MALTA

QORTI TA' L-APPELL

ONOR. IMHALLEF

EDWINA GRIMA

Seduta ta' l-14 ta' Jannar, 2015

Appell Civili Numru. 41/2011

Glynis Valerie Pace

Vs

British High Commission (Malta)

Il-Qorti,

Rat id-decizjoni bin-numru 2109 deciza mit-Tribunal Industrijali fl-1 ta' Novembru 2011, fejn giet ipprounzjata is-segwenti decizjoni fl-ismijiet premessi:-

"The Chairman:-

This case has been referred to the Industrial Tribunal by means of a Declaration

made by Glynis Pace (holder of Maltese identity card number 0480901L) in the

Maltese language filed in the Court Registry on the 15th of September 2008, signed by Doctor George Abela.

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 engaged as a Personal Assistant to the Senior Commercial Officer in the British High Commission by

means of a letter of appointment dated 18th June 1999. On the 22nd day of February 2008 Claimant was informed that her employment was being terminated with effect from the 16th May 2008 for redundancy reasons. The reasons given by the British High Commission for the termination of her employment were not justified at law since she was not truly redundant at law, and further details would be provided during the hearing of the case. Claimant requested the Industrial Tribunal to declare that her alleged redundancy was not

a genuine one and that her employment was not terminated according to law.

She also requested that the Tribunal declares that Respondent was in breach of

her contract of employment and that same Respondent had to pay her compensaton and damages according to law, together with any other remedy that the Tribunal deems fit to apply, including her reinstatement at her place of work.

Respondent Commission filed a reply on the 29th of October 2008 whereby it was stated that first and foremost Claimant's pleas are null in as much as she was never dismissed from her employment. Furthermore, it was declared that the British High Commission was was undergoing a restructuring process since

July 2006 in all its departments, including London's UK Trade and Investment. It was decided that the commercial section within the British High Commission

(Malta) be closed down. Claimant's salary was issued by the UK Trade and Investment of London. As explained in the letter dated 22nd February 2008, in view of the closing down of this section, Claimant's role as Commercial Assistant in the UKTI Section was not requried any furher and therefore at that point her position was being made redundant. Claimant was granted 12 weeks notice period according to law, and her last day of employment was the 16th of May 2008. Claimant was not dismissed from work, but her employment was terminated owing to the restructuring process conducted within the British High Commission that lead to various redundancies. The post occupied by Claimant within the commercial section did not exist any more, and not even the section itself still exists.

PRELIMINAY STAGE

On the first sitting it was agreed that this case would be heard and decided in the English language due to the fact that the representatives of Respondent Commission do not understand the Maltese language. Parties further agreed that this case be heard together with Industrial Tribunal Case number 2614/LC and evidence tendered in that case shall be deemed to be valid evidence for this present case, unless otherwise specifically indicated. Parties informed the Tribunal that they had exhausted all their efforts to reach an amicable settlement, but were not successful.

EVIDENCE

Upon inversion of evidence, through Yvonne Ratcliffe, the British High Commission (Malta) explained how the British High Commission in Malta is a branch of the Foreign Office in London; part of it was even funded by such Office abroad. The Commission was divided into four departments covering the consular work, the political work, the managerial work and the commercial work. The Commercial Section was not funded by the British Foreign Office but by the United Kingdom Trade Investment Department, in short UKTI. Witness Yvonne Ratcliffe explains how she was posted with the British High Commission in Malta with effect from June 2008

when it had already been decided by the British Foreign Office and the Trading Investment Ministry that there should be a restructuring exercise within the commercial offices worldwide, which led to the closure of various offices and the abolition of various posts. Witness claims that Claimant and others had their salary paid by the United Kingdom Trading Investment within the Trade Investment Ministry, and so they were directly employed by such Ministry. Witness exhibited documents from UKTI in London explaining how six regional operations, including that in Malta, should close down with immediate effect owing to low commercial activity. Document refers to UK-based members of staff and Locally Engaged staff. Witness explained that Claimant was engaged locally, and she was graded as LE III (Locally Engaged grade 3). From documentation at her disposal, witness confirmed that other LE IIIs working for the British High Commision (Malta) were Mr John Mifsud, Ms Maria Attard, Ms Christine Cachia, Ms Joyce Sant and Mrs Diana Terpougoff, but unlike Claimant and Mr Benjamin Bugeja, these were not with UKTI and had different job-descriptions.

In October 2009, Claimant produced Maria Attard as witness, who was employed by the British High Commission in 2002. She explained that as an LE III she covered tasks within three departments within the Commission: the Visa Section, the Consular Section and the IT Section; originally she applied for the job related to the Visa Section only. She explained how several employees stopped working either at retirement age or even before, when in 2008 the Commission was short-staffed: in January 2009 a new LE III, Penny Leck, was employed as a Consular Assistant and Anti Clearance Assistant.

Mr Benjamin Bugeja testified about his own employment, after being engaged as a Commercial Assistant in 1981 at scale LE III. However he was given duties as Information Officer (within the Political Section), and was asked to do translations for the Entry-Clearance Section. Later he was asked to work as a back-up accountant within the Management Section. For some months he managed the Accounts Section on his own. He was also assigned duties related

to the Queen's visit in Malta. All documentation showed that he was employed

by the British High Commission, not by UKTI, and expected to remain in employment at least till 2013 to alert British entrapreneurs to take up European Union Structural

and Cohesion Funds allocated to Malta. His 2008 termination of employment was totally unexpected. Other LEIIIs remained in employment,

whilst others were financially compensated for early termination. The employee who remained in employment to run the accounts section was employed after him. Mr Bugeja was aware that the British High Commission in Malta was paying his salary from funds that came from England. After the termination of his employment he found an alternative employment in May 2008, but only on part-time basis.

Claimant was employed in 1999 as Personal Assistant to the Senior Commercial Officer in the LEIII grade. However she was assigned duties within the Press and Public Affairs Section, the Chancery; she also assisted the High Commissioner, the Acting High Commissioner and the Deputy High Commissioner, and helped out in various ways during the Royal visit in 2005.

She reiterates that other LEIIIs that remained in employment were engaged after her and so the last-in-first-out rule was not respected. Claimant was aware that the Commission received funds in general from England, but then it was the Commission that paid her salary, and all correspondence went to show that UKTI could in no way be deemed to be her employer. Claimant found an alternative employment in June 2008 for a 1-year term; then she testified that she had another 1-year term till June 2010; document X indicates that Claimant's employment was further extended till 31st December 2010.

Mr Martin Bianco testified in the Maltese language and stated that he used to head the Commercial Section within the British High Commission. He states that he chose Benjamin Bugeja and Glynis Pace to work within his Section, but then everyone did tasks within other sections. He particularly mentions the fact that Mr Bugeja worked for 10 years within the Accounts Section. Then the High Commissioner would frequently ask him to have Ms Pace to assist him or to assist in some other section. Witness recalls two occasions where Locally engaged employees were transferred to other sections housed within the Commission. He also recalls that for a long period of time Mr Bugeja was asked to do translations on a daily basis whilst Mrs Pace was asked to reply to information enquiries (as opposed to commercial enquiries) on a daily basis as well.

Jackie Jordan testified that she was employed with Respondent Commission in 1992 as Personal Assistant to the Deputy High Commissioner in the LE III grade. In January 2007 her post was declared redundant, and after taking her case before the Industrial Tribunal, she was awarded compensation. Witness testifies that LE IIIs would cover each other wherever required, even if their original employment was in different sections.

CONSIDERATIONS

This Tribunal needs to deal with the pleas raised by Respondent; the first being the claim that Claimant was not dismissed. This plea touches the merits of the case and shall be dealt with at a later stage. The second plea is that Claimant was not employed by the British High Commission but by the United Kingdom Trade and Investment Department. It must be noted that all documentation exhibited, including the engagement letters, termination of employment letters and FS3 indicate the British High Commission as the employer. It is very likely that the British High Commission receives funds from the Foreign Office and from the UKTI so that its operations in Malta would be viable, but that does not mean that the British High Commission is an agent of these departments. The juridical link remains between the Commission and Claimant.

The third plea is that Claimant's employment depended on the Commercial operations assigned by the English counterparts, and in so far as the British Department decided to close down some regional operations around the world,

Claimant's services were nor required any more. Respondent produced sufficient evidence that Claimant was employed in the Commercial Section within the Commission, and the commercial operation was withdrawn from England in 2008. In this respect Responedent was entitled to dismiss workers on the basis of redundancy. At this point this Tribunal has to investigate whether the last-in-first-out rule was respected. Although Claimand considers all LE IIIs as being workers in the same class, this Tribunal can conclude that they are all in the same grade, but not necessarily in the same class. However other Personal Assistants do fall within the same class. At

this point this Tribunal finds that there is no sufficient evidence that Respondent retained in employment personal assistants who were engaged after Claimant.

Finally, Respondent raised a new plea within its Note of Submissions claiming that this case was not brought in front of the Industrial Tribunal within the 4 month period set out in Section 75 of the Employment and Industrial Relations Act. From the outset it must be stated that the 4 month period is not a period of prescription and so the relative plea can only be raised in limine litis. Responedent brought no justification for raising it at a later stage. In any case, the Tribunal further observes that Claimant's last day of employment was the 16th May 2008 whilst this case was submitted on the 15th September 2008, that is within the prescribed time. Having said all that, this Tribunal points out that this pleas was not regularly raised by means of an application and so this Tribunal is abstaining from deciding upon it.

This Tribunal moves on to investigate whether Claimant was dismissed, since Respondent is denying this, and wheter the termination of her employment was conducted in the same manner as in the case of other ex-employees. Claimant was not dismissed by disciplinary action but she was dismissed for redundancy reasons; still she was dismissed. It was proven that several other workers were dismissed by Respondent for redundancy reasons, and in each case these were paid compensation which was by and large equivalent to two years' pay. It seems that this compensation was granted to some but not to others, and this amounts to discrimination in the way termination of employment was handled. This compensation did not depend on whether the ex-employees would find an immediate alternative employment, but simply compensation for the mere fact that they were rendered redundant. In this respect, this Tribunal feels that Claimant should not be treated differently from other ex-employees who were dismissed from employment on redundancy reasons. Therefore compensation should be afforded to her as well. Still, this Tribunal feels that one should give some weight to the wage of Claimant, the fact that she found a temporary alternative job and the fact that she worked for respondent for around nine years.

DECISION

Therefore, after seeing all the acts of this case, this Tribunal declares that there is no proof that Claimant was not genuinely dismissed for reasons of redundancy, however it has been proven that she has been discriminated against in her dismissal, in so far as other workers were granted redundancy compensation and she was not granted anything. For this reason, this Tribunal orders that Respondent pays Claimant compensation in the amount of thirty five thousand Euros (€35,000), which has to be paid within forty days from today.

Lawyers' fees following this decision are being fixed in the amount of ninety three Euros (€93). This case is hereby being definitely determined."

Bl-appell minnha introdott fil-konfront ta' din id-decizjoni, il-Kummissjoni Appellanti ressqet is-segwenti aggravvji fejn ilmentat illi:

1. Preliminarjament id-decizjoni hija nulla stante illi t-Tribunal iddecieda fuq element ta' diskriminazzjoni fit-terminazzjoni tal-impjieg tal-appellata minkejja il-fatt illi l-appellata ma ressqet l-ebda talba ibbazata fuq trattament diskriminatorju fuq il-post tax-xoghol u ghalhekk id-decizjoni hija *extra petita* jew *ultra petita* a tenur ta'l-artikolu 790 tal-Kapitolu 12 tal-Ligijiet ta' Malta.

2. It-Tribunal ghamel interpretazzjoni skorretta tal-principju *last in first out* minhabba li dan il-principju ma jaghtix il-possibilita li l-appellata li tintbaghat f'settur differenti sabiex l-impjieg taghha ma jigix terminat.

3. Illi giet mogthija interpretazzjoni zbaljata mit-Tribunal ta'l-artikolu 26 tal-Kapitolu 452 tal-Ligijiet ta' Malta.

4. Illi s-sentenza ma taghmilx sens legalment u dana billi gialdarba it-Tribunal wasal ghal konkluzjoni illi t-terminazzjoni tal-impjieg kienet gustifikata fuq bazi ta' *redundancy*, allura il-Kummissjoni appellanti ma setatx tinzamm responsabbli ghad-danni fuq bazi ta' diskriminazzjoni.

5. Illi bid-decizjoni tieghu it-Tribunal qieghed jiddikjara illi l-principji legali applikabbli ghal principju ta' *redundancy* ma ghandhomx japplikaw fil-kaz tal-Kummissjoni appellanti u dana ghaliex donnu qieghed jigi impost fuq l-appellanti l-obbligu li jikkumpensa lill-haddiema tieghu kull darba li jigi terminat xi impjieg fuq bazi ta' *redundancy*.

   Billi il-Kummissjoni appellanti qeghda preliminarjament tissolleva in-nullita tad-decizjoni tat-Tribunal, il-Qorti hija tal-fehma illi qabel xejn hija ghandha tistharreg dana il-gravam billi l-istess jista' jimpingi fuq l-ezitu ta' dawn il-proceduri. Illi l-Kummissjoni appellanti tishaq illi id-decizjoni tat-Tribunal kienet wahda *extra petita* jew *ultra petita* u dana kif definit fl-artikolu 790 tal-Kapitolu 12 tal-Ligijiet ta' Malta.

   Huwa apparenti mill-korp ta' l-inkartament quddiem it-Tribunal illi l-kwistjoni devoluta lilu kienet tikkoncerna l-licenzjament ta' l-appellata mill-impjieg taghha mal-Kummissjoni appellanti, illi l-istess kienet ingusta billi r-raguni ta' *redundancy* moghtija ma kenitx wahda genwina u ma saritx skond il-ligi. Fid-decizjoni tieghu it-Tribunal iddecieda illi dana il-licenzjament fuq bazi ta' *redundancy* kien wiehed gustifikat, izda imbaghad ghadda sabiex illikwida kumpens favur l-appellata u dana billi dehrlu illi hija giet iddiskriminata meta impjegati ohra kienu inghataw kumpens meta gew imkeccija bhalha fuq bazi ta' *redundancy*.

Illi l-ligi industrijali u cioe' il-Kapitolu 452 tal-Ligijiet ta' Malta jaghmel distinzjoni bejn ilmenti li jikkoncernaw it-tkeccija ingusta mill-post tax-xoghol u ilmenti ohra li jaqghu taht it-Titolu I tal-Att. Tant illi l-artikolu 74 jaghmel distinzjoni bejn il-komposizzjoni tat-Tribunal fiz-zewg ilmenti separati billi fil-kaz tat-tieni tip ta' ilment it-Tribunal necessarjament irid ikun ippresjedut minn avukat bhala Chairperson u dana kif definit fl-artikolu 73(4). Illi d-diskriminazzjoni fit-tkeccija ta'l-appellata mill-impjieg taghha jaqa' taht dak provdut fl-Ewwel Titolu ta'l-Att u precizament fl-artikolu 26(1)(b), kwistjoni li qatt ma giet devoluta ghal gudizzju tat-Tribunal billi l-ilment ta'l-appellata kien jikkoncerna biss l-allegat tkeccija ingusta taghha. Mill-atti probatorji fil-fatt ghandu jirrizulta illi qatt ma giet imqajjma ebda kwistjoni dwar dina id-diskriminazzjoni fit-tkeccija, izda l-atti jiffukkaw biss fuq il-kwistjoni tat-tkeccija ta'l-appellata mill-impjieg taghha. Fil-fatt fit-tmiem tan-nota ta' sottomissjonijiet imressqa mill-appellata u dana ghal konsiderazzjoni tat-Tribunal qabel ma dan ghadda ghad-decizjoni tieghu, l-appellata tghid hekk:

"*From all the above it clearly results that claimants' dismissal from their employment within the British High Commission was unfair; they were made reduandant without a good and sufficient reason, not according to law, and the principle of last in first out was not observed since other employees, in their same grade, and who were employed after the claimants kept their employment, while claimants were dismissed.*"

Illi ma hemmx dubbju minn qari tad-decizjoni tat-Tribunal illi l-argument imressaq 'il quddiem mill-British High Commission illi ir-*redundancy* kienet gustifikata minhabba process ta' ristrutturar giet milqugha. Il-perm

tal-kwistjoni devoluta quddiem dina il-Qorti fl-ewwel aggravvju huwa jekk stabbilit illi allura l-appellata ma kellhiex ragun fl-ilment imressaq minnha, it-Tribunal kellux jghaddi imbaghad sabiex jillikwida kumpens bhala *redundnacy payment* u dana fuq bazi ta' diskriminazzjoni, ilment li kif inghad ma kienx devolut ghal gudizzju tieghu.

Illi l-artikolu 81(2) jiddelinja ir-rimedju li ghandu jinghata mit-Tribunal meta jintlaqa' ilment bhal dak imressaq mill-appellata. Is-sub-inciz (a) jipprovdi illi it-Tribunal ghandu jakkorda kumpens meta jirrizultalu illi t-tkeccija tkun wahda minghajr gusta kawza u dana meta jiddisponi illi:

"**(a) f'każi ta' tkeċċija mingħajr kawża ġusta, jekk ma jkunx hemm talba speċifika biex jerġa' jidħol fl-impieg jew jerġa' jiġi impjegat, jew it-Tribunal jiddeċiedi li ma għandux jagħmel ordni biex jerġa' jidħol fl-impieg jew jerġa' jiġi impjegat kif intqal qabel, it-Tribunal għandu jagħti sentenza ta' kumpens, li għandha titħallas mill-prinċipal lil min jagħmel l-ilment, rigward it-tkeċċija**:"

Imbaghad is-sub-inciz (c) jipprovdi illi f'kazijiet ta' diksriminazzjoni abbazi ta'l-artikoli 26 et.seq. ghandu jinghata is-segwenti rimedju stabbilit fl-artikolu 30(2) ta'l-Att:

"**(2) Jekk it-Tribunal Industrijali jkun soddisfatt li l-ilment jkun ġustifikat, hu jkun jista' jieħu dawk il-miżuri li jidhirlu xierqa inkluz il-kanċellament ta' kull kuntratt ta' servizz jew ta' kull klawsola fil-kuntratt jew fi ftehim kollettiv li tkun diskriminatorja, u għandu jordna l-ħlas ta' kumpens għat-telf u dannu li tkun sofriet il-parti aggravata bħala konsegwenza tal-ksur.**"

Illi ghalhekk ma hemmx dubbju illi l-ligi taghmel distinzjoni netta bejn kazijiet li jitrattaw ilmenti ta' tkeccija ingusta u dawk fejn ikun gie imressaq ilment dwar azzjoni diskriminatorja.

Illi l-appellata madankollu tistrieh fuq id-decizjoni moghtija minn din il-Qorti kif diversament ippresjeduta fil-kawza **Jackie Jordan vs British High Comission** fejn il-fattispecje tal-kaz kienu kwazi identici, izda f'liema kawza saret talba specifika ghal **redundancy payment** fuq bazi ta' diskriminazzjoni. Kwindi l-istess Jordan giet akkordata kumpens mit-Tribunal u dana b'applikazzjoni ta'l-artikolu 26 ta'l-Att. Abbazi ta' din l-argomentazzjoni legali kwindi it-talba maghmula minn Jordan abbazi ta'l-artikolu 26 ta'l-Att giet milqugha. Fil-kaz in dizamina izda dina it-talba thalliet barra.

Maghdud dana kollu, madankollu din il-Qorti hija tal-fehma, bhat-Tribunal, illi f'dan il-kaz partikolari il-kwistjoni ta' **redundancy** fejn impjegati ohra kienu gew moghtija kumpens, kellha iggib bhala konsegwenza wkoll l-ghoti ta' kumpens u dana sabiex ikun hemm trattament parifikatorju. Dana qed jinghad abbazi ta' insenjament moghti minn dawn il-Qrati li dejjem hadu il-linja guridika illi fejn tinsorgi kwistjoni ta' ksur ta' jeddijiet fondamentali kif sanciti fil-Kostistuzzjoni u fil-Konvenzjoni Ewropeja dwar il-Jeddijiet Fundamentali tal-Bniedem kull Qorti jew Tribunal ghandu id-dmir illi jhares milli jsehh kwalunkwe allegat ksur.

"***Huwa forsi utli li jigi ripetut b'introduzzjoni illi "l-individwu fir-relazzjonijiet tieghu ma' individwi ohra, kien regolat bil-ligijiet ordinarji promulgati mill-Istat. Ligijiet li kellhom pjenament jassiguraw lic-cittadin il-protezzjoni shiha mhux biss tad-dmirijiet u l-***

obbligi li dawk ir-relazzjonijiet joholqu imma wkoll fir-rigward tal-harsien u protezzjoni shiha tal-jeddijiet fondamentali li l-ligi ordinarja kellha wkoll tassigura lil kull cittadin" ("Constantino Consiglio et -vs- Kav. Joseph N. Tabone nomine", Qorti Kostituzzjonali, 11 ta' Awissu, 2000). F'materja ta' rapport ta' impjieg din l-enuncjazzjoni tircievi qawwa rafforzata ghaliex, kif anke kkonstatat, meta kien ghadu jvigi c-CERA (Kapitolu 135) qabel il-konsolidazzjoni tieghu mal-Kapitolu 266, "it is equally obvious from various parts of the Act itself that the law is primarily concerned with the protection of employees" ("Sylvia Falla -vs- Ernest Jennings nomine", Appell Kummercjali, 14 ta' April, 1969);

Dan, apparti, imbaghad, illi skond ir-regola generali tad-dritt fir-rigward tal-kuntratti kollha ghandu applikabilita` kostanti l-principju tal-bwona fede (Artikolu 993, Kodici Civili), u tali jimponi ruhu anke fuq min ihaddem fil-perkors tar-rapport kontrattwali ma' l-impjegati tieghu. Dan mhux biss ghall-ezekuzzjoni tajba u korretta ta' dak ir-rapport imma wkoll ghall-iskop li jkun assigurat u garantit illi dak ir-rapport ma jsirx strument ta' diskriminazzjoni. B'illustrazzjoni ta' dan f'tema ad ezempju ta' licenzjament minhabba redundancy, il-ligi tirrestringi l-poter diskrezzjonali ta' min ihaddem ghall-prinicpju tal-"last in, first out" [Artikolu 36 (4) tal-Kapitolu 452]. Li jfisser, illi min ihaddem ghandu jsegwi certa procedura rigoruza ghall-fini li tkun iggarantita l-parita` tat-trattament bejn haddiema fl-istess klassi u tkun evitata d-diskriminazzjoni. Agir mod iehor ma jistax ma jissinjifikax vjolazzjoni tal-principju tal-bwona fede u tali jikkostitwixxi inadempiment f'min ihaddem;

Premessa din l-introduzzjoni, huwa forsi wkoll opportun li jigi registrat illi, gja qabel il-promulgazzjoni tad-disposizzjonijiet specifici nnovattivi

ghat-tutela kontra d-diskriminazzjoni, ex-Artikolu 26 tal-Kapitolu 452 u l-Avvizi Legali u d-Direttivi ta' l-Unjoni Ewropeja fuq imsemmija, kien inghad illi "filwaqt li hu veru li kienet biss il-Prim' Awla tal-Qorti Civili li kellha gurisdizzjoni originali biex titratta u tiddeciedi materji ta' vjolazzjonijiet attwali jew mhedda tad-drittijiet fondamentali, fosthom allura d-dritt ta' helsien mid-diskriminazzjoni, u li minn decizjonijiet ta' dik il-Qorti seta' biss isir appell lil din il-Qorti, dan ma jfisserx illi kull Qorti u Tribunal iehor kellu necessarjament iwarrab mill-konsiderazzjoni tieghu kull sottomissjoni li nsibu fir-rigward ta' l-allegata diskriminazzjoni li tolqot il-mertu, u li jaqa' fil-kompetenza ta' tali Qorti jew Tribunal" ("Teddy Rapa -vs- Chairman, Awtorita` ta' l-Ippjanar et", Qorti Kostituzzjonali, 31 ta' Mejju, 2000). Ir-rilevanza ta' din is-silta qed tigi sottolinejata mhux tant mill-ottika tal-kompetenza gudizzjali, del resto ffissata fit-Tribunal adit skond l-Artikolu 30 ta' l-Att, izda biex taccentwa l-punt illi kwestjoni ta' allegata diskriminazzjoni, meta tinsorgi, setghet dejjem tircievi l-iskrutinju tat-Tribunal. Dan b'applikabilita` tat-test oggettiv "to what was done, not the reasons or motives behind what was done" (Selwyn's, "Law of Employment", 15th Edition, para. 4.6 pagna 109);" - Appell numru 21/09 fl-ismijiet Paul Borg vs APS Bank deciza fis-26/03/2010.

Bl-istess ottika il-Qorti investigat kwistjoni simili ta' tkeccija abbazi ta' diskriminazzjoni u dana qabel ma dahlu fis-sehh id-disposizzjonijiet tal-ligi li jikkoncernaw id-diskriminazzjoni fil-kors ta' impieg u fit-tkeccija mill-impjieg:

"Issa s-socjeta` konvenuta tissottometti illi ghajr ghal dak mahsub fl-Artikolu 45 tal-Kostituzzjoni u fl-Artikolu 14 tal-Konvenzjoni (Kapitolu 319) ma jezisti l-ebda provvediment taht il-ligi ordinarja li titratta dwar

diskriminazzjoni fuq il-post tax-xoghol. Li jfisser, dejjem skond din l-istess sottomissjoni, illi ma tezisti l-ebda bazi guridika ghall-azzjoni attrici;

Fil-fehma tal-Qorti materja ta' diskriminazzjoni ma hijiex rizervata biss ghall-investigazzjoni u rettifika mill-organi gudizzjarji kostituzzjonali. Jekk l-organi l-ohra, proprju bhal ma hi din il-Qorti, jistghu jipprovdu skond il-ligi ordinarja rimedju xieraq u adegwat ghal lezjoni, attwali jew mhedda, ta' jedd fundamentali, kien dan l-istess rimedju li kellu, u ghandu, fl-ewwel lok jigi mfittex. Ara a propozitu decizjoni ta' din il-Qorti kif presjeduta fil-kawza fl-ismijiet "Joseph C. Agius -vs- Avv. Richard Galea Debono nomine", 21 ta' Ottubru 2002;

.... Inoltre l-istess socjeta` konvenuta donnha tiskarta l-fatt illi fl-ambitu tar-relazzjonijiet regolati mil-ligijiet ordinarji ghandhom jircievu, imbaghad, protezzjoni shiha mhux biss id-drittijiet jew obbligi tal-ftehim, izda wkoll il-harsien pjen tal-jeddijiet fundamentali li l-ligi ordinarja kellha wkoll tassigura. Harsien u protezzjoni kontra l-vjolazzjonijiet tal jeddijiet fundamentali;

Fil-verita` ma hemm xejn x' jostakola li xi hadd jagixxi kontra min hu minnu meqjus fi htija ghall-vjolazzjoni ta' xi jedd fundamentali tieghu. Kif jinsab osservat, "dan ghaliex ghandu jkun pacifiku li kull individwu kien tenut u marbut li josserva d-dettami tal-Kostituzzjoni u tal-Konvenzjoni – din ta' l-ahhar illum parti mill-ordinament guridiku nostran – kif kellu jkun pacifiku li l-Qrati kollha, u mhux biss il-Prim' Awla fil-kompetenza kostituzzjonali taghha, u din il-Qorti, kellhom jinterpretaw u japplikaw il-ligijiet fid-dawl tad-disposizzjonijiet tal-Kostituzzjoni u tal-Konvenzjoni" - "Constantino Consiglio et -vs-

Kavalier Joseph N. Tabone nomine", Qorti Kostituzzjonali, 11 ta' Awwissu 2000." - 3 ta' Ottubru, 2003 Citazzjoni Numru. 1560/1995 Margaret Camilleri, Caroline Ebejer u Monica Gatt vs The Cargo Handling Co Ltd.

Fil-kaz taht konsiderazzjoni dak li hu mitlub li jigi mistharreg huwa l-ghemil tal-Kummissjoni appellanti dwar il-mod kif mexxiet it-tkeccija ta'l-impjegati taghha abbazi ta' *redundancy*, li ghalkemm gustfikat, gabet maghha agir diskriminatorju fil-konfront ta' uhud mill-impjegati meta gie deciz illi kellu jinghata *redundancy payment* lil uhud izda mhux lill-ohrajn.

Illi ghalhekk abbazi ta' dawn il-konsiderazzjonijiet l-ewwel aggravvju qed jigi respint.

Illi fit-tieni aggravvju il-Kummissjoni appellanti tilmenta illi t-Tribunal ta interpretazzjoni zbaljata tal-kuncett ta' *last in first out* u dana meta fl-istess nifs tikkwota dik il-parti tad-decizjoni tat-Tribunal fejn iddecieda illi ma kienx hemm provi fl-atti illi dina ir-regola ma gietx sewgita u li ghalhekk it-tkeccija tal-appellata abbazi ta' *redundancy* kienet wahda gustifikata. Illi minn qari ta' dan l-aggravvju johrog illi l-appellanti qeghdin jilmentaw minn din il-motivazzjonijiet singolari tad-decizjoni u mhux mid-*decide* u dana peress illi l-ezitu tad-decizjoni ghar-rigward tat-tkeccija kient wahda favorevoli ghall-Kummissjoni appellanti. Il-Qorti tifhem illi bl-espressjoni "kap wiehed jew izjed ta' kull sentenza" adoperata fl-Art 240 tal-Kap 12, jew f'disposizzjonijiet ohra sparsi fil-Kodici ta' Organizazzjoni u Procedura Civili fejn tissemma l-kelma "kap" l-ligi qed tirreferi espressament ghall-kapi fil-parti operattiva tas-sentenza. Illi ghalhekk appell minn motivazzjoni kif miltub mill-intimat

appellanti, izda mhux minn kap tas-sentenza impunjata huwa proceduralment zbaljat tali illi jirrendi dan l-aggravvju inammissibbli u ghalhekk qed jigi rigettat.

Illi finalment l-ahhar tlett aggravvji jittrattaw il-kumpens moghti lill-appellata u dana b'applikazzjoni ta'l-artikolu 26 ta'l-Att. Illi l-appellanti issostni illi t-Tribunal ghamel interpretazzjoni zbaljata ta'l-artikolu 26 ta'l-Att u li fi kwalunkwe kaz ma sehhet l-ebda diskriminazzjoni fil-kaz ta'l-appellata u dana billi il-persuna li inghatat il-kumpens u cioe' Nadienne Muscat Gatt ma kenitx impjegata fl-istess klassi ta'impjieg u cioe' fil-*commercial section* u wkoll peress illi t-terminazzjoni ta'l-impieg ta' Muscat Gatt kien wiehed volontarju u mhux forzat. Dana ghalhekk wassal, skond l-istess appellanti, ghal sitwazzjoni fejn ghalkemm gustifikata fit-tkeccija maghmula, hija xorta wahda kellha thallas il-kumpens sabiex b'hekk ma gietx osservata l-ligi li tirregola il-kuncett tar-*redundancy*.

Illi dana il-punt ta' dritt kien diga' gie dibattut minn din il-Qorti kif diversament ippresjeduta fl-appell fl-ismijiet **Jackie Jordan vs British High Commission,** surriferita fejn inghad:

"***Huwa forsi utli li jigi mfakkar illi l-principji tan-non-diskriminazzjoni derivanti minn certi Direttivi ta' l-Unjoni Ewropeja hasbu ghal trattament ugwali fl-impjiegi mhux biss fil-kaz ta' impjieg jew tal-kondizzjonijiet tieghu izda wkoll b'inkluzjoni ghal rimunerazzjoni u tkeccija. Ara l-Avviz Legali 461 tas-sena 2004 li permezz tieghu gew trasportati b'Regolamenti d-Direttivi tal-Kunsill 2000/78/KE u 2000/43/KE.***"

Illi din il-Qorti tikkondividi dana l-insenjament anke fid-dawl ta' dak dispost fl-artikolu 26 ta'l-Att li specifikament jirregola it-trazzin tad-

diskriminazzjoni wkoll fil-mument tat-tkeccija mill-impjieg u hlasijiet relatati. Ghalhekk il-Kummissjoni appellanti ma ghandhiex ragun meta issostni illi it-Tribunal interpreta dina d-disposizzjoni tal-ligi b'mod zbaljat. Fuq kollox kienet l-istess appellanti lil hadet id-decizjoni illi taghti kumpens lil xi impjegati li kellha titlob ir-rizenja taghhom meta sar il-process ta' ristrutturar fi hdan il-Kummissjoni, izda mhux lil ohrajn fejn minflok, bhal fil-kaz tal-appellata, ghazlet it-triq ta' tkeccija forzata minhabba *redundancy* u ghalhekk hasset li kienet gustifikata bil-ligi illi ma taghtix dak il-kumpens bhal kif ghamlet ma' haddiehor fejn ghal xi raguni, li mhux il-kompitu ta' dina l-Qorti li tistharreg, imxiet b'mod differenti sabiex b'hekk hija stess holqot sitwazzjoni ta' disparita' bejn l-impjegati taghha li kellhom ibatu il-forka tat-tkeccija.

"Il-ligi promulgata bil-Kapitolu 452 ghandha certament skop ekonomiku u socjali ghat-tutela ta' l-impjegati. Dan anke minghajr l-applikabilita` tad-Direttivi ta' l-Unjoni. Bis-sahha ta' dawn, imbaghad, kif regolati fid-diversi Avvizi Legali ta' dawn l-ahhar snin, il-ligi giet rafforzata aktar ghal dak l-istess harsien bl-iskop li tevita kemm tista' trattamenti diversi. Dan sija fil-waqt ta' applikazzjoni ghall-impjieg, sija fil-kors u d-durata ta' l-impjieg, u sija fi-lmument tal-finalita` tieghu.

... Hi t-tezi ta' l-appellanti illi l-appellata "was not entitled to compensation under local labour law" (ara xhieda ta' John Green, Management Officer/Consul a fol. 44 et sequitur). Hi wkoll it-tezi ta' dan ix-xhud illi l-appellata ma kienetx fl-istess klassi ta' impjieg ghal dik ta' l-impjegata l-ohra Nadienne Gatt. Din il-Qorti tistqarr li tezisti diversita bejn grad u klassi, kif hekk ukoll illustrat, mill-ottika ta' redundancy, fis-sentenza "Joseph Brincat -vs- Jeffrey M Poulton nomine", Appell Kummercjali, 19 ta' Lulju, 1976. B'danakollu mill-

perspettiva tad-diskriminazzjoni hu accettat illi fil-kaz ta' "redundancy payments", u din tidher li hi l-materja saljenti hawnhekk, "the method of calculation must be the same for all employees who are made redundant". Ara Selwyn "Law of Employment", 15th Edition, 2008 taht il-kapitlu "Discrimination in Employment" (para. 4.1 et sequitur);"

Illi ghalhekk abbazi ta' dawn il-konsiderazzjonijiet l-ahhar tlett aggravvji ukoll ser jigu rigettati.

Ghal dawn il-motivi l-appell qed jigi respint u id-decizjoni appellata ikkonfermata.

L-ispejjez ta' dina l-procedura ghandhom jithallsu mill-Kummissjoni appellanti.

< Sentenza Finali >

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