) to (g) that the claimant's behaviour instilled in the team an element of disruptive behaviour.

2.5. Damaging of Company property due to negligence

The claimant testified that, "I cracked back of the screen of the laptop by dropping it … And with the second one, … I was having soup and there was a glass of water next to me. I dropped the soup, and the glass went all over the laptop." *(fn. 45 Page 4 of the transcript of the sitting of 13th September 2018)*

Ms Kaznierska testified that the damage with the third laptop was a broken HDMI port. (fn. 46 Page 5 of the transcript of the sitting of 20th October 2016). This was not proven but there was no denial on the part of the claimant. Indeed, Ms Ozer testified that, "Sorry, if there was any real damage to the property of the company I'm sure they would have charged me for that." *(fn. 47 Page 4 of the transcript of the sitting of 13th September 2018*). *Such a statement reflects also the claimant's negative attitude towards the defendant, who was exceptionally generous with Ms Ozer and tolerant of her behaviour at work.*

That the claimant damaged Company property due to negligence (2.5) is proven.

2.6. Overall negative influence on the team

Dr Degiorgio testified: "Kellha attitudni arroganti lejn is-supervisors taghha u n-nies illi tagħmilha magħhom." *(fn. 48 Page 7 of the transcript of the sitting of 26th January 2017 & p.6 of the transcript of the sitting of 6th April 2017)*

The claimant submitted an affidavit from Ms Ayral declaring that, "There were many instances when I worked during the same shift as Nagihan Ozer so I am aware of her work ethic and her attitude on the place of work. In this regard I have to say that she always had a positive attitude towards her work and colleagues…."

Yet in her testimony (fn. 49 Page 4 of the transcript of the sitting of 7th November 2019) when asked, "You always worked the same shifts?" Ms Ayral replied, "No, no, no. We don't have all the time the same shift. Our shifts always changed." *So Ms Ayral's affidavit limits itself to the occasions when Ms Ayral's shift coincided with Ms Ozer's, and in any case Dr Degiorgio's testimony is validated by the fact that Ms Ozer did not dispute it.*

Whereas the Tribunal is not satisfied that Ms Ozer caused any changes in the behaviour of any of the defendant's employees and therefore cannot accept the accusation that the claimant was of a negative influence on the team (2.6) her attitude and behaviour was not an exemplary one. The Tribunal does not consider her

negativity as a particular, stand-alone cause of the termination of employment. The accusation is more of a resultant of the claimant's proven poor timekeeping (2.1), abuse of sick leave (2.2), substandard quality of work (2.3), disruptive behaviour (2.4), and damaging of Company property due to negligence (2.5). Of course, it is an important repercussion of the claimant's general attitude and behaviour but punishing for a resultant of a punishable cause is tantamount to punishing twice for the same offence.

The Tribunal does not consider the accusation of the claimant's having been of a negative influence on the team (2.6) as having been proven.

3. *The defendant issued a request on the 8th February 2016 to the claimant asking her to choose between changing her working times, and not being paid for the time that she did not work. The relevant document was exhibited to show that the defendant,* "tried to accommodate as much as we could." *(fn. 50 Page 11 of the transcript of the sitting of 24th November 2016). The defendant told the Tribunal that the claimant never replied to that offer. (fn. 51 Page 2 of the transcript of the sitting of 6th April 2017)*

However, the claimant learnt about the offer upon her return from vacation, on the 18th February 2016. She couldn't be validly accused of ignoring the request, because she was not aware of it. She "never had a chance to check my e-mails anyway (upon her return from vacation). I only know this e-mail because she (Ms Petterrson) presented it to you (the Tribunal)." *(fn. 52 Page 10 of the transcript of the sitting of 13th) No wonder the defendant never received a reply to the offer!*

In this context, the defendant was too hasty in considering the claimant's not replying to the missive as a contributor to the decision that the claimant be dismissed.

4. *The defendant seems to have been guided by paragraph C. of the Section entitled Duration and Termination of the Employment Agreement (fn. 53 Doc. NOZ 1), that says,* "In the event that the Employee … habitually neglects the duties to be performed under this agreement …, such circumstances shall constitute a good and sufficient cause for dismissal and for the *ipso facto* termination of this contract of service …."

The principle of natural justice, which in this case translates into giving the employee due, formal, written notices of risking dismissal unless the employee corrects her attitude and behaviour, and giving the employee the opportunity to defend herself with the assistance of a person of her trust when faced with prospective dismissal, overrides whatever provisions there may be in an Employment Agreement.

5. *The proven misconduct of the claimant as shown in 2.1 to 2.5 would normally constitute sufficient grounds for dismissal.*

But the case being deliberated upon by the Tribunal is not normal because it violates natural justice.

At no point in time was the claimant made fully aware that her behaviour and attitude were leading to her being dismissed from her employment.

Indeed, she received mixed signals as the following episodes show:

(a) *Her direct supervisor, Mr Kankaya, and her direct superior but one, Ms Pettersson, repeatedly drew her attention to her need for a change in attitude and for strict observance of rules while the Executive Director, Dr Degiorgio, was exceptionally lenient in her regard and he never took or arranged to be taken any disciplinary action against her unacceptable behaviour – he authorized her to report directly to him whenever she encountered any problem, without her seeking permission from her more direct superiors; he accepted a situation whereby her unauthorized request for leave of absence for nine calendar days was arbitrarily transformed by the claimant into a sickness period for the same duration; he refrained from taking disciplinary action also when he discovered that Ms Ozer had reported sick on the day of the meeting he accorded to her. (fn. 54 Pages 8, and 9 of the transcript of the sitting of the 26th January 2017)*

(b) *The payrise that the claimant had asked for and was given was conditional to Ms Ozer's improving her timekeeping and her productivity. These two factors in the work performance of the claimant contributed to what the defendant considered to be the justification of the dismissal. Yet, given that the Director of the defendant had given the claimant the privilege to seek his advice directly in case of any problem that she faced, conversely he should have called her in the presence of her more direct superiors to warn her that her timekeeping had to be regularized or her starting to be paid for the hours that she reported for work, and that her productivity must reach the defendant's standards, thus showing the claimant that her performance was not acceptable and that the defendant was taking the matter very seriously. (fn. 55 Page 10 of the transcript of the sitting of 11th May 2017) Instead of taking such or equivalent action, Ms Ozer was allowed to persist in her unacceptable performance in the Director's full knowledge.*

(c) *Again, five months before dismissal the claimant's Head of Dept, wrote to Ms Ozer saying,* "I do apologise if it made you feel like anyone … felt like you couldn't be trusted as that really isn't the case." *(fn. 56 Doc. MP 8)*

Here the defendant wanted to have official documentation justifying what the claimant defined as sick leave during the period for which Ms Ozer applied to take as optional leave. The same letter of Ms Pettersson was prompted because Ms Ozer had provided a note containing two different handwriting styles, which the defendant did not consider to be authentic. The claimant refused to provide, nor did she give her consent for the provision of, confirmation of the required authenticity. And the defendant accepted the situation!

6. *On her part, the claimant committed the offences mentioned in 2.1 to 2.5. By her attitude and behaviour she contributed to the defendant's decision, and for this she has to assume responsibility, thus affecting the Tribunal's compensatory award.*

7. *According to the defendant the opportunities of employment of Turkish speaking persons are high in the betting industry in Malta. (fn. 57 Page 9 of the transcript of the sitting of 26th January 2017). This assertion was not contradicted. The scarcity of such persons increases the probability of the claimant's finding alternative employment within a reasonable period.*

8. *The claimant was 32 years of age when she was dismissed, thus making her young enough to pursue a long working life.*

9. *The claimant gave only nineteen months of service to the defendant. (fn. 58 August 2014 to February 2016) As recognized in the notice of the termination of employment provided in Article 36 (5) of Chapter 452 of the Laws of Malta, and in redundancy benefits featuring in collective agreements, the shortness of the duration of employment reduces the degree of obligation of the employer towards the employee in matters of monetary compensation for termination of employment.*

Remark

The Tribunal deplores instances of unfaithful references to testimonies/evidence, on the part of the defendant. Examples of such instances:

i) *the allegation that the claimant* "repeatedly alleged that with respect to the tardiness issue, she had an agreement with the Director Dr Degiorgio to come in late." *On the contrary Ms Ozer testified that,* "I didn't have an agreement with Mr Daniel for being late …" *(fn. 59 Page 4 of the transcript of the sitting of 21st March 2019)*

ii) *the defendant claimed that in her affidavit Damla declared that,* "it is of her understanding that the applicant requested leave for October and August" *(fn. 60 Page 16 of the defendant's Note of Submissions); nowhere does this feature in the affidavit;*

iii) *the accusation that the claimant did not produce any evidence to confirm that the leave request was made for the month of October 2015 (fn. 61 Page 14 of the defendant's Note of Submissions); in fact the claimant presented Doc. No. 1 showing that although a seat was reserved for her on a flight, it was not taken up; (of course, this does not necessarily mean that no other request for leave for a different month was made, see 2.2.1).*"

L-Appell

6. Is-soċjetà appellanta ppreżentat ir-rikors tal-appell tagħha fl-14 ta' Ottubru, 2020, fejn qiegħda titlob lil din il-Qorti sabiex tħassar u tirrevoka d-deċiżjoni appellata tat-Tribunal, filwaqt li tiddikjara li t-tkeċċija tal-appellata mill-impjieg tagħha kienet għal raġuni tajba u suffiċjenti fil-liġi, u dan bl-ispejjeż taż-żewġ istanzi kontra l-appellata. Tgħid li l-aggravji tagħha huma s-segwenti: (1) ir-raġunijiet għat-terminazzjoni tal-impjieg tal-appellata li ġew ippruvati u saħansitra aċċettati mit-Tribunal huma raġunijiet tajba u suffiċjenti fil-liġi u jwasslu għal terminazzjoni mmedjata skont id-dispożizzjonijiet tal-Kap. 452; (2) il-kompetenza tat-Tribunal hija li jannalizza u jikkonferma jekk kienx hemm raġuni tajba u suffiċjenti għat-tmiem tal-impjieg; (3) it-Tribunal wasal għal konklużjoni erronja li kien hemm ksur tal-prinċipju ta' ġustizzja naturali; u (d) id-deċiżjoni tat-Tribunal ma kinitx ekwa u ġusta.

Ir-Risposta tal-Appell

7. L-appellata filwaqt li ssostni li d-deċiżjoni appellata hija waħda ekwa u ġusta, tgħid li din timmerita konferma, b'dana li qabelxejn tirrileva li l-appell

interpost ma jittrattax punt ta' dritt skont kif kien jirrikjedi s-subartikolu 82(3) tal-Kap. 452.

<u>Konsiderazzjonijiet ta' din il-Qorti</u>

8. Ġaladarba l-appellata qiegħda tikkontendi li l-appell interpost mis-soċjetà appellanta huwa msejjes fuq il-mertu u li bl-ebda mod ma jittratta punt ta' liġi, din il-Qorti għandha ssegwi dak li jirrikjedu minnha d-dispożizzjonijiet tas-subartikolu 82(3) tal-Kap. 452, u tiddeċiedi jekk l-appell odjern għandux jiġi dikjarat inammissibbli.

9. Filwaqt li ser tgħaddi sabiex tikkonsidra kull wieħed mill-aggravji li qiegħda tressaq is-soċjetà appellanta fid-dawl tad-dispożizzjonijiet tas-subartikolu 82(3) tal-Kap. 452, il-Qorti għandha tgħid mill-ewwel li l-appellata għandha raġun. Tibda bl-ewwel aggravju fejn is-soċjetà appellanta qiegħda tikkontendi li ġaladarba t-Tribunal ikkonferma r-raġunijiet li hija kienet offriet sabiex temmet il-kuntratt ta' impjieg tal-appellata għajr għal waħda, dan kien biżżejjed sabiex iwasslu għal konvinċiment li l-kawża ta' tkeċċija kienet waħda ġustifikata. Il-Qorti ma tagħraf l-ebda punt ta' liġi f'dan l-argument sħiħ tas-soċjetà appellanta, liema argument jolqot biss il-mertu u għalhekk l-apprezzament tiegħu kif magħmul mit-Tribunal fejn dan sab li r-raġunijiet li offriet is-soċjetà appellanta għat-tkeċċija tal-appellata ma kinux biżżejjed sabiex jiġġustifikaw tali tkeċċija. Għalhekk din il-Qorti tgħid li dan l-ewwel aggravju tas-soċjetà appellanta ma jagħtix dritt ta' appell.

10. It-tieni aggravju tas-soċjetà appellanta jfisser mill-ġdid l-argument tagħha kif imressaq fl-ewwel aggravju tagħha. Tgħid li t-Tribunal huwa kompetenti sabiex jannalizza u jikkonferma jekk kienx hemm raġuni tajba u suffiċjenti sabiex impjieg jiġi tterminat. Għall-istess raġuni li din il-Qorti għadha kif fissret meta kkonsidrat l-ammissibbilità o meno tal-ewwel aggravju, tgħid li skont il-liġi t-tieni aggravju tas-soċjetà appellanta wkoll ma jagħti l-ebda dritt għal appell.

11. Is-soċjetà appellanta tgħid li t-tielet aggravju tagħha jirrigwarda l-konklużjoni erroneja tat-Tribunal li kien hemm ksur tal-prinċipju tal-ġustizzja naturali. Tissottometti li kien hemm nuqqas ta' applikazzjoni sewwa tal-fatti mal-prinċipji legali applikabbli għal terminazzjoni tal-impjieg għal raġuni tajba u suffiċjenti. Dan tgħidu filwaqt li tiċċita silta mid-deċiżjoni appellata minn fejn joħroġ dan it-tielet aggravju tagħha. Iżda s-soċjetà appellanta mill-ewwel tkompli l-argument tagħha b'riferiment għal dak li tgħid irriżulta b'mod ampju mill-provi b'mod kuntrarju għall-osservazzjoni tat-Tribunal, u b'hekk tali argument tagħha jkompli fil-mertu. Għalhekk għal darb'oħra l-Qorti ssib li l-aggravju tas-soċjetà appellanta ma jittratta l-ebda punt ta' liġi.

12. Ir-raba' u l-aħħar aggravju tas-soċjeta' appellanta huwa li d-deċiżjoni appellata mhijiex waħda ekwa u ġusta. Dan tgħidu filwaqt li tagħmel riferiment hawn ukoll għal dawk ir-raġunijiiet li hija fissret fl-istess rikors tal-appell tagħha, u tiċċita dik il-parti tad-deċiżjoni appellata fejn it-Tribunal ifisser il-ħsibijiet tiegħu fir-rigward ta' diversi fatturi relattivi għal-likwidazzjoni tal-kumpens. Hawn ukoll jirriżulta ampjament li l-aggravju tas-soċjetà appellanta ma jirrigwarda l-ebda punt ta' liġi u għalhekk l-ebda appell mhuwa permissibbli.

<u>Decide</u>

Għar-raġunijiet premessi, il-Qorti tiddikjara li l-appell tas-soċjetà appellanta huwa rritu u null, u għalhekk tastjeni milli tieħu konjizzjoni tiegħu.

L-ispejjeż ta' dawn il-proċeduri għandhom ikunu a karigu tas-soċjetà appellanta.

Moqrija.

Onor. Dr Lawrence Mintoff LL.D.
Imħallef

Rosemarie Calleja
Deputat Reġistratur