INDUSTRIAL TRIBUNAL

Decision number 2308

Case Number 3081/KBC

In the case between:

Lee Fresle (ID 00026660A)

and

Westminister Properties Ltd. (C-39022)

Subject Matter : alleged unfair dismissal

Chairperson: Dr Katrina Borg-Cardona

Today, Friday, 3rd October 2014

The Tribunal,

Having seen the application of the 1st November 2012, by means of which the applicant alleged that his employment with the respondent company was terminated for reasons that were unjust and illegal;

Having seen the applicant's note of the 28th November 2012, and the documents attached thereto;

Having seen the respondent company's statement of facts of the 28th November 2012 and the documents attached thereto;

Having seen the parties' list of witnesses;

Having heard the testimony of Malcolm Azzopardi who stated that the hotel run by the respondent company had received a complaint from a guest in relation to the alleged behaviour of the applicant and on confronting the applicant, the latter verbally

gave his resignation from employment. He stated that the following day he sent the applicant a letter accepting his verbal resignation, to which the applicant replied stating that he had not resigned. He stated that he had wanted to discuss two issues with the applicant, namely the client's complaint and an allegation by a female member of the housekeeping department who had complained about a conversation allegedly held with the applicant, which she had found offensive. The witness stated that the following day the applicant presented himself at the place of work to clear his office.

Having heard the testimony of Antoine Torpiano who confirmed the customer's complaint on the applicant's alleged behaviour and that the respondent company had received a report of specific behaviour, which was considered as sexual harassment. The witness stated that when the applicant was called to give his version of events, whilst initially he did give his version contradicting the allegations, at one point he simply stated that he was resigning. The witness stated that he had objected to the immediate and unexpected resignation and solicited the applicant's comments to the complaint in order that the company would be in a position to answer it satisfactorily. However, when faced with the allegation of sexual harassment, the applicant repeated that he was resigning and left the office. He stated that when the applicant contacted them, they advised him that they had accepted his resignation and a letter was sent to that effect. The witness stated that the following day, the applicant was called to attend the hotel to discuss the matter again and it was at that point that the applicant brought up the fact that his resignation was not done in writing.

Having heard the testimony of David Gatt, accounts manager with the respondent company, who stated that the company had notified the ETC that the applicant's employment had been terminated since he had resigned.

Having examined the affidavit filed by the applicant on the 29th April 2013, wherein he referred to the incident with the hotel guest and the meeting with Malcolm Azzopardi and Antoine Torpiano, which followed this incident. He stated that he felt that the latter two had already taken a decision, placing the blame on him. The applicant stated that he merely asked if they wanted him to resign and that management twisted his words and suggested that he was actually resigning. He

stated that the following day he explained that there was no reason for him to resign but if they did want him to resign, he wanted a letter of recommendation. The applicant stated that Malcolm Azzopardi insisted that he had already resigned, which he denied. He subsequently took legal advice and, on the following day held another meeting with management to discuss terms to part ways amicably, but management held on to its position that the applicant had resigned.

Having heard the cross-examination of the applicant;

Having seen the documents exhibited by the witnesses;

Having heard the final verbal submissions of the parties;

Considered:-

That the primary issue that needs to be determined by this Tribunal is whether the termination of the applicant's employment was due to the employee's resignation or whether, instead, it was a unilateral act of the employer.

Both parties acknowledge that the contract of employment regulating the terms and conditions of the applicant's employment with the respondent company contains the following condition:

> *"Both the Employee and the Employer shall inform each other in writing in circumstances of resignation by the Employee and termination of Employment by the Employer, which will be subject to the schedule of Notice of Termination of Employment as stipulated by Law."*

Whereas the applicant insists that the correct interpretation of this clause is that a valid resignation must be in writing, the respondent company (in its final submissions, pg. 16) states that it has discretion on whether to insist on requiring a resignation in writing and, in the case in question, they opted for a lower threshold (i.e., a verbal resignation). This Tribunal however fails to reconcile the respondent company's interpretation of the clause with the text of the clause itself. The clause, in fact,

requires the Employee to notify his resignation in writing and the Employer to notify the termination in writing. Reducing the resignation from employment to the written form is intended and functions as a level of protection to the employee from precisely the situation which forms the merit of this case, that is, when a resignation is imputed by the employer but disputed by the employee. The respondent company's stance of dismissing the specific obligation the parties subscribed to in the contract of employment runs contrary to the principle of *pacta sunt servanda*, which is a well-established principle of contract law, also applicable to contracts of employment.

This Tribunal makes reference to the judgment in the names **Francis Paris et vs Maltacom p.l.c.** where the First Hall Civil Court declared that:

> "*Il-prinċipju tar-rispett għal volonta' tal-partijiet huwa wieħed fondamentali u dak li ftehmu fuqu il-partijiet għandu "forza ta' liġi" għalihom ... u l-Qorti m'għandhiex tuża d-diskrezzjoni tagħha biex tissostitwixxi għal dak li ftehmu l-partijiet il-volonta' tagħha*"[1];

Reference is also made to the judgment in the names **Godwin Navarro u Olivier Navarro għan-nom u in rapprezentanza tal-kumpanija Velna Shirts Company Limited vs Saviour Baldacchino** where the First Hall Civil Court stated that:

> "*Is-sens ġuridiku jiddetta illi l-ftehim bil-miktub għandu jorbot lill-firmatarji fit-termini stretti tiegħu u ma għandux jiġi mibdul jew ċirkuwit b'mera assunzjoni soġġettiva ta' xi parti fost il-kontraenti*"[2];

Also in the judgment in the names **Gloria mart Jonathan Beacom et vs L-Arkitett u Inginier Civili Anthony Spiteri Staines**, the Court of Appeal stated that:

> "*Il-prinċipju kardinali li jirregola l-istatut tal-kuntratti jibqa' dejjem dak li l-vinkolu kontrattwali għandu jiġi rispettat u li hi l-volontà tal-kontraenti kif*

[1] Prim'Awla tal-Qorti Ċivili - **Francis Paris et vs Maltacom p.l.c.**, 7 October 2004;

[2] Prim'Awla tal-Qorti Ċivili **- Godwin Navarro u Olivier Navarro ghan-nom u in rapprezentanza tal-kumpanija Velna Shirts Company Limited vs Saviour Baldacchino,** 28 February 2003;

espressa fil-konvenzjoni li kellha tipprevali u trid tiġi osservata. Pacta sunt servanda.";[3]

This Tribunal notes that the parties concur that no resignation in writing was given or received. Furthermore, the second part of the clause stated that a resignation or termination *will be subject to the schedule of Notice of Termination of Employment as stipulated by Law*. If the applicant did indeed resign, in the light of such clause, such resignation would take effect after the lapse of the statutory notice term. Yet, the respondent company suggests that the resignation was verbal and came into immediate effect. There seems to be some confusion on the issue of notice since the applicant was actually serving under a contract for a definite term and a mere period of notice would not have absolved him of residual contract obligations. A resignation during the operative term of the contract would have exposed him to a claim for compensation by the employer in terms of Article 36(12) of Chapter 452 of the Laws of Malta. Yet no such claim was made by the employer, notwithstanding its assertion that the applicant had resigned.

The parties indeed disagree on whether the applicant actually gave his verbal resignation or whether, as he insists, he merely tested the waters to see how far they were willing to push the matter. It was certainly imprudent for the applicant to mention resignation at all when confronted with facts that could eventually lead to disciplinary measures being taken in his regard. However, this Tribunal determines that his imprudence was buffered by the safety that the one relevant clause in his employment contract offered.

Having heard and carefully considered the evidence in this case, this Tribunal believes that the applicant did mention resignation during his meeting with his superiors, that he never gave his resignation in writing (if ever one was intended) and that the respondent company never requested the resignation to be made in writing. When it considered the employment of the applicant as summarily terminated without obtaining a written confirmation of the purported resignation, the respondent company exposed itself to a claim for unfair dismissal. This Tribunal does not see any

[3] **Gloria mart Jonathan Beacom et vs L-Arkitett u Inginier Civili Anthony Spiteri Staines** decided on the 5 October 1998 by the Court of Appeal.

merit in the respondent company's argument that the applicant took fifty-three days to make a written claim to the company. The law establishes periods of time following which actions are deemed extinguished, and what is relevant to the Tribunal is that the applicant acted *within* the short time window allowed by law to challenge a dismissal that he deemed unfair.

Having established that no valid resignation in terms of the contract of employment took place, this Tribunal determines that the termination of employment was due to a unilateral act of the employer. The respondent company's actions were likely motivated by the serious allegations made by a hotel guest and an employee of the company but, on the basis of the evidence tendered by the parties, this Tribunal finds that the respondent company failed to prove the veracity of the allegations when it was incumbent upon it to prove a just cause for termination. It follows, therefore, that it did not have a good and sufficient cause to terminate the applicant's employment on disciplinary grounds.

In so far as the applicant's requests for the payment of arrears of wages, bonus and vacation leave, this Tribunal notes that its jurisdiction is a special one, limited to cases where an unfair dismissal is alleged and to all cases falling within the jurisdiction of the Industrial Tribunal by virtue Title I of Chapter 452 of the Laws of Malta or any regulations prescribed thereunder. The First Hall Civil Court has already established that

> *"il-ġurisdizzjoni esklussiva tat-Tribunal Industrijali ġiet konferita bil-Kap. 452 tal-Liġijiet ta' Malta b'deroga għall-ġurisdizzjoni ġenerali tal-qrati ordinarji. Għalhekk, salv fil-każijiet indikati fil-liġi stess, id-disposizzjonijiet tal-Kap.452 ma jistgħux jiġu interpretati b'mod wiesgħa tant li jiġu estiżi sabiex jinkludu setgħat li l-leġislatur ma ndikax fil-liġi għax ma riedx li dawn jidħlu fil-parametri tas-setgħat tat-Tribunal. Fi kliem ieħor, il-ġurisdizzjoni tat-Tribunal Industrijali u s-setgħat li għandu huma dawk espressament indikati fil-liġi stess li stabbiliet il-parametri tal-operat tiegħu."*[4]

[4] **Karmenu Vella vs General Workers' Union,** Prim'Awla tal-Qorti Ċivili, 30 September 2010.

The applicant's second demand does not fall within the specific and limited parameters of its jurisdiction and, consequently, this Tribunal will not take cognizance of this demand.

For the reasons above stated, this Tribunal:

1) **Finds that the termination of the applicant's employment with the respondent company was not made on grounds which are good and sufficient according to law and was therefore illegal;**
2) **Declines to take cognizance of the applicant's claim for the payment of unpaid wages, bonus and vacation leave, without prejudice to the applicant's rights *si et quatenus*;**
3) **Liquidates compensation due to the applicant in terms of Articles 36(11) and 81(2)(a) of Chapter 452 of the Laws of Malta in the amount of seven thousand seven hundred euro (€7,700) and orders the respondent company to pay onto the applicant the sum thus liquidated, with interest from the date of this decision.**

(Signed)
Dr Katrina Borg-Cardona
Chairperson

True Copy

Marica Psaila
F/Secretary