



MALTA

**CIVIL COURT**

**FIRST HALL**

**THE HON. MR. JUSTICE**

**JOSEPH R. MICALLEF**

Sitting of the 25 th November, 2014

Citation Number. 311/2014

Vito Domenico **BENVENGA**

VS

## **DIRETTUR ĠENERALI VETERINARY AND ANIMAL WELFARE<sup>1</sup>**

### **The Court:**

Having taken cognizance of the Sworn Application filed by applicant Vito Domenico Benvenga on the 14<sup>th</sup> of April, 2014, by virtue of which and for the reasons therein mentioned, he requested that this Court (a) declare and ordain that he is entitled to the payment from defendant Director-General of a sum totalling thirty-two thousand three-hundred and seventy euro and ninety-two cents (€ 32,370.92) representing an outstanding amount of unpaid salaries and allowances owed to him for the period between November 23<sup>rd</sup> 2011 and April 23<sup>rd</sup> 2013 in connection with his service engagement with the said Director General; and (b) condemn defendant Director-General to pay him the said outstanding amount. Plaintiff requested also payment of costs;

Having seen its interlocutory decree of the 23<sup>rd</sup> of April, 2014, whereby it ordered service of the Application on the defendant and gave orders to the plaintiff as to the production of evidence on his part;

Having taken cognizance of the Sworn Reply filed by defendant Director-General on May 13<sup>th</sup>, 2014, whereby, by way of preliminary pleas, he pleaded that the correct designation of his office was “*Direttur Ġenerali Veterinary and Animal Welfare*” and that the requisite corrections be effected in the records of the case; that plaintiff’s claim was inadmissible as it was too vague and without discernible legal basis; he pleaded *res judicata*, insofar as regards plaintiff’s claim for arrears and allowances

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<sup>1</sup> Change in designation authorized by decree dated June 4<sup>th</sup> 2014

for the period between November 23<sup>rd</sup> 2011 and December 21<sup>st</sup> 2012, such claim falling within the remit of the judgment handed down by the Court of Appeal on November 29<sup>th</sup> 2012. Defendant then proceeded to raise pleas on the merits;

The first and the second preliminary pleas were withdrawn during the hearing of June 4<sup>th</sup> 2014, after the necessary decree and clarifications were registered. Plaintiff also reduced his original claim by nine-hundred and forty-four (€ 944) after proof of part payments was shown to the Court's and to plaintiff's satisfaction;

Having ruled by decree made during the hearing of June 4<sup>th</sup>, 2014, on a request to that effect by counsel to plaintiff, that all proceedings of this case would henceforth be conducted in English;

Having also directed that, before proceeding any further, the Court would consider the defendant's preliminary plea regarding *res judicata*, and that evidence in support of that plea and to counter it was to be brought forward by the parties, if they deemed it necessary to do so;

Having taken note of the sworn testimony of defendant and heard other evidence tendered in open Court;

Having granted parties the faculty to file written submissions on the said preliminary plea;

Having seen the Note of Submissions filed by defendant on September 15<sup>th</sup> 2014<sup>2</sup>;

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<sup>2</sup> Pp. 94 – 101 of the case bundle

Having seen the Note of Submissions filed by plaintiff on September 24<sup>th</sup> 2014<sup>3</sup>;

Having heard additional oral submissions by counsel to the parties during the hearing of October 7<sup>th</sup> 2014;

Having examined all the relevant documents in the records of the case;

Having put off the case for to-day's hearing for judgment on the said preliminary plea;

***Having Considered:***

This is an action for payment of arrears in salary and unpaid allowances. Plaintiff is claiming the payment of a specified amount of unpaid salaries and corresponding allowances for a period spanning the time when an Industrial Tribunal ordered his reinstatement and pending the confirmation of that award by a judgment of the Court of Appeal on an appeal entered into by defendant from the Tribunal's ruling and until effective reinstatement;

Amongst other pleas, defendant raised the issue of *res judicata*, claiming that the sum claimed by plaintiff was, in actual fact, already the subject

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<sup>3</sup> Pp. 102 – 5 of the case bundle

of the award handed down by the Industrial Tribunal and duly confirmed by the Court of Appeal;

This judgment will deal with the said preliminary plea, since its validity or otherwise is crucial in determining whether this suit would proceed further or stop at this juncture;

The salient relevant facts which emerge from the records of the case show that plaintiff was engaged by the relevant Ministry as official veterinarian in March 2006 under a one-year fixed-term contract of service. His engagement was extended by one-yearly extensions until 2010. After requesting confirmation that his employment had become one of an indefinite duration in terms of law (owing to the fact that he had been in aggregate employed without break for a period in excess of four years), in March 2011 he was informed that his contract was not being renewed;

On being thus informed, plaintiff referred the matter to the Industrial Tribunal, claiming breach of the law on the employer's part relating to the proper treatment of fixed-term employees and raising the issue of unfair dismissal. By virtue of an award handed down on November 22<sup>nd</sup> 2011<sup>4</sup>, the Industrial Tribunal upheld plaintiff's request and declared that his employment had been converted into one of an indefinite duration and ordered plaintiff's reinstatement within twenty (20) days thereof. Furthermore, the Tribunal awarded plaintiff by way of compensation the sum of eight thousand euro (€ 8,000), together with costs;

Defendant appealed the award in December of 2011. The appeal was dismissed by a judgment of the Court of Appeal of November 29<sup>th</sup> 2012<sup>5</sup>;

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<sup>4</sup> Doc "DG1", at pp. 33 – 42 of the case bundle

<sup>5</sup> Doc "A", at pp. 3 – 17 of the case bundle

Plaintiff was effectively reinstated in employment on December 21<sup>st</sup> 2012<sup>6</sup>;

In October of 2013<sup>7</sup>, plaintiff filed a judicial letter against defendant claiming payment of wages and allowances for the period between the date of the decision by the Industrial Tribunal and the date of his effective reinstatement;

Plaintiff filed this action on April 14<sup>th</sup>, 2014;

The legal considerations concerning the plea under examination call for an enquiry into the constitutive elements which substantiate it. In this regard, both parties agree as to the constitutive elements underlying the plea of *res judicata*. There is, however, disagreement as to which elements emerge in the present context of the dispute in question;

That it is nowadays settled law that for the plea to succeed, three elements have to be proved by the party raising the same plea. These elements are (a) the same object constituting the litigation (*eadem res*), (b) between identical parties (*eadem personae*) and (c) regarding a dispute which has already been the subject of a final judgement (*eadem causa petendi*). For the plea to succeed, these three elements have to be proved concurrently: where any one of these elements is lacking, the plea fails since in that case there is no identity (*nisi omnia concurrunt, alia res est*);

That the plea of *res judicata* is founded on public interest and aims at safeguarding the tenure of rights and obligations secured through a definitive judgement<sup>8</sup>, as well as to forestall the possibility of contradiction created by conflicting judicial pronouncements or that litigation be protracted indefinitely to the detriment of the proper administration of justice<sup>9</sup>;

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<sup>6</sup> Doc "DB1", at p. 72 of the case bundle

<sup>7</sup> Doc "B", at p. 18 of the case bundle

<sup>8</sup> Comm. App. 5.10.1992 in the case *Herrera noe vs Cassar noe et* (Kollez. Vol: LXXVI.ii.489)

<sup>9</sup> Civ. App. 28.6.1973 in the case *Caterina Ġerada et vs Avukat Antonio Caruana* (unpublished)

That the plea of *res judicata* is of very strict interpretation<sup>10</sup>, owing to the fact that it halts an otherwise valid legal claim. In case of doubt as to the concurrence of the above-mentioned elements, the plea ought to be rejected<sup>11</sup>;

That this principle is complimentary to the rule that where a particular dispute has been settled by a judgment which has become final, then whatever has been decided is binding and irrevocable in regards to the parties involved<sup>12</sup>. This principle is all the more applicable where the disputed issue would have already been in existence at the time when the first judgment has been handed down<sup>13</sup>;

That in the present case, there seems to be no dispute as to the existence of the element of **identity of parties**. It must be clarified that the original defendant was another public officer within another Government Department: however, the present defendant has assumed the tenure and responsibilities of the former Director-General not only as regards the proper designation, but also as regards the competences of the Department held by the former. In this regard, therefore, this element has been duly proven;

That there is no agreement between the parties as to the concurrence of the other two constitutive elements supporting the plea;

That regarding the element of **identity of the object of the dispute** (“*eadem res*”), defendant argues that what plaintiff is claiming in this present suit is the same as the subject-matter of the claim he had raised before the Industrial Tribunal. He submits that plaintiff’s claims for arrears in salary and payment of allowances in the present law-suit were determined upon by both the Tribunal and the Court of Appeal. He bases this argument on the declaration made by the Tribunal to the effect that appellant (plaintiff in the present proceedings) was not entitled to any remuneration for the time he was out of employment;

That plaintiff shoots down this line of reasoning by stating that there could never be any identity between what he claimed before the Industrial Tribunal and what he is presently claiming, for the simple reason that what he claimed then was in connection with his unjustified dismissal, whereas what he is claiming now is as a result of the

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<sup>10</sup> F.H. PS 28.3.2003 in the case *Anthony Borġ et vs Anthony Francis Willoughby et*

<sup>11</sup> Cfr. Civ. App. 5.10.1998 in the case *J. Camilleri vs L. Mallia* (Kollez. Vol: LXXXII.ii.305)

<sup>12</sup> Cfr. F.H. 11.3.1949 in the case *Cassar Parnis vs Soler* (Kollez. Vol: XXXIII.ii.344);

<sup>13</sup> P.A. GV 27.6.1995 fil-kawża fl-ismijiet *A.P. Farrugia noe vs T. Borġ Reveille et* (Mhix pubblikata)

reinstatement which the Tribunal had ordered. He submits that the amounts he claims are due to him were never the subject-matter of the proceedings before the Tribunal;

That in considering the element of identity of object one generally refers to the contested thing or title which is the basis of the lawsuit. Such identity does not need to be absolute and material provided that the object in the latter proceedings is not one about which the first proceedings have produced a binding judgment<sup>14</sup>;

That if one were to closely examine the object of plaintiff's claim before the Industrial Tribunal and compare it to the object of his present claim, one would reasonably arrive at the conclusion that both proceedings had different objects. The unjustified termination of employment which was the basic object of the former proceedings could never be identified with a claim for payment of arrears in salary and payment of allowances for the time when the employment had been reinstated. Furthermore, the present claim refers to a period of the employment relationship which succeeded the time of reinstatement ordered by the Tribunal and could never have been anticipated during those proceedings, especially before it was to be known whether the claim regarding unjustified dismissal from employment was going to be upheld or not;

That for this reason, the Court finds that this essential element for the success of the plea under examination is lacking;

That in such circumstances, the Court may pass on to dismiss the plea, as the concurrence of the three established elements has to be shown to exist for that plea's successful outcome. However, the Court feels it is useful also to consider the third element, namely that of **identity of claims** ("*eadem causa petendi*") as this may become useful at a later stage of the proceedings;

That when considering this element of identity, one would be referring to the legal claim upon which a lawsuit is based in regard to the object upon which a dispute has arisen. The expression "identity of cause" has given rise to numerous and varying opinions and disparate judicial pronouncements, particularly in matters which regard the extent to which such identity ought to be applied when it comes to comparing what would have been claimed and what the judgement would have decided<sup>15</sup>. Since the plea of *res judicata* has, of its very essence, to be

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<sup>14</sup> F.H. RCP 9.1.2002 in the case *Rabat Construction Ltd vs Cutajar Construction Co. Ltd*

<sup>15</sup> Cons. 25.1.2013 fil-kawża fl-ismijiet *John Camilleri vs Avukat Generali*



raised in relation to a judgment, one has to ask whether one refers only to the dispositive part of such a judgement or whether one should also take into consideration its deliberative part<sup>16</sup>;

That in this aspect, the Court believes that in order to establish whether there is indeed an identity of the claim between the first proceedings and those in which the plea is raised, one would do well to “*jeżamina jekk il-kwestjoni li tiġi sollevata bit-tieni domanda ġietx jew le ġja’ deċiża bil-ġudikat preċedenti; fi kliem ieħor, jekk il-punt li jiġi diskuss fit-tieni kawża ġiex jew le ġudikat bis-sentenza ta’ qabel, jew jekk dik l-ewwel sentenza ħallietx dak il-punt impreġudikat*”<sup>17</sup>;

That these considerations arise because it is settled law that a *res* becomes a *judicatum* not only in regard to what has been expressly debated and ruled upon in the former proceedings, but also to what ought to have been discussed in those proceedings and was not, for any reason, raised before the Court in a timely manner<sup>18</sup>. The mere rewording or refashioning of the reasons for bringing forward the second suit does not extinguish the efficacy of the judgment in the former proceedings<sup>19</sup>;

That in support of this third element of identity, defendant argues that plaintiff’s present claim is identical to the claim raised before the Industrial Tribunal. He avers that on the basis of the ruling by the Industrial Tribunal that plaintiff was not entitled to any remuneration for such time as he was out of employment, this creates an obstacle to his present claim regarding the time within which he had not been effectively reinstated. He further argues that the time during which the first proceedings had been pending before the Court of Appeal was to be reckoned also as a period during which plaintiff was not in employment and thus covered by that ruling;

That plaintiff robustly rebuts this argument. He points out that the Industrial Tribunal was tasked with dealing with a specific claim and could only rule on the basis of that claim relating to a particular temporal stage. When the Tribunal handed down its award, it ruled on matters which had been brought before it: it could not and was not asked to rule about matters which arose subsequent to its award. The confirmation of that award by the Court of Appeal did not alter this reality. The fact that

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<sup>16</sup> Civ. App. 31.3.1952 fil-kawża fl-ismijiet *Borġ noe vs Farruġia* (Kollez. Vol.XXXVII.1.75)

<sup>17</sup>Cfr. Civ App. Inf. PS 23.1.2009 in the case *Alfred Lanzon et vs Charles Żammit Cordina*

<sup>18</sup> Civ. App. 6.5.2011 in the case *Lambusa Maritime Company Ltd vs Freightzone (Malta) Ltd.*

<sup>19</sup> F.H. FGC 4.6.1999 in the case *Cole Foods Limited vs Accent Clear Traders Company Limited* (unpublished)

defendant availed himself of the right to appeal the tribunal's decision did not mean that what had been ordered by the Tribunal was only operative or effective when the Court of Appeal handed down its judgement dismissing the defendant's appeal. On the contrary, when the Court of Appeal rejected defendant's appeal, it was ratifying the decision of the Industrial Tribunal which had ordered plaintiff's reinstatement. Thus, it could not be argued that plaintiff's present claim could indeed by any stretch of the imagination be deemed to be encompassed by the Tribunal's pronouncement on the entitlement to remuneration or otherwise of plaintiff when, in effect, he had been ordered as reinstated in employment;

That the Court is inclined to adopt the plaintiff's reasoning in this matter. Although defendant had availed himself of his inalienable right to appeal the award of the Industrial Tribunal, he cannot reasonably claim that the plaintiff was not employed. The Court of Appeal's judgement ratified the Tribunal's decision and this to the extent of that award. Once plaintiff's present claim is for a circumstance which altogether was beyond the ambit of the Tribunal's award, then it cannot be said that plaintiff's present claim is indeed covered by that Tribunal's decision or by any confirmation thereof by the Court of Appeal;

That therefore, even on this score, defendant's plea is bound to fail;

The Court therefore decides and rules that:

It **rejects the preliminary plea** of *res judicata* raised by defendant as being unfounded in law and in fact, with **costs** against the said defendant; and

**Orders** that the case proceed on the merits.

**< Partial Sentence >**

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