

INDUSTRIAL TRIBUNAL

Decision Number 2735

Case Number: 3780/JG

In the employment issue

between

Marieta Koseva (I.D. 62760(A))

and

Zoya Kirilova (I.D. 0144310(A))

Subject matter: alleged unfair dismissal

Today: 7th May, 2021

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 22nd August, 2019 by advocate Dr David H Harding on behalf of Ms Marieta Koseva I.D. card 62760 (A). On the other hand, Ms Zoya Kirilova I.D. card 0144310 (A) filed her reply in the court's registry bearing the date of the 21st November, 2019 and signed by advocate Dr Joseph P. Bonello.

In view that the process was meant to serve foreign nationals, the deliberations were conducted in the English language while sometimes interpretation to the Bulgarian language was required. This decision is therefore being served in the English language to facilitate communication.

With regards 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 Marieta Koseva was employed by Ms Zoya Kirilova on the 1st June, 2018 in the role of “cleaner” on a full time indefinite contract marked Dok K at Paderborn Restaurant in the town of St Paul’s Bay. Ms Koseva had a probationary period of six months.

On the 14th March, 2019 Ms Koseva reported sick and was certified so up to the 31st March, 2019. On the 4th April, 2019 Ms Koseva travelled to Bulgaria on vacation to visit her family, which visit the plaintiff claims was sanctioned by her employer. Ms Koseva claims that before her departure Ms Kirilova told her that she had found a new employee who was younger in age and who was doing a better job than the plaintiff. The plaintiff claims that her employer told her that she does not want her back on the job.

Before the departure to Bulgaria, Ms Koseva asked Ms Kirilova to return the deposit that the former claims the employer kept as guarantee in case any of the employees left her employ without settling any pending issues.

The plaintiff returned to Malta on the 8th May, 2019 and sought the assistance of the department for Industrial and Employment Relations who mediated on behalf of the plaintiff to be paid her dues in connection with her sick leave entitlement for March. Eventually Ms Koseva was paid. Nonetheless the plaintiff was advised by the department not to sign any documentation presented by the employer in connection with the termination of her employment. Moreover, she was advised to check her employment status with Jobs Plus.

Towards the end of May, 2019 Ms Koseva met Ms Kirilova together with her partner Mr Mladenov in the street and Ms Kirilova asked Ms Koseva to sign the termination form of Jobs Plus denoting “resignation” as the reason for termination. Ms Koseva refused to sign.

In the meantime, Ms Koseva was employed by Neven Atanasov who was an ex-colleague of the plaintiff at Paderborn restaurant and who had gone into self-employment.

On the 21st June, 2019 Ms Koseva received a letter from Jobs Plus informing her that they are in receipt of documentation delineating that her employment was terminated for reasons of “resignation” as from the 7th April, 2019.

3 Considerations

The Tribunal had before it a situation where the plaintiff was claiming that the defendant had terminated her employment unjustly as her employer opted to employ someone in her stead, who is younger in age and perceived by her employer as a better cleaner. Ms Koseva was effectively terminated on the 7th April, 2019 namely three days after departing the island to visit her family.

On the other hand, the defendant claims that she never dismissed Ms Koseva. In fact, it is claimed that it was Ms Koseva who failed to report for work on her return to the island and therefore the employer Ms Kirilova, was left with no option but to file in a termination form which Ms Koseva refused to sign.

The Tribunal had to establish the actions and their sequence to see whether there was either a dismissal from employment or an abandonment of the place of work and secondly whether either action was carried out in accordance with chapter 452 of the Laws of Malta.

The organizational system of running the Paderborn Restaurant was very informal and lacking in documentation. While, Ms Koseva had a formal contract of employment and her monthly salary payslip denoted a full-time job, in fact she was only working part time and paid on an hourly basis in cash, daily. It was claimed by Ms Koseva that she was neither granted the statutory paid vacation leave nor the statutory bonuses. The approval of the unpaid vacation leave was also done in a casual manner and no records of application for vacation leave or approval were kept. Such claims were not negated by the defendant. In fact, the declaration of the case of the defendant states that the employer did not keep proper records of the employee’s attendance. There was clearly a culture of quasi total informality.

While the Tribunal would not expect a sophisticated payroll system to manage few employees, the employment relationship is a very serious one and for that reason, it is amply covered by rules and regulations. In this regard, even a small business is expected to keep the basic records of attendance while salary payslips need to be a true reflection of the work done and the payments effected. Failing to do so is not only illegal but

weakens the employer's position when confronted with claims such as we have in this case.

Moreover, in situations that possibly shall lead to a terminating employment, the employer needs to state clearly what behaviour needs to change, in order that the employee avoids dismissal. If a dismissal takes place, it needs to follow a process where at least the employee can air his or her side of the story.

Ms Koseva was employed as a cleaner on a full-time basis on an indefinite contract. In March she slipped on wet floors at the restaurant and reported sick and certified so up to the end of March, 2019. She was planning to travel to her home country and had in fact booked the travel arrangements. Ms Koseva left the island on the 4th April, 2019 while she missed work on the 1st, 2nd, and 3rd April. Typical employers would not want a repeat of such behaviour and therefore one would have expected Ms Kirilova to at least raise the point with her employee, but none was done at the time.

Before her departure from Malta Ms Koseva was short on cash and in this regard requested a refund of the €250 deposit which Ms Kirilova was in the habit of retaining from her employees as guarantee for any unsettled issues by an employee leaving her employ. The Tribunal rejects such practices because they denote an abuse of the power that an employer has as well as showing a lack of trust in the employees which is basic in an employment relationship.

The initial reaction of the employer was to refuse the refund however Ms Koseva promised to return the deposit once back at work as the intention of Ms Koseva was to return to her place of work; quote –

A job which I like it and I wish to continue – sitting of the 6th March 2020 page 7

The plaintiff claims that while there was no objection from her employer to travel abroad nevertheless her employer Ms Kirilova told her that she does not want her back at work quote;

She told me that she is not going to take me back for any work anymore. She told me before I go. I swear in God. She just show me places how she clean the other lady. Look this. How nice. Look. I'm happy with her and I don't want you anymore – sitting of the 15th January, 2021 pg 18

The defendant negates this assertion and claims that she never told her employee that her job was terminated.

The Tribunal went on to consider other circumstances surrounding this critical point and noted that at the point of departure to Bulgaria, the employer did not state when the employee was expected back at the place of work. One understands that an employer who fails to pay his employees for their statutory vacation leave has little or no leverage to sanction or not the vacation leave. Nevertheless, by her actions Ms Kirilova was approving, a number, of unpaid vacation leave days for Ms Koseva. Therefore, it is reasonable to expect that if the employer is keen on having the employee back at work, would set the date when the employee is expected back at work. This did not happen.

The Tribunal also considered the action of the department for Industrial Relations and Employment that mediated successfully for Ms Koseva to be paid for her March sick leave entitlement. It is pertinent to point out that the advice of the department to Ms Koseva was that she cannot return to her job but instead she should check her employment status at Jobs Plus.

When they call me by the phone to go and get my cheque for the sick leave they told me that I couldn't go back to work with her and to go JobPlus and check my status. That's why. That was in June. I went to the Job Plus and they give me the termination which is from 7 of April – sitting of the 15th January, 2021 pg 31

The Jobs Plus termination of employment form effectively states that the last day of work was the 7th April denoting “resignation” as the reason for termination. This sequence of events leaves no doubt in the mind of the Tribunal that when the department inquired with the employer about the sick leave payment due to Ms Koseva, they were informed that Ms Koseva’s employment was terminated. Therefore, follows the logical advice of the department to Ms Koseva to check her status at Jobs Plus.

The meeting towards the end of May was also considered and here the Tribunal was faced with two versions. Ms Koseva said that;

She (Ms Kirilova) asked me to sign the paper for resignation. That's what she asked me. Not to go back, to sign the resignation – sitting o 29th January, 2021 pg 28

On the other hand, there is the version of Ms Kirilova where she stated that;

I just happened to meet her on the street, and when I saw her on the street and I realized that she is back in Malta, she's not coming back, I told her. If you do not come back to work I would have to stop you from being employed. And at that point I asked her to sign and fill up a form but, she didn't - sitting of 20th November, 2020 pg 3

The Tribunal notes how Ms Kirilova concludes that Ms Koseva is not returning to work without first asking her whether she was going to do so or not. Moreover, the Tribunal notes that when the employer warned the employee that her employment shall be terminated unless she returns to work, Ms Kirilova finds it fitting to hand the termination of employment form to Ms Koseva to sign, instead of soliciting a reply from the plaintiff. The logical response from Ms Koseva was to refuse to sign the termination form as in fact she was not 'resigning' her job.

The Tribunal asserts that the employer had no intention of welcoming back her employee at the place of work, in fact had already terminated the employee's employment and used the meeting in the street solely to get the signature of Ms Koseva on the termination of employment form depicting "resignation" as the reason for termination.

This sequence of events is corroborated by the fact that it took the defendant up to the 21st June, 2019 to submit the termination form to Job Plus denoting the 7th April, 2019 as the day of termination. If Ms Koseva had abandoned the place of work or simply refused to report for work, then why should Ms Kirilova list "resignation" as the reason for termination? Such assertion is misappropriation of public documents and do not reflect the true version of the events.

Moreover, the Tribunal points out at another inconsistency. While in May Ms Kirilova is warning the employee of the consequences of not returning to work, on the other hand, the date of termination of employment, namely the 7th April, 2019 precedes this meeting. It therefore corroborates the above assertion that the scope of the conversation in late May was solely to obtain the signature of the plaintiff on the termination form and not to direct her to return to work.

Therefore, the Tribunal finds the testimony of Ms Koseva consistent throughout the proceedings and corroborated with the documents presented while inconsistencies run through the testimony of Ms Kirilova. In this regard, the Tribunal finds the plaintiff Ms Koseva's testimony credible.

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 Ms Zoya Kirilova pro et noe shall by way of compensation pay the Plaintiff Ms Marieta Koseva Two Thousand euros (€2,000) within thirteen weeks from the decision of this case.

The Tribunal directs that the employment records of Ms Marieta Koseva held by Jobs Plus 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. The defendant in the case Ms Zoya Kirilova shall pay the respective fees of both legal counsels.

Tribunal Decision deems this Case closed.

(signed)

Joseph Gerada
Chairperson

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