MALTA

CIVIL COURT
FIRST HALL

THE HON. MR. JUSTICE
JOSEPH R. MICALLEF

Sitting of the 29 th September, 2009

Citation Number. 2905/1996/1

Margaret **ALDER**

vs

MANAGEMENT SYSTEMS UNIT LIMITED and by a decree dated November 24th., 1997, defendant's name was substituted by Malta International Technology and Training Services Limited

The Court,

Having seen the Writ of Summons filed on October 7th., 1996, whereby and for the reasons stated therein, plaintiff requested the Court to (a) declare that the contract of service entered into between the parties and a copy of which is attached to the said Writ as Document A was a

contract of service for a fixed term; (b) find that defendant company (hereinafter referred to as "MSU") terminated said contract without a good and sufficient cause; (c) liquidate the sum due to plaintiff by way of compensation in terms of article 34(11) of Chapter 135 of the Laws of Malta[1]; and (d) condemn MSU to pay plaintiff said liquidated sum. She also claimed legal costs;

Having seen the Note of Pleas filed on August 13th., 1997, whereby MSU rebutted plaintiff's claims, in the first place, by denying that she had a contract of service with defendant but only a contract for services, and even if one were to agree that hers was indeed a contract of service, it was entered into for an indefinite duration. For this reason, MSU raised the plea of lack of jurisdiction of this Court to hear the case, since the exclusive jurisdiction in matters of alleged unfair dismissal in cases of contracts of service of an indefinite duration vests in the Industrial Tribunal. Furthermore, MSU argued that it had sufficient and valid reasons to terminate plaintiff's engagement. For these reasons, no compensation is due to plaintiff;

Having seen the decree dated November 24th., 1997[2], whereby the Court upheld plaintiff's request that the case be heard and decided in English;

Having seen the decree dated January 28th., 1998, whereby, on a request by plaintiff's counsel, Dr Maria Dolores Gauci was appointed Judicial Assistant in order to hear the evidence tendered by the parties and their witnesses;

Having seen the evidence tendered by the parties;

Having heard oral submissions by counsel to parties;

Having thoroughly examined the tendered evidence and filed documentation;

[1] The Conditions of Employment (Regulation) Act, 1952 (repealed by the Employment and Industrial Relations Act, 2002)
[2] P. 24 of the records

Having seen the decrees whereby the case was put off for judgement;

Having considered,

That this case relates to a request for compensation for the premature termination of a contract of service without a good and sufficient cause. Plaintiff claims she was engaged in a contract of employment of fixed duration, but her employer – MSU – unilaterally terminated that contract before the lapse of the agreed term and that it did so for a reason which was not good and sufficient at law. She is therefore claiming compensation in terms of the law extant at the time of such termination;

That defendant MSU rebuts plaintiff's claim by denying that she had a contract of service with MSU. Alternatively, even if one were to accept that the engagement was indeed a contract of service, it was one of indefinite duration and, therefore, any claims of alleged unfair dismissal fell exclusively within the jurisdiction of the Industrial Tribunal and not of the ordinary courts. MSU claimed that it had sufficient and very valid reasons at law to terminate the plaintiff's engagement and that therefore she was due no compensation for such termination;

That the salient facts which result from the records of the case show that by virtue of an agreement entered into in September, 1993[3], after a publicised call for applications, plaintiff was engaged to work as a systems developer in a managerial grade with MSU, under the terms and conditions therein outlined. Amongst other things, it was stated that the contract was not a fixed term one, but that the task for which plaintiff was engaged was expected to last thirty-six (36) months. The contract was to run from October 18th., 1993. Plaintiff is an expatriate and provision was made in the contract for refunds of air fares

[3] Doc "A", at pp. 6 – 10 of the records

and relocation expenses incurred by her, her spouse and her dependent children;

That by the beginning of January, 1995, plaintiff was involved in a state of growing conflict with her superiors at MSU. She challenged her end-of-year performance appraisal[4], and within two months sent in a written notice of resignation from the company[5]. Nevertheless she withdrew that notice, but by July of the same year[6] she was formally warned to improve her output or else face dismissal. Clashes between other operatives of MSU[7] and plaintiff had arisen even before that time[8];

That MSU wrote to plaintiff on February 6th., 1996[9], informing her that it was terminating her engagement with thirty days' notice for reasons connected with her performance and the results achieved. She was advised that her last day of work was to be March 2nd. The suit was filed on October 7th., 1996;

Having further considered

That foremost among the legal considerations pertinent to the issue, the Court feels that, before any other, it has to determine the nature of the engagement which was agreed to by the parties. This is an issue which is of focal importance in that its determination will inevitably affect the outcome of plaintiff's suit. Since plaintiff seeks a remedy expressly founded in terms of a legal provision regarding employment law[10], the success or otherwise of her claim depends entirely on her engagement being deemed a contract of service. Furthermore, for that provision of law to apply to her case, it has to be shown that her engagement was not one of indefinite duration;

[4] Doc "MSU1", at pg. 136 of the records
[5] Doc "MSU2", at pg. 137 of the records
[6] Doc "MSU3", at pp. 138 – 9 of the records
[7] Evidence of Philip Micallef 5.3.2003, at pp. 225 – 6 of the records
[8] Docs. "MSU5" and "MSU8", at pp. 141 – 2 and 162 – 3 of the records
[9] Doc "B", at p. 11 of the records
[10] She relies on the provisions of art. 34(11) of Chap. 135, which has since been abrogated, but which provisions have been incorporated *verbatim* in art. 36(11) of Chap. 452

That on this point the parties are at loggerheads. Plaintiff claims that hers was a contract of service for a fixed term, and her first request is actually one which seeks a declaration by this Court to the effect that her engagement was indeed such a contract of service. On the other hand, MSU rebuts that claim on two levels: as a primary line of defence, MSU argues that the engagement was not a contract of employment, but an engagement for services; as a subsidiary line of defence, MSU avers that even if plaintiff's engagement were to be considered a contract of service, it was not a fixed-term one but one of indefinite duration. The implications of this two-pronged defence are damning to the plaintiff's case. If the first line of defence were to succeed, then she cannot rely on the law of employment to claim the compensation she expects. If the second line of defence were to prevail, then this Court would be lacking jurisdiction, since the special law on employment categorically prescribes the sole and exclusive jurisdiction to lie in the hands of the Industrial Tribunal in determining all issues relating to unfair dismissal[11];

That as to **the nature of the plaintiff's engagement with defendant company** one has to rely on the agreement actually reached, and which, amongst other things, lays down that it shall be governed, construed and interpreted in accordance with the laws of Malta[12]. In the present case, the agreement was put down in writing. The law does not require a contract of employment to be in writing *ad validitatem*[13], and furthermore even if such an agreement has been drawn up in a written form, it may not contain provisions which are not in conformity with that special law, in which case they are deemed not to have been included[14]. An agreement which contains provisions or conditions not allowed by law is not invalidated by virtue of such clauses, but any such provisions are deemed not to have been made;

[11] Art. 75(1)(a) of Chap 452
[12] Clause 11.01
[13] *Vide* definition of "*contract of service*" in Art. 2(1) of Chap 452
[14] Artt. 4(2) and 42 of Chap 452

That in plaintiff's case, the agreement was not expressly called "a contract of service" or "a contract of employment". Nevertheless, this does not, by itself, exclude it from being so. It is a sound and accepted legal principle that the identity and nature of a contract is to be adduced from the terms and conditions which feature in it and which are deemed to reflect the mutual consent of the parties, and not from its formal nomenclature. This rule is no less relevant in the field of employment contracts[15]. Plaintiff claims that the contract she signed with MSU is identical to contracts made with other expatriate colleagues whom MSU itself considered to be its employees[16];

That this is a case based on the fundamental rule that contracts made according to law have the force of law between the contracting parties (the rule of *pacta sunt servanda*)[17]. Likewise, it is an established rule of construction of contracts that all the clauses in a contract are to complement each other and such that each clause is given the meaning resulting from the whole instrument[18]. Furthermore, terms or expressions which are susceptible to more than one meaning must be construed in the meaning more consistent with the subject-matter of the covenant[19];

That with regard to MSU's contention that plaintiff's engagement was in actual fact a contract of works, the Court deems it appropriate to point out that case-law has established that the demarcation line between the essential elements of a contract of service (identical to a contract of employment) and a contract of works (the "*appalt*") is the degree of dependency which the person engaged can and may exercise in the performance of the task assigned: the more the assignee of the task is allowed to operate autonomously, the less the engagement can be considered a contract of service[20]. A

[15] P.A.TM **3.7.2003** in the case ***Joseph Balući vs Bernie Mizzi noe***
[16] Her affidavit at p. 28 of the records
[17] Art. 992(1) of Chap 16
[18] Art. 1008 of Chap 16
[19] Art. 1005 of Chap 16
[20] Civ. App. **27.4.1964** in the case ***Ellul vs Rossignaud noe*** (Vol: **XLVIII.i.276**)

contract of service or of employment presumes a high degree of dependency of the person engaged, even if such a person is engaged in a managerial or executive post. This dependency is what makes the other party an "employer";

That in terms of law applicable to the case, an employee is a person who has entered into or works under a contract of service, or any person who has undertaken personally to execute any work or service for, and under the immediate direction and control of another person, including an outworker, but excluding work or service performed in a professional capacity or as a contractor for another person when such work or service is not regulated by a specific contract of service. Plaintiff insists that her engagement falls squarely within the remit of the definition of employee, whereas MSU holds the view that her engagement was typical of a case excluded by such definition;

That if one were to examine in detail the various terms making up the agreement between plaintiff and MSU, one would be impressed by the number of provisions which more than suggest that the plaintiff was an employee rather than a contractor. Particular reference is made to Clauses 2.01, 2.02, 4.01, 4.06 and 4.11.1. These clauses specifically describe that plaintiff was to work "under the direction and co-ordination of the Chairman", who has "the discretion to move or reallocate assignments" imparted to plaintiff. The remuneration was payable in a manner applicable to salaries[21], and not related to the volume or value of the services she was tasked to perform. Furthermore, a performance bonus was due for "excellent performance" up to a maximum of "10% of contract salary". Unlike in the case of a contractor, the plaintiff was allowed leave of absence in certain particular days of the year as well as for annual periods of rest, both benefits typical of conditions accorded to employees and expressly demanded by pertinent labour legislation[22]. It is perhaps not coincidental that, amongst the instructions

[21] See also Doc "MA4", at p. 48 of the records
[22] *Vide* evidence of Joseph V. Tabone 6.3.2000, at pg, 103 – 121 of the records

issued by MSU's Human Resources Officer on February 13th. 1996[23] (a date prior to plaintiff's effective termination of employment) was one relating to a forwarding of a "termination form" to the Employment & Training Corporation, a document pre-eminently used in the case of contracts of employment. That very same document has another telling instruction: the eighth instructs that Marsa Sports Club was to be "informed that Ms Alder is no longer an employee of MSU". Logic suggests that if plaintiff was no longer to be considered as MSU's employee after a particular date, then she necessarily was, for all effects and purposes, an employee prior to that date. That document was drawn up before any litigation arose, and this Court relies on it as a candid proof of the real relationship between plaintiff and MSU;

That for the above reasons this Court considers that plaintiff was, actually, engaged with MSU under a contract of employment and that therefore the defendant company's first plea cannot be upheld and will thus be rejected;

That as to **the nature of the contract of employment applicable to plaintiff** one must again take note of the terms discussed and included in the signed agreement;

That the Court considers appropriate at this juncture to point out that prior pronouncements by Maltese Courts on the issue of jurisdiction relative to issues of unfair dismissal have made inroads into the vexed question of the relevance of any longer distinguishing between contracts of employment of a fixed term and indefinite duration contracts. For a long while it had been understood that since the definition of "*unfair dismissal*" from employment always made express reference to termination from employment of an indefinite duration, therefore the provisions of the special law – in this case the Industrial Relations Act, 1976 (Chapter 266 of the

[23] Doc "MA3", at pp. 46 – 7 of the records

Laws of Malta)[24] – were not applicable to fixed-term contracts of employment;

That, however, the mandatory terms in which article 28 of the said Act[25] was couched, belied the need for such a distinction. It was found to be an all-embracing jurisdictional provision which, as an exception to the general jurisdiction attributable to the ordinary Courts[26], vested exclusive jurisdiction in the statutory quasi-judicial body – the Industrial Tribunal – wherever any issue relating to whether dismissal was lawful or not arose[27]. This line of thought was effectively and authoritatively settled also with respect to a contract of employment of a fixed duration where it was alleged that dismissal was unfair[28]. This line of judicial pronouncements seems to relegate the nature of the contract of employment (that is, whether one of fixed or of indefinite duration) to a secondary level of purely academic interest, as long as the main issue was the determination of whether the dismissal was fair or otherwise;

That plaintiff insists that her engagement was for a fixed term. She relies on the fact that the contract mentioned that her task was "likely to take 36 months"[29]. Nevertheless in that very same clause, it is expressly stated that "This contract is not a Fixed Term Contract". Throughout the compilation of evidence, both parties exerted admirable effort to promote their respective position with respect to the reasons which resulted in plaintiff's dismissal: this attitude deflected attention from the more pertinent one of determining the basic issue of the nature of the engagement and the proper *forum* where the issue ought to be debated;

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[24] Since repealed and incorporated and consolidated, with amendments, into the Employment and Industrial Relations Act (Act XXII of 2002, Chap. 452 of the Laws of Malta)

[25] Now replaced by art. 75(1) of Chap 452 in even more categorical terms

[26] P.A. **19.4.1990** in the case ***Rossignaud noe vs Borg noe*** (Kollez. Vol: **LXXIV.iii.502**)

[27] App. **5.10.2001** in the case ***Dr. Carmel Chircop vs Awtorita` Marittima ta' Malta***

[28] Inf. App. **23.2.2005** in the case ***Rita Nehls vs Sterling Travel & Tourism Ltd.***

[29] Clause 1.02 of the contract

That the Court considers the wording of Clause 4.12.2 of the agreement, which states: "*Either party may, by giving 30 days' notice to the other party, terminate this contract without fault and without liability*", to be of utmost relevance. Incidentally, this is the Clause which MSU relied on in its letter terminating plaintiff's engagement;

That it is this Court's considered and firm opinion that such a provision throws telling light on the nature of the contract of employment regulating plaintiff's engagement. A Clause of that nature has no place in a contract of employment for a fixed term, which, by definition, does not require a notice period (by either party) for its termination, such date having been established at the outset. On the contrary, the inclusion of such a clause would be tantamount to a contradiction in terms. Where the parties reserve the right to give mutual notice of termination, the pervading message conveyed by that clause would be akin to the position prevalent in the case of a contract of employment for an indefinite term (and even in such a case, a clause of this nature favours the employee and not the employer, who may, at law, only give the employee notice in the case of redundancy[30]);

That neither can it be argued that the reservation made in that clause for the giving of notice by either party was made in view of a supervening circumstance which might justify recourse to it later on. The law[31] expressly dispenses with the need for either party to give notice of termination to the other even in the case of fixed-term contracts, provided there is a good and sufficient cause to do so. Thus, the insertion of such a clause in plaintiff's contract was, if not incompatible with the very nature of a contract of employment for a fixed term, a redundant provision which only served to stultify the soundness of plaintiff's legal basis;

That under such circumstances, the issue still resolves itself principally as one revolving around the question of the reason of plaintiff's termination of employment, and in

[30] Art. 36(3) of Chap 452
[31] Art. 36(14) of Chap 452

particular if that termination was one founded on “a good and sufficient cause”. As has been outlined above, this matter is by law the exclusive preserve of the Industrial Tribunal, and this Court is precluded *ratione materiae* from delving into the questions raised by plaintiff without acting beyond its proper jurisdiction;

That for these reasons this Court finds that it cannot accede to plaintiff’s first claim, and consequently on the subsequent ones on jurisdictional grounds, and considers defendant company’s fourth plea as legally valid and will therefore uphold it;

That this being the case, the Court need not examine plaintiff’s other claims, which are beyond the remit of this Court’s jurisdiction;

For the foregoing reasons, the Court decides to:

Dismiss defendant company’s first preliminary plea as being unfounded at law, and declares that plaintiff’s engagement with defendant company was effectively a contract of employment and not a contract of works;

Dismiss the plaintiff’s first claim and declares that the contract of employment with defendant company was one of indefinite duration;

Uphold the defendant company’s fourth plea and declares that the matter raised by plaintiff’s claims regarding the reason of her dismissal lies within the exclusive jurisdiction of the Industrial Tribunal and is thus precluded from taking cognizance thereof;

Consequently **abstain from deciding on plaintiff’s other claims;**

Costs are to be borne by plaintiff, except those relating to the defendant’s company first plea.

Read

< Final Judgement >

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