

Industrial Tribunal
Decision Number: 2659

Case No: 3659/JD

Employment Issue

Between

Ali Saleban Jama ID55514A

And

John Borda ghan-nom ta' J & J Scrap
Metals

Subject Matter: alleged unfair dismissal

Chairman: Is-Sur Joseph Delia BA(Hons)(Econ), FIPD

Today 27th February, 2020

¹APPLICATION

The plaintiff, Mr Ali Saleban Jama, lodged an application in the Law Courts on 4th July 2018.

The application explained that the plaintiff suffered an industrial injury resulting in a 28-day hospitalisation followed by a period of convalescence. During such period his employer informed him that he was dismissed and requested him to sign a form saying that his employment was being terminated due to his failing to perform duties as agreed in the employment contract.

The plaintiff claimed that his dismissal was unjust and illegal and requested the Tribunal to so declare it and claimed all monies due to him for real and moral damages.

REPLY

By means of a reply received by the Tribunal on 5th October 2018 the defendant, J.J. Borda Scrap Metals, asserted that the plaintiff's claims had neither factual nor legal basis.

The plaintiff was injured at work in December 2017 and was given injury leave. € 500 of the injury leave payment was forwarded to him in advance, at the plaintiff's request, so that he

¹ The parties agreed that since the plaintiff did not understand Maltese the proceedings would be held in the English language; the Tribunal upheld the agreement.

could send the money to his family. He was given also an *ex gratia* payment of € 100 for medication.

The plaintiff returned to work in February 2018, presenting the defendant with a fit-for-work certificate.

On the morrow of his presenting the aforementioned certificate the plaintiff did not report for work, without advising his employer.

He turned up for work two weeks later and requested defendant to pay him for the said fortnight without giving a valid justification for his absence. The defendant paid him for one of those two weeks.

The plaintiff's absence continued for another two months. On his return to work, on the 1st May 2018, when asked to justify his absence from work, the plaintiff did not give a valid reason.

Therefore the defendant could not but terminate the plaintiff's employment for a good and sufficient cause, in terms of the law, since the plaintiff had abandoned his place of work.

The Tribunal ought to restrict any compensation in accordance to Chapter 452 of the Laws of Malta and was requested to declare that legally the termination of employment was not unjust and so the plaintiff was not owed any compensation.

TRIBUNAL'S CONSIDERATIONS

1. In his testimony the defendant corrected what he stated in his Reply to the effect that the € 500 mentioned in the Reply was a loan and not money in advance².
2. When, two weeks after the plaintiff was certified as being fit for work³ the defendant asked him why he did not report for work during that fortnight the plaintiff, "... started shouting" and threatened to get a lawyer and the police⁴. This incident was immediately followed by the plaintiff's pleading to the defendant to pay him for the two weeks that he was absent. The defendant paid him for one of them. The plaintiff had to report for work on the following working day. He did not, turning up after two weeks. He worked for two weeks and did not show up for work before another five weeks, ie on the 1st May 2018 – and all this without the plaintiff's giving justification for his absence.
3. The only two medical certificates⁵ submitted by the plaintiff to the Tribunal are dated the 20th July 2018, and the 30th October 2018, almost three months, and five months, respectively, after the plaintiff's employment was terminated. The hospital appointments card presented to the Tribunal shows that he had a single appointment

² Page 3 of the transcript of the sitting of the 11th October 2018

³ The plaintiff was certified that he could return to work as from the 25th February 2018. He did not turn up for work but called at his place of work on 9th March 2018 to collect his wages – *ibid*

⁴ Page 3 of the transcript of the sitting of the 11th October 2018

⁵ In addition to the December 2017 surgical intervention case history/summary and x-ray results of the same month.

every month since the date when he was certified by hospital to return to work; such appointments are scheduled. Unless the plaintiff proved to the Tribunal that he made the defendant aware of such appointments – which proof was not submitted – the medical certificates and appointments card presented by the plaintiff as evidence are useless because the defendant could not have been aware of such certificates/appointments when he made the decision to terminate the plaintiff's employment⁶. The defendant testified that, except for the certificates showing that the plaintiff would be operated upon on the 5th, and 12th January 2018, and the one certifying the plaintiff as fit for work, the first time that he saw the plaintiff's medical certificates was during the Tribunal hearings⁷. This testimony was not challenged by the plaintiff.

4. The plaintiff did not present the only certificate that, according to the evidence presented to the Tribunal, was in possession of the employer⁸, viz. the one presented to the defendant by the plaintiff certifying that the plaintiff could return to work from the 25th February 2018. This certificate was presented to the Tribunal by the defendant!
5. The plaintiff testified that his specialist advised him not to report for work before one year. He did not tell the Tribunal why he did not say so to the defendant to justify his absence from work. What he gave the defendant was a certificate saying that the plaintiff could return for work on the 25th February 2018, which date was just over two months from the date of the industrial accident!
6. The Tribunal finds it rather coincidental that the defendant claimed that his specialist advised him not to return to work before one year, which happens to be the exact period of the mandatory minimum duration of paid injury leave. In any case, the plaintiff did not produce any evidence of such medical advice. The specialist certificates that he produced say that the plaintiff, "should try to avoid handling cutting machines.... The sensory ... loss is permanent"⁹, and that he suffered a 7% disability¹⁰. Neither of these certificates nor any other document submitted to the Tribunal made any reference to the one year claimed by the defendant.
7. The proven facts of the case show that the plaintiff was not reliable in terms of reporting for work. No employer is expected to accept such a situation since it does not enable him to plan the firm's operations, and burdens the plaintiff's fellow workers unnecessarily, possibly making the said operations more expensive due to overtime that would have to be incurred to compensate for the plaintiff's absence.

⁶ Pages 1, and 2 of the transcript of the hearing of 7th February 2019.

⁷ Page 2 of the transcript of the hearing of 7th February 2019

⁸ The defendant must have had also a hospital statement showing the dates of the two January 2018 (four months prior to the termination of employment) surgical interventions undergone by the plaintiff, and the plaintiff's December 2017 application for Social Security Injury Benefit that carried an 'open' medical certificate. The Tribunal was provided with no proof that these documents had been presented to the defendant.

⁹ Document SJ27

¹⁰ Doc. SJ12

8. The plaintiff advised the Tribunal that he would present his specialist as a witness.¹¹ He did not present him.
9. The plaintiff testified that the two visits to hospital¹², which visits were scheduled, from the 26th February until he was dismissed from work in May were as an outpatient.¹³ So he could have reported for work, if not to carry out work, at least to explain the situation, as the plaintiff saw it, to his employer. He testified that in March he had phoned “John” at the office of the defendant informing him that he was in hospital, and that he got no “response”.¹⁴ He did not summon “John” to testify.
10. The plaintiff testified that he visited hospital, when requested by the hospital – every two weeks; in the same breath he testified that it was every two days.¹⁵ But the hospital’s Outpatient Service Appointment Record that he presented to the Tribunal shows that the visits from January to May 2018 were monthly.
11. From the submissions to the Tribunal it results that the defendant honoured his legal monetary obligations towards the plaintiff. He even gave him a loan, financial assistance for medication, and a payment of € 600 notwithstanding that the defendant considered the latter as not strictly due to the plaintiff.¹⁶ The defendant also showed concern for the welfare of the plaintiff - “The first time he left hospital he came to our offices, ... , (I) asked how he is, if he needs anything that we as a company or me as an individual can do and he told me that he’s fine at hospital ...”¹⁷ This testimony was not challenged by the plaintiff.
12. In his testimony the plaintiff made a fleeting¹⁸ allegation that he was dismissed because the defendant was not satisfied with his performance at work and not because of unauthorized absence from work. He based his allegation on the fact that the Jobsplus Termination Form shows that the reason of termination was “Failure to perform duties ...”.¹⁹ The Tribunal notes that the Form is not signed by the defendant.
13. In his testimony the defendant declared that the reason of dismissal was, “... that he can’t continue working for us for not reporting without an excuse for five weeks ...”.²⁰ Indeed he testified also that, “... we had no problem with Jama.”²¹ And, “... six weeks passed by and Jama reported to work. I ... told him to sign the termination form because if he asked, if something happened to him, ... if he needed help we would have come to a compromise, but nor reporting to work for six weeks, I felt that it’s a case for telling him to sign his termination form”²² The plaintiff did not contradict

¹¹ Page 6 of the transcript of the sitting of the 4th April 2019

¹² Doc. SJ31

¹³ Page 10 of the transcript of the sitting of the 21st November 2019

¹⁴ Page 7 of the transcript of the sitting of the 21st November 2019

¹⁵ Page 12 of the transcript of the sitting of the 21st November 2019

¹⁶ Page 4 of the transcript of the sitting of 7th February 2019

¹⁷ Page 2 of the transcript of the sitting of 11th October 2018

¹⁸ The plaintiff did not submit any treatment of this allegation, neither in the Application, nor during the hearings, and not even in the final submissions.

¹⁹ Doc. SJ4, and page 5 of the transcript of the sitting of the 4th April 2019.

²⁰ Page 3 of the transcript of the sitting of 7th February 2019

²¹ Page 2 of the transcript of the sitting of 11th October 2018

²² Page 4 of the transcript of the sitting of 11th October 2018

any of the testimony given by the defendant. He merely made an allegation based on the Jobsplus Termination Form which the defendant did not sign. In any case, this point was not taken up or treated by the plaintiff as a critical contradiction of the testimony and evidence given by the defendant. Indeed, it was not even mentioned in any of the plaintiff's submissions; these dealt exclusively with the absence of the plaintiff from his place of work. Also, throughout the defendant's testimony it was amply and consistently made clear by the defendant that the reason for terminating the employment of the plaintiff was that of abandonment of employment. The Tribunal is satisfied that the actual reason of dismissal was abandonment of employment, as per the defendant's Reply to the plaintiff's Application²³.

14. According to the plaintiff's employment history²⁴ the plaintiff hardly ever managed to retain employment longer than three months. He provided no information on the reasons of termination from the six jobs that are registered with Jobsplus.

DECISION

Having attentively heard both parties' testimonies of all the witnesses presented, and examined the Application, the Reply, the entire documentation submitted, the transcripts of the Tribunal hearings, and the final submissions, the Tribunal made its considerations as per 1 to 14 and hereby decides that taking all the elements of the case in their totality the termination of employment of Mr Ali Saleban Jama was for a good and sufficient cause in terms of Chapter 452 of the Laws of Malta, and therefore the plaintiff is not owed any monies for any damages.

This case could not be decided upon within the period indicated in Article 78 (1) of Chapter 452 of the Laws of Malta because of administrative constraints and requests for deferment of hearings.

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 paying its own fee.

Thus this trade dispute is resolved.

(signed)

Joseph Delia
Chairman

TRUE COPY

Graziella Spiteri
F/Secretary

²³ Page 1 of the Reply

²⁴ Doc. SJ14