MALTA

QORTI TA' L-APPELL

ONOR. IMHALLEF
PHILIP SCIBERRAS

Seduta tat-12 ta' Frar, 2010

Appell Civili Numru. 28/2009

Mirjana Kovecevic

vs

Myoka Management Ltd

The Court,

On 17th November, 2009, the Industrial Tribunal decided the Employment Issue between the above mentioned parties by means of following decision:-

> **"**This case has been referred to the Industrial Tribunal by means of a Declaration made by Mirjana Kovacevic in the Maltese language and filed in the Court Registry on the 24th of April 2008, signed by lawyer Dr Aron Mifsud Bonnici. For the purposes of Section 78 of Chapter 452 of the Laws of Malta it has to be stated that this case could not be concluded within the time stipulated

by law due to lengthy production of evidence spread over a number of sittings.

DECLARATIONS

In her Declaration, Claimant declares that she was employed as Spa Manager within the Respondent company, but on the 7th of April 2008 her employment was terminated for no valid reason at law. Subsequently Claimant filed a statement of case (in the Maltese language) whereby she further stated that her employment was for an indefinite period of time and that she had been employed over two years, whilst her employment licence was issued 5 months before her dismissal. She further states that she earned Lm70 or €163.06 per week; and when in January 2008 she got to know she was pregnant she made it known to her colleagues at work. Claimant states that although she never refused to do massages, the management was not permitting her to do massages owing to her pregnancy, and then on the 31 of March 2008 Respondents' director Ms Marion Mizzi phoned her and informed her that her employment was terminated since she could not shoulder the responsibility should anything happen to Claimant during her pregnancy. Claimant's employment was terminated with effect from the 7th of April 2008 for "Health reasons", as shown in document MK14 exhibited with the same Statement of Case. In her Statement of case, Claimant asks for compensation, but not for reinstatement.

Respondent company filed a reply on the 1st July 2008 whereby it was stated that Claimant's employment was terminated during the probationary period and therefore respondent was not bound to give any justification for such dismissal. Respondent further claims that the company abided by the law and even gave Claimant one week notice and paid her for it.

PRELIMINARY STAGE

Hearing could not start in the first sittings since Respondent company was not receiving the notifications sent to its address in Fgura. During the 1st July 2008 sitting it has been agreed that hearing of this case should continue in the English language. Parties were encouraged to settle the dispute amicably but it later resulted that the efforts were not successful. It was at first agreed to hear evidence on the plea that Claimant was dismissed during the probationary period, but then it was agreed that since this is the only reason for the termination of employment, the evidence had to cover all aspects of the case and this Decision is therefore a final and comprehensive one.

EVIDENCE

In brief, Claimant's version of facts is that in 2005 she started working illegally (being a non-EU foreigner without a work licence) with Respondent Company as beauty therapist. She was pregnant and suffered a miscarriage; so she agreed with director Marion Mizzi to leave Malta and resume working when she returns. Actually she left Malta on the 2nd of April 2007 and returned to Malta on the 17th of September 2007 (document marked MK-1 and exhibited during the 9th June 2009 sitting). She started working the next day. Claimant alleges that she was given a contract of work from the very beginning, but after signing she was never given a copy. Then in January 2008 she realised that she was pregnant and informed her colleagues about this. Claimant says that she wanted to do all the work she was doing before she got pregnant, but the Management of Myoka was refusing to give her strenuous tasks like massages. Then in the end of March 2008 operations manager Analise Loporto informed her by means of an sms that they could not permit her

to do facials only and that she had to stop working. Marion Mizzi also confirmed to her that her employment was being terminated, and on the ETC termination of employment form signed by Claimant and by Analise Loporto the reason for termination was indicated as dismissal for health reasons.

Marion Mizzi, on behalf of Respondent Company, has a very different version: she states that Claimant was engaged with her company as a trainee to learn and practice as beauty therapist. At that time she was being paid pocket-money. Then she left and even worked for someone else; in November 2007 she came back and having got a work licence she was employed with effect from 20th November 2007 (date of contract exhibited on 17th February 2009 as document SFC/MML/1). Some months later Claimant got pregnant and some time later she was not strong enough to handle all the massages that came up. Claimant would prefer doing facials, which are less strenuous, but then she would insist to keep on doing all the task she was performing before she got pregnant. Miss Mizzi felt that too much strain might be dangerous for a pregnant woman; but at other times she would say it was not fair that Miriana does manicures and facials only whilst the other therapists do massages, because massages are more demanding and therapists don't have products to sell with them - so there is less commission with massages. Miss Mizzi even complains that Claimant used the pretext of pregnancy as an excuse to avoid massages and do easy jobs. Miss Mizzi testifies that the situation was not acceptable any more, and Claimant proposed to stop working whilst Respondent Company would continue to pay the National Insurance Contribution just as if she remained working: there was a disagreement on this till Claimant was dismissed.

CONSIDERATIONS

This Tribunal is preoccupied by the fact that both parties were breaching the law in various ways, and so they both tried to twist facts to mitigate their wrong-doings. This is more evident on Respondent's side, whose version of facts is in many instances self-contradictory.

The Tribunal has to investigate whether the termination of employment of Claimant was during the probation period, when both employer and employee may terminate the work contract even if there is no valid reason, and whether a pregnant employee can be dismissed during the probation period.

Counsel to Claimant refers to Legal Notice 92 of 2000 (S.L.424.11) enacting Regulations related to cases of pregnant employees, whereby regulation 11 stipulates that an employer cannot terminate the employment of a pregnant woman or a woman on maternity special leave. Counsel argues that there is no exception to this rule and since *lex specialis derogat generalis,* this law overrules any other general rule. This Tribunal has deliberated profoundly on this matter as the wording is very clear: it admits no exception. However this Tribunal is sure that the wording is the result of lack of foresight on the legislator's part, and it should be evident to anyone that the legislator never intended to give a *carte blanche* to pregnant employees, and whatever they do they cannot be dismissed. The wording of the law is very clear, and yet it does not reflect the true intention of the legislator. Otherwise a woman who is employed during the initial stage of her pregnancy will do away with probation period as she cannot be dismissed; and one can even think of a situation where a pregnant woman defrauds her employer, and the employer will have to wait till the end of her pregnancy before dismissing her. This does

not make any sense, and this Tribunal believes that the legislator meant to say that there can be no dismissal from employment at that specific period of time reason being such pregnancy or maternity leave. Having said that, this Tribunal rules that a pregnant woman can still be dismissed during probationary period.

The next question to be tackled is whether Claimant was dismissed during the probation period. Miss Mizzi testifies that as soon as Claimant obtained the working licence she was employed with Respondent company. It has to be noted that the relevant work permit is dated 23rd November 2007 whilst the work contract is dated 20th November 2007. Therefore, although it is nowhere stated in the contract, same contract is back-dated. Claimant testifies that she was never given a copy of this contract, and this Tribunal finds this assertion plausible. She also states that she was re-employed the next day after she returned from her country, and also here this Tribunal finds this assertion plausible, or rather probable. Although the tendered evidence clearly shows that since 2006 Miss Kovacevic was being paid the same basic pay as in 2008, this Tribunal is not going to take into consideration any term of employment that could have been worked prior to 2nd April 2007 (when Claimant went to her home country), since this Tribunal is deeming any such employment terminated on that date. In any case, re-employment was always subject to the issue of a new entry visa to Claimant. Claimant returned to Malta on the 17th September 2007, and this Tribunal believes that she was employed on the 18th September 2007; the date indicated on the contract of employment was certainly fictitious and arbitrarily chosen by respondent company; it does not reflect the true date of employment. Taking the 18th of September as the date of employment would lead this Tribunal to conclude that the

dismissal in question took place after the 6-month probation period had elapsed.

Given that the only reason given by respondent company for the termination of employment of Miss Kovacevic was the probationary period, this Tribunal can safely conclude that the said employment was terminated for no valid reason at law, and that respondent company should be made to pay compensation to Claimant. This Tribunal took numerous factors into consideration, and the main ones being the following:-

Claimant worked part of the probation period without work licence, and she should pay a price for this.

On the other hand this Tribunal understands that ETC's procedures for the employment of non-EU foreigners are too bureaucratic and not transparent at all.

Repondent company did not dismiss Claimant simply because she was pregnant; after all the company got to know about this pregnancy in January 2008 whilst Claimant was dismissed in April 2008.

Marion Mizzi for respondent company was afraid that should Claimant keep on doing massages, this could lead to unpleasant consequences, such as a miscarriage, and the dismissal should be viewed as a well-intended decision to safeguard Claimant's pregnancy.

Although Claimant could have expected Respondent company to give her alternative tasks to safeguard her pregnancy, the very meagre evidence produced in this respect (particularly the sms by Manager Annalise Loporto) indicate that there wasn't much alternative work to do.

The fact that Claimant had a successful pregnancy and can only work limited hours since she has to take care of her baby.

DECISION

Therefore, after seeing all the acts of this case, this Tribunal declares that Claimant has been unjustly dismissed just a few days after the expiration of the probation period. Taking into consideration the very special circumstances of this case, this Tribunal believes that two thousand three hundred Euros (€2,300) should be paid by respondent company to Claimant by way of compensation. This sum has to be paid within 45 days from today. This Tribunal notices that Claimant has not asked for reinstatement; however should parties amicably agree between themselves that Ms Kovacevic be reinstated in her job within the coming 45 days, this Tribunal recommends that the payable compensation should be reduced to a nominal one of five hundred Euros (€500) which would still be payable within 45 days from today.

Lawyers' fees following this decision are being fixed in the amount of ninety Euro (€90). This case is hereby being definitely determined."

From this decision defendant Company appealed to this Court requesting that such decision be set aside on the ground that it was within her rights to dismiss claimant owing to the fact that she was still in her probationary period of employment;

In her reply claimant raises a preliminary plea of nullity asserting that the application of appeal by the appellant Company was filed after the expiration of the expressed term established by law;

Under Article 82(3) of the Employment and Industrial Relations Act (Chap. 452) it is provided that an application for appeal from the decision of the Industrial Tribunal shall be filed by not later than twelve days from the date of such decision;

According to established doctrine and jurisprudence it is said that:-

1. The observance and respect of the time limits set forth in the Code of Organisation and Civil Procedure and other special laws is a matter of strict public order. Vide "**Giuseppi Caruana -vs- Charles Psaila**", Court of Appeal, 21st March, 1997;

2. As such, no claim, however valid, will be entertained after a certain prefixed statutory date;

3. Unlike prescription for the filing of action under substantive civil law, as a rule time-barred procedures are not open to any extension, suspension or interruption, save in the exceptional circumstances envisaged by procedural law (Articles 108 and 109 of Chapter 12). Besides public order, such is motivated by reason of certainty and uniformity. Vide "**Salina Wharf Marketing Limited -vs- Malta Tourism Authority**", Appeal (Inferior Jurisdiction) 12th December, 2007; "**A.F. Ellis (Homes Decor) Ltd -vs- Direttur Generali, Dipartiment tal-Kuntratti**", appeal (Inferior Jurisdiction), 23rd January, 2009;

4. In particular, vis-à-vis the period of limitation for the filing of appeals, it has been said that "*in materia di termini giudiziari perentoriamente fissati dalla legge sotto pena di decadenza, quali sono quelli entro cui è lecito presentare le scritture di appello, la nullita` puo essere rilevata e dichiarata dalla Corte, astrazion fatta da qualsiasi acquiescenza delle parti eccetto nei casi ove è stabilito il contrario, poiche si versa in tema di disposizioni procedurali, di ordine pubblico, che non è lecito ai*

contendenti di modificare o violare nemmeno di comune accordo" ("**Caterina vedova Mallia Tabone -vs- Nobile Gio Carlo Mallia Tabone *et***", Court of Appeal (Civil Jurisdiction), 3rd October, 1927). This, undoubtedly, is a basic concept and forms part of the general principles of domestic procedural law;

It is a fact that the appeal lodged by appellant company on the 2nd December, 2009 falls outside the prefixed statutory time limit of twelve days from the date of the judgement pronounced by the Industrial Tribunal on November 17, 2009. In point of fact such an appeal had to be filed by not later than the 30th of November, 2009, in which case the appeal so filed is not in conformity with Article 82(3) of Chapter 452;

Evidently, in this instance the time for lodging the appeal has run out, and this conclusion renders the Court incompetent to consider the merits of the appeal submitted by the Company.

For all the foregoing reasons the Court declares the appeal filed by the Company against the Tribunal's decision to be *fuori termine* and, therefore, null and void. Costs are to be borne by the appellant Company.

< Sentenza Finali >

----------TMIEM----------