THE DUBAI INTERNATIONAL FINANCIAL CENTRE COURTS

In the name of His Highness Sheikh Mohammad Bin Rashid Al Maktoum, Ruler of Dubai

IN THE SMALL CLAIMS TRIBUNAL OF DIFC COURTS

BEFORE SCT JUDGE MAHA AL MEHAIRI

BETWEEN

Claimant

JEW

and

JANG CAPITAL MARKETS MENA LIMITED

Defendant

Hearing:**11 March 2019**

Judgment:**15 April 2019**

JUDGMENT OF SCT JUDGE MAHA AL MEHAIRI

UPON the Claim Form being filed on 2 September 2018 and amended on 6 September 2018;

AND UPON a defence and Counterclaim being lodged by the Respondent 17 September 2018;

AND UPON this matter being called for a Consultation before SCT Judge Ayesha Bin Kalban on 2 October, with the Claimant and Defendant's representatives attending the Consultation;

AND UPON the parties failing to reach an agreement;

AND UPON the Small Claims Tribunal Order of SCT Judge Maha Al Mehairi issued on 16 October 2018 granting permission to transfer the case to the DIFC Court of First Instance in accordance with Rule 53.37 of the DIFC Court Rules;

AND UPON the Claimant's Notice dated 30 October 2018 seeking permission to appeal the Order of SCT Judge Maha Al Mehairi issued on 16 October 2018;

AND UPON the parties providing oral submissions at the Hearing of 6 December 2018;

AND UPON the Respondent's Counterclaim being separated from the Appellant's original SCT claim;

AND UPON reviewing all documents and evidence submitted on the Court file;

IT IS HEREBY ORDERED THAT:

1. The Defendant shall pay the Claimant a total sum of USD 119,945.48 comprised of:
2. USD 9,166 notice period;
3. USD 22,270.70 gratuity;
4. USD 1,519.78 as reimbursement of the SCT Court fee;
5. USD 86,989 penalties pursuant to Article 18(2) of the DIFC Employment Law.

- The Defendant shall pay to the Claimant an additional USD 301 per day, starting from 16 April 2019 until the day that the judgment amount is paid to the Claimant.
- The Claimant's claims as to legal fees and disbursements are dismissed.

Issued by:

Maha Al Mehairi

SCT Judge

Date of issue: 15 April 2019

At: 10am

THE REASONS

Parties

1. ﷺ(hereafter the "Claimant") is an individual formerly employed as a broker at Jang Capital Markets Mena Limited (hereafter the "Defendant").

2. Jang Capital Markets Mena Limited (hereafter the "Defendant") is an agricultural commodities merchant, operating under a financial brokerage license with registration number XXX. The Defendant for this purpose herewith is a branch of this London-based company, located, operating, and registered within the DIFC.

Preceding History

1. On 2 September 2018, the Claimant filed a claim in the DIFC Courts' Small Claims Tribunal (the "SCT") for certain sums allegedly entitled to him as a result of his employment with the Defendant. The original claim form was amended on 6 September 2018. The total claim value is for USD 75,989 inclusive of salary, holiday pay and bonuses. The Claimant also claims a daily penalty accrued as per Article 18 (2) of the DIFC Employment Law, and legal fees plus VAT.

2. The Defendant responded to the Claim and lodged a Counterclaim on 17 September 2018 with an Acknowledgment of Service dated 18 September 2018.

3. The matter was called for Consultation before SCT Judge Ayesha Bin Kalban on 2 October 2018, with the Claimant and Defendant's representatives attending the Consultation, however the parties failed to reach an agreement.

4. Thereafter the Defendant sought permission to transfer the case to the DIFC Court of First Instance (the "CFI") in accordance with Rule 53.37 of the DIFC Court Rules, via a Notice dated 14 October 2018. The consequent Order of SCT Judge Maha Al Mehairi issued on 16 October 2018 granted permission for this transfer. The Claimant appealed this order with a Notice dated 30 October 2018 to keep proceedings within the SCT.

5. After the parties provided oral submissions at the Hearing of 6 December 2018, the Respondent's Counterclaim was separated from the Appellant's original SCT claim via the Order of Judge Maha Al Mehairi dated 26 December 2018. The parties have subsequently filed additional documentation and particulars to the SCT in reference to this claim.

6. Having reviewed all documentation on the Court file to date, I shall consider the issues set before me in the original claim dated 2 September and amended on 6 September 2018.

The Claim ﷺ

1. The Claimant contends that he entered into an Employment Contract with the Defendant on 11 December 2014 (hereafter the "Employment Contract") to fill the position of "broker" and to work at the Defendant's Dubai offices, located in the DIFC. At the time of issuing the Employment Contract, the Defendant's name was "Jang Capital Markets Limited (Dubai Branch)", subsequently the Defendant changed its name to "Jang Capital Markets MENA Limited". There is therefore a second Employment Contract and a letter dated 14 March 2017 regarding the company's change of name.

2. The Claimant contends he commenced his employment with the Defendant on 16 January 2015 (the "Commencement Date") and continued to be employed by the Defendant until his termination on 20 June 2018 (the "Termination Date").

3. The Employment Contract included a basic annual salary to the Claimant of GBP 60,000 (equivalent to USD 90,000) and this was increased to USD 110,000 due to the Claimant's good performance as per the documentation provided to the Court.

4. A letter dated 13 June 2018 sent by the Defendant to the Claimant alleges the following gross misconduct allegations:

- The Claimant refused to comply with management instruction;
- The Claimant breached confidentiality; and
- The Claimant misled clients inaccurately by marketing services which the Defendant is not licensed to provide.

- The above allegations within the aforementioned letter dated 13 June 2018 refer to an email sent by the Claimant on 8 June 2018, in which he contacted clients previously served by a Mr Jone, whom is an ex-employee of the Defendant. The Claimant alleges contact with Mr Jone was agreed prior by management and was in keeping with the distribution of Mr Jone's clients across the existing workforce.

- On 14 June 2018, the Claimant was informed that he was not permitted to work at the Defendant's offices nor was he permitted to contact any clients. The Claimant's access to emails was blocked. On 15 June 2018, the Defendant provided the Claimant with an additional letter which informed the Claimant of his immediate suspension. The Claimant contends he was told by the Defendant that the new letter of 15 June 2018 superseded the 13 June 2018 letter. The 15 June 2018 letter provided to the Court states that the Defendant had become aware of new information which warranted the Claimant's immediate suspension.

- On 18 June 2018, a disciplinary hearing was held by the Defendant, the outcome of which was communicated in a letter to the Claimant dated 20 June 2018. The letter dated 20 June 2018 provided to the Court states that the Claimant has been dismissed due to gross professional misconduct and as such shall be receiving monies comprised of notice pay and gratuity. Subsequently, the Claimant appealed the decision made at

the disciplinary hearing. In the appeal conducted on 4 July 2018, the minutes of which were provided to this Court, the Claimant contends that he was unaware that he had refused to comply with management instruction regarding the 8 June 2018 email, and that it was his firm belief he had not breached confidentiality.

- Based on these events, the Claimant contends that he is owed significant sums, not less than USD 75,989, for salary and other remedies to include:

- The notice period USD 9,166;
- Gratuity USD 20,941;
- Bonuses USD 45,882;
- All legal fees and costs;
- Interest on outstanding salary as the Court deems fit; and
- Article 18(2) penalties. ◆

- The Claimant contests his termination for gross professional misconduct under Article 59A of the DIFC Employment Law No. 4 of 2005 (as amended by DIFC Law No. 3 of 2012) (the "Employment Law"). The Claimant argues that the Defendant wrongly suspected the Claimant's resignation, and subsequently fabricated a gross misconduct claim in order to dismiss the Claimant from employment without paying monies due, as per Article 62 of the Employment Law, in which the employer is not required to pay such monies upon termination due to the finding of professional misconduct. The Claimant further argues that the Defendant has a history of building a case around previous employees by way of finding a legal mechanism to justify the termination of employees under Article 59A of the Employment Law.

The Defence

1. The Defendant filed a statement of defence alongside a Counterclaim, detailing its arguments against the entirety of the Claimant's Claims. The Defendant's main argument is that the Claimant is guilty of gross professional misconduct due to the alleged breach of confidentiality by the Claimant.

2. In reference to the email sent to MrJone's clients, the Defendant states that:

3. Mr Jone resigned from the Defendant's employment on 7 June 2018 and on the same date Mr Joos ◆emailed brokers in that particular division in order to begin the process of re-allocation of Mr Jone's clients;

4. The Claimant did not respond to the said email from management specifying which clients he wished to take coverage of, and therefore when the aforementioned email of 8 June 2018 was sent to Mr Jone's client roster, this was a `direct and intentional refusal to comply with a fair and reasonable management instruction';

5. The email sent by the Claimant on 8 June 2018 was unlawful and detrimental to the Defendant as it was in breach of the Defendant's confidentiality policy and it misled clients by inaccurately marketing services which the Defendant is not licensed nor permitted to provide.

6. The Defendant argues that the Claimant transmitted confidential client information outside of the company via an email dated 13 June 2018 to the Claimant's personal email account leading to serious breach of confidentiality.

7. The Defendant argues that the Claimant has breached the Defendant's Confidentiality Policy and furthermore Clause 26 of the Employment Contract regarding confidential information due to the fact, (that is agreed by both parties), that the Claimant did not seek permission to transmit the information via email to the Claimant's personal email address.

8. The Defendant contends that the Claimant's dismissal was in accordance with Article 59A of the Employment Law as it finds the Claimant has committed gross professional misconduct.

9. Based on this version of events, the Defendant argues that the Claimant is not entitled to a gratuity payment under Article 6(1) of the Employment Law. The Defendant asserts that the Claimant received a final salary payment which included payment up to and including the Termination Date and payment for any accrued but untaken holidays. The Defendant argues that it terminated the Claimant's employment under Clause 27 (immediate termination due gross professional misconduct) of the Employment Contract and therefore was not liable to give or pay for any notice period, moreover, under Article 62(1) the Claimant was not entitled to gratuity payment because the Defendant terminated the Claimant's employment for cause pursuant to Article 59A of the Employment Law.

10. Alongside its Defence, the Defendant filed a Counterclaim for the following:

- Breach of contractual, statutory and implied obligations;
- The dissemination of its confidential information;
- Exposure to legal risk;
- Reputational loss;
- Further loss caused by disruption;
- Wasted management time;

- Damages for malicious prosecution by way of the Claimant's Claim.

Aforementioned, the Counterclaim is separate from this claim, and shall be dealt with by the CFI, not the SCT, and thus full particulars are not given here.

Discussion

1. The DIFC Courts and the SCT have jurisdiction over this case as it concerns employment within the DIFC and the amount in question is less than AED 500,000. This dispute is governed by the DIFC Employment Law in conjunction with the relevant Employment Contract and other valid agreements between the parties. Aforementioned, this discussion does not concern the Counterclaim, only solely the issues put forth by the Claimant as per the Claim filed 2 September 2018 and amended on 6 September 2018.

2. In essence, this is a simple case concerning the alleged professional misconduct of the Claimant and consequently whether or not the Claimant is entitled to end of service gratuity and other monies allegedly owed. As per Article 62(1) of the Employment Law, subject to Article 62(5), and (6), an employee who completes continuous employment of one year or more is indeed entitled to a gratuity payment at the termination of the employee's employment. However, as specified at Article 62(4), an employee is not entitled to a gratuity payment where the employee has been terminated for cause as defined in Article 59(4). As per the law which governs this dispute, an employer may terminate an employee's employment for cause in circumstances where the conduct of one-party warrants termination and where a reasonable employer or employee would have terminated the employment. In this case, the Defendant terminated the Claimant's employment due to alleged professional misconduct.

3. It is important to note at the outset that it is not the concern of this Court as to whether or not the Claimant is guilty of professional misconduct, rather, to find whether the Defendant has acted reasonably in dismissing the Claimant for misconduct and subsequently withholding the Claimant's gratuities and monies otherwise due. An authority in disputes such as these is found in *British Home Stores Ltd v Burchell* [1978] IRLR 379 which sets out a framework for Employment Tribunals in deciding whether or not employers have acted reasonably in dismissing employees for misconduct. For the purposes of the alleged misconduct case in front of me, the Burchell `test' can be reduced down to three pertinent questions:

- Did the Defendant genuinely believe the Claimant was guilty of the alleged misconduct?

- Did the Defendant have genuine grounds to suspect the Claimant's misconduct?

- Did the Defendant carry out as much investigation as was reasonable in the circumstances before making a final decision about the Claimants' guilt?

- When assessing the validity of the Claimant's claim, I shall discuss each of the key issues in this case in turn, taking into consideration the Burchell test in reference to the aforementioned laws governing this dispute.

`Reasonable' grounds for dismissal

1. The Defendant submits various pieces of evidence regarding the Claimant's alleged misconduct, namely an email sent on 8 June 2018 to clients, and an email sent on 13 June 2018 to the Claimant's personal email. The Defendant submits said evidence under the theory that the Claimant acted in a manner that was inappropriate and unlawful, in that the Claimant both misled clients in terms of the services offered by the Defendant (Claimant's email dated 8 June 2018) and was in breach of the company's confidentiality policy (Claimant's email dated 13 June 2018). I shall deal with these two issues chronologically.

2. At the onset, it should be noted that the existing professional relationship between the parties is disputed. It is agreed by both parties that, prior to any allegations, there was an incident in which the Claimant's line manager, Mr Joos, encountered the Claimant printing his employment contract. It is the Defendant's contention that the two parties `maintained a very good relationship' after this event, however, it is the contention of the Claimant that the relationship deteriorated thereafter. I find the Defendant's theory of the case highly unlikely given that any employer would be concerned if they were to find an employee printing a copy of his or her Employment Contract. Moreover, the Defendant admits, in its defence, that on discovery of the email sent by the Claimant on 8 June 2018, the Claimant's line manager did initiate a verbal discussion with the Claimant `to express his annoyance and disappointment'.

3. On the Defendant's own account it is clear that in the first instance, it was the Claimant's non-compliance in taking management instructions(in `taking' clients from the ex-employee's roster rather than requesting to do so and gaining permission from the line manager) which was in fact the premise for the original dispute, not any alleged professional misconduct, which in terms of the chronology of events, came much later down the line. Indeed, on learning about the 8 June 2018 email, it appears the Defendant did not express that it genuinelybelieved the Claimant to be guilty of professional misconduct, but rather expressed displeasure that the Claimant had not requested permission to email clients that were not on his roster. In fact, it was not until 14 June 2018, after `investigation' of the Claimant's email account that the Claimant was informed that he was not permitted to work at the Defendant's offices nor was he permitted to contact any clients. The Claimant's access to emails was blocked and on 15 June 2018 the Defendant provided the Claimant with the additional letter which informed the Claimant of his immediate suspension. Therefore, there was nearly a clear week between the first email and the allegations of misconduct.

4. It is the Defendant's case that the email of the 8 June 2018 was in breach of the Defendant's confidentiality policy as it allegedly misled clients by inaccurately marketing services which the Defendant is not licensed nor permitted to provide. I find that whilst this argument is completely devoid of merit, on the basis of the content of this email alone and the `marketing' of services, it does not constitute reasonable grounds upon which to allege gross professional conduct. As previously mentioned, it is not the responsibility of this Court to ascertain if the Claimant is indeed guilty of professional misconduct; this is not a finding of fact. Rather, it is to assess whether the Defendant had reasonable grounds upon which to reasonably believe that the Claimant was guilty of said professional misconduct. I find the email of 8 June 2018 is not

substantial enough to warrant the belief that the Claimant was guilty of the alleged.

5. On the evidence before the Court, the email of 13 June 2018 is more compelling evidence that the Defendant had genuine grounds to suspect the Claimant's gross professional misconduct. The Defendant argues that in sending the 13 June 2018 email, the Claimant has breached the Defendant's Confidentiality Policy and furthermore Clause 26 of the Employment Contract regarding confidential information. It is a fact that is agreed by both parties that the Claimant did not seek permission to transmit the screenshots via email to the Claimant's personal email address. On the Claimant's account this email was sent in mistake to his personal address, and yet the Claimant argues that the emailing to personal email accounts was a common practice within the company.

6. It is the Defendant's case that the screenshots sent on 13 June 2018 are in breach of the company's confidentiality policy, which specifies that employees are not permitted to send confidential information to their personal email without proper authorisation from their manager. The wording of the confidentiality clause indicates that the emailing of confidential data from professional to personal email is indeed permitted in certain circumstances (when authorised) and thus the alleged mistake is not the issue in itself, rather, the fact that the Claimant did not gain permission.

7. It is not simply the manner in which the 13 June 2018 email was sent, but the content which requires proper consideration. As the evidence supplied clearly shows the email did not contain information which is `confidential' per se. Rather, these are screenshots of full names and the companies at which those named are employed. It is the Defendant's case is that these people named are key decision makers, and that the information is `specific and contextually derived' and thus `incredibly commercially sensitive and confidential'. This specific part of the Defendant's argument indeed hinges on the fact that those individuals named are authorised to place trades with the Defendant, and that this `categorisation' of clients is not public. I find this line of argument lacking merit, due to the fact that the names of employees and companies information can easily be found on publicly available sources, and the fact that they are authorised to place trades with the Defendant is a moot point. Ultimately the criteria for a confidentiality breach as per the Defendant's own confidentiality policy is simply not met. The combination of information (name and company) in the screenshots sent by the Claimant simply does not constitute a breach of confidentiality. Therefore, on the facts before the court, it seems improbable that these are substantial grounds upon which the Defendant would suspect the Claimant's misconduct.

8. With regard to the third part of the Burchell test, I find that the Defendant did not meet the requirement to carry out as much investigation as was reasonable in the circumstances. Indeed, it would have been fair, reasonable and prudent to take more time to come to a final decision about the Claimants' guilt. Allegations of professional misconduct are not to be taken lightly and can taint a man's professional reputation. The timeframe in question is, on anyone's account, very tight; with a matter of mere days between the first incident (the printing of the employment contract), the discussion in which the line manager voiced his displeasure, the email of the 8 June 2018, the email of 13 June, and the dismissal and subsequent allegations. Though the disciplinary hearing and appeal were held, this Court finds that investigations were rushed, and that there was very little time for the Defendant to conduct a thorough inquiry into the email accounts and databases to fully understand whether the Claimant was indeed guilty of gross professional misconduct.

9. For the reasons set out above, and on the lack of evidence before this Court, I do not find reasonable grounds upon which the Defendant based their judgment of the Claimant's alleged misconduct. I thus find that the Claimant's dismissal was not in accordance with Article 59A of the Employment Law and consequently find the Claimant is entitled to a gratuity payment under Article 6(1) of the Employment Law.

10. This is not to say that the Defendant's version of events is totally implausible. However, based on the evidence before this Court that the Defendant has not met its burden of proof in showing reasonable grounds to make misconduct claims. Without the Defendant proving its defence, the correct course of action is to rely on the original Employment Contract, which must be honoured as the Defendant has not been able to show a reason not to honour it. Consequently, the Defendant must pay the Claimant gratuity payment under Article 6(1) of the Employment Law.

11. The Defendant owes the Claimant for his End of Service Gratuity, in accordance with Article 62 of the DIFC Employment Law. Subject to Article 62(5), and (6), an employee who completes continuous employment of one year or more is entitled to a gratuity payment at the termination of the employee's employment.[illegible] The gratuity payment shall be calculated as follows:

- Twenty-one days' basic wage for each year of the first five years of service.

- Thirty days' basic wage for each additional year of service, provided that the total of the gratuity shall not exceed the wages of two years of service.[illegible] [illegible]

- The daily rate for the employee's basic wage shall be calculated based on the number of days in the year and where the termination occurs prior to the end of any full year of employment, the gratuity payment shall be calculated on a proportionate basis.

The Claimant's Entitlements

1. As determined above, I cannot find that the Defendant had reasonable grounds to believe misconduct. Thus, the terms of the original Employment Contract must govern. Under the terms of the original Employment Contract, the Claimant is entitled to a number of sums, all of which I will address in turn below.

2. The Claimant is entitled to the following:

- Notice period USD 9,166;

- Gratuity USD 22,270.70;

- Court fee USD 1,519.78; and

- Article 18(2) penalties USD 86,989. ◆

End of Service Gratuity

1. The Claimant's calculation for his end of Service gratuity has been calculated incorrectly. I find that his end of service gratuity payment should be calculated as follows:

For the period of continuous employment from 16 January 2015 to 20 June 2018 (3 years, 5 months and 5 days) at a rate of 21 days' basic daily wage (USD 301) per year:

3 years' service:

3 x 21 = 63 days accrued

63 (days) x 301 (daily rate) = USD 18,963

5 months and 5 days service (191 days):

21 / 365 = 0.057 x 191 = 10.99

10.99 (pro rata days) x 301 (daily rate) = USD 3,307.70

Total End of Service Gratuity: USD 18,963 + USD 3,307.70 = USD 22,270.70

◆

Discretionary Bonus

1. I find the Claimant is not entitled to the bonus sought, pursuant to Clause 8 of the original Employment contract dated 11 December 2014 this bonus is discretionary, and the Defendant is therefore not obliged to pay such a sum.

Legal Fees and Costs

1. The general rule in the SCT regarding legal costs states at Rule 53.70 of the Rules of the DIFC Courts (hereafter "RDC") that the "*SCT may not order a party to a small claim to pay a sum to another party in respect of that other party's costs, fees and expenses, including those relating to an appeal, except: (1) such part of any Court or Tribunal fees paid by that other party as the SCT may consider appropriate; (2) such further costs as the SCT may assess by the summary procedure and order to be paid by a party who has behaved unreasonably.*"

2. In this case, neither party has claimed, nor can either party be said to have behaved "unreasonably" as per the standard required by RDC 53.70(2). Therefore, I am limited in my assessment of costs to the SCT fees paid by both parties. I find that it is reasonable in this case, as the Claimant has been successful on most claims, to require the Defendant to reimburse the Claimant for his SCT Court fees in the amount of AED 5,585.19 equivalent to USD 1,519.78.

3. The parties shall otherwise bear their own costs.

Interest

1. The Claimant has made further claim to "Interest on outstanding salary as the court sees fit." With reference to the discussion on Article 18 of the DIFC Employment Law, the Court does not see fit to award any interest to the Claimant, especially in circumstances where the Claimant has failed to make any legal argument as to his entitlement to interest and has failed to quantify the interest claimed. The Claimant's claim for interest is dismissed.

Article 18 Penalties

1. Article 18 of the DIFC Employment Law states:

"18. Payment where the employment is terminated

1. An employee shall pay all wages and any other amount owing to an employee within fourteen (14) days after the employer or employee terminates the employment.

2. If an employer fails to pay wages or any other amount owing to an employee in accordance with Article 18(1), the employer shall pay the employee a penalty equivalent to the last daily wage for each day the employer is in arrears."

1. In this case, I have already found that the Defendant owes the Claimant significant sums as notice period, bonuses and gratuity. Therefore, the Defendant is found to be in "arrears" as to "wages or any other amount owing" to the Claimant. It is therefore appropriate to require the Defendant to pay to the Claimant the penalty articulated in Article 18(2) of the DIFC Employment Law.

2. As the Claimant's last working day was 14 June 2018, the Article 18 penalty will begin to accrue from 14 days after that starting from 29 June 2018 onwards until full payment is made to the Claimant. Article 18 penalties are calculated by taking the last daily wage payable to the Claimant. In this case, the Claimant was paid 110,000 USD basic salary per annum. The daily wage applicable shall therefore be (USD 110,00 annual salary / 365 working days) USD 301. 289 days have passed from 29 June 2018 until this Judgment and thus the Defendant shall pay the Claimant USD 86,989 as Article 18(2) penalties. The Defendant shall continue to pay the Claimant USD 301 per day starting

from 16 April 2018 onwards, until the aforementioned Judgment amount has been paid.

Conclusion

1. The Defendant shall therefore pay the Claimant a total sum of USD 119,945.48 to include:
2. Notice period USD 9,166;
3. Gratuity USD 22,270.70;

- Court fee USD 1,519.78; and
- Article 18(2) penalties USD 86,989. ◆
- The Defendant shall pay to the Claimant an additional USD 301 per day, starting from 16 April 2019 until the day that the judgment amount is paid to the Claimant.
- The Claimant's claims as to legal costs and interest are dismissed.

Issued by:

Maha Al Mehairi

SCT Judge

Date of issue: 15 April 2019

At: 10am