

# INDUSTRIAL TRIBUNAL

DECISION NUMBER 2110

**Chairman: Dr Leslie Cuschieri** Cert.Dip.Stud., LL.D.

**Case Number 2614/LC**

**In the Employment Issue between**

**Benjamin Bugeja**

**vs**

**British High Commission (Malta)**

**regarding alleged unfair dismissal.**

Today 1<sup>st</sup> November 2011

This case has been referred to the Industrial Tribunal by means of a Declaration made by Benjamin Bugeja (holder of Maltese identity card number 088359M) in the Maltese language filed in the Court Registry on the 17<sup>th</sup> 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 his Declaration, Claimant declares that he was engaged as a Commercial Assistant in the British High Commission by means of a letter of appointment dated 22<sup>nd</sup> April 1981. Claimant was informed that the 16<sup>th</sup> day of May 2008 had to be his last day of employment, which was being terminated because for redundancy reasons. The reasons given by the British High Commission for the termination of his employment were not justified at law since he was not truly redundant at law, and the principle of last-in-first-out was not respected.

Claimant requested the Industrial Tribunal to declare that his alleged redundancy was not a genuine one and that his employment was not terminated according to law. He also requested that the Tribunal declares that Respondent was in breach of his contract of employment and that same Respondent had to pay him compensation and damages according to law, together with any other remedy that the Tribunal deems fit to apply, including his reinstatement at his place of work.

Respondent Commission company filed a reply on the 28<sup>th</sup> of October 2008 whereby it was stated that first and foremost Claimant's pleas are null in as much as he was never dismissed from his employment. Furthermore, it was declared that the British High Commission 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 22<sup>nd</sup> February 2008, in view of the closing down of this section, Claimant's role as Head of UKTI Section was not required any further and therefore at that point his position was being made redundant. Claimant was granted 12 weeks notice period according to law, and his last day of employment was the 16<sup>th</sup> of May 2008. Claimant was not dismissed from work, but his employment was terminated owing to the restructuring process conducted within the British High Commission that led 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.

### PRELIMINARY 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 2613/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 he 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 Commission (Malta) were Mr John Mifsud, Ms Maria Attard, Ms Christine Cachia, Ms Joyce Sant and Mrs Diana Terpougoff, but unlike

Claimant and Mrs Glynis Pace, 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.

Claimant confirmed his own affidavit and further testified that he was 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 entrepreneurs 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.

Glynis Valerie Pace also confirmed her affidavit, and further testified that she 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. Witness 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 her employment was further extended till 31<sup>st</sup> December 2010.

Mr Martin Bianco asked to testify in the Maltese language: 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 in front of 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 will start by dealing 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 emerges from evidence tendered as well as from the document exhibited by the Commission entitled “**UKTI Ring-Fenced Budgets: FAQs & GUIDANCE**” that the British High Commission receives funds from the Foreign Office and from the UKTI so that its operations in Malta would be viable. Still this does not mean that the British High Commission is not the employer, or that it acted as an agent of these foreign entities. The juridical link remains between the Commission and Claimant. Furthermore, **Question 25** in this quoted document refers to a Terminal Gratuity granted to all members of Staff, and explains that in the case of Locally Engaged staff salaries are funded by this UKTI but “The cost of terminal gratuities is met from the main budget or from central FCO funds.” This plea is therefore being rejected.

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 Respondent 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. While Claimant considers all LE IIIs as being workers in the same class, Respondent argues that Claimant was engaged in the Commercial Section and the last-in-first-out rule should be viewed within that perspective. It was shown to this Tribunal that although Respondent's argument is correct, Claimant did other jobs within the Commission, particularly as an LEIII within the accounts section, and this for almost ten years. It appears that Claimant coped well in this section, even when he was manning it on his own, and he was then sent back to the Commercial Section only because the Commercial Section was not coping without him, and a complaint was lodged. A new employee took over the work in the Accounts Section, and this employee is still in employment today. In these particular circumstances, this Tribunal feels that the Commission should have applied the last-in-first-out rule by giving Claimant the option to go back to the Accounts section instead of terminating his employment. If in spite of the original engagement Claimant was assigned duties in the accounts section for ten years, then there should not have been any problem transferring him to that section in a more formal manner. Unfortunately, Respondent did not even consider such a move and proceeded by terminating. This plea is therefore not being accepted.

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. Claimant's counsel's argument that Claimant's last day of employment was the 16<sup>th</sup> May 2008 and so the breach complained of took place on the 17<sup>th</sup> May 2008 is debatable. In any case, it must be stated that the 4 month period set out by the law is not a period of prescription, and so the principle that a plea of prescription can be raised at any stage of proceedings even in appeal does not apply. The Maltese law requires that all pleas be raised in *limine litis*, and ulterior pleas can only be raised at a later stage if it is shown that the matter giving rise to such plea did not exist at the time of the Reply, or that Respondent could not have known of its existence. Relative case-law hold that

failure to raise such a plea in the initial stages amounts to renunciation to such plea. Furthermore, this plea was not regularly raised by means of an application and so this Tribunal is abstaining from deciding upon it.

Now this Tribunal has to investigate whether Claimant was dismissed, since Respondent is denying this, and whether the termination of his 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 him as well.

Claimant should be compensated in the first place following the breach of the last-in-first-out rule. On this count, this Tribunal agrees with Respondent's argument that Claimant got an alternative employment immediately, but it also resulted that this employment was on part time basis and for a definite period of time. Therefore Claimant still qualifies for a minimal compensation on this count. Claimant further qualifies for another amount of compensation in as much as other LEIII employed at the Commission were granted a termination of employment compensation. On this second count, some weight should be given to his length of service and to his salary.

## DECISION

Therefore, after havin seen all the acts of this case, this Tribunal declares that it has been proven that Claimant was genuinely dismissed for reasons of redundancy, but the last-in-first-out rule was not considered at all. Furthermore it has been proven that he has been discriminated against in his dismissal, in so far as other workers were granted redundancy compensation and he was not granted anything. For this reason, this Tribunal orders that Respondent has to pay Claimant compensation in the global amount of forty three thousand Euros (€43,000), 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.

**Dr Leslie Cuschieri**

Chairman