

INDUSTRIAL TRIBUNAL

Decision No. 2646

Case Number: 3714/JG

In the employment issue

between

Cher Tonna (I.D. 68586M)

and

CCBill EU Limited (C 34086)

Subject matter: alleged unfair dismissal

Today: 24th of January, 2020

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

1 Introduction

This case was referred to the Industrial Tribunal by means of a petition dated 9th January, 2019 by advocate Dr Paul Farrugia on behalf of Ms Cher Tonna I.D. card 68586 M. On the other hand the company CCBill EU Limited C 34086 filed its reply in the court's registry bearing the date of the 25th February, 2019 and signed by advocates Dr Georg Sapiano and Dr Joseph M Grech.

In view that the process included foreign nationals, some of the deliberations were conducted in the English language. This decision is also being served in the English language to facilitate communication.

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, Ms Cher Tonna was employed by the said company namely CCBill EU Limited hereunder referred as “the company” on the 5th January, of 2018 in the role of Human Resource Manager on a full time basis. Ms Cher Tonna had a probationary period of six months.

On the 27th July, 2019 she was called in by the Managing Director Mr Adrian Camilleri and in the presence via Skype of the Global Director of Human Resource, Ms Kimberly Dawn Moncher located in Arizona United States of America, was informed that they received complaints from members of the staff, about the Plaintiff’s behaviour.

In her statement Ms Moncher said that the complaints revolved around Ms Cher Tonna’s inability to hold on to confidential information and claimed that the latter was heard on several occasions, discussing things which she were told by employees in confidence and in her sole capacity as Human Resource Manager.

On the other hand Ms Tonna said that Mr Adrian Camilleri and Ms Kimberly Moncher were not specific about the nature of the incidents or the alleged conversations neither named the person or persons that placed the complains. She claimed that this state of affairs placed her in a disadvantage to defend her position against the allegations. Nevertheless, Ms Moncher stated that she gave Ms Tonna a list of guiding behaviours that she was expecting the HR Manager to conform with, in order to succeed in her job.

On the 14th, September, 2019 Ms Kimberly Moncher had a one to one conversation with Ms Tonna over Skype where the former explained to Ms Tonna that there was much dissatisfaction amongst senior management regarding her behaviour and that the outcome was not yet determined.

On the other hand Ms Tonna said that the conversation revolved around a vacancy advert of the company which Ms Tonna had uploaded on her facebook page, as well as, the incident that took place during the company pool party. Once again Ms Tonna claims that she was not given details about the allegations made and therefore felt incapable to defend her position, well.

On the 17th of September, 2018 Ms Tonna received an email informing her that her employment was terminated and that she should not report for work on the 18th September. The email was followed by a formal letter of termination signed by Mr Ronald Cadwell, the Group CEO on the same day.

3 Considerations

In this case, the Tribunal needed to rule whether the company's action to dismiss the HR Manager was a fair and just one.

The Managing Director Mr Adrian Camilleri said in his statement that he suspected that Ms Tonna may have shared information with some employees about the fact that a team lead had resigned his post while he was being investigated about alleged stalking of an employee. Mr Camilleri however claims that he had no way of verifying whether his suspicions about Ms Tonna were founded or not. The Tribunal asserts that conducting an internal investigation may have gone a long way to provide the information that the Managing Director required. The choice of not investigating the matter was an option which he chose to take.

He also reported that his Director of Software Development had approached him and expressed concern about Ms Tonna's attitude and inability to restrain herself from passing comments and from maintaining confidentiality. In addition Mr Adrian Montebello, the Network Operations Manager approached him with similar reports. He also claims that there were other managers who had complained about similar behaviour which included also the allegations that Ms Tonna posted inappropriate posts on her facebook page and on the intra-net platform Slack.

Given this body of information, the Tribunal expected that the Managing Director and the Global Director of Human Resource take decisive action and carry out a formal investigation into these reports and if necessary take disciplinary action. They opted not to.

Mr Camilleri cites in his statement the incident where he experienced first-hand Ms Tonna discussing the situation of the assistant staff chef and after drawing her attention to this fact, the Managing Director was satisfied with Ms Tonna's response with a mere, quote: "it will not happen again in the future". The Tribunal is surprised how after the above body of information and this first-hand evidence, the Managing Director is so easily satisfied with an apology and fails to rise to the occasion and issue a warning letter to underline the importance of confidentiality. Such action would have sent a clear message that this behaviour is not tolerated and indeed is a cause for dismissal. In this case management had no problem with the disclosure of the report as it was first-hand information from the Managing Director himself and therefore it was a defining moment for the Managing Director to set the standard in no uncertain terms. Once again, the Managing Director opted not to issue a warning letter.

Compounded by the fact that Ms Tonna ended her probationary period on the 4th July, 2018, a mere 17 working days before the meeting of the 27th July, the Tribunal would be justified to probe that if things were so bad why was Ms Tonna's employment not terminated during the probationary period? The Managing Director and the Global Director of Human Resource could have easily done this but once again they opted not to.

It is opportune at this point to question why the probationary period was set for 6 months when the standard practice of the probationary period for managerial positions is 12 months. In this case, management decided to go for the shorter period and with the benefit of hindsight, they once again landed the company in further complications.

The Company presented a number of witnesses who claim they have evidence of the Plaintiff's alleged misbehaviour.

Mr Degiorgio, the software development teamlead recalled how Ms Tonna referred to her work with a depressed member of staff during a sub-committee meeting in the presence of Mr Degiorgio and Mr Mizzi.

Mr Mizzi cloud engineer related the event when he was shown documents by Ms Tonna relating to the action taken by management against the staff member who caused the pool incident. He was also unhappy that pictures were taken by Ms Tonna but which were deleted upon his request.

Ms D'Anastasi UI developer recalled how Ms Tonna used to discuss private matters of employees in the canteen and how she was concerned about the gossip in the office following the resignation of a manager. She was also upset about the pictures taken during the pool party but which were deleted upon her request.

Mr Muscat network engineer was upset mainly because of what he described as unprofessional comments about the root cause of his behaviour during the pool party and how Ms Tonna's diagnosed a social condition when she does not have the professional credentials to do so.

Mr Scorey software development manager complained about Ms Tonna's comments made before junior staff about management's lack of commitment to update the HR software system.

Mr Montebello network services manager recalled when Ms Tonna made references to a staff member during the lunch break in the canteen and when she exclaimed that the best way to get new office furniture was to destroy the current one described by Mr Montebello as “wobbly”.

The witnesses showed consistency in the fact that they considered their HR Manager not to be discreet enough both on the personal level but also on corporate issues and in view of this they could not trust her and therefore they claimed that Ms Tonna lacked the capacity to serve them well. These allegations are of course serious enough to warrant an investigation and if facts are corroborated, a disciplinary process kicks in which may even lead to dismissal. However, the due process has to be carried out which validates or otherwise the allegations made. Allegations on their own do not constitute guilt and therefore the due process is needed to proof or disproof the allegations.

The Company did not seem to be short of witnesses during the proceedings, so there was no problem with having these same witnesses relate their same testimony during an internal investigation and allow a disciplinary process to take its normal course. Notwithstanding, once again, the Managing Director opted to do nothing of the sort.

The gossip about Ms Tonna’s private affairs which Ms Tonna categorically refuted was dismissed by the Managing Director as mere speculation, another word for rumours, rather than treating it for what it really was an act of vilification and defamation.

The Tribunal notes the constant failure of leadership of senior management to take decisive and timely action and do what it was supposed to do, that is, carry out a formal investigation into the allegations, draw the appropriate conclusions and take the necessary action.

The responsibility of those in leadership positions is to define the corporate culture and be seen and heard encouraging and rewarding behaviours that are embraced by the company and addressing effectively those behaviours that are unacceptable for the organisation. Such leadership would help people adjust and fit the culture and over time such behaviours deliver the culture that the organisation wants. The company was presented with several opportunities to assert its leadership which it repeatedly missed and consequently this level of inaction gave way for more gossip and rumours.

The Tribunal also notes that apart from the lack of detailed information about the allegations against Ms Tonna, a number of mixed messages were levelled at her.

Ms Moncher described the allegations as quote: “quite serious” even if the conversation was kept quote: “light”. On the other hand Mr Camilleri was concerned that the allegations were serious enough to be escalated to him even if he thought that quote “the situation did not appear problematic enough”.

So, on one hand Ms Moncher describes the incidents as serious, even if management provides no significant details about the allegations, and on the other hand, Mr Camilleri describes the situation as not problematic enough. By deduction, the mere fact that neither the Managing Director nor the Global Director of Human Resource felt the need to issue a basic warning letter clearly implies that the indiscretions were not serious enough to warrant one. These mixed messages confuse employees and when under these circumstances, they fail to respond adequately, they cannot be held liable.

In a case of unfair dismissal the defendant has to make it clear that a specific behaviour is unacceptable and that failure to comply shall lead to dismissal. Failing to operate in this manner seriously weakens the case for the defendant.

The generic nature of the allegations, lacking specific details of circumstances, people and place and failure to provide adequate information to the plaintiff even when requested, as well as failing to conduct a formal investigation and follow the due disciplinary process, skewed the system against Ms Tonna. Under these conditions, she had no real possibility to adequately defend herself.

A second meeting was held on the 14th September between Ms Moncher and Ms Tonna via skype about further allegations that she received from staff members. Ms Moncher said that some of Ms Tonna’s alleged behaviours had verified sources but nevertheless none were presented to Ms Tonna. It appears that Ms Tonna was considered guilty until she is proved innocent.

Moreover, some new allegations were dismissed by Ms Moncher as sheer speculation and therefore by deduction nothing to be bothered about. Speculation is another word for rumours which can be tantamount to bullying and harassment and therefore very serious issues and management is obliged, at law, to act. The HR system has to be a fair one where an employee is not only disciplined when wrongdoing is proved but also to protect the employee’s well-being when abused. Instead Ms Moncher dismissed the important elements where the employee needed protection, accepted the elements which she considered Ms Tonna to be guilty of and decided or recommended the dismissal of Ms Tonna without a due

process. Ms Moncher applied a skewed process against the employee and therefore justice could not be served.

Moreover, the system was skewed not only because the due process was seriously defective but defective to an extent that she was not even given the opportunity to appeal the dismissal decision. This is standard procedure in a regular grievance and disciplinary policy. Yet Ms Moncher opted not to follow such basic practice.

In fact the HR Manager Ms Tonna was precluded by the Global Director of Human Resource Ms Moncher from developing a grievance and disciplinary policy and procedure that is meant to offer the employees a fair hearing. So this shortcoming is not one of omission but of commission. This is not consistent with the professional management of people at work and therefore further weakens the case for the company.

The events that followed the dismissal are equally concerning to the Tribunal. Within an incredibly short period of 8 working days from termination of employment of Ms Tonna, Ms Cindy Anastasi, a former employee of CCBill EU Ltd, resigns her post with Tangiers International Ltd to take up the vacant post of Ms Tonna at CCBill EU Ltd. Ms Cindy Anastasi does not leave Tangiers International Ltd until at least the 12th October, 2018 yet she is so well informed about the events leading to the dismissal of Ms Tonna that she is confident to call her new Managing Director, who at the time, was on vacation in Spain. Ms Cindy Anastasi updates him on the decision that senior management in the United States and in Malta dismissed his HR Manager, informs him that the company initiated a recruitment process, explains that interviews were conducted and that a contract of employment concluded and announces that coincidentally she is his new HR Manager. Mr Camilleri states that he was overwhelmed by messages from Ms Cindy Anastasi while in Spain.

What seems unreal for the Tribunal is the fact that these strategic developments for the business do not seem to perturb the Managing Director, in fact he reports that he could not say that he was unhappy of course with his new HR Manager. Anyway, Mr Camilleri states that they had already previously discussed the fact that Ms Cindy Anastasi was unhappy in her current position and was looking for a new position. The Managing Director seems to imply that the fact that the vacant position was filled by Ms Cindy Anastasi within 8 working days was nothing but a lucky coincidence.

The level of access to information that Ms Cindy Anastasi had about decisions taken by senior management in Malta and in the United States, her familiarity with her new Managing Director to call him while on vacation in Spain and the authority she felt she had to report to

him that his HR Manager has been sacked and replaced, is not typical of the behaviour of a new employee. It is neither the typical behaviour of a Managing Director to act indifferent in front of these developments unless he either knew well in advance of how things will roll or lacks leadership competence. Either way, it is not consistent with credible leadership.

4 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 unjust.

5 Compensation

The Defendant CCBill EU Limited shall by way of compensation pay the Plaintiff Ms Cher Tonna Twenty Two Thousand euros (€22,000) within four weeks from the decision of this case.

The Tribunal directs that the employment records of Ms Cher Tonna held by the National Employment Authority and JobsPlus are changed to read that the reason of termination was unfair dismissal.

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