INDUSTRIAL TRIBUNAL

DECISION NUMBER: 2513

Case Number: 3488/JD

In the Trade Dispute

between

Adv. Dr Andrew Borg-Cardona (818655M)

on behalf of Mr Toufic Yafaoui (0066700A)

and

FIMbank plc (C 17003)

regarding alleged unfair dismissal

Chairman: Mr Joseph Delia BA(Hons)(Econ), FIPD

Today the 1st of March, 2018

INTRODUCTION

This Case was referred to the Tribunal by means of a petition made in the Maltese language by Advocate Dr Andrew Borg-Cardona, in his capacity as special attorney for and on behalf of Mr Toufic Yafaoui who is not domiciled in Malta. The aforementioned petition, that was endorsed by Mr Yafaoui, was filed in the Court Registry on the 6th September 2016.

At the Tribunal's first hearing of this Case, that was held on the 20th October 2016, the Defendant consented to the entire proceedings of the Case being conducted in the English language since the Plaintiff was an English-speaking person; it was agreed however that the Tribunal's award would be in Maltese. At the sitting of the 11th January 2018, by the parties' mutual consent, the latter agreement was reversed so that the award would be delivered in English.

On the 14th October 2016 the Plaintiff submitted an Application to the Tribunal informing the Tribunal that he received a telephone call from the Head of Legal of the Defendant and that he was considering such a call as an intimidatory act. The Defendant submitted to the Tribunal a written declaration[1] during the hearing of the 20th October 2016 stating that the call was not "meant to put any undue pressure on the plaintiff to settle the case at hand". This declaration was supported by a sworn explanation by the aforementioned Head of Legal during the sitting of the 10th November 2016. The Tribunal decreed on the 27th April 2017[2] that whereas the Plaintiff should be comforted by the aforementioned declaration

[1] Doc. MB 1

[2] This was the first hearing of this Case since November; the prolonged deferment was at the Plaintiff's request

and explanation the Defendant might not, until the delivery of the Tribunal's award on this Case, contact the Plaintiff except during the counterexamination of the Plaintiff at the Tribunal's hall.

A BRIEF OUTLINE OF THE CASE

The Plaintiff was employed by the Defendant on two fixed-term contracts[3] and in accordance to SL 452.81.

In both contracts the Plaintiff was engaged as Senior Vice President, Head of Treasury and Capital Markets. In the first contract he was responsible to the Group Head of Banking whereas in the second he was responsible to the President. The second contract almost doubled the Plaintiff's salary.

During the hearing of 10th November 2016 the Defendant produced documents that were sent by the Plaintiff from his workstation at the Defendant's to his own personal e-mail address. At the request of the Defendant, and without this being challenged by the Plaintiff, the Tribunal ordered that the documents be sealed and be made accessible exclusively to the Tribunal, the Plaintiff, and the Defendant.

The Defendant had made available to the Plaintiff a laptop, an ipad, and an iphone. Due to frequent travelling to London, where his wife was undergoing medical treatment, the Plaintiff left the laptop and ipad in London to carry out his work during his stays in London; making use of his iphone for heavy work was not practical because of the limitations of the screen.

The Plaintiff's explanation for attempting to send data that was the property of the Defendant to his personal email was that he had been requested by the Defendant to prepare a forecast. Since, he claimed, he was used to forward data to his personal email account so that he could work also from home, he tried to send the data that he considered necessary for the forecast to his personal email account so that he would work on it urgently at home.

Had the Plaintiff been familiar with the instructions issued by the Defendant, he would have asked for the necessary permission from the Defendant's Head of IT Security or the Senior Vice President Group CIO. But he did not bother to read the Defendant's Group Information Security and Acceptable use of IT Systems Policy, hereinafter referred to as "Policy" unless otherwise indicated, nor did he take heed of the various memos circulated to all employees urging them to familiarise themselves with the Policy, with the result that he breached the Policy by attempting to send what the Plaintiff considered to be sensitive data to his personal e-mail account.

[3] Doc. FB 1, that is undated but bears the year 2011, and doc. FB 2

The Plaintiff was in clear breach of the Policy. The Defendant considered that the Plaintiff (a) did not give them "a proper explanation"[4] for such a breach, and (b) acted irresponsibly also because his actions could "have … had serious regulatory implications"[5]; thus the Plaintiff's actions constituted "an act of gross misconduct"[6] and therefore the Defendant terminated his employment.

The Plaintiff's attempts at sending Defendant's data to his personal e-mail account failed due to the automatic blocking of the data by the Defendant's IT security system.

STATEMENTS OF CASE

Main Points Of Defendant's

The Plaintiff was employed as Head of Treasury with the Defendant on two fixed term contracts of three years each, from April 2011.

Since the Defendant is a regulated entity and processes confidential information, it had, since 2000, implemented an Information and Security Group Information Security and Acceptable Use of IT Systems Policy, made it available on the intranet to all employees, updating it regularly, and drawing the employees' attention to it on a regular basis.

The Policy stipulates that it is unacceptable for an employee to forward corporate e-mails to personal accounts.

Around the 12th May 2016 the Plaintiff sent to his gmail account at least two e-mails containing extremely sensitive information on the commercial affairs of the Defendant.

The Defendant had provided the Plaintiff with web-mail access from any computer and also from devices given to the Plaintiff by the Defendant including an I-phone and tablet.

The Plaintiff had no reason by virtue of his role to access and share this confidential information.

On the 13th May 2016 the Defendant suspended him for alleged gross misconduct and invited him to a disciplinary hearing that was held on the 17th May 2016 .

At the hearing the Plaintiff did not provide any proper explanation for his actions but acknowledged that he had sent the aforementioned e-mails to his personal account.

The Defendant felt that it had no choice but to terminate the Plaintiff's employment for breaching the Policy, since the Plaintiff's actions could have potentially caused serious damage to the Defendant, with detrimental consequences to its business, its employees and its clients.

[4] Doc. FB 7
[5] Doc. FB 7
[6] Doc. FN 7

The Plaintiff's obligation to confidentiality stemmed not only from the Policy but also from Maltese Law, which Law provides that employees have serious duties of confidentiality in relation to sensitive commercial data of banks.

The Defendant asked the Tribunal to reject all the claims of the Plaintiff and to declare that the Plaintiff's employment was terminated for good and sufficient cause according to Law.

Main Points Of Plaintiff's

The Plaintiff was employed as Head of Treasury with the Defendant on the basis of a fixed-term contract that was to expire in April 2017. He had occupied this role since April 2011.

His Performance Appraisals were consistently positive.

On the 25th May 2016 he was dismissed for allegedly breaching the Defendant's IT and Data Protection policies.

The dismissal was unjustified at law in that there was not a good and sufficient cause.

It is not contested that the Plaintiff sought to forward some work emails containing data sheets to his personal email address but this did not constitute a "material justifying breach of the policies (sic)". The data sheets in question contained material that concerned the Plaintiff's own department.

The intention on the part of the Plaintiff was to facilitate the carrying out of important work during nonworking hours. The material was needed to work out a comprehensive budget based on historical data from his department.

Due to the difficulty of accessing material outside the office he forwarded some emails to himself on his personal email to be able to access them on his personal laptop, which has a larger screen than his mobile phone.

This course of action had been resorted to by other company officials. The CEO addressed to the Plaintiff on his personal email address, the same address to which the Plaintiff had forwarded the emails to which the Defendant found objection.

The Policy on which the Defendant rely is not unequivocal in that they limit themselves to stating that disciplinary action may be taken in instances of breach of the Policy, itself not clearly stated, and there is no suggestion that dismissal will be resorted to in all circumstances.

There is no evidence that the Plaintiff was informed of, and/or had accepted in full, the terms of the Policy, although he does not suggest that any employee has the right to treat confidential information inappropriately.

The Plaintiff had not sought to gain personal advantage or act in any manner that was not ethical or that was in breach of his duty of respect to the interests of the Defendant , rendering the extreme sanction of dismissal disproportionate in the extreme.

The Tribunal is requested to declare that Plaintiff is entitled to receive payment by way of damages of an amount equivalent to one-half of the balance of remuneration he would have received for the remaining period of contract as provided under the law and moreover the Tribunal is requested also to consider whether further compensation should be awarded taking into account the Plaintiff 's personal circumstances as known at the material time to the Defendant .

FINAL SUBMISSIONS

The final submissions were made at the sitting of 11th January 2018.

The Defendant's:

The Defendant is a publicly listed bank and therefore covered by a number of laws: Data Protection Act, Banking Act, MFSA Regulations, Listing Regulations, etc. obliging it to protect the data of its clients, of its operation, and any other data which the law considered to be confidential. A breach of these laws could lead to the loss of licence of the Defendant and to criminal proceedings against the Directors. This was the *forma mentis* of the Directors when deciding on this case.

Since the year 2000 the Defendant has had an IT Group Information Security and Acceptable Use of IT Systems Policy that strictly prohibits forwarding data from the Bank's systems to private email addresses because these are not secure.

This Policy is then backed up by reminders to employees to adhere to the Policy.

The Plaintiff was completely oblivious and lived in a world of his own when it came to this sort of matter.

Besides the Policy and the reminders the Defendant wanted to increase its defences and in January 2016 introduced a system which scans the emails which are sent out and if they are being sent to a private address flags them as such.

Everybody was informed about this new system.

The Defendant have a system that can be accessed from any computer even the Plaintiff's own personal one, by logging in the internet protocol address.

The Plaintiff decided to have his office laptop in London and his personal laptop in Malta. On the day in question he came to send out, out of his own decision, a lot of sensitive data to his own personal email. A decision which he took on his own, no one told him, and he

decided to do it from his own personal laptop. He didn't even think about calling IT, or about using the remote system which he could have used even from his personal laptop.

The Plaintiff had been sending emails to his private address since 2015.

Both the Defendant's Head of Human Resources, and the Head of Treasury, who was his direct superior,[7] told him before the hearing, "Listen. This is probably going to be a matter of a final warning."

What triggered the Defendant to move one notch up from final warning to dismissal? The answer comes out of the (disciplinary) meeting itself. During that meeting it seems that the Group Chief Operations Officer asked the Plaintiff a very simple question - "Toufic are you sorry for what you have done?" He wanted to ask him that question to see whether the Plaintiff realised what he had tried to do. He wanted to see whether the Plaintiff as Head of Treasury of the Defendant knew what and why the systems were there, why the systems had blocked, and (if) at least felt some kind of remorse for doing what he had tried to do and not lived in this world of his own where everything was just "hunky-dory" and nothing had happened. The Plaintiff did not respond to that question and simply stayed there silent.

His only defence, not in the hearing but now we come to the actual case, he presented a string of emails. It is just one email with text incoming, which is extremely different from an outgoing email with nine attachments full of data. The Plaintiff does not even realise the difference. He does not assume the responsibility for all his actions because he does not even know why the Defendant had the systems in place to protect its data from leaving the Defendant . The Plaintiff ignored those systems, wasn't even aware of those systems, and continued to try and breach the Defendant's system by sending out emails to himself that in itself was tantamount to what we would consider an act of grave misconduct followed by the state of complete ignorance of the system which led the Bank to be extremely concerned about its own safety in terms of data and therefore considered that that was the plus notch to go for dismissal.

The Plaintiff's:

The Defendant seems to value form and formality more than substance.

Two Executives of the Defendant – his direct line boss, and the HR – told the Plaintiff that the case was a serious matter but that it was not going to be the end of the world.

Apparently, the Defendant was quite happy to consider a final warning to the Plaintiff but because he failed to "show remorse" the Defendant decided that he was oblivious to the implications of his actions. This showed an arrogance on the part of the person who took

[7] During the course of the Plaintiff's second contract of employment the designation of Head of Treasury was removed from him and given to a newly appointed person

that position, that went beyond reasonableness. Are we operating in the nineteenth century when the boss decided everything from what you had for breakfast to what time you went to sleep?

Yes, the Plaintiff made a mistake.

The data didn't actually go out. It was withheld by the system.

The Plaintiff was coming and going from London where his wife was undergoing treatment. If you travel often you leave as much as possible of your equipment where you are going to need it.

If he had the technological savvy to do it, the Plaintiff could have printed out the data and given it to anybody if he accessed it from the iphone and ipad made available to him by the Defendant. But he wouldn't even contemplate doing it because he is a responsible and ethical employee.

The only reason he sent it to his personal address was because he could not access the data on his laptop with a bigger screen … in order to do work which was urgent and instead of saying, "I don't have my equipment. I'm sorry. I can't do it," he did his best and accessed it.

The Defendant referred to various pieces of legislation but did not bring any of them in evidence nor were specific details of them given.

The Plaintiff did make a mistake. But not a major sin because the data did not actually get through so there was no material risk for the Defendant .

The Defendant does not say that the Plaintiff was doing this for personal gain; he was doing it to carry out his job.

In the Plaintiff's mind the use of his own personal address was not frowned upon to the extent that even a simple attempt to try and use it brings upon you the ultimate sanction. The Defendant allowed people, the Chairman, to use private email addresses. It made sure that the data was stopped from leaving so there was no real risk anywhere even if there had been an intention but then it comes down with the death penalty on my client having given him this false sense of security, the same false sense of security given him before the hearing.

We're talking here about a senior bank employee with an unblemished reputation who had worked with the Defendant for many years, who was working on the assumption that this would be his last job in employment, he's that age. Because the gentleman who was interrogating him decided that he failed to show sufficient remorse for his actions to impose upon him the death penalty in employment terms is beyond reasonableness, beyond good and sufficient, it is completely unacceptable.

CONSIDERATIONS

1. The reason for the Plaintiff's dismissal was that, "by attempting to send two corporate emails containing files with sensitive and confidential information including details of clients and figures related to (his) department's work, to (his) personal email address without a proper explanation, (he) acted in a manner which was irresponsible and negligent, moreover so in the light of (his) duties and fiduciary obligations as a senior management member of the Bank. … (his) actions (ran) directly counter to the contents of the Group Information Security and Acceptable Use of IT Systems Group Information Security and Acceptable Use of IT Systems Policy[8] …. The Bank (considered his) actions as an act of gross misconduct … also because (his) actions could have also had serious regulatory implications if any data was lost or should it have fallen in the wrong hands."[9]

The Tribunal analysed the reasons for dismissal as enunciated in the letter of the Plaintiff's termination of employment. The analysis is in the following 1.1 to 1.5.

1.1 The letter of termination[10] refers to two emails. The Defendant submitted two documents, viz. BC 2, and BC 3 to substantiate these emails. But BC 3 does not show any emails sent by the Plaintiff! The Defendant confirmed that in fact they were not two emails with different contents but two attempts at sending the same email[11].

1.2 The Tribunal does not doubt the confidentiality and sensitiveness of the data contained in the e-mail that the Plaintiff twice attempted to send to his personal e-mail account. These data were presented by the Defendant to the Tribunal as docs FB 4, and GC 1 to GC 4, the latter presented by the Defendant in a sealed envelope.

However, whether leakage of the data would have cost the Defendant its operating licence and criminal proceedings taken against the Defendant due to the Plaintiff's breaching of the Policy, as implied by the Defendant in the final submissions, was not proven. Indeed, the Defendant's Company Secretary, Dr Batelli, who is a lawyer, testified that, "By having a look at the data that Toufic sent to his personal e-mail address we identified data which are in a way protected."[12] The Tribunal notes the qualification, "in a way"! So the protection of the data was not absolute but qualified!

Dr Batelli testified also that, "(The Case) … was an issue of data protection, bank secrecy, and it was my duty as a bank lawyer to make sure that these things are not happening within the bank ….There are data (among the data that Toufic sent to his personal e-mail address) which Toufic was entitled to know as Head of Treasury but there are other data

[8] Hereinafter in the Tribunal's Considerations referred to as "the Policy"
[9] Doc. TY 4
[10] Doc. TY 4
[11] Testimony of the Chief Information Officer as per page 8 of the transcript of the testimony at the sitting of 10th November 2016
[12] Page 5 of the transcript of the testimony at the sitting of 10th November 2016

that have nothing to do with the Treasury of the Bank and mainly relates to the underlying transactions between the Bank and clients which really and truly I'm sorry but I can't see why Toufic should have access to that data."[13] But the letter of employment said that the e-mails that the Plaintiff was trying to send contained, "details of clients and figures **related to your department's work**."! This constitutes serious inconsistency – the Defendant produced a witness who made a much more grievous accusation against the Plaintiff, viz. that he attempted to send data to his personal e-mail account which data he should not have access to!

Also, to the question, "… was it data that Toufic as Senior Manager of the Bank was not entitled to view or was he in his position as Head of Treasury a person with access to this data who would use it for professional reasons for employment reasons?" the Head of Legal replied, "To tell you the truth I believe that I cannot give you an answer which is a generic one. We should go through each and every attachment to those emails."[14] At no stage of the Tribunal sittings did the Defendant "go through" any of those attachments which the Defendant's witness considered to be outside the Plaintiff's jurisdiction. Thus, the Defendant did not prove the assertion by the witness that the Plaintiff managed data that he was not supposed to have access to and in any case the assertion is not supported by the letter of termination.

The Tribunal does not consider the case to be one of stealing of company information, nor does the letter of termination accuse the Plaintiff of such a crime.

The Plaintiff explains why he needed the voluminous data that he attempted to send to his personal e-mail account: "… I needed to observe statistically the kind of traffic that was happening within the different … If I were to take the corporate side, FIMbank traditionally is, apart from few relationships, is more of a transactional bank so there is not one transaction that really repeats itself. … So statistically it was important for me to be able to produce a coherent and realistic budget … I needed to base myself on history. … they were trying to … shy away from taking more risks so they said let's look at that business (foreign exchange) … So I had to historically – because every year the patterns change. Every year customers change."[15]

1.3 The letter of termination says that the reason for dismissal was that the Plaintiff did not give a proper explanation for sending sensitive and confidential emails from the Defendant to his personal email account.

[13] Page 3 of the transcript of the testimony at the sitting of 10th November 2016
[14] Page 5 of the transcript of the testimony at the sitting of 10th November 2016
[15] Page 8 of the transcript of the testimony at the sitting of 27th April 2017

In his testimony the Defendant's Head of HR stated that, "... during the meeting … we were prompting him to be forthcoming as to why he sent the information at home; he just didn't reply …"[16].

He repeated this testimony at another Tribunal sitting[17] viz. "(At the disciplinary hearing) we asked why he wanted to send these files to his personal e-mail but he didn't give us a reason as to why…. he was like trying to say something but he never said anything…."

But the Plaintiff testified[18] that at the disciplinary hearing of the 17th May, "… I was very nervous so I read a statement." The Plaintiff submitted to the Tribunal doc. TY 7, which he described as his recollection of the statement read out to the 'Board of discipline' at the aforementioned hearing. The statement went like, "I was fifty-two years of age and worked for FIMbank over five years, always with good integrity and good faith. I had no intentions to go with the material anywhere but to serve the best interest of the business and FIMbank. I transferred these excel sheets to my personal e-mail so that I could work on them over the weekend in Malta on my laptop. It is true that the Bank had given me a laptop and an ipad that gives me access to the Bank server but these were in London for when I visited to be by the side of my wife who was (undergoing) treatment. I didn't explain to them that (the type of treatment)…. I also explained to them the reason why I was sending these excel sheets to my personal e-mail. This is following a meeting I had with … the Group Treasurer of … our new owners. He said – You have always produced results on FX. Because business was slow, put forward a realistic budget to the new CEO. This would lift pressure away from Treasury. "

That statement contained the Plaintiff's reason for sending the email/s in question to his personal email account. That the Plaintiff read out a statement to the Board of discipline and that the Plaintiff's precis of that statement was truthful was not queried by the Defendant.

In fact, the letter of termination does not say that no explanation was forthcoming from the Plaintiff but that the Plaintiff did not give the Defendant, "a proper explanation". Since the fact that the Plaintiff read out a statement during the aforementioned disciplinary hearing was not contested, the Tribunal is taking the 'inconsistency' between the Head of HR's testimony and that of the Plaintiff as being due to the Defendant's dismissing the Plaintiff's explanation as not "proper".

1.4 The Plaintiff was dismissed because he, "acted in a manner which was irresponsible and negligent."[19]

[16] Page 14 of the transcript of the testimony at the sitting of 28th September 2017
[17] Page 5 of the transcript of the testimony at the sitting of 20th October 2016
[18] Page 16 of the transcript of the testimony at the sitting of 27th April 2017
[19] Doc. TY 4

The Plaintiff testified, "Yes, I mean of course there is an IT Group Information Security and Acceptable Use of IT Systems Policy. I have to say that I didn't read it ….".[20]

Of course, to have a senior member of the management of the Defendant, oblivious of his employer's Policy is unacceptable.

Apart from that, the Tribunal finds the Plaintiff's claim that he did not read the Policy rather questionable because doc. TY1, which is the appraisal of the Plaintiff's performance base year 2012 carries a declaration signed by Plaintiff on 15th January 2013 viz., "I have kept myself updated with the content of the Employee Handbook, Code of Conduct, **Information Security Policies** and other Departmental Policies and Procedures." The Tribunal however cannot establish with certainty whether the Information Security Policies that the Plaintiff declared that he read in 2012 had the identical contents of the Policy that the Defendant accused the Plaintiff of breaching, because the Policy version that the Defendant presented to the Tribunal was that of July 2015[21] and so it could well be that there were changes to the Policy since 2012/2013. The Plaintiff made no similar declarations in subsequent appraisals presented to the Tribunal[22]. The Tribunal gives the benefit of the doubt in favour of the Plaintiff in the sense that it appears that he was testifying the truth when he declared that he had not read the Policy.

The Tribunal considers the Plaintiff's behaviour as seriously lacking responsibility and carefulness also because his two attempts at sending confidential information to his personal e-mail account violated the Policy and if the Defendant's IT Security System failed to block the Plaintiff's attempts there would have existed the possibility of the information falling into the wrong hands – and such behaviour is not to be normally expected from a senior management member and who, according to the Plaintiff himself[23], worked in the City of London for over twenty-five years and for the likes of American Express Bank, Bankers Trust, and Commerce Bank heading Turkey and the Middle East. (This profile outline of the Plaintiff was not contested.)

The seriousness of the Plaintiff's failure in his duties is even greater when one notes that he had employees reporting to him and, "Managers are responsible for ensuring that all … employees in their business area are made aware of this … Policy and understand their obligations with regard to complying with the … ."[24]

The Plaintiff's behaviour is seriously disappointing also because he was aware that the use of personal email accounts was irregular. In fact when replying to the CEO on the 27th September 2015 to the CEO's email of 26th September 2015 the Plaintiff ended his email by,

[20] Page 13 of the transcript of the testimony at the sitting of 27th April 2017
[21] Doc. FB 3
[22] Docs TY 2, and TY 3
[23] Page 3 of the transcript of the testimony at the sitting of 27th April 2017
[24] Doc. FB 3 under the section of Management

"I am sorry I have used my personal email as it is easier than the iphone6."[25] (This in itself does not prove that the Plaintiff read the July 2015 version of the Policy, because it could well be that the Policy version that he declared he read in 2012 could have prohibited the sending of corporate data to personal email accounts but need not have carried the same references to disciplinary actions that were stated in the July 2015 version, which latter version was the only version submitted to the Tribunal.)

1.5 That the Plaintiff breached the Policy is sufficiently proven. So the Tribunal confirms that the Plaintiff's behaviour was irresponsible.

2. But in deciding whether to apply the ultimate measure of dismissal the employer must weigh such behaviour against mitigating factors, which the Tribunal lists in 2.1 to 2.5 below:

2.1 The Defendant agreed with the Plaintiff that there was no malice on the Plaintiff's part:[26]

"Plaintiff: To be honest I was acting in good faith and I had good motives. I'm not someone …

Adv. Brincat (assisting the Defendant): We are not debating that.

Plaintiff: Let me tell you. Let's not debate that. That's fine. That's fantastic. Because let's not debate that. Because I have thirty-three years of experience …

Adv. Brincat: Agreed.

Plaintiff: … and work ethic within the banking industry. And it has been a pattern of mine to work like this and send work to my personal e-mail; at FIMbank as well. I was asked by the Group Treasurer to do a revised budget, to ease any pressure that could come from the new CEO. He said you've always been profitable in fx …

Adv. Brincat: There is no debate about that Mr Yafaoui."

In the final submissions however the Defendant put the question: "… why no other employee of the Bank tried the same thing. This is an important point the Tribunal needs to consider." The Tribunal's consideration is that the Tribunal was not presented with any proof that the Plaintiff was the only employee of the Defendant who attempted to send corporate data to his personal account.

2.2 When on the 27th September 2015 the Plaintiff replied to the CEO's email of 26th September 2015[27] and the Plaintiff ended his email by, "I am sorry I have used my personal

[25] Doc. TY 5
[26] Page 7 of the transcript of the testimony of the sitting of the 28th September 2017
[27] Doc. TY 5

email as it is easier than the iphone6," the CEO's reply was addressed to the Plaintiff's personal e-mail and said, "Thanks a lot Toufic, appreciated and noted your comments which will be incorporated." And this when Section 8.2 of the Policy[28] stipulates that, "It is unacceptable for a user to use e-mail services to … transmit messages which forward corporate emails to personal accounts." The CEO did not consider it necessary to draw the Plaintiff's attention to the Policy. Also, in reply to the question, "Was this sort of email (from the CEO's personal email account to the Defendant) something which was common in the past?" the CIO said, "Yes, very common. … prior to February 2016 we did not have the means by which to identify the emails and to block them."[29]

But such incidents as the aforementioned exchange of emails show the background in which the Plaintiff's deviation from the Policy occurred. The Plaintiff testified that, "I always send work home. Send it to my personal email. It has been a pattern of mine for five years at FIMbank. It's not something new."[30] This was confirmed by the Head of HR[31]: "… we asked our IT people to look into the e-mails of Toufic to see whether there were more e-mails or not which he tried to send, and it transpired that – we went back to 2015, the beginning of 2015, and there were various other e-mails containing again various information."

So three months prior to his dismissal the Defendant introduced a change in the degree of tolerance in the forwarding of corporate e-mails to personal accounts – from a degree of tolerance to zero tolerance. Failure to abide by the change in such a relatively short span from the introduction of the zero tolerance ought not to warrant dismissal unless such drastic disciplinary measure is expressly stated in the policy.

2.3 The CIO continued to confirm that since February 2016 these practices stopped "absolutely. They couldn't do otherwise because they were being blocked …." So the Defendant not only did not, but could not, suffer any damages as a result of the Plaintiff's breaching of the Policy. This however does not exculpate the Plaintiff's behaviour.

2.4 The Plaintiff continued to testify that, " … at the (disciplinary) meeting of 17th May … I sat down and as we started sort of talking then I was very nervous so I read a statement." "The GCOO Howard Gaunt did not believe what I said. He did say, "I don't believe you." He felt I never apologised, never said, 'I was sorry'. … The … GCOO … said, 'I did not hear you say, 'I'm sorry'. You did not apologise.' … Now I was truly shocked and lost for what to say. I thought that this would be dealt with with a yellow card or a warning."[32] The expectation on the part of the GCOO for an apology was confirmed by the Defendant in the final submissions.

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[28] Doc. FB 3
[29] Page 13 of the transcript of the testimony of the sitting of 10th November 2016
[30] Page 5 of the transcript of the testimony of the sitting of 28th September 2017
[31] Page 5 of the transcript of the testimony of the sitting of 20th October 2016
[32] Pages 16, 17, and 18 of the transcript of the testimony of the sitting of 27th April 2017

But the Head of HR testified that, "(At the disciplinary hearing) he admitted that he shouldn't have sent these e-mails …"![33] So the Defendant did show remorse!

2.5 The Plaintiff had no previous reprimands. On the contrary, he always received appreciation for top performance over the years with the Defendant.

In doc. TY 1, which is the appraisal of the Plaintiff's performance in 2012, the Appraiser says, "Overall I am quite happy with the progress we have made in the Treasury Department since Toufic took over 2 years ago …. There has been excellent work in the FX area with improved profitability and good development of customers …. The department is now a profitable one … The challenges ahead … will be more inspiring and exciting and this will make Toufic's role much more rewarding although not less demanding. I am sure he will tackle this positively and will be successful in turning Treasury into an even more profitable and contributing department. Increased responsibilities/limits/authorities will also lead to a more satisfying career development. I would like to thank Toufic for his hard work and his strong support during the last 12 very difficult months …."

TY 2 is the appraisal for the Plaintiff for the period 2013-2014. The Appraiser, who is different from the Appraiser of the previous year, and therefore normally tends to be more objective in his assessment, says, "For the past 2 years Toufic has been able to generate a good profitability … keeping in mind the difficult market environment and risks inherent ….".

TY 3 is the appraisal drawn up for the Plaintiff for 2015. It was done jointly by the Appraiser for 2013-2014 and yet another new Appraiser, Michael Davakis, who was employed as the Plaintiff's direct superior. They stated, "This is a commendable performance." Indeed, for Integrity and Ethical Management, the Plaintiff got the highest rating.

3. The Plaintiff testified that his direct superior, Mr Davakis, "thinks that what I did would merit a yellow card and not a dismissal."[34] On his way to the disciplinary hearing of the 17th May 2016 he was greeted by the Defendant's Head of HR and, "he says, look I think as well it will be only a yellow card and then you might resume work even that same day."[35] And, "as I walk in the new CEO comes towards me and gives me like a hug. So he actually shows me a friendly gesture."[36]

So the two senior management members, i.e. the Head of Treasury, and the Head of HR, as well as a top management member, the CEO, were not convinced that the Plaintiff ought to be dismissed. These three officials of the Defendant knew the Plaintiff relatively well. Throughout the testimony and documentation presented to the Tribunal there was no

[33] Page 5 of the transcript of the testimony of the sitting of 20th October 2016

[34] Page 15 of the transcript of the testimony at the sitting of 27th April 2017
[35] Page 16 of the transcript of the testimony of the sitting of 27th April 2017
[36] Page 16 of the transcript of the testimony of the sitting of 27th April 2017

reference whatsoever about the Defendant's GCOO, Mr Gaunt, except in the context of the final disciplinary hearing which led to the decision of the Plaintiff's dismissal, and to a reference by the Plaintiff's direct superior, Mr Davakis, advising the Plaintiff that he (Mr Davakis) thought that Mr Gaunt would favour the issuing of a yellow card.[37] The fact that in the acts of the case the GCOO appeared only at the disciplinary hearing is indicative that he was not as familiar with the Plaintiff's strengths and weaknesses as the Head of HR, the Plaintiff's direct superior, and the CEO.

The Plaintiff testified that Mr Gaunt, "did not believe that my intentions were honest and I was acting in good faith."[38] The GCOO, "… joined the Bank only three months ago, so he didn't know me very well."[39] Neither of these testimonies was contested.

Messrs Subramanian, CEO with whom the Plaintiff exchanged correspondence as previously referred to, Davakis, Head of Treasury, who appraised the Plaintiff's performance, and Cassar, Head of HR, "No, he's a gentleman Mr Cassar,"[40] knew the Plaintiff – they knew him as a person and so they would have applied the disciplinary measure that in their opinion would have been the most effective to help the Plaintiff have the opportunity to prove his loyalty to the Defendant without humiliating him and without demotivating him.

Had the decision been left to the Chief Executive Officer, Mr Subramanian, to the Head of Treasury, Mr Davakis, and the Head of Human Resources, Mr Cassar, the Plaintiff would not have been dismissed. To the Head of HR, to the Plaintiff's direct superior, and to the CEO the Plaintiff did not discredit himself to the point he could no longer be trusted. It was the decision of the Group Chief Operations Officer, who insisted on the Plaintiff's express declaration of compunction, that carried the final decision of dismissal.

The Tribunal remarks that there is more than one way for a person to display regret for his/her behaviour. It is a subjective matter - a matter that affects a person's dignity. The fact that the Plaintiff declared to four top representatives of the Bank that he should not have attempted to send the data to his personal e-mail account, his giving the reason why he wanted to forward the data, which to the Tribunal is plausible though not justifiable, and his declaring that his services to the Defendant were given "with good integrity and good faith"[41], is a form of expression of regret. The Tribunal is convinced that the Plaintiff considered the direct, explicit expression of saying "sorry" to be an act of humiliation; no employee ought to be put in such a situation.

[37] Page 15 of the transcript of the testimony of the sitting of 27th April 2017
[38] Page 18 of the transcript of the testimony of the sitting of 27th April 2017
[39] Page 11 of the transcript of the testimony of the sitting of 28th September 2017
[40] Page 14 of the transcript of the testimony of the sitting of 27th April 2017
[41] Doc. TY 7

4. At the sitting of 28th September 2017[42] the Head of HR testified that, "The reason for the change in decision (from yellow card to dismissal) was that when we were talking to Mr Yafaoui during the meeting and we were prompting him to be forthcoming as to why he sent the information at home he just didn't reply…." But what about the statement that the Plaintiff read out at the disciplinary hearing, in which statement he explained why he needed to send the data to his personal e-mail account? At no point in the Tribunal hearings was the Plaintiff challenged about his testifying that he read out the statement. He was merely asked if he had left a copy of it with the members of the Board of discipline, to which question the Plaintiff replied in the negative. But this did not detract from the truthfulness of the Plaintiff's testifying that he read out a statement.

5. The Tribunal recognises that at such senior and top posts of management the post holders are highly focused and many of them are immune (at least temporarily) to matters that are not strictly relevant to the subject-matter that they are dealing with during a particular phase. It is also common knowledge that certain particularly talented persons tend to be undisciplined and absent minded; they need tactful 'restraining'. This however must not be interpreted as the Tribunal's condoning nonadherence to policies.

6. Whereas the Plaintiff's breach of Defendant's Policy[43] is sufficiently proven, it is the Tribunal's opinion that the Policy lacked clarity and specificity in its articulation of the disciplinary consequences of breaching the Policy. The Policy's references to disciplinary measures appeared in Sections 5, 10, 11.3.5, and 17.

Section 5 said, "Non-compliance with this … Policy will be subject to Management review and disciplinary action will be taken where deemed fit."

Section 10 enunciated, "The Management shall consider the divulging of one's own password to another person … as an act of gross misconduct which can lead to disciplinary action …."

Section 11.3.5 established that, "Should a user continue to work on an infected machine … , then this will be classified as gross misconduct and will be subject to disciplinary action."

Section 17 stated, "… any deviation or exception will be considered as non-compliance and may be subject to disciplinary action as per the … Policy …."

It is custom and practice in the articulation of disciplinary references, when referring to specific serious offences meriting summary dismissal to add the words, "that may include dismissal" after "disciplinary action"; also, the use of the word, "may", rather than, "shall", detracts from the imparting of the required or intended gravity of deviations from the Policy. Indeed, the glaring omission of the words, "that may include dismissal", features

[42] Page 14 of the transcript of the testimony of the sitting of 28th September 2017
[43] Doc. FB 3

also in the circular issued by the Defendant immediately after the incident involving the Plaintiff – the circular of the 12th May 2016 issued at 2251 hrs[44] (i.e. after the incident in question was discovered) states, "Any instances of non-adherence to this … Policy will be subject to disciplinary actions." This statement however is relatively more assertive than the Policy presented as doc. FB 3 because it says that deviations from the Policy, "will", not "may", be subject to disciplinary actions.

Whereas normally gross misconduct implies sufficient gravity of misbehaviour to warrant dismissal, the only two references in the Policy to gross misconduct[45] [46] say respectively that disciplinary action can be taken, and that (gross misconduct) will be subject to disciplinary action. This dilutes the gravity of gross misconduct because in the former it implies that gross misconduct may not necessarily lead to disciplinary action, let alone dismissal, whereas in the latter the disciplinary action does not make reference to dismissal. Also, these only two instances when the Policy considers its violation to constitute gross misbehaviour are in the cases of "the divulging of one's own password to another person, and/or, the use of another person's user account", and, "should a user continue to work on an infected machine without informing the IT Department …" The Plaintiff did not commit any of these two violations. Yet the Plaintiff was accused of gross misbehaviour! Going strictly by the Defendant's Policy, since the Plaintiff was not accused of either of these violations, the Plaintiff could not be accused of gross misbehaviour!

One of the motives that the Defendant mentioned in the letter of termination of employment of the Plaintiff was the Defendant's breaching of Sections 8.2 and 8.3 of the Policy. But whereas other Sections referred to the possibility of disciplinary action being taken in case of their being breached, no such reference was made in these Sections although their being breached was "unacceptable", "prohibited", and "forbidden"; at the same time, the Tribunal recognises the overall cover provided by Section 5 whereby "non-compliance with the Policy will be subject to … disciplinary action".

7. The defendant could have resorted to alternative tough disciplinary measures like (a) issuing a final written warning and, in the Plaintiff's performance appraisal for 2016-2017, giving the Plaintiff the lowest rating to behaviour item entitled "leading and inspiring others" (since according to Section 4.2 of the Policy "Managers are responsible for ensuring that … employees in their business area are made aware of this … Policy and understand their obligations with regard to complying with the Policy"), or (b) issuing him with a final written warning and suspending the plaintiff's performance bonus, or (c) issuing him with a final written warning and subjecting say 50% of the 2016-2017's performance bonus to the plaintiff's abiding strictly by the defendant's policies, systems, and procedures.

[44] Doc. BC 4
[45] Doc. FB 3 page 12 Section 10
[46] Doc. FB 3 page 15 Section 11.3.15

If none of these examples was possible to implement, it was up to the Defendant to find the commensurate disciplinary measure, but dismissal ought not to have been an option.

It is not the Tribunal's duty to suggest specific alternative disciplinary measures; it is the Defendant's prerogative, duty and responsibility to come up with effective and proportionate measures to redress inappropriate behaviour.

8. The Tribunal noted that the Plaintiff was supernumerary in the Defendant's employ. The Defendant's Head of HR explained that, "In December 2015 we employed another person Michael Davakis who was now above Mr Toufic Yafaoui so Toufic was reporting to this new person ….. The Head of Treasury now was Michael Davakis but essentially the responsibilities shifted from Toufic to Michael Davakis, but of course Toufic was still responsible for money things in the Treasury Department but now instead of reporting directly to the CEO he was reporting to Michael Davakis who was then in turn reporting to the CEO…. (Toufic) was (still responsible for the Bank's liquidity) but he wasn't the top person now. So Michael Davakis was ultimately responsible for the treasury function of the Group[47]. At the Tribunal's sitting of the 28th September 2017[48] the Defendant's Head of HR submitted that, "Mr Yafaoui was not replaced …. … his work … it's now been absorbed by the Head (Mr Davakis) and the other people who report to the Head who were also there when Mr Yafaoui left. But he was not replaced …."

In the context of how the Plaintiff's serious misdemeanour was dealt with, the fact that the Plaintiff was not replaced tends to question whether the reasons given in the letter of termination of the Plaintiff's employment were the unadulterated, exclusive, and ultimate motive for the Defendant's decision to go for the extreme measure of dismissal.

9. It is obvious to the Tribunal that the degree of attention, examination, analysis, and thoroughness required to assess if a situation merits dismissal - the capital punishment in employment law - was seriously lacking.

Decision

Having examined and evaluated the statements of case, testimonies, documents and submissions presented and made by both parties, and having made the aforementioned Considerations, the Tribunal, taking all the aforementioned elements in their totality and complexity, deems the Defendant's decision to dismiss the Plaintiff to have been inappropriate, disproportionate and avoidable, and therefore was not for a sufficient cause.

The Defendant shall by way of compensation pay the Plaintiff "one-half of the full wages that would have accrued to" him from the morrow of the last day of the Plaintiff's paid employment with the Defendant in May 2016, until the 14th April 2017 inclusive, and this in

[47] Pages 2, and 3 of the transcript of the testimony of the sitting of 20th October 2016
[48] Page 14 of the transcript of the testimony at that sitting

accordance to article 36 (11) and (12) of chapter 452 of the laws of Malta. The payment shall be effected by the 30th April 2018.

The Tribunal rejects the Plaintiff's request to make "further compensation"[49] notwithstanding the Plaintiff's "personal circumstances"[50] because it deems the aforementioned compensation decided upon by the Tribunal to be fair and reasonable.

With regard to article 78 of chapter 452 of the laws of Malta the Tribunal could not decide this case within the stipulated period due to several deferments requested by both parties.

In accordance with Legal Notice 48 of 1986 of the laws of Malta the representation fees for each party shall be € 93.17. The fees for both parties shall be paid by the Plaintiff.

As a result of this Tribunal Decision this Case is closed.

(signed)

Mr Joseph Delia

Chairman

TRUE COPY

Graziella Spiteri

F/Secretary

[49] Plaintiff's statement of case
[50] Plaintiff's statement of case