CIVIL COURT – FIRST HALL

HON. MADAME JUSTICE MIRIAM HAYMAN LL.D.

Sitting of Monday 15 th July, 2024

Application number: 1134/2020MH

Number:

Abiodun Olufemi Owoeye

vs

HWS Technologies Limited (CT 83626)

The Court:

Having seen **the application of plaintiff dated 26th February 2020 filed in the Industrial Tribunal** which stated that –

Illi l-esponenti kien gie ngaggat mas-socjeta intimata bhala Network Engineer u dan b'mod definit ghal sena li jista jigi mgedded. Illi dan il-kuntratt gie maqbul u ffirmat miz-zewg partijiet nhar is-16 ta' Dicembru tas-sena 2019 u dan skond il-kuntratt hawn anness u mmarkat bhala Doc A.

Illi nhar is-7 ta' Frar 2020, l-esponenti kellhu l-impjieg tieghu terminat fuq allegazzjoni illi dokumenti tieghu necessarji sabiex jahdem Malta nhargu tard u li kien qieghed jitlob dati yulterjuri sabiex isiefer fuq xol meta fir-realta l-

esponenti kien ghadu kif twilditlu tarbija u kien marid li ma setax isiefer fil-kundizzjoni li kien.

Illi l-impjieg tieghu fi hdan il-kumpanija gie tterminat ingustament u dana ghal ragunijiet li mhumiex validi skond il-Ligi.

Ghaldaqstant, l-espoponent filwaqt illi jgib il fuq espost a formali konjizzjoni ta dan it-Tribunal, jitlob lil istess sabiex, wara illi jisma fatti kollha li jsawru dan it-kaz:

1) *Jiddikjara illi t-tkeccija kienet wahda ingusta u konsegwentement il-kuntratt ta' mpjieg gie terminat ghal ragunijiet ingusti*
2) *Tillikwida dik is-somma spettanti lil esponenti bhala danni ghat-tkeccija ingusta minnhu subita*

Tordna sabiex l-esponenti jerga jigi ri-integrat fl-impjieg mas-socjeta konvenuta immedjatament u fl-istess kariga illi kien inghata.

Having seen the list of witnesses and the documents attached to the application.

Having seen **the reply of HWS Technologies Limited filed in the Industrial Tribunal on the 16th June 2020**[1] wherein the following pleas were raised –

> ***Fl-ewwel lok*** *u in linea preliminari illi l-azzjoni proposta mir-rikorrent hija irrittwali u nsostenibbli u dan it-Tribunal ghandu b'mod preliminari jastjeni milli jkompli jiehu konjizzjoni tal-procedura, u dan ghas-segwenti ragunijiet:*
>
> a) *Fl-ewwel lok l-inkompetenza tat-Tribunal odjern in kwantu illi mill-qari tad-disposizzjonijiet tal-kuntratt ta' impjieg ffirmata fis-16 ta' Dicembru 2019 u li ghalih jaghmel referenza ukoll ir-rikorrent, huwa ben evidenti illi dak huwa kuntratt ta' impjieg definit.*
>
> b) *Fit-tieni lok u minghajr pregudizzju, illi kienet ghadha mhix effettiva r-relazzjoni lavorattiva bejn il-kontendenti, u dan qed jinghad peress illi minkejja l-kuntratt ffirmat fis-16 ta' Dicembru 2019, il-kuntratt kellu jinghata effett fl-10 ta' Jannar 2020 kif dikjarat anke mal-JobsPlus fl-4 ta' Frar 2010. Kwindi, meta r-rikorrenti jallega illi l-impjieg tieghu gie*

[1] Fol 36 et seq

tterminat fis-7 ta' Jannar 2020, huwa fatt illi kien ghadu lanqas biss ma gie ngaggat, anke jekk kien hemm il-hsieb illi jsir dan. Tant illi filwaqt l-impjieg kellu jibda fl-10 ta' Frar 2020, l-Jobs Plus gew mgharrfa illi l-impjieg ma kienx ser jibda fis-7 ta' Frar 2020, kollox kif bejn dokumentat. Fic-cirkostanzi, irrimedji li jista' talvolta jkollu r-rikorrent mhumiex il-proceduri odjerni.

***Fit-tieni lok** u ukoll in linea preliminari, l-irritwalita' tat-talbiet kif maghmula in kwantu illi qed fl-istess waqt illi qed jitlob kumpens ghal allegata tkeccija ngusta, ir-rikorrenti qed jitiob ukoll li jigi ri-integrat fl-impjieg.*

***Fit-tielet lok** u minghajr pregudizzju ghas-su-espost, u fl-aghar ipotesi illi l-aggravji preliminari hawn fuq sollevati kellhom jigu respinti, illi ir-rikorrenti kien ghadu fiz-zmien tal-prova.*

***Fir-raba' lok,** fil-mertu u ukoll minghar pregudizzju ghas-su-espost, jinghad illi l-kuntratt gie ffirmat fis-16 ta' Dicembru 2019 sabiex ir-rikorrent ikun jista' japplika u jottjeni permessi mehtiega (work permit) mill-awtoritajiet kompetenti bil-ghan illi jkun jista' jibda' l-ingagg. Fil-fatt, jidher illi r-rikorrent ottjena l-work permit fil-31 ta' Jannar 2020.*

Illi dan l-ingagg kien strettament relatat ma' kuntratt ta' xoghol illi s-socjeta' intimata rebhet fil-Germanja minn ghand HWS Gruppe u r-rikorrenti kellu jirrapporta l-ewwel gurnata tax-xoghol tieghu appuntu l-Germanja fejn kellu jibda' bit-tahrig tieghu mas-socjeta' estera biex jkun jista' jigi ezegwit il-kuntratt bejn is-socjeta' mittenti u dik estera.

Illi kien hemm ghalhekk il-hsieb illi r-rikorrent jmur il-Germanja fit-3 ta' Frar 2020 biex jibda bit-tahrig — imma fuq talba tieghu stess, xtaq imur gimgha wara, ossia, fis-7 ta' Frar 2020. Saru l-bookings kollha necessarji u intalab imur l-ufficcju biex jigbor jigbor il-laptop, xi karti relatati u kif ukoll il-biljetti tal-ajru u l-voucher tal-lukanda.

Illi tant is-socjeta' mittenti agixxiet in bona fede illi in preparazzjoni ghall-impjieg tar-rikorrent, is-socjeta' mittenti ghamlet kollox, iffirma til-kuntratt tax-xoghol, hallset hi l-ispejjes ghar-residence permit tar-rikorrent, hallset ghat-titjiriet tal-ajru biex ir-rikorrenti jitla' l-Germanja, il-lukanda fejn kellu jigi allogjat -- kollox.

Illi huwa mar lejliet illi kellu jsiefer, ossia, fis-6 ta' Frar 2020 u hemmek kellem lil Angela Falzon, HR & Business Support Executive tas-socjeta'

intimata, u gharrafha illi kellu bzonn jistrieh u ma xtaqx imur l-ghada, 7 ta' Frar. Dan minkejja illi kien ilu granet mgharraf illi kellu kollox ibbukkjat u li l-ewwel gurnata ta' impjieg tieghu kienet fl-10 ta' Frar 2020 u illi kellu kollox ippreparat. Gie mgharraf illi l-ghada, s-Sibt, ma kienx hemm flights, li l-kumpannija, ghar-rikjesta ta' gurnata tieghu kienet ser titlef il-flus ghaliex il-flight li kien imiss kien it-Tnejn ta' wara, fl-10 ta' Frar u b'hekk kien jasal tard ghal bidu tat-tahrig.

Illi meta gew mgharrfa barra minn Malta illi r-rikorrent ma xtaqx jibda' t-tahrig it-Tnejn filghodu, huma ma kienu sodisfatti xejn u ghaddew biex kkancellaw il-kuntratt taghhom mas-socjeta' intimata li giet mgharrfa illi ma kellhomx aktar bzonn is-servizzi tal-kumpannija lokali.

Illi meta gew mgharrfa b'dan, l-imsemmija Angela Falzon gharrfet lir-rikorrent sabiex l-ghada, il-Gimgha 7 ta' Frar, jmur l-ufficcju biex jerga' jirritorna l-laptop u jigi mgharraf illi l-ingagg mhux ser isehh. Kienu miftehma ghad-9:00am izda meta sad-9:30am baqa' ma tfaccax, saret telefonata lilu u kien evidenti illi r-rikorrent kien ghadu rieqed u qal li kien nesa' li kellu appuntament, filwaqt illi stqarr illi ghamel lejl l-isptar u kien ghajjin u baqa' rieqed.

Filwaqt illi ftehmu illi jmur 1-ufficcju fis-1:00pm, ir-rikorrent ha mieghu 1-karti tal-isptar minn fejn Angela Falzon setghet tosserva illi l-hinijiet fuq l-istess karti kienu jindikaw hin wara t-telefonata u b'hekk il-verita' jidher illi kienet illi kien mar l-isptar wara t-telefonata tad-9:30am u mhux matul il-lejl.

Gie mitlub jirritorna l-laptop u gie mgharraf illi ma kellux ghalfejn jigi ngaggat u wisq anqas isiefer peress illi l-kumpannija estera kienet ikkancellat l-kuntratt minhabba l-indispozizzjoni tieghu illi jikkoopera u jaqdi dmiru.

Illi b'hekk u konsegwenza ta' dan kollu imma fuq kollox tal-intansigenza tal-istess rikorrent, tan-nuqqas ta' kooperazzjoni tieghu u tan-nuqqas tieghu illi jzomm mal-pjanijiet li keiku maghmula, l-impjieg tar-rikorrent ma kienx necessarju illi jibda' u aktar minn hekk, il-kumpannija esponenta tilfet qliegh u sofriet dannu materjali imma ukoll dannu f'isem hazin ghalija mas-socjeta' estera.

GHALDASTANT, ghar-ragunijiet hawn fuq elenkati u ragunijiet ohra illi talvolta ghad jistghu jingiebu a konjizzjoni tat-Tribunal, it-talbiet tar-rikorrenti ghandhom jigu michuda fl-intier taghhom.

Having seen the list of witnesses and the documents attached to the reply.

Having seen the **judgment of the Industrial Tribunal of the 30th November 2020**[2] by virtue of which it was decided that it did not have the jurisdiction to hear and decide cases, like the present one, where the allegation is one of unjust dismissal in connection with definite contracts of work.

Having seen that the acts of the case were referred back to the First Hall Civil Court, and the case has now been assigned to this Court to proceed with the hearing.

Having seen its decree dated 28th June 2021[3] by virtue of which the Court upheld plaintiffs' request for the proceedings to continue in the English language.

Having seen all the evidence brought forward by the parties.

Having heard the final oral submission by counsel to the defendant company. Neither applicant nor his counsel appeared to make submissions during the last sitting of the 26th January 2024.

Having seen that the case was adjourned for judgement for today.

Having seen all the other acts of the case.

Considered:

Plaintiff filed these proceedings to request a declaration from the Court that his dismissal from work by defendant company was unfair and based on reasons which are not valid according to law. Moreover, he is requesting the liquidation

[2] Fol 48 et seq
[3] Fol 57

and payment of the resulting damages as well as the reinstatement to employment in the same position he had prior to the dismissal.

Defendant company is rejecting all the claims as unfounded in fact and at law.

A. EVIDENCE

From the acts of the case it transpires that –

i. On the 16th December 2019 plaintiff and defendant company signed an agreement by virtue of which they agreed on the following terms and conditions among others:

- Subject to the other provisions of the agreement, the employee's period of service is for a fixed term of one year starting 6th January 2020 and shall continue thereafter unless or until terminated by either party giving not less than the required period in writing;
- The first six months are considered as a probationary period;
- The employee is employed as a Network Engineer;
- Both the parties have the right to extraordinary termination of said Contract of Employment for good reason as governed by the rules and regulations emanating from Employment & Industrial Relations Act [Cap. 452 of the Laws of Malta];

ii. **Plaintiff Abiodun Olufemi Owoeye** testified[4] that he signed the contract of employment with defendant company three days before the expiry of his old maltese ID card which in fact expired on the 19th December 2019. He submitted

[4] Affidavit at fol 60 et seq

a new KEI (Key Employment Initiative) application at Identity Malta on the 18th December 2019 and informed the HR Officer of defendant company about it. The KEI application was supposed to take 5-10 days. By the second week of January 2020 he had not received any notification to collect his work permit so he proceeded to Identity Malta where he was told that it had been approved but he still had to wait for it to be sent out.. When he approached Identity Malta again the following week, he was told that it will be sent out by the 3rd week of January and he should receive notification for pick up by mail. In fact by the 3rd week of January he was told that it had been shipped out. HR Officer of defendant company was being informed about these developments.

On the 28th January 2020 the HR Officer contactd him to ask if he had any news yet and he informed her that he had not received any notification yet but that he was expecting it by Wednesday or Friday. She also asked about his pregnant wife who was due to give birth shortly. He stated that he was at a crossroad with starting the new job and the delivery date of the baby which at the time was not yet decided.

By the 30th January he received notification to pick up his card in the mail and on the 31st January he went to Identity Malta where he was able to pick uo his work permit. He informed the HR Officer and she asked him when would he like to start. At that time, since the delivery date of the baby was known (6th February by c-section) he suggested to HR that he starts 7th February hoping that he would start off by the initial paper works and then head out to germany for training.

By the 2nd February he had started to feel sick and was on medication. His wife was admitted to hospital too. Whilst sick he was shifting between Mater Dei hospital, resting and taking care of his children.

By the 4th February the HR contacted him to ask about his wife and he explained the situation of his health too. He told her that hopefully the next day he would be better and would go to the office to fill out the forms and pick up his laptop.

By the 5th February he felt worse healthwise so he did not go to the office.

On the 6th February it was the delivery date of of the baby. He wasn't feeling any better so he went to St James hospital for treatment and the doctor told him that if by the next day he develops symptoms such as a cough or flu symptoms he needed to be given an antibiotic prescription before his flight. He then managed to go to Mater Dei hospital in time for the baby's delivery and soon after he went to the office to clear the pending paper work. After filling out the papers and receiving the laptop, he asked the HR Officer if it was possible to reschedule his flight from Friday 7th February to Monday 10th February so that he will be able to receive treatment over the weekend and head out to Germany on Monday to start training by Tuesday. But if the flight could not be changed he would make alternative arrangement for the medication and he would still fly out on Friday. The HR told him that she will get back to him. That evening she called him and asked him to go to the office Friday morning at 9.30am. He accepted but since at night he started to feel more sick and his cough got worse, the next morning, Friday 6th, he headed out to hospital so he missed his appointment with HR. She called him later that morning and expressed her disappointment that he did not even inform her that he was not going to make it to the office at the agreed time. They then fixed another meeting for that same afternoon at 1pm at the office.

When he went to the office, the HR informed him that the company had decided to stop the contract on the basis of the fact that his paperwork took very long and he was asking for a flight rescheduling so they felt that he was not taking this job seriously. He pleaded with her to reconsider and showed her some

documents related to the medical treatment he received that morning and during the previous days. But HR told him that the decision had been made and it cannot be reversed.

Plaintiff also answered questions in cross-examination[5]. He stated that he did not get any medical certificates showing that he was unable to go to work during the times he said he was sick. Also, since his termination, he did not see any adverts by defendant company to recruit personnel in the same position as that offered to him the plaintiff.

iii. **Noel Ellul, director of defendant company**, testifies that[6] defendant company, in conjunction with another company based in Germany offer software support for larger companies. The German company obtains contracts and in turn it sub-contracts them to the defendant company. In this present case the network support was required by Puma and so defendant company was sub-contracted by the german company to employ someone in Malta to provide that service. So defendant company started looking for the appopriate person for the job, in the light of the fact that there were also deadlines by the end client (Puma).

Witness further stated that defendant company never had a position of a network engineer within its structure. So the person that they were going to employ had to go to Germany for training because in Malta that kind of training was not available.

Noel Ellul also explained that the reason why the date of signing of the contract with plaintiff was different from that of the commencement date of the job because he still had to obtain the work permit. Although plaintiff had told them that it will only take a couple of days for such permit to be issued, it ended up

[5] Fol 69 et seq
[6] Fol 77 et seq

taking almost three months. Besides that, at one point plaintiff also told them that he was having some health issues etc and so the commencement date kept being postponed. In turn, defendant company had to seek regular extensions from the side of Germany too.

Eventually they agreed that plaintiff would start on the 7th February. They booked the flight, purchased a laptop for him, booked accomodation, training etc. But the day before plaintiff asked for the rescheduling of the date of travel because he was sick. When defendant company reverted to its german counterpart with this request to postpone yet again, this request was turned down. Moreover Puma cancelled the contract because of the delays from the defendant company to provide the service they required. Witness recalled that they had requested Puma about 4 extensions for the service to start and this because of the delays of plaintiff to obtain the work permit, the health issues he raised etc. At that point defendant company informed plaintiff that they cannot employ him because the deal with Puma had fallen through.

iv. **Angela Falzon, former HR and office manager with defendant company**, testified[7] that whereas plaintiff had to be employed in the capacity of network engineer on the 6th January 2020, this had to be postponed to 10th February 2020 due to several issues. The contract was annulled since it was clear to them that plaintiff was reluctant to fulfil his obligations.

She met plaintiff for the first time for a screening interview for the Network Admin role via Skype on the 27th November 2019. Since he was the only candidate for the role, they went ahead for a second interview with Roland Heidner, Senior Manager for Network Operations in the 2nd December. On the 10th December, Roland confirmed to go ahead and send an offer to plaintiff and

[7] Fol 80 et seq and fol 84 et seq

let him know that he would need to be in Germany for training by Monday 6th January 2020.

After several email and telephone calls, she agreed with plaintiff that he would be employed through KEI as Network Engineer, so as to 'fast-track' his work permit application. Several weeks went by and they still did not get his work permit and therefore could not travel to Germany. In the meantime, the client was becoming anxious because of this delay, however they decided to wait patiently anyway.

On 31st January 2020 she got a message from plaintiff confirming that he got his work permit. They got a call to confirm certain details where she asked if he would be ready to fly on Monday 3rd February. However, he wanted them to book a week later, i.e. Friday 7th February since his wife was due to give birth during that weekend. They agreed on those terms and went ahead with the bookings of Ryanair flight, taxi from Nuremburg airport to accomodation in Neustadt, accomodation and travel insurance.

During that week, she requested that he goes to the office to provide him with the laptop to work in Germany and fill-in some paperwork, however he finally went on Thursday 6th February, since he claimed he was sick. She provided the laptop and subsequently he asked if they could postpone (yet again) his visit to Germany as he needed time to rest, and her response was that he had been resting since November. When he saw her upset by his statement, he asked her to postpone by at least one day, and he would go on Saturday 8th February. But since the flight was scheduled for the following day, i.e. Friday 7th at 8pm, she wondered why make the company lose money for just a few hours' delay. She told him there are no direct flights to Nuremburg on the weekend and the next flight would be Monday 10th in the evening, thus making the client wait for him another day since they were expecting him in the office on Monday 10th at 8am.

This meant that defendant company would disappoint their client again. She said she would confirm with the client and get back to him.

She contacted Roland Heidner, who was not happy about Abiodun's attitude. He then told her they will not be going forward with the contract.

At this point, she called plaintiff to request him to come in the office on Friday morning and come with the laptop the following day at 9am.

When he did not appear at the office by 9:30am she called him. He sounded asleep and he confirmed that he had forgotten about the appointment, mentioning that he was in hospital till early morning and that he went back to sleep after he returned to hospital. She told him that he could have sent a message to postpone the appointment, to which he replied that he had forgotten his mobile at home. He also mentioned that since his wife was in hospital, he left his young children alone, unsupervised. She got upset by this statement since it shows recklessness from a parent, especially leaving unattended kids without a mobile. They agreed to reschedule the appointment at 1pm.

When he arrived, he showed her the receipts from hospital, and she noticed that the time on the receipt showed a time later than their call. Therefore, he had gone to the hospital after he called her to say he spent all night in hospital. She asked him to return the laptop and let him know the client cancelled the contract.

Plaintiff requested defendant company to re-consider their decision.

B. MERITS

Before proceeding to deal with the claims of plaintiff and the pleas of defendant company, the Court deems it appropriate to address the issue of the nature of plaintiff's contract of employment.

The Court cannot but note that the wording of the contract of employment signed between the parties on the 16th December 2019 is not free from ambiguities. In fact it starts off by defining it as an "indefinite term contract of employment". Even the engagement and termination forms[8] with Jobs Plus indicated plaintiff's job as an indefinite one.

The classification of the contract of employment is important because it has an impact on the jurisdiction of the Court. In fact, prior to the amendments of Act LVIII of 2020, cases of unfair dismissals of employees with an indefinite contract were deemed to fall within the exclusive competence of the Industrial Tribunal.

However, from the substance of the said contract, it transpires that in effect it is one for a definite term of one year and shall continue thereafter unless or until terminated by either party giving not less than the required period in writing.

Thus, this court is in agreement with the conclusion of the Industrial Tribunal in its decision of the 30th November 2020 that, according to the law as it stood at that time prior to the amendments, the present case falls within the competence of this Court.

Having underlined the above, the Court will continue with the considerations on the merits.

Applicant's first claim is for a declaration by the Court that his dismissal was unfair and that therfore his contract of work was terminated for unjust reasons.

According to **article 36 (14) of Chapter 452 of the Laws of Malta** –

[8] Fol 39 and 40

"Notwithstanding the foregoing provisions of this article, an employer may dismiss the employee on a contract of service for an indefinite time and the employee on a contract of service for an indefinite time may abandon the service of the employer, without giving notice and without any liability to make payment as provided in sub-article (10) if there is good and sufficient cause for such dismissal or abandonment of service:

Provided that notwithstanding the foregoing provisions of this article, an employee may abandon a fixed term contract of service prior to its expiry and an employer may terminate a fixed term contract prior to its expiry without any liability to make payment as provided in sub-articles (11) and (12) if there is good and sufficient cause for such dismissal or abandonment."

In the case **Daniel D'Amato vs Oil Tanking Malta Ltd decided on the 30th September 2015**, the Court stated the following in connection with the dismissal of an employee -

"L-impjieg li huwa l-għajn tal-għejxien għal ħaddiem u il-familja tiegħu huwa sagru u għalhekk tkeċċija ma tistax tingħata bħala kastig jekk ma tkunx konsegwenza ta' xi offiża gravi tant illi meta wieħed jiżen in-nuqqas tiegħu mal-ħsara li jista' isofri il-prinċipal għal tali nuqqas, dan ixaqleb favur il-prinċipal. Huwa biss f'din iċ-ċirkostanza illi t-tkeċċija tkun ġustifikata…."

Moreover in the case **Arthur Walker vs Foster Clarks Products Limited** decided on the 30th April 2008 it was stated that -

"Opportunement, irid jiġi reġistrat illi l-kunċett ta' kawża ġusta u valida għat-tmiem tar-rapport ta' impjieg hu ravviżat f' dawk il-fatti u mġibiet tali li jinduċu għat-telf ta' fiduċja, anke għaliex dan hu komunement intiż bħala l-presuppost

essenzjali ta' dan ir-rapport. Dan dejjem b'riferiment għall-aspetti konkreti tan-natura tar-rapport, il-posizzjoni ta' l-impjegat fl-azjenda, l-intensita' ta' l-allegata kondotta kolpuża u ta' kwalsiasi aspett ieħor korrelatat mar-rapport."

In the case **Charlot Scerri vs ST Microelectronics (Malta) Limited** decided on the 1st March 2006 the Court stated that –

"B' mod ġenerali jidher li f' materja ta' tkeċċija mill-impjieg iridu jitħarsu dawn il-prinċipji rakkolti mid-duttrina Ingliza u dik kontinentali fuq is-suġġett:-

(1) L-addebitu tan-nuqqas jew ta' l-imġieba ħażina jrid ikun speċifiku, jiġifieri għandu jkun formulat b'mod ċar ta' l-aspetti essenzjali u materjali tal-fatt denunzjat. Mhux aċċettat allura li l-addebitu jkun bażat fuq sempliċi suspetti vagi jew ridott għall-alluzjonijiet ġeneriċi;

(2) Ir-reazzjoni mill-prinċipal trid tkun ukoll waħda tempestiva. Jekk xejn, biex tikkonsentixxi lill-impjegat li jkollu difiża immedjata, u daqstant ieħor effikaċi, biex jilqa' għall-akkużi fil-konfront tiegħu;

(3) Il-kontestazzjoni minn min iħaddem tesiġi, b'neċessita`, li tkun immutabbli, jiġifieri, li jkun hemm korrispondenza bejn il-fatt kontestat u dak migjub 'il quddiem bħala bażi ta' akkuża u ta' l-azzjoni dixxiplinarja dwaru;

(4) Ta' importanza, imbagħad, huwa l-prinċipju tal-proporzjonalita` bejn l-addebitu u s-sanzjoni li tigi komminata mill-principal. Dan fis-sens illi l-provvediment dixxiplinarju jrid ikun in relazzjoni mal-għażla u l-mizura tas-sanzjoni u in rapport għall-gravita tan-nuqqas; s'intendi, valutata fl-entita` tagħha, soġġettiva u oġġettiva."

Applying the above mentioned principles to the circumstances of the present case the Court makes the following considerations –

1. The first issue that must be tackled is the date of commencement of employment of plaintiff and the date of termination of the same. In his application he claims that he was dismissed from employment on the 7th February 2020. On the other hand, in its pleas, defendant company argues that on that date the employment relationship had not even started because as stated in the Jobs Plus forms of the 4th February 2020 and of the 7th February respectively, the date of engagement was going to be the 10th February 2020 and the date of termination was also the 10th February 2020;

2. It is pertinent to note that the contract of the 16th December 2019 stated that the one year contract was deemed to start with effect from the 6th January 2020, subject to the other provisions of the agreement. From evidence it transpires that this date was indicated because as Roland Heidner had requested, the original day when plaintiff was meant to start training in Germany would be precisely the 6th January 2020. The date of commencement of the employment was therefore attached to the date when plaintiff would start training/work abroad. As resulting from evidence, defendant company entered into the contract with plaintiff so that he could provide services to a 3rd company abroad and its role was to facilitate and prepare the groundwork for plaintiff's job abroad;

3. As things developed, plaintiff's paperwork to obtain the work permit took much longer than expected, so the commencement date of his employment kept being postponed. Once this issue was solved, plaintiff raised other issues, namely the due date of the birth of his child and his own illnesses because of which the start of employment was postponed yet again.

4. Reference is made to the internal correspondence between Angela Falzon on

behalf of defendant company and Roland Heidner from the German side. In the emails of the 31st January 2020[9] and of the 5th February 2020[10] it was clearly stated that plaintiff's first day of work would be the 10th of February 2020. Plaintiff himself was notified about this date by Angela Falzon in her email dated 3rd February 2020[11] where he was instructed to report to work at 8am at the address provided;

5. As resulting from evidence, plaintiff never actually started work/training in the position he was engaged for (Network Engineer) because in the phase where arrangements were still being made, the German company decided to cancel the contract it had with defendant company for reasons which it attributed to plaintiff (these will be tackled at a later stage).;

6. So strictly speaking, the date of the 7th February 2020 indicated by plaintiff in his application reflects the date when he was informed that the German company had decided to stop the contract because as such he had not even started to work yet. In fact no salary or part thereof was issued/claimed by plaintiff throughout the period between the signing of the contract and the termination of the contract;

7. Thus, defendant company's assertion that the commencement of plaintiff's employment was ultimately going to be the 10th February 2020 is correct. So is the official date of termination of employment – 10th February 2020.

8. Hence, the employment itself had not started, and so no issue of unfair

[9] Fol 41
[10] Fol 42
[11] Fol 43

dismissal arises. As a result, the first preliminary plea of defendant company marked (b) in so far as it is compatible with has been just stated, is justified and will be upheld (save for the error in dates where the date of the 10th January 2020 should read 10th February 2020 and 7th January 2020 should read 7th February 2020);

9. The Court moreover states that either way, even if the employment of plaintiff would be deemed to have started, the circumstances of the case and the way they developed do not in the opinion of the court lead to an unfair dismissal in terms of the law for these reasons:

i) as stated above, the engagement of plaintiff was intended to provide a service to a 3rd company and plaintiff was fully aware of this;

ii) From the very early stages after signing of the contract if the 16th December 2019, difficulties surrounding the obtaining of plaintiff's work permit started to crop up. Whilst plaintiff had indicated that his work permit would be issued within 5-10 days (which is why it was planned that he would start work on the 6th January 2020) it took much longer to be issued and in fact plaintiff was only able to collect it on the 31st January 2020;

iii) It is true that as such, the delay taken by the maltese authorities to process the application and to issue his work permit is out of his control. At the same time however, both defendant company and the german company patiently waited and voluntarily postponed the date of commencement of work more than once;

iv) Once this issue was solved, the defendant company proposed that plaintiff would fly out to Germany on Monday 3rd February 2020. Considering that almost a month had passed from when plaintiff was intended to start work, it is deemed fair and reasonable for the defendant company to request plaintiff to travel to start work in the shortest time possible;

v) But yet again it was plaintiff himself who wanted another postponement. This time he raised issues that he was sick and that his wife was due to give birth. In connection with his sickness, although plaintiff provided receipts (copies) showing that he was on medication during those days, he provided no medical evidence to show how the illness would impact his travelling and neither did he produce a medical certificate that he was unable to travel. With regard to the birth of his child, as much as humanly one appreciates the desire to assist to such a momentous event as a parent, plaintiff surely was aware at the time of the signing of the contract that round about that time his baby would be born. So if notwithstanding such awareness he still proceeded to sign the contract, then he voluntarily accepted to honour the contract irrespective of the events surrounding his personal life;

vi) Having said that, defendant company, after consulting with the german counter-part, yet again accepted plaintiff's request by postponing the commencement of work/training of plaintiff by another week, that is to travel to Germany on Friday 7th February and to commence work on Monday 10th February;

vii) As stated above, by the 4th February plaintiff was informed about all the details of his flight, accomodation, transport etc when arriving in Germany;

viii) Notwithstanding that, on the 6th February plaitiff once again requested a postponement for his travels because he still had not recovered from being sick. When faced with the disappointed reaction of the representative of defendant company he changed his request again and wanted to travel on Saturday 8th February instead of Friday 7th February. Besides the fact that even in this instance plaintiff did not provide any medical certificate that he was unable to travel, the Court agrees with the defence raised by defendant company that it made no sense to lose money just for a few hours delay;

ix) Also, if plaintiff would have travelled on Monday 10th February he would have arrived in the evening thus missing the agreed date of commencement of work on that day at 8am;

x) Considering all the above, it comes as no surprise that after so many delays and postponement of commencement of work the german counterpart lost patience and decided to back out of the contract since clearly plaintiff did not honour his part of the obligation;

xi) The Court cannot in the circumstances find fault in defendant company after having to endure so many postponement requests from plaintiff and each and every time it did its best efforts to obtain an approval from the german counter-part. Having crossed the line so many times with his requests to delay the start of his employment, plaintiff now cannot point fingers at defendant company;

xii) Also, when defendant company was faced with the final decision from the german counter-part to stop the contract, it cannot be held responsible for informing plaintiff about this and for deciding to terminate the contract of the 16th December 2019. In fact it is deemed that the reason given by defendant company to Jobs Plus – *"circumstances beyond employer's control. Cancellation/suspension of employment licence"* – is a true and fair representation of what actually happened.

In the light of the above, plaintiff's first claim cannot be upheld as it has not been proven and consequently it is going to be rejected together with the remaining claims.

For these reasons the Court decides the case by –

1. Upholding paragraph (b) of the first plea of defendant company in so far as it is compatible with what has been stated in this judgement;

2. Rejecting all plaintiff's claims with costs.

Hon. Miriam Hayman
Judge

Maraya Aquilina
Deputy Registrar