

TRIBUNAL INDUSTRIJALI

Decizjoni Nru 2908

Kaz Numru 3921/JG

Fil-Kwistjoni tax-xoghol

Bejn

Mohammed Bhaah (I.D. 0102225A)

U

Sara Grech Limited (C7360)

Dwar: Tkeccija mill-impjeg allegata li hi ngusta

Illum: 12 ta' Meju, 2023

**Chairman: Is-Sur 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 20th November 2020 by advocate Dr Paul Farrugia on behalf of Mohammed Bhaah I.D. card (C 0102225A). On the other hand, the company Sara Grech Limited (C 7360) filed its reply in the court's registry bearing the date of the 15th January, 2021 and signed by advocates Dr Kris Scicluna and Dr Joseph M Grech. In view that the process included foreign nationals, 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, Mr Mohammed Bhaah was employed in 2014 on a fulltime indefinite contract of employment. He was on a fixed salary and commissions on rentals and sales transactions – folio 6. In view of his Libyan nationality, he was assigned the business of the Arab nationals. He claims that he worked hard and was one of the better sub agents of the company.

On the 1st July, 2020 the plaintiff had his employment terminated on grounds of abandonment of his place of work - ref folio 5. The date of termination was later changed to read 24th July, 2020 following an appeal before the National Employment Authority. The plaintiff alleges that the motivation behind the termination of his employment were the commissions that he claims were due or accruing to him, for the property deals that he was party to and which he alleges, his employer wanted to avoid paying.

He claimed to have worked closely with Ms Sara Grech whom he claims ran into problems with when it came to paying the commissions. For that reason, he tended to be vigilant and would demand that every agreement reached in connection with any proposed property deal, would be in writing.

In October 2019, the plaintiff together with his colleague Kenneth Vella were dealing with a prospective client which Mr Bhaah considered to be, a big deal. He claims that Ms Sara Grech wanted to be directly involved in the deal while setting the parameters of how the commission due would be awarded, if and when, the deal was closed. In fact, the plaintiff claims that both he and his colleague were given instructions not to approach the client as Ms Grech would be dealing with the client, directly herself.

Some two months later Mr Bhaah got to know that the client, that he and his colleague were dealing with, had concluded a promise of sale through Ms Sara Grech for the price of €27 million euros. The plaintiff stated that he was irritated with the news as none of the details of the deal appeared on the GO electronic platform of the company while no information was forthcoming from management about this transaction.

Mr Bhaah states that he confronted Ms Grech about the matter who informed him that the person who actually bought the property was some other client who wanted to remain anonymous and who is independent from the person that Mr Bhaah and his colleague were dealing with, previously. However, Mr Bhaah claims that upon verifying this information with the initial client, it transpired that the new

owner of the property was, in actual fact, the same person that Mr Bhaah and his colleague had dealt with previously. Furthermore, Mr Bhaah got to know from the client that he was negotiating a second property deal through Ms Sara Grech for the price of circa €14 million.

The plaintiff states that upon pointing out the situation to Ms Grech, he was invited for a meeting on the 21st July, 2020 with both Ms Sara Grech chairperson of the company and Mr Benjamin Grech Managing Director. During the meeting, Mr Bhaah claims that the 10% commission due on the sale of property in question was reduced to 2% and with the condition that he would sign the pre-prepared letter of resignation from his employment. He says that he refused to sign the resignation letter and asserted that if management was unhappy with his performance, they should dismiss him, instead.

Mr Bhaah states that he continued attending the office normally until the 24th July, 2020 when he received a call from Mr Benjamin Grech and Ms Sara Grech asking him once again to sign the resignation letter and to stop going to the office. By the 27th July he was blocked from remote access of the company electronic platform system, as well as the use of company mobile phone.

Mr Bhaah states that he contacted the Department for labour and industrial relations which at the time was closed for the public due to the pandemic but nonetheless emailed him advising him to refer the case to a lawyer.

The plaintiff reminded that despite the pandemic he had managed to close two deals which he considered big as well as reminded that he has never even been served with a warning letter for poor performance.

Mr Bhaah states that he got to know that his employment was terminated when JobsPlus contacted him and informed him that they have in hand a termination of employment form dated 1st July, 2020 delineating “abandoned the place of work” as the reason for termination. He claims that he challenged the validity of the date of termination before the National Employment Authority which resulted in the date being officially changed to the 24th July, 2020.

On the other hand, the defendant claimed that Mr Bhaah was aware that his employment was terminated and was kept on the books of the company simply to accommodate him until he finds another job.

The company stated that the defendant sent a legal letter to it claiming commission, which the company contends that the matter concerned the plaintiff and his colleague Mr Kenneth Vella and not the company. The company states that it mediated an agreement between its two sub agents about the commission due, if and when the deal pulled through. Nonetheless, when the company was faced with what it considered to be an unfounded allegation against it by Mr Bhaah, it felt it had to formalize the termination of the defendant's employment contract – folio 13.

The company states that up to the point of filing the response, the commission is still not due as the deal is not yet signed and delivered. The company reaffirms that it was the act by the plaintiff of abandoning his job that led to the termination of employment. In fact, the company argued that Mr Bhaah had absconded from work for periods of time and management had to chase after the plaintiff to adhere to his contractual obligations at work.

The company emphasised the alleged poor performance of Mr Bhaah at work where his sales targets had not been reached for months and his output was below the average of the team. In addition, the plaintiff failed to follow the required training course that accredits the estate agents. The company also rejected the allegation made by the plaintiff that the company held him back, remotely, from using the electronic platform system. In fact, the company stated that he could have done so provided he accessed the system through the office-based IT facilities.

3 Considerations

In this case, the Tribunal needed to rule whether the company's action to terminate the employment of the plaintiff on grounds of abandonment of the place of work was fair and according to law.

In this regard the Tribunal had to evaluate the elements that constitute and or can lead to a termination of employment on grounds of abandonment of work. Chapter 452 does not give a definition of the term abandonment of work however the word abandonment denotes neglect and in the context of employment is the neglect of one's duties and obligations at work. Such act can be a just cause for termination of employment under chapter 452 of the laws of Malta.

In English Law, a case of abandonment needs to have two elements present;

- 1 that the employee must have failed to report for work or must have been absent without valid or justified reason,
- 2 that there must have been a clear intention on the part of the employee to sever the employer-employee relationship manifested by some overt act.

Absenteeism per se is not an overt act which would prove an unequivocal intent on the part of the employee to discontinue employment. Acts that show clear intent of the employee to sever the employment relationship is a more determining factor by which to deduct that the employee has no more intention to work for his or her employer.

Abandonment of the place of work is a matter of intention and cannot lightly be presumed from certain equivocal acts. The intent to discontinue the employment must be shown by clear proof that it was deliberate and unjustified. Therefore, such elements need to be tested in such cases. For example, it cannot be argued that the fact that an employee simply disappeared from his workplace is guilty of abandonment.

Absence must be accompanied by overt acts unerringly pointing to the fact that the employee simply does not want to work anymore. Moreover, in cases where the employer claims termination of employment on the grounds of abandonment, it is the employer who has the burden to proof that the refusal of the employee to return, back to work was unjustified.

Mere unexplained absence is not sufficient. It is the employer who has the burden of proof to show a deliberate and unjustified refusal of the employee to resume his employment without any intention of returning. The employer should produce proof of some overt act of the employee that clearly and unequivocally show his intention to abandon his post.

Abandonment of work does not per se sever the employer-employee relationship. It is merely a form of neglect of duty, which is in turn a just cause for termination of employment.

The operative act that will ultimately put an end to the employment relationship is the dismissal of the employee after complying with the procedure by law. If the employer does not follow this procedure, there is illegal dismissal.

Due process in the case of abandonment of work requires at least two steps in English law;

- 1 First notice directing the employee to explain why he should not be declared as having abandoned his job, and
- 2 Second notice to inform him of the employer's decision to dismiss him on the ground of abandonment.

It is also important to distinguish between abandonment of work and absence without leave. While in the case of the former there is the intent to quit the job, in the latter there is no such desire. Absence without leave is a violation of internal procedures of the company on notices required in the event of employee's absence. On the other hand, abandonment signifies a clear intention to cut the relationship with the employer. Therefore, it is one thing to say that an employee did not abandon his work and quite another to say that he is likewise not guilty of absence without leave. Absence without leave may be subject to disciplinary action.

Absence from work and the intention to sever the employment relationship

In March 2020 the company office was closed due to the pandemic. It was opened again on the 4th May with some restrictions where the number of staff in the office at the same time were limited and any presence of employees on-site was subject to the approval of the Manager Mr John Yong - folio 127. In the same period, Ms Sara Grech also expressed confidence in the whole team for their superb teamworking of the previous weeks - folio 29.

On the 2nd July the chairperson Ms Sara Grech remarks in an email - folio 32 that the plaintiff's performance is close to nothing. In his reply, Mr Bhaah said, folio 33, that he was at the office every single day in June but acknowledges that his performance is poor. In her return email folio 34 Ms Grech highlights what he needs to do to improve performance including putting in the time but makes no mention of absence from work.

The exchange of emails of the 17th July, 2020 folios 34, 35, 36, 37 clearly show that the employer and the employee had a serious difference of opinion regarding the sale of the property to Carlo Stivala to which the plaintiff was claiming commission due. On the 21st July Mr Bhaah was called in and attended a meeting with the Chairperson and the Managing Director of the company where the difference of opinion seemed to escalate – Ref electronic recording in the acts.

The recording taken by Mr Bhaah further reveals that on one hand, Mr Bhaah was insisting on being paid his commission while on the other the company was refusing his assertion. The exchange between the parties was difficult and seemed to lead to no solution. In this context, the plaintiff Mr Bhaah utters the words;

“I do not want to work with you”

These words have to be taken not only in the context of a difficult meeting that Mr Bhaah was experiencing but also in the context of the corresponding emails folio 37 where he expressed a feeling of loss and let down because of the situation that was developing which to him contrasted with his perception of a trusting relationship with his employer.

“ *Guys we work with trust*” folio 37

Selwyn states that “*words spoken or action taken by an employee in the heat of the moment or under extreme pressure should not necessarily be taken at face value*”.

In this regard, the Tribunal concludes that Mr Bhaah’s words *folio 37* cannot be taken as an overt act to resign or abandon his employment but merely an expression of anger and disappointment about the situation at hand.

On the other hand, in the same meeting of the 21st July, Mr Bhaah was asked by the company to sign the resignation letter which the company had already on previous occasions demanded from the plaintiff. In this regard the request was premeditated and therefore not a request grown out of the discussion on the day. Therefore, it is reasonable to conclude that the company wanted to terminate the employment of Mr Bhaah and the preferred way of doing it was for the plaintiff to resign his position with the company.

This sequence of events show that the plaintiff was still in employment on the 24th July, 2020 as per decision of the National Employment Authority despite the fact that the employer registered the date of termination as the 1st July, 2020. This discrepancy in the date could have had serious legal implications for the civil status of the plaintiff had he not filed the complaint before the NEA.

On the 23rd July the Sales Director in an email folio 23 remarked that the plaintiff did not report for work at the office but she did not ask for a reason for absence but

simply wanted to know whether he can take up or not the lead that she delegated to him. She asked him to return to the office on the morrow, that is on the 24th July.

Nonetheless, on the 27th July, 2020, Ms Grech sent an SMS to Mr Bhaah stating;

Come in tomorrow – I do now wish to end this badly. So come in and pay your dues and sign the resignation or I will sign them and simply put you did not turn up for work. I will not be used any longer.

Selwyn states that *if an employee is threatened that if he does not resign he will be dismissed, a consequent resignation will amount to a dismissal.*

While in his reply to Ms Grech of the 27th July, Mr Bhaah reiterates his alleged right for the commission due to him, Mr Bhaah does not resign but advises the chairperson that if she wanted him out of the company she had to fire him. Here Mr Bhaah has clearly demonstrated that he would not resign his employment. It was an overt act determining that he did not abandon his employment though it could have been a breach of company rules and one that could lead to dismissal.

On the 28th July, Ms Grech instructs the plaintiff to report for work at Mriehel office and while he complained that he was locked out of the system confirms that he would abide by Ms Grech's instruction. This is a second overt act denoting that Mr Bhaah did not abandon his place of work but was actually still complying with his employer's instructions.

On the 19th and 21st August, 2020 Ms Grech once again insists with the plaintiff to pay his outstanding dues and stated that unless he did so, she would cancel his agreement with the company and send it off to Job Plus denoting;

“did not turn up for work”.

In effect this is what she did.

The Tribunal points out that the official forms of the Jobs Plus are meant to be filled in, in bona fide and therefore should reflect a true and fair view of the situation. In this case the termination form was being used to exert pressure on the plaintiff to either resign or face the prospect of being accused of abandonment of the place of work. None of these descriptions reflect faithfully the situation at work.

It is to be noted that the plaintiff on the 21st July, 2020 folio 44 refers to an agreement that he had with his employer to keep him on the books of the company until he renews his work permit in Malta. The arrangement was corroborated by Ms Grech folio 13. Therefore, the plaintiff had no incentive neither to resign nor to abandon his place of work as either options would have prejudiced his status as a migrant worker in Malta and therefore his chances of a renewed permit.

The Tribunal finds no evidence that the plaintiff in anyway showed overt acts for the employer to reasonably conclude that their employee Mr Bhaah had abandoned his employment. So much so that he kept responding to his employer's messages while on the other hand, on several occasions the chairperson kept encouraging him to resign his position which he refused to do.

Due Process

The Tribunal also looked into the due process leading to the termination of the employment relationship.

Mr Bhaah had been working for the company since 2014 but according to Ms Sara Grech his performance in the later years was dismal. The rental closure of the plaintiff amounted to half or less than half those of the other sub agents – folio 21. In 2019 she said;

“your production this year is a far cry from last years performance” – folio 23.

In May 2020 the chairperson of the company insisted with Mr Bhaah puts in the effort and prepare for the reopening of the offices. In June 2020 Ms Grech even asks the plaintiff to re-imburse the company with the excess mobile calls as there was no income generated by the plaintiff to offset the expense against – folio 31. On the 2nd July 2020 Ms Grech asks the plaintiff to pay the excess mobile call but also makes the important question;

“ can you please let us know what is wrong and how this can improve?” folio 32.

The chairperson knew well that something was seriously amiss with the performance of the plaintiff.

The Managing Director exclaims,

“if you would contribute a bit better towards the company and do your job” folio 35.

The same sentiment is echoed by the chairperson Ms Grech when she exclaims,

“the other deal you swindled yourself into”

while asking what contribution the plaintiff was making to the company. This evidence is indicative that for management, the plaintiff's performance at work was very poor. In the electronically recorded conversation presented in the acts Ms Grech is recorded saying that the plaintiff was disrespectful and even claimed that the plaintiff called her a liar. It finally escalated to the point that on the 19th August, 2020 the chairperson declared;

“let me know when we can do the termination. I do not want to retain you on SGL for nothing” folio 43.

Notwithstanding, Mr Bhaah responds in his defence but nonetheless, the evidence is clear enough that management was seriously unhappy with the performance of the plaintiff and that it was seeking the termination of employment.

Poor performance may lead to disciplinary action and is grounds for dismissal and after following due process at law, an employer may terminate the employment contract. On the other hand, a complaint or grievance expressed by an employee also needs to be dealt with fairly and timely and failure to do so, weakens management's position, in the event, that action is taken against the employee while the grievance is pending.

In this regard the Tribunal finds it perplexing that despite management's arguments regarding the poor performance of the plaintiff, it would not issue a warning letter clearly stating and warning that unless the KPIs are achieved, the company shall take disciplinary action that may lead to dismissal. Nor did management resort to disciplinary procedures which following a fair hearing as contemplated by law, could have justified a decision to terminate the employment contract. Instead, it opted to terminate the employment relationship on grounds of abandonment of the place of work which the tribunal concludes, was not the case.

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, decides that the Defendant's decision to dismiss the Plaintiff was unlawful.

5 Compensation

The Tribunal considered that Mr Bhaah was an employee since 2014. The Acts do not disclose the salary payable but, in any case, it could not have been less than the statutory minimum wage. Therefore, the Tribunal used this measure as the basis for the computation of the compensation. No other value was added apart from the statutory benefits while the Tribunal also took into consideration that by Mr Bhaah's admission, he had not generated income for the year leading to his termination of employment.

The Defendant Sara Grech Limited shall by way of compensation pay the Plaintiff Mr Mohammed Bhaah, ten thousand and nineteen euros and 46 cents (€10,019.46) within six weeks from the decision of this case. The calculations are based on the statutory minimum wage for;
2020 of €179.33 / week plus €3.49 cola for 21.67 weeks,
2021 of €181.08 / week plus €1.75 cola for 30.33 weeks,
plus the statutory bonuses of € 135.10 x 2 cycles and € 121.16 x 2 cycles.

The Tribunal directs that the employment records of Jobs Plus are amended to read that the reason for 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. The legal fees accruing to both parties shall be for the account of the company Sara Grech Limited.

Tribunal Decision deems this Case closed.

(iffirmat)
Is-Sur Joseph Gerada
Chairperson

(Vera Kopja)

Jordan Muscat
Ghas-Segretarju