IN THE INDUSTRIAL TRIBUNAL OF GIBRALTAR

Case No. 8 of 2012

BETWEEN:-

MIRKO BAUM

Complainant

-and-

JYSKE BANK (GIBRALTAR) LIMITED

Respondent

Date: 11th October 2013.

Charles Gomez and Daniel Benyunes for the Complainant.
Samantha Grimes for the Respondent.

By an Originating Application dated the 20th February 2012 the Complainant claimed unfair dismissal against the Respondent on the grounds that he had been summarily dismissed because he had:-

> "sought clarification from the Respondent as to (a) the redundancy package to be offered to him given that all the indications that the work for which he had been employed would no longer be available and (b) as to the Defendants policy for dealing with clients who according to the Defendant itself, might be engaged in illicit activity (see paragraph 14 and attachment)".

With regard to ground (b) above it is pertinent to point out at this point that in essence the Complainant is alleging, as I understand it, that the Banks' failure to confirm to him (the Complainant) that the clients with whom he (the Complainant) worked had not engaged in money laundering activities in Germany led him (the Complainant) to develop an acute but reasonable fear that he (the Complainant) might be liable to criminal prosecution in Germany or Gibraltar and consequently when he had raised such concerns with the Defendant he had been disciplined and then summarily dismissed.

The Respondent denies in full the Complainants' allegations and asserts that the Complainant was dismissed for gross misconduct after a fair disciplinary

hearing and the dismissal of the Complainants' appeal against the disciplinary boards' decision.

On the 18th March 2013, Mr Benyunes for the Complainant and Mr. Rocca for the Respondent appeared before me at practice directions. At the directions hearing Mr. Benyunes presented to me a draft order for directions. The thrust of the draft order presented sought the disclosure by the Respondent of documentation, records etc from 1996 onwards relating to general across the board issues concerning internal Bank Anti-Money Laundering and/or Combating the Financing of Terrorism policies and procedures. Mr. Rocca objected to the terms of the draft order sought and after duly hearing both parties I refused to grant the order for disclosure sought by the Complainant; for the purposes of the matter currently before me there is no need to go into why I refused the order sought. An alternative practice directions order was then produced by Mr. Rocca and made by consent; in said order it stated that the case be set down for hearing by the Secretary of the Tribunal on the 31st May 2013.

I stop at this stage to point out that as is my normal practice in all cases were it is applicable, I did in the course of the practice directions hearing inform both counsel that whilst I did not believe it was material, my firm had many years before acted for the Respondent but no longer did so and that the firm had accounts at the bank. I made such a statement not because I believed that such a fact could affect my judgment of the case once it was heard but rather to put into the domain of both parties for their information, and such action as they deemed fit, information which in my view they should be aware of. I am and have always been very conscious of the need to put before parties any connection that I may have with any party and/or their witnesses so that they may take such action as they deem fit.

At no time during the practice directions hearing did either party make any objections whatsoever to my appointment as chairman.

At some point after the 31st May 2013, the Secretary to the Tribunal arranged with myself the dates for the hearing of the case and informed Counsel for the parties accordingly; it would appear that Counsel for neither party were consulted by the Secretary as to the dates set. By letter dated the 10th June 2013, addressed to the Secretary to the Tribunal, the Respondents counsel asked for the hearing date at the beginning of September 2013 to be vacated to another date since one of the Respondents' material witnesses was unable to attend. The Secretary to the Tribunal consulted me on the request

made and I asked the Secretary to revert back to Isola's requiring them to specify the reason for the witnesses absence from Gibraltar on the relevant date(s); she did so. On the 12th June 2013, the Respondents' counsel replied to the Secretary providing the information sought; said information being relayed to me by the Secretary. After having considered the matter, including taking into account alternative hearing dates and the possibility of adjourning the case once commenced until the witness returned to Gibraltar, I decided with extreme reluctance to agree to the vacation of the hearing dates set. I asked the Secretary to communicate my decision to both parties and to find the earliest possible alternative hearing date. It would appear that the Secretary informed Ms Grimes of my decision and, in all innocence, asked her to communicate the same to the Complainant's counsel; an uncharacteristic error on the Secretary's part.

On the 8th August 2013, the Complainants' counsel wrote to the Secretary of the Tribunal, all cannons blazing, requesting in effect the recusal of "the Chairman and all officials who had inappropriate contacts with Isolas ..... and for a new Chairman (and if appropriate secretarial staff to be appointed) in his/their stead". Moreover, they asked for the Chairman's recusal on the further ground that:-

> "we understand that he is a customer of the respondent and/or the introducer and/or the representative of customers of the respondent and knows and has professional dealings with the manager of the respondent and/or several of its employees."

The letter ended with the comment that:-

> "we have sought to raise this matter discretely such that you can deal with it on paper without the necessity of it being raised in an open hearing".

As it is my opinion that such matters should be raised in an open hearing or not at all, I asked the Secretary to request the Complainants' counsel to confirm whether or not they were making a formal application(s) to the tribunal and, if so, to specify the application(s) which would then be set down for a preliminary hearing.

By the letter dated the 20th August 2013, the Complainants' counsel confirmed that:-

"Our clients' application is for Mr. Nuñez to recuse himself from this case and have no further dealings with it."

"Thus, the basis of this application is the fact that Mr. Nuñez has had and/or continues to have a business relationship with the respondent and/or the clients of the respondent during or since the period of our client's employment with the respondent to such a degree that could cloud his judgment and ability to preside impartially in respect of the present proceedings."

The application for recusal came before me on the 11th October 2013 by way of preliminary hearing. At the hearing Mr. Gomez emphasised that (1) the application was only for me to recuse myself and did not affect any other member of the Tribunal's staff (2) no personal aspersions were being made against myself by reason of the application and (3) the application was being made on the basis of perceived and not actual bias. Mr. Gomez set out his stall in support of his submission for recusal on the following basis. Myself, as indeed any other lawyer in Gibraltar with business contact with the Respondent, as a person who deals with the Respondent would be aware of the banks' anti-money laundering procedures and therefore already have an appreciation of how strict or otherwise they are. Such an appreciation would be sub-consciously re-enforced if I was introducing clients to the bank due to the fact that I would have had to do my own due diligence on the client before introducing them to the bank. Thus, if I was introducing clients to the bank it followed that it was because I had mentally concluded that the Respondents anti-money laundering policies were satisfactory. As the deficiencies or otherwise of said policies were at the heart of the Complainants' case for unfair dismissal it followed that on the basis of the dove tailing, sub-consciously or otherwise, of the conclusions referred to above, an objective observer would conclude that I had already decided that the Complainants' views/arguments with regard to the banks anti-money laundering policies could not be correct. Certainly his client believed that there was much more than a fanciful doubt that I may be biased against him as I introduced clients to the bank knowing what the Respondents' anti-money laundering procedures were and therefore having already determined that said procedures were satisfactory. I would make the observation at this point that notwithstanding that according to the documentation filed to date in this case the issue of AML and/or CFT policies does not appear to be that material to the issue of whether or not the Complainant was unfairly dismissed, it seems to me that the whole argument put forward by Mr. Gomez is somewhat flawed.

Mr. Gomez in the course of his submissions presented to me a bundle containing the following authorities:-

(i) Locabail (UK) Limited and another v Waldorf Investment Corp and others;

(ii) Porter v Magill, Weeks v Magill;

(iii) Pages 539-547 of De Smiths' Judicial Review of Administrative Action.

I have considered all said authorities.

Mr. Gomez also produced a questionnaire setting out the questions which he believed merited replies from myself. Of this more later. Ms Grimes in addressing the Tribunal emphasised that her client was very much sitting on the fence with regard to the application but nevertheless made the following observations:-

(a) the application made was very much a last minute application which appeared to have been sparked off by the request for an adjournment of the hearing date;

(b) the whole issue of whether the Respondents' anti-money laundering procedures were satisfactory or not had nothing to do with the essence of the case; namely whether the complainant was unfairly dismissed;

(c) after quoting from a passage in the Locabail case, she submitted that she could not see how the present situation fitted the parameters required for their to be perceived bias on my part.

Turning then to the questions set out in the questionnaire provided by Mr. Gomez, I would reply as follows:-

1. I do not, have not and would never contemplate receiving any introductory fees from the Respondent or indeed anyone else;

2. To the best of my knowledge and belief I do not personally know and do not deal on a regular or any other basis with any of the Danish or

expat employees of the Respondent - as a person who has been employed with the Respondent for over 3 years the Complainant, who I do not believe I have met or spoken to, is or should be well aware of this;

3. I do not and have not shared clients with the Respondent or ever had any retrocession or other similar type of agreement with the Respondent or ever received commission fees from the Respondent or conducted work for the Respondent at any time in recent history;

4. I am aware of the Respondents' know your client requirements and of the anti-money laundering requirements imposed by the Financial Services Commission on all licencees - I have no accurate or specific knowledge as to whether the Respondents' anti-money laundering policies/procedures, in the past or currently, breach the Financial Services Commission's requirements and/or Gibraltar law. It seems to me that there is a distinction, which Mr. Gomez did not address, between KYC requirements imposed by the Respondent, which any person dealing with the Respondent would naturally be aware of, and the procedures and policies internally followed by the Bank with reference AML requirements, which only bank officials and/or their legal advisers would be fully aware of;

5. My firm has an office account and various client accounts with the Respondent and has done so for many many years;

6. Companies and other legal entities associated with my firm have had and do have accounts with the Respondent;

7. At one time or another I have provided general advise (not specific to the Respondent) to various clients with reference anti-money laundering legislation and/or Financial Services Commission requirements with respect to the same;

8. My firm more than ten years ago acted for the Respondent.

That then is the back ground date with respect to the recusal application made by Mr. Gomez.

As I understand the law the test that I have to apply to the submissions made by Mr. Gomez is the following. Would a fair-minded and informed

observer, having considered the facts, conclude that there was a real possibility of bias on my part? In considering such a question I bear in mind amongst others, the following passage from the judgment in the above-mentioned case of Locabail; namely:-

> "In contrast, a real danger of bias may well be thought to arise if there is personal friendship or animosity between the judge and any member of the public involved in the case, if the judge is closely acquainted with any member of the public involved in the case, particularly if that person's credibility may be significant in the outcome of the case; if in a case where the judge has to determine an individual's credibility, he has rejected that person's evidence in a previous case in terms so outspoken that they throw doubt on his ability to approach that person's evidence with an open mind on a later occasion; if the judge has expressed views, particularly in the course of the hearing, on any question at issue in such extreme and unbalanced terms that they cast doubt on his liability to try the issue with an objective judicial mind; or if, for any other reason, there is real ground for doubting the judge's ability to ignore extraneous considerations, prejudices and predilections, and his ability to bring an objective judgment to bear on the issues. However, no sustainable objection can arise merely because, in the same case or a previous case, the judge has commented adversely on a party or witness, or found their evidence to be unreliable. Furthermore, other things being equal, the objection will become progressively weaker with the passage of time between the event which allegedly gives rise to a danger of bias and the case in which the objection is made."

Does the fact that my firm has accounts at the Respondent bank, as indeed it has at other banks, and/or that my firm is associated with companies that I have introduced to and have accounts at the Respondent bank, as indeed with other banks, and/or that I am aware of the Respondent banks' KYC requirements for the opening of accounts, as indeed of other banks, and/or that I am aware of the anti-money laundering laws and FSC requirements with regard to the same give a fair minded and informed observer reason to conclude that there was a real possibility of bias on my part? I have given the matter much thought and mentally placed myself in the shoes of this fictional character and have come to the conclusion that this fair minded and informed observer would not conclude or perceive bias on my part. Therefore I refuse to recuse myself on the ground raised by Mr. Gomez. However, this does not dispose of the matter.

In the course of the hearing of the 11th October 2013, and before Ms Grimes addressed the Tribunal, I informed Mr. Gomez that it was my perception that the unfortunate innocent error made by the Secretary to the Tribunal in requesting Isola's to inform the Respondents' Counsel of the vacated hearing dates, was being used by the Complainant as the excuse to justify the application for recusal made, and that said application was being made not because there was a belief of perceived bias but rather because the Complainant wished to have another attempt at persuading a different chairman to agree to the practice direction orders which he had sought on the 18th March 2013 and which I had refused to make. To his credit Mr. Gomez agreed that the error made by the Secretary was certainly "the trigger" for the application and that the Complainant might well wish to renew his application for the disclosure orders refused if another chairman was appointed. As I pointed out to Mr. Gomez at the hearing this particular issue does cause me concern. To my mind the application for recusal made is nothing more than a cynical attempt by the Complainant to have another chairman appointed so that he can once again apply for disclosure orders which in my opinion he is not entitled to. Thus, in my mind the application for recusal has little to do with the issue of bias and a lot to do with the Complainant wishing to have a second bite at forbidden fruit. That being the case, would a fair minded and informed observer conclude that such a view could sub-consciously colour my view of the contents of the Originating Application and the Grounds for Resistance filed and, more importantly, the credibility to be given to the Complainants' evidence once this is heard. I believe that I have the ability to ignore such views and bring objective judgment to bear on the real issues of this case but I recognise that a fair minded and informed observer would conclude that there is real ground for doubt, and this being so I must, as required by the authorities, resolve that doubt in favour of recusal. In the circumstances, I hereby recuse myself.

Dated this 29th day of October 2013.

Joseph Nuñez
Chairman