INDUSTRIAL TRIBUNAL

DECISION NUMBER 2236

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

Case Number 2925/LC

In the Employment Issue between

Christinus Harvey

vs

British High Commission Malta

regarding alleged unfair dismissal.

Today the 16th July 2013

This case has been referred to the Industrial Tribunal by means of an application made by Christinus Harvey in the Maltese language filed in the Court Registry on the 18th May 2011, signed by Doctor Joanne Vella Cuschieri.

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 the fact that there were preliminary issues and the relative evidence was tendered on a number of sittings.

DECLARATIONS

In his application, Claimant declared that he has not been called to work by Defendant Commission since the 1st of April 2011, and when he requested that he be called back to work, Commission denied request claiming that the contract of work had elapsed. Claimant declares that he was employed for an indefinite period of time, and that the only reason that could be invoked for the termination of his employment was redundancy, but this could not the case

since his duties were passed on to third parties. He claims that the said termination was unjust and null at law. Claimant therefore requested the Industrial Tribunal to declare that the termination of his employment was unjust, and to provide him with a remedy as per Article 81 of Chapter 452 of the Laws of Malta, including an order for reinstatement and for payment of an equitable compensation. Subsequently, on the 28th June 2011, Christinus Harvey filed a Declaration of case in the English language whereby a number of exhibited documents were explained, and further declared that the Industrial Tribunal should provide a remedy in terms of Article 80 of Chapter 452 of the Laws of Malta. The exhibited letter of Claimant's appointment as Security Guard was for 1 year with effect from 30 January 2006. One particular paragraph states that "After the probation period, the appointment may be terminated at any time by the giving of one month's notice by either side. Wilful misconduct, disobedience or neglect of duties may lead to your dismissal without notice." This contract was then extended for another year and subsequently extended from 30th January 2008 till 29th January 2009. As from 30th January 2009, Claimant's employment was converted into one of Relief Security Guard. No termination date was indicated. Claimant was advised that "Due to the fact that you will be working only as and when required and your hours will not be fixed, you will have no entitlement to paid sick leave." The exhibited ETC job-history shows that Claimant's employment was converted from a 'full-time' employment to a 'part-time /casual.'

Respondent Commission filed a Declaration of facts on the 23rd August 2011 through its legal counsel Dr Peter Fenech, pleading that on preliminary basis, Claimant's application is legally unfounded since employees beyond the retirement age hav no security of tenure of employment other than that contracted for, and this in accordance with paragpraph (a) of the second proviso to Article 36(14) of the Emplyment and Industrial Relations Act, Chapter 452 of the Laws of Malta. Secondly it pleaded that the application is based on the wrong premise since Claimant was no longer in full time employment in 2011, but was contractually engaged as a Relief Security Guard, part-time, casual

worker, in accordance with the form submitted to the ETC on the 31 January 2009. Thirdly defendant pleaded that without prejudice to the above, Claimant was employed as a Relief Security Guard for a 12 month period, renewed in 2010, but such employment was not renewed in 2011. Fourthly, the Commission pleaded that Claimant was employed with the Commission as a casual relief worker to be called in at the sole discretion of the Commission. The Commission exhibited several documents as well, including a letter dated 15th January 2010 which confirms the appointment of part-time, casual , relief Security Guard with effect from 29th January 2009 (supposedly 30th January 2009) under the same conditions except for a slight increase in the remuneration rate.

PRELIMINAY STAGE

On the first sitting it was agreed that this case would be heard and decided in the English language. Parties were encouraged to discuss an amicable solution to this dispute. Since this was not successful, the case started being heard in respect of the pleas raised by the Commission.

Furthermore, during the 10th January 2012 sitting, Claimant conceded that he had initiated these proceedings after that he attained his pensionable age. During the 28th February 2012 sitting, the Tribunal directed the parties to produce evidence on the first plea of the Commission, which would then be decided as a preliminary plea.

EVIDENCE

Respondent Commission produced Christian Borg from the Employment and Training Corporation who could only confirm that ETC records show that Claimant was employed as part-time and casual security guard in February

2009 but had no indication of any termination date. Prior to that, Claimant was employed with the same Commission, but his employment was terminated owing to the fact that he reached the retirement age. This reason was one of the reasons listed on the ETC's termination of Employment form, and in this particular case the relative box was actually ticked as the reason for the termination of his employment in 2009. Mr Marcel Bonnici, also from ETC, who explained that for ETC, an employment which is part-time casual means that working hours are not more than 7 hours 45 minutes per week, and no national insurance contribution is due. When working 8 hours per week the employee would be deemed to be part-time.

Joseph Chircop from the Social Security Department stated that Christopher Harvey of identity card number 151948(M) (the Calaimant) had a pensionable age of 61, and actually started receiving the retirement pension on the 31st January 2009. Brian Goodhead confirmed that Mr Harvey had retired before he was employed by the Commission on the 24th of May 2010. At that time the Commission kept Claimant as a stand in should some regular employee could not make it to work. In 2011 he informed Claimant that this stand-in service would not be required any further because the responsibilities were being contracted out.

Claimant testified with respect to the first plea of the Commission. Claimant also exhibited an explanation as to how his employment came to an end. Up till 2009 his employment was full-time working 40 hours per week. On the 17th January 2009 he became 61 and retired from work. From 31st January 2009 onwards he became *relief security guard*, and the Commission would keep a note as to the hours he would work. The Commission later realised that Claimant was still working practically 40 hours per week, and so he was informed that he would have to pay the National Insurance contributions in arrears. In February 2011 a meeting was held for security guards, but he was not invited: the guards were informed that security was being out-sourced to a private contractor and so their job was now redundant – they were even offered

a sum of money. Unlike Claimant, they were on a full-time contract. When Claimant enquired about this, the Commission informed him that he was still to stand-in whenever required, but in reality he was never called in.

CONSIDERATIONS

This Tribunal is hereby deciding the first plea raised by defendant Commission, but in reality it has enough evidence to decide even upon the other pleas raised by the Commission. However, as agreed with the parties, the considerations of this decision will focus only on the first plea, that is the Commission's claimed right to terminate Claimant's employment since he attained retirement age as per Section 14 of the Employment and Industrial Relations Act.

Claimant's legal counsel ably argues firstly that by keeping Claimant in employment after the expiry of the definite term contract the Commission permitted the contract to convert automatically into an indefinite contract, and secondly that termination of one's employment at the attainment of the age of 61 is permitted by law, but not at a later stage.

In their submissions, the respective legal counsels touched the other pleas raised by the Commission, particularly the third and fourth pleas. While the Commission's counsel argues that Claimant's contract was not renewed and that's how his employment was terminated, Claimant's counsel points out that Claimant was kept in employment after it lapsed, and therefore the employment became an indefinite one. On this point the Tribunal notes that the terms of reference of the 2009 appointment as part-time casual security officer indicate that at that point the engagement was already an indefinite one; so in any case it is surely not a question of a lapsed contract of employment. On the other hand the parties had agreed from the very beginning that they only needed to give just one month's notice to terminate the employment contract, and this when Claimant was on full-time basis; when on part-time casual basis it was even

more loose, as it was left at the Commission's total discretion as to when to call Claimant for work.

Reverting to the plea to be decided here, the Tribunal cannot concur with Claimant's submission that the second proviso to Section 36 subsection (14) of the Employment law gives the employer a one-time opportunity to terminate an employee's employment upon attaining his or her retiring age. To this Tribunal, the law provides no further security of tenure of employment when an employee reaches his or her retiring age. Obviously, someone who is going to be employed after attaining the retiring age (as in the case in point) one can provide for the security of tenure of employment by positively putting it down in the engagement contract, whereby the contract would prevail. But in cases where no security of tenure is provided for in the contract of employment, such security is not automatic at law with respect to employees who have already attained their age of retirement. Therefore in this particular case, Claimant cannot claim a right of security of tenure from the general provisions of law, and having no such specific provision in his letter of appointment, then his engagement could be terminated at any time. Having said this, the Commission's decision not to call Claimant for work cannot be deemed illegal, and therefore there is no question of reinstatement or compensation. Mr Christinus Harvey's claims are being rejected.

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