



FIL-PRIM'AWLA TAL-QORTI ĊIVILI

IMHALLEF

ONOR. GRAZIO MERCIECA LL.D.

ILLUM, 27 ta' April 2023

Rikors Nru. 1178/2018 GM

Paulino sive Lino Schembri [Karta tal-Identita' Nru. 700560(M)]

vs

Ir-Rettur ghan-nom u in rappreżentanza tal-Universita' ta' Malta

Il-Qorti,

Rat ir-Rikors Ġuramentat ta' Paolino sive Lino Schembri li permezz tiegħu wara li ppremetta illi :

1. Ilu għal diversi snin jokkupa l-kariga ta' Lettur ġewwa l-Universita' ta' Malta;
2. Kien qed jigi ingaġġat fuq allegatament kuntratt definit ta' xogħol minn sena għal sena pero' ai fini u l-effetti kollha tal-liġi l-kuntratt tiegħu ex lege ikkonverta ruħu f'wieħed indefinit;

3. Fit-30 ta' Mejju 2018 intbagħatet ittra mill-Uffiċċju tar-Rettur tal-Universita' ta' Malta [Dok A] fejn huwa ġie infurmat li l-Kunsill tal-istess Universita' kienet laqgħet rakkomandazzjoni tal-iStaff Affairs Committee tal-Universita' sabiex l-*commitment* tiegħu jitnaqqas minn dak ta' T9 għal dak ta' T1;
4. Paulino Schembri ipprotesta ruħu għal dan il-fatt ma' diversi organi tal-Universita' u dan minħabba l-fatt li l-*commitment* tiegħu *de facto* ma kien naqas xejn u anzi f'ċertu ċirkostanzi żdied u fil-fatt ma kien hemm l-ebda raġuni valida fil-liġi għalfejn ma kellux jibqa' ikonnoxxut bħala Lettur fil-kategorija ta' T9;
5. Minkejja d-diversi wegħdi da parti tal-Universita' li l-każ tiegħu kien ser jiġi indirizzat dan baqa' ma seħħx;
6. Id-deċizzjoni tat-30 ta' Mejju 2018 hawn qabel indikata ittiegħdet bi ksur tal-liġijiet ta' Malta, minħabba konsiderazzjonijiet mhux ġusti jew xierqa u bi vjolazzjoni tad-drittijiet tar-rikorrent kif ser jiġi ppruvat fil-mori ta' dawn il-proċeduri.

Talab lil din il-Qorti sabiex:

1. Tiddikjara li l-għemil amministrattiv konsistenti fid-deċizzjoni meħuda mill-Universita' ta' Malta nhar it-30 ta' Mejju 2018 fil-konfront tar-rikorrent ma għandhiex validita' fil-liġi u konsegwentament ma tagħmilx stat fil-konfront tar-rikorrent;
2. Konsegwentament tħassar u tirrevoka d-deċizzjoni tal-Universita' ta' Malta tat-30 ta' Mejju 2018 fil-konfront tar-rikorrent;
3. Tordna lill-Universita' ta' Malta tagħti lir-rikorrenti kull rimedju li dina l-Onorabbli Qoti jidhrilha xieraq fiċ-ċirkostanzi tal-każ għan-nuqqasijiet u l-vjolazzjonijiet minnu sofferti.

Rat ir-Risposta Ġuramentata tar-Rettur, il-Professor Alfred J. Vella li permezz tagħha eċċepixxa illi :

1. L-allegazzjonijiet tar-rikorrenti huma infondati fil-fatt u fid-dritt, kif ser jiġi muri fil-mori tal-kawża;
2. Il-fatti huma ikkontestati għar-raġunijiet segwenti. Ir-rikors huwa mimli ineżattezzi kif ser jiġi muri fil-mori tal-kawża. Ir-rikorrenti kien appuntat mill-l ta' Ottubru 2014 sat-30 ta' Settembru 2015 bħala *visiting senior lecturer* (Dok. A.) għal żmien definit ta' sena fuq bażi ta' T9 ġewwa l-

Istitut għat-Turiżmu, Vjaġġar u Kultura. Illi paragrafu 5 tal-istess ittra tagħmilha ċara daqs il-kristall illi "*Subject to the exigencies of the University of Malta, this appointment may be renewed in writing on an annual basis for a maximum period of 4 years. However, if the appointment is renewed, the level of T9 status assigned may vary from year to year*". Illi dan ifisser li l-pożizzjoni tar-rikorrenti huwa ta' Tn stante illi bħal kull *visiting teaching staff* ġewwa l-Universita' ta' Malta, l-ammont ta' taġlim ivarja bejn sena u oħra u jiġi kkalkolat skont l-esiġenzi tal-Universita' ta' Malta. Illi r-rikorrenti għallem l-Universita' ta' Malta mis-sena 2014 u għaldaqstant huwa minnu illi t-titlu ta' Tn *visiting senior lecturer* huwa wiehed permanenti. Illi mis-sena 2014, il-kuntratt tar-rikorrenti ġie mġedded kull sena u għallem is-segwent:

- 1 ta' Ottubru 2014 sat-30 ta' Settembru 2015 – visiting senior lecture T9
- 1 ta' Ottubru 2015 sat-30 ta' Settembru 2016 – visiting senior lecture T9
- 1 ta' Ottubru 2016 sat-30 ta' Settembru 2017 – visiting senior lecture T9
- 1 ta' Ottubru 2017 sal-25 ta' Settembru 2018 – visiting senior lecture T9
- 26 ta' Marzu 2018 sat-30 ta' Settembru 2018 – visiting senior lecture T2.5
- 1 ta' Ottubru 2018 sat-30 ta' Settembru 2019 – visiting senior lecture T3.5.

Għal din is-sena akkademika, t-tagħlim tar-rikorrenti huwa kollu fit-tieni semestru u jikkonsisti fis-segwent: -

- 42 siegħa għal TTC1403 - *HACCP and the Law*
- 28 siegħa għal TTC1404 - *Visits to industrial and artisan food producers*
- 28 siegħa għal TTC1405 - *Practicum*;

L-ammont ta' taġlim għas-sena akkademika 2018/2019 kien jimmerita T3.5 *visiting senior lecturer*. Fil-fatt saret talba u l-Kunsill approva tali talba għal T3.5 nhar it-30 ta' Novembru 2018 u l-bdil fil-salarju kien effettiv mill-1 t'Ottubru 2018. Illi r-rikorrenti huwa membru attiv ġewwa l-Istitut għat-Turiżmu, Vjaġġar u Kultura. Ir-rikorrenti jinsisti mad-Direttriċi Dr Marie Avellino illi jhobb ix-xogħol tiegħu u juri x-xewqa li jrid ikun involut fl-Istitut. Għalkemm l-Istitut japprezza l-hidma tar-rikorrenti, huwa jrid jifhem illi sfortunatament l-Universita' ta' Malta ma tistax tikkumpensa r-rikorrenti għax-xogħlijiet illi jagħmel buona volonta' tiegħu u ma jkunx assenjat lill-Istitut. Illi l-Universita' ta' Malta ma tistax talloka l-pożizzjoni ta' T9 lir-rikorrenti stante illi din il-pożizzjoni ma tirriflettix ix-xogħol li ġie inkarigat jagħmel f'din is-sena akkademika. Li kieku l-Universita' ta' Malta talloka tali pożizzjoni tkun qed tagħmel użu hażin ta' fondi pubbliċi, stante illi tali pożizzjoni tkun ingħatat lill-impjegat arbitrarjament u abbużivament. Infatti, huwa proprju l-allokkazzjoni ta' tali pożizzjoni illi qed jippretendi r-rikorrenti illi jirrendi l-att amministrattiv *ultra vires*, null u bla effett *ab initio*.

3. Subordinatament u mingħajr preġudizzju għas-suespost, ir-rikors bilkemm jimmotiva l-pretensjonijiet tar-rikorrent, tant illi, bl-eċċezzjoni ta' paragrafu 6, ma hemmx motivazzjoni ġuridika/legali li tista' potenzjalment tissostanzja l-kawża. Fl-istess paragrafu 6, u b'mod ġenerali u astratt għall-aħħar, ir-rikorrenti jgħid illi 'd-deċiżjoni tat-30 ta' Mejju 2018 hawn qabel indikata ittiehdet bi ksur tal-liġijiet ta' Malta.' Ir-rikorrent jimplika illi tali ksur huwa bbażat fuq l-Artiklu 469A (1)(b)(iii), u ċjoe', fi kliem ir-rikorrenti, 'minhabba konsiderazzjonijiet mhux ġusti jew xierqa u bi vjolazzjoni tad-drittijiet tar-rikorrent kif ser jiġi ppruvat fil-mori ta' dawn il-proċeduri'. Fl-ewwel lok il-Liġi ma tikkontemplax 'kunsiderazzjonijiet mhux ġusta jew xierqa', iżda 'għanijiet mhux xierqa jew jissejjes fuq kunsiderazzjonijiet mhux rilevanti'. Fit-tieni lok, huwa r-rikorrent illi qed jagħmel tali allegazzjoni u għaldaqstant huwa r-rikorrenti li jrid jippruvaha. Wiehed ma jistax ma jsaqsix kif ir-rikorrenti ser jipprova ċirkostanza illi lanqas biss jikkontempla fir-rikors promotur innifsu.

4. Subordinatament u mingħajr preġudizzju għas-suespost, *dato ma non concesso* illi l-att amministrattiv huwa msejjes fuq kunsiderazzjonijiet irrelevanti, l-awtorita' pubblika, f'dan il-każ l-Universita' ta' Malta, aġixxiet *in bona fide*. Għaldaqstant, m'għandhom jingħataw l-ebda danni anke li kieku din l-Onorabbli Qorti tiddetermina illi l-att amministrattiv relattiv għandu jiġi impunjat (kif qed jitlob ir-rikorrenti).

Rat l-atti tal-kawża.

Rat in-noti ta' sottomissjonijiet tal-partijiet.

Semgħet is-sottomissjonijiet bil-fomm tal-abbli avukati difensuri tagħhom.

Ikkunsidrat:

L-attur kien appuntat mal-Universita' bħala *visiting senior lecturer* b'kuntratt ta' mpjeg għal żmien definittiv fuq bażi ta' T9 li bil-liġi gie mibdul għal wiehed ta' żmien indefinittiv. Huwa gie appuntat b'ittra tal-1 t'Ottubru 2014 li tgħid li "*Subject to the exigencies of the University of Malta, this appointment may be renewed in writing on an annual basis for a maximum of 4 years. However, if the appointment is renewed, the*

level of T9 status assigned may vary from year to year". Dan għaliex bħal kull *visiting lecturer* ieħor, is-siġhat ta' taġħlim li jingħata jvarja skont in-numru ta' studenti. Fis-sena akkademika 2018/2019 ingħata l-livell ta' T3.5. Skont l-Universita` dan sar għaliex naqas in-numru ta' studenti. Skont l-attur dan ma kienx il-każ; anzi x-xogħol li kien jagħmel hu ingħata lil haddieħor fuq bażi fultajm.

L-attur ma jibbażax il-kawża tiegħu fuq ksur *ex contractu* imma minhabba deċiżjoni meħuda għal kunsiderazzjonijiet mhux xierqa. Dan iqanqal il-kweżit jekk il-Qorti tistax tassogġetta din it-tilwima għall-iskrutinju tal-istħarriġ ġudizzjarju. Tabilhaqq, l-Universita` m'għamlitx eċċezzjoni f'dan is-sens. B'danakollu, l-Qorti qajmet din l-eċċezzjoni *ex officio* qabel ippronunzjat is-sentenza u wara li avżat lill-partijiet billi teffettwa l-kompetenza tagħha fir-rigward tal-azzjoni kif ikkonfezzjonata mill-attur.

L-Universita` hija korp imwaqqaf b'ligi. Bħala tali għandha l-kapaċita` ġuridika li tidhol f'kuntratti ta' impjeg sabiex twettaq il-funzjonijiet tagħha. Il-Qorti qanqlet il-kweżit jekk l-Art. 469A hux applikabbli meta jkun hemm relazzjoni kuntrattwali bejn l-ilmentatur u l-awtorita` pubblika.

Skont id-De Smith:

The range and growth of contractual relationships in the public sector has presented a challenge for judicial review law. The current position on amenability to judicial review of situations involving contracts is the product of two policies. One is that judicial review, a remedy of last resort, is inappropriate when there is another law governing the situation. Thus, contract disputes are normally to be left to the general law of contract... (or, in relation to employment contracts, recourse to an Employment Tribunal) rather than judicial review... The existence of a possibility of a private law claim does not

by itself, however, make judicial review inappropriate. The other policy is to recognize that some public functions may be carried out through the medium of contractual relationships, which justifies the use of the Administrative Court's judicial review supervisory jurisdiction...¹

The tests applied by the courts to determine whether a function involving a contract is susceptible to judicial review has been criticized as overly complex... In the orthodox approach, the court assumes that the fact that the source of a public authority's power is statutory is in and of itself insufficient to make a dispute about a contract amenable to judicial review; the court therefore goes on to consider whether there is some additional "sufficient public element, flavour or character" to the situation...²

As in other contexts, in working out whether a decision is susceptible to judicial review the court considers two main factors. It will have regard to the source of the power under which the impugned decision is made. If this is "purely" contractual, judicial review is unlikely to be appropriate; some close statutory (or prerogative) underpinning of the contract will normally be needed. Alternatively, the court may consider whether the function being carried out by the defendant is a public function. Having decided that a decision is susceptible to judicial review, the court will go on to examine the grounds advanced by the claimant for the decision's unlawfulness.³

The courts have held the following contractual situations *not* to be susceptible to judicial review: where a pupil at an independent, fee-paying school was excluded following an alleged theft; where a sports regulatory body disciplined a member with whom it is in a contractual relationship...⁴

In contrast, the courts have held (or assumed) to be a sufficient public law element... where a local authority terminated an informal arrangement permitting a hot-food take-away caravan to be located at a market... the decision of a local authority to set a weekly fee under a contract for the provision of residential care...⁵

Where the contract-related decision is the promulgation of a broad policy, taken under the exercise of statutory powers, the courts have often assumed without argument that the decision is susceptible to judicial review.⁶

Where a public authority takes action in relation to an employee, such as... termination of an employment relationship, this will normally be matter for contract or employment law rather than judicial review...

It will perhaps be easiest to establish when an employment decision amounts to a public function where what is at stake is a general policy, taken under statutory or prerogative powers...⁷

¹ De Smith, *Judicial Review*, 8th ed. (sena 2018) 3-065.

² De Smith, *op.cit.*, para 3-066.

³ De Smeeth, *op.cit* para 3-067.

⁴ De Smith, *op.cit* para 3-069.

⁵ De Smith, *op.cit* para 3-070.

⁶ De Smith, *op.cit* para 3-071.

⁷ De Smith, *op.cit* para 3-072.

L-istess kittieb jagħti dawn l-eżempji ta' fejn tkun involuta *policy* ġenerali:

A local authority's decision restricting how educational psychologists should consult other professionals before producing their advisory reports... an exercise of prerogative powers to change terms of employment to ban trade union membership... a redeployment and redundancy policy adopted by a local authority...⁸

Il-Wade huwa tal-istess fehma:

The leading case is the *Datafin* decision, which excludes cases based on contract (as was already established) and holds that possibly the only other requirement is 'what can be described as a public element, which can take many different forms'⁹...

... contracts of employment are equally beyond the scope of quashing and prohibiting orders. Thus where a university in Ceylon dismissed a lecturer from his post, it was held that his position was merely that of an employee under an ordinary contract of master and servant, and that in such a case a quashing order would not lie. There have been similar rulings on applications made by employees of the Crown Prosecution Service, and of a district health authority, and of the BBC...¹⁰

Universities and colleges may or may not have statutory powers. If they have, the court may treat them as statutory public authorities which are subject to quashing and prohibiting orders as well as to declaration and injunction. But the mere fact that the university is established by statute does not necessarily make its powers statutory: it may engage its employees under ordinary contracts of service.¹¹

Skont il-Professur tal-liġi **Tonio Borg**, fid-dritt Inġliż:

... where there is some other branch of law which more appropriately governs a dispute between the parties, or where there is a contract between litigants, then the express or implied terms of such agreement govern such issue rather than the common law rules on judicial review.¹²

⁸ De Smith, para 3-073.

⁹ H.W.R. Wade & C.F. Forsyth, *Administrative Law*, 11th Ed., (sena 2014) Chap 17, *Boundaries of Judicial Review* paġna 532.

¹⁰ Wade, *op.cit.*, paġna 536.

¹¹ Wade, *op.cit.*, paġna 536.

¹² Tonio Borg, *Judicial Review of Administrative Action in Malta* (sena 2020) paġna 39.

Ikompli jikteb li dan japplika għal-liġi Maltija permezz tal-Art. 469A(4) tal-Kap 12 (li jeskudi l-istħarriġ ġudizzjarju meta l-mod ta' kontestazzjoni jew ta' ksib ta' rimedju dwar xi att amministrattiv partikolari quddiem qorti jew tribunal jiġi provdut dwar f'xi liġi oħra).

It is also submitted that when a *contractual* relationship under civil law regulates a relationship between government and John Citizen, it is civil law which regulates such relationship rather than judicial review. This follows also the distinction already referred to between governmental liability and judicial review. Where an action of government possibly falls under some kind of contractual relationship it is private law which regulates the matter just as if any private citizen was party to that relationship rather than the State. Consequently, an action for reimbursement of customs duty paid in excess did not amount to a challenge of the validity of an administrative act. Similarly a withdrawal of a concession by Malta Transport Authority arising from a contract between the parties was governed by the terms of such contract and did not fall under article 469A.

Hekk ukoll, din il-Qorti, diversament ippreseduta, sabet li kwistjoni dwar it-tul ta' perjodu ta' drittijiet ta' rmiġġ;¹³ u r-rifjut li l-attur jiġi rikonoxxut bħala inkwilin taħt il-liġi ċivili¹⁴ kienu materji ta' natura kuntrattwali li jaqgħu lil hinn mid-dominju tal-istħarriġ ġudizzjarju.

Interessanti li kawża minn ċerta Josette Attard li kellha l-Ph.D. fil-letteratura Maltija, dwar allegat ksur ta' ftehim kollettiv billi l-Universita` daħhlet lil ħaddieħor bħala lettur minflokha meta kien imissha hi, saret kontra l-Universita` abbażi ta' ksur kuntrattwali, u mhux skont l-Art. 469A. Il-Qorti semgħet il-kawża wara li kkunsidrat li t-Tribunal Industrijali ma kienx kompetenti fil-materja. L-Universita` eċċepiet li l-kawża messha saret taħt l-Art. 469A iżda din il-Qorti, allura ppreseduta mill-Imħallef (illum S.T.O. Prim Imħallef) Mark Chetchuti, ma daħlitx

¹³ Emmanuel Gatt v Malta Maritime Authority 07.07.2004 Prim'Awla.

¹⁴ Justin Caruana v Kummissarju tal-Art 16.10.2006 Prim'Awla.

f'dan il-mertu għaliex l-għażla tal-azzjoni hija dejjem f'idejn l-attur.¹⁵ Il-Qorti kompliet tisma' l-kawża u ċaħdet it-talba tal-attriċi billi ma sabitx li kien hemm ksur kuntrattwali.¹⁶

Fil-fehma tal-Qorti l-attur għandu rimedji ordinarji taħt il-liġi kuntrattwali u għalhekk il-liġi żżomm lill-Qorti milli teżercita s-setgħat tagħha straordinarji tal-istħarriġ ġudizzjarju.

Decide:

Għal dawn il-motivi, l-Qorti tiddeklina li tiegħu konjizzjoni tal-każ minhabba li mhix kompetenti tagħmel l-istħarriġ ġudizzjarju mitlub mill-attur stante li l-mod ta' kontestazzjoni huwa pprovdut permezz ta' liġijiet oħrajn.

Spejjeż a kariku tal-attur.

Moqrija.

ONOR. IMĦALLEF
GRAZIO MERCIECA

¹⁵ Josette Attard v Rettur Università ta' Malta 24.01.2012, Prim'Awla.

¹⁶ Josette Attard v Rettur Università ta' Malta 28.11.2013, Prim'Awla.