INDUSTRIAL TRIBUNAL

Decision Number 2611

Case Number: 3708/JG

In the employment issue

Between

Abdulkerim Abagero Abas
I.D. nr 67947(A)

And

Malta Public Transport
Services Operations Limited (C 48875)

Subject Matter: alleged unfair dismissal

Today: 26th July, 2019

Chairman: Is-Sur Joseph Gerada FCIPD, M.A.(Mediation), IUKB Suisse, Dip.Applied Soc.Stud.,MAAT

1 Introduction

This case was referred to the Tribunal by means of a petition by advocate Dr Frank Cassar on behalf of Mr Abdulkerim Abagero Abas I.D. card 67947 (A), bearing the date of the 20th December, 2018. On the other hand the company Malta Public Transport Services Operations Limited (C 48875) filed its reply in the Court's Registry bearing the date of the 6th February, 2019 and signed by advocate Dr Paul Gonzi and advocate Dr Thomas Bugeja. In view that Mr Abdulkerim Abagero Abas I.D. card 67947 (A) is a foreign national and English is a language that he uses to communicate, the parties agreed to have the proceedings done in English and the decision is also delivered in English language.

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.

2 Facts of the case

The Plaintiff was employed by the said company namely Malta Public Transport Operations Limited hereunder referred as "the company" since October of 2016 in the role of a scheduled bus driver on a full time basis.

That on the 28th August, 2018 the company terminated his employment on the basis that Mr Abdulkerim Abagero Abas failed to perform job related tasks assigned. This is an offence as per Malta Public Transport policies and procedures or the Collective Agreement, which reads:

1) Receiving more than two misconducts written warnings,
2) Disobeying company instructions or procedures.

The company provided evidence namely Dok MPT 2, 3, 4, 5, 13, 14, 15, 16, 17, that the employee Mr Abdulkerim Abagero Abas had a series of warnings namely Dok MPT 8,11, 12, as well as, produced the performance record covering all the above offences including the more serious misconducts and gross misconducts. According to the Collective Agreement 2016/2020 such offences carry various penalties including suspension without pay of more than fifteen days or termination of employment for good and sufficient cause, reference collective agreement clause 38.5.

On the other hand Mr Abdulkerim Abagero Abas claims that he had been the subject of discrimination as he had been notified to attend a disciplinary hearing on the 27th March, 2018 which gave the wrong time for the hearing and due to this fact missed being heard but nonetheless he was found guilty as charged and penalised.

He also claims that another warning was unjustly issued as he claims that the delay in performing the next duty was not due to a deliberate act to skip the trip but because he needed to rest and which if he failed to do so might have jeopardised the lives of his passengers and himself.

Mr Abdulkerim Abagero Abas felt that these are the basis upon which he claims discrimination in his regard and therefore renders the dismissal unjust.

3 Considerations

The Tribunal noted the claim by Mr Abdulkerim Abagero Abas that although he welcomed working overtime, sometimes it got too much for him especially when such overtime work was mandated. He claims that tiredness sometimes made him feel sick and actually reported sick on a number of occasions. Moreover, he claims that the doctor seemed to question the motive behind the sick report and this caused the employee to report for work even though he did not feel up to it.

It was also noted that Abdulkerim Abagero Abas is a foreign national with limited command of the English language and therefore such situation makes communication more difficult. In this regard provisions that ensures that information does not only flow but it serves its purpose of getting the message through and implications understood, assumes greater importance.

The Tribunal noted and established how the plaintiff was served with a written warning dated 22nd August, 2018 about an offence which was described as "Gross Misconduct" after he was called for a hearing at the wrong time of the day namely indicated to attend at 09.45 pm instead of 09.45 am. The Tribunal noted how this mistake was either not noted by Management or if noted was not corrected. The absence of the plaintiff from the disciplinary proceeding did not trigger any alert to Management that something could be amiss.

It was noted how Mr Abdulkerim Abagero Abas failed to produce a report for the two charges dated 17th April, 2018 re incident of the 11th April, 2018 and the other of the 31st July, 2018 re incident of the 27th July, 2018 which once again, the lack of response did not trigger any alert to Management that something could be amiss.

It was noted how despite the eight warnings on his record Mr Abdulkerim Abagero Abas chose, not to use the grievance procedures contemplated in the Collective Agreement to address any concerns that he had and neither used the services of a trade union in his defence. In addition he even failed to appeal the dismissal decision dated 28th August, 2018. Once again none of these omissions which would have given the plaintiff legitimate recourse to justice triggered any alert to Management that something is not adding up.

The allegations by Mr Abdulkerim Abagero Abas that his immediate supervisors in the company abused their position, by their lack of good people management practices and the use of racist language, was also noted.

The Tribunal noted the disciplinary procedure followed by the company and its attention to adhere to the provisions of the collective agreement. In particular notes the standard format of the;

(i) Disciplinary Hearing Form

(ii) The appointment details for disciplinary hearing for Gross Misconduct
(iii) The Charge letter for Gross Misconduct

The sophisticated nature of tracking the buses on route as well as its system of communicating with the drivers via their ticket system apart from the cell phone facility was also noted. In addition, it was also noted that when the communication through the ticket system and through the cell phone failed to reach Mr Abdulkerim Abagero Abas on the 31st July, 2018, the control room was creative by reaching out to another driver in the vicinity who could personally speak to the plaintiff and check on his well-being.

4 Decision

The company produced extensive documentary evidence as mentioned above while the testimonies of Mr C Baldacchino (driver), Mr G Vitale (control room operator) and Mr J Simiana (Operations deputy director) corroborate adequately the said documentary evidence. There is no justification for plaintiff to have left the passengers waiting for circa half an hour when he was supposed to have departed half an hour before. There is also no justification for citing tiredness as a reason to skip a scheduled trip on the 31st July, 2018. If the situation was so serious that plaintiff could not drive for safety reasons, the reasonable thing to do was to call the Control Room to send a replacement and if no one took the call, seek another driver in the vicinity to assist and if this did not work keep trying to contact the office. It can never ever be acceptable to abandon duties at work and instead go to sleep. The suggestion that plaintiff might have fainted and not slept is not plausible as it is not consistent with the transcript of the telephone conversation between the plaintiff and Mr G Vitale.

Mr Abdulkerim Abagero Abas often referred to his grievances as discrimination but the Tribunal could find no discriminatory acts, as defined by law, from Management and therefore this allegation about discrimination was not proved.

In this regard the company proved that it had good grounds to dismiss plaintiff. However, the Tribunal needed to consider also the context within which this case was framed and the reality of the situation as perceived from all angles.

In this case, apart from the fact that Mr Abdulkerim Abagero Abas was an employee of the company is a migrant with refugee status. To make a success of his role he needs to understand and internalise both the operational and the administrative rules of the company, like any other employee but being a migrant it may require additional effort and being a refugee may require even more effort. The Human Resource department of the company is in pole position to facilitate

or otherwise this process. The cultural implications of migrant workers are critical for successful integration at the place of work. In this regard one has to note that the barriers to integration may not only be linguistic in nature but the mere systems of grievance procedures, fair hearing, due process, work place counselling and membership in a trade union may be alien concepts and sometimes confusing. Such social sophistication is unfortunately not the experience of most migrant refugees.

In this regard, it might not come as a total surprise that after receiving the warning of gross misconduct dated 5th April, 2018 Mr Abdulkerim Abagero Abas failed to report to HR the fact that he had an unfair hearing and did not contest the warning. He was right is saying that the error of the time of the hearing reading 09.45pm instead of 09.45am was not his mistake and therefore it is reasonable to expect that he would lodge a formal complaint with HR. Yet he did not. Actually, he never resorted to the grievance process contemplated in the collective agreement. This begs the question – Was he aware of how the company manages its administrative side of the business and in particular how to present a grievance to management?

Moreover, the plaintiff failed to respond to the warning dated 22nd August, 2018 emanating from the failed hearing of the 27th March, 2018, and failed to respond to the charges of the 17th April and 31st July, 2018. In addition he even failed to appeal his dismissal from the company.

Despite the overwhelming evidence of the precariousness of his employment position, he chose to place himself in further vulnerability by not seeking assistance, which, a reasonably intelligent person like Mr Abdulkerim Abagero Abas would not be expected to do but he did. This begs a second question how aware was Mr Abdulkerim Abagero Abas of the implications of the disciplinary procedures and the corresponding documentation that he was being served with?

The conclusion that the Tribunal comes to is that Mr Abdulkerim Abagero Abas faced challenges in navigating his way through the administrative procedures of the company. He was trying to work in a system whose knowledge and understanding of was limited, at best, to the operational side of the business while ignorant of how the administrative and the people relations side of the company worked, namely the HR system and the processing of staff complaints and the wider picture of the disciplinary policy and its implications.

On the other hand, while the eight warnings clearly indicated that the disciplinary approach was not having the desired effect and that the logical conclusion to this state of affairs would likely be dismissal, the company was not at all alerted that it is unorthodox that an employee chooses not to defend himself in a high risk situation that might lead to him losing his job. In such a context it is reasonable to expect that the Human Resource Department calls in the employee and investigates such unorthodox behaviour and figure out what the reality is. The Tribunal finds no evidence of such reasonableness.

The Collective Agreement has a clear disciplinary policy reference clause 38 and consistent with this policy the company developed tools such as;

(i) Disciplinary Hearing Form
(ii) The appointment details for disciplinary hearing for Gross Misconduct
(iii) The Charge letter for Gross Misconduct.

The Tribunal notes that these documents tend to satisfy the more legal elements of the process and less on the implications of the process. One very important document in this regard is the Disciplinary Hearing Form. This form ensures that the person charged with the offence has;

(i) Understood the purpose of the disciplinary process,
and for those who chose to represent themselves;
(ii) Confirm that they have chosen not to be assisted in the disciplinary procedure,
(iii) Confirm that they received the Charge letter and
(iv) Confirm that they received the letter of summons.

However there is nothing that indicates whether the employee understands not only the process but also the implications of such confirmations. For the native employee these things might be easier to understood but for a migrant refugee who has limitations even at the language level let alone at the cultural level, may hold little substance.

The disciplinary procedures are an integral part of what constitutes a good and sufficient cause for dismissal and therefore form is an important element but so is substance. The employee needs to understand not only the way the process will work (legal aspect) but also understands how best to defend himself and the implications that such process might have on his employment relationship with the company (human aspect). While the former element is well catered for by the Human Resource Department, the latter is missing. A just process requires both.

The idea of a one size fits all, in this case one form fits all employees, risks excluding some of the employees and this is where the possibility of injustice and inequality creeps into the system.

Alternatively, the concept of heterogeneity adopts an individual rather than a group approach and while it has one standard for all, it communicates and deals with different persons in different ways to ensure that the standard is achieved by all and not only by those in the dominant group.

Reasonable accommodation is needed not because it is a right or privilege but a pragmatic measure stemming from the basic principle of equality and fairness – different treatment without being preferential.

Apart from imparting information about the process, the company has to ensure that the charged employee understands the implications and possible consequences emanating from the process.

This standard assumes greater importance when the consequence may include dismissal which for an employee this is the capital punishment of employment.

Clause 38.1 of the Collective Agreement contemplates informal counselling and Mr Abdulkerim Abagero Abas badly needed a professional HR person to counsel him and explain in no uncertain terms that his behaviour at work, if it continued as it was, was heading to the obvious outcome that is; dismissal. This very important aspect of people management which would have placed the company is an excellent position to better understand the rationale of his behaviour and gain the opportunity to influence the employee positively rather than punitively was missed. Not one single document was produced to satisfy the Tribunal that the company spared some time and effort in this pro-active response.

The litmus test in such situations is whether the charged person was placed in the best position to make an informed decision about how best to defend oneself against the possibility of dismissal.

The Tribunal feels that the company fell short of the standard expected.

Moreover, the written warnings reference Dok MPT 11 and 12 state that;

Abdulkerim, the company wants to believe that you will do your best to improve your performance. Should this not be the case, you would leave the company no option but to adopt further disciplinary measures.

In this case, further disciplinary measures include the capital punishment of employment that is dismissal and in that regard it is imperative and necessary that it is spelled out loud and clear for the receiver of the warning to understand the serious risks involved. There need to be no ambiguity in this regard and a warning that may lead to dismissal needs to state so clearly.

This detail is imperative in such a context and if missing seriously weakens the case for the company.

In this case the warnings reference Dok MPT 11 and 12 do not carry this element clearly.

The Tribunal had on one hand, to weigh the gravity of the behaviour of Mr Abdulkerim Abagero Abas which was serious and justified at law and on the other hand the way the company managed the disciplinary action which failed to ensure that plaintiff was fully understanding the implications of what was being served and by deduction lacked the ability to offer the best defence possible, as well as, the lack of clarity in the relevant warning letters whereby they do not explicitly include the wording that further disciplinary measures includes; Dismissal.

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 unjust.

5 Compensation

The Defendant shall by way of compensation pay the Plaintiff Eight Hundred euros (€ 800) within four weeks from the decision of this case.

In accordance with Legal Notice 48 of 1986 of the laws of Malta the representation fees for each party shall be € 93.17. Each party in the case shall pay the respective fees to their legal counsel.

Tribunal Decision deems this Case closed.

(signed)

Joseph Gerada
Chairperson

TRUE COPY

Graziella Spiteri
F/Secretary