Claim No. CFI 016/2012

THE DUBAI INTERNATIONAL FINANCIAL CENTRE COURTS

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

ON APPEAL FROM THE SMALL CLAIMS TRIBUNAL
BEFORE JUSTICE SIR JOHN CHADWICK

BETWEEN

CAROL

Applicant

and

(1)CHRIS

(2)CIRO

Respondents

Hearing:26 August 2012

Counsel:The Appellant, CAROL appeared in person.
Mr Payam Beheshti instructed by Clifford Chance for the Respondents.

Judgment:9 September 2012

JUDGMENT

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1. This is an appeal from an order made in the Small Claims Tribunal on 6 February 2012 in proceedings brought by CAROL against CHRIS and CIRO. CAROL claim in those proceedings was for the payment of a bonus awarded to him in a letter, dated April 2008, from CHRIS.

2. On the material that has been put before this Court, at the date of that letter CAROL was employed under a Contract of Employment, dated 18 May 2006, by Dubai Investment Group LLC. That company was described in the Contract of Employment as a subsidiary of "CHRIS". The Contract set out, in paragraph 3, the compensation that he was to be paid: a basic salary with allowances. There were certain other benefits, such as an annual leave ticket and a schooling allowance and medical insurance. Nothing was said in that Contract as to any entitlement to, or expectation of, a performance bonus.

3. The letter of April 2008 was signed by the Chief Executive Officer of CHRIS. It was in these terms (so far as material):

> "Re 2007 Discretionary Incentive Bonus. In recognition of your contribution to the overall performance of the company during 2007, it gives me great pleasure to inform you that you have been awarded a discretionary incentive bonus amounting to USD 350,000 for this period. In accordance with the approved policy this incentive bonus is paid out in three installments. An initial cash payment will be made this month amounting to 50 percent of the above award, and the balance of the incentive will be deferred for two years and will be distributed when participants meet the criteria set out under the rules of the scheme. Under the rules, the first half of the deferral will be distributed in the next calendar year during January and the second half of the deferral will be distributed one year following the first deferral distribution."

Pausing there, on reading that paragraph of the letter, CAROL would have expected to receive a first installment of his bonus, in the amount of USD 175,000, within the month of April 2008; a further installment of USD 87,500 in January 2009; and a final installment of USD 87,500 in January 2010. But the letter went on in these terms:

> "The deferred element awarded will be invested into a shadow fund that will have a return determined by reference to the aggregate performance of CIRO. There will be no capital protection applied to this award. Therefore, any future negative returns achieved by Dubai Group will result in a reduction of the deferral award. Where a participant ceases to be employed by the company or an associated company, except in special circumstances as outlined within the rules he/she shall thereupon forfeit any uninvested award, and these amounts will be transferred to the reserve pool accordingly.
>
> I would like to extend my sincere thanks for all your support during 2007 and wish you every success in 2008. Please note the above information in relation to the incentive scheme is strictly confidential. The contents herewith should not be the subject of any further discussion, and this should be observed both externally and internally at all times."

4. CAROL accepts that he did receive the full payment of $175,000 due in April 2008; but the payment due in January 2009 was reduced by 30 per cent (from $87,500 to $61,250) on the grounds of poor performance of the shadow fund during 2008. But, as he stated in his letter of claim dated 11 November 2011:

> "However, I have to date not received any of the January 2010 payment, When I wrote to the CHRIS/CIRO in this regard, they replied that the return on equity was very bad in 2009 and, therefore, no further payments would be made in relation to deferred bonuses for prior years,"

CAROL complained that he had written to the CHRIS/CIRO again asking them to elaborate the basis on which there would be no further payment of the deferred element but that, as at the date of that letter of claim he had had no response to that request.

5. It was in those circumstances that CAROL commenced these proceedings, claiming against CHRIS - and, in the alternative, CIRO - for the release of the 2008/2009 results of CIRO used to calculate the performance of the shadow fund, the release the calculations behind the reduction and cancellation of the January 2009 and January 2010 deferred payments, and for an interim payment of USD 52,500, with accrued interest since January 2010 on the basis that that represented a 40 per cent reduction on the USD 87,500 final installment.

6. The Defendants' response to that claim was not to explain the basis on which CHRIS or CIRO asserted that CAROL was not entitled to the final installment payment; but, rather, to take a jurisdiction point. It was said that the claim did not fall within Article 5A of the Judicial Authority Law, (Dubai Law No. 12 of 2004). In support of that contention the Defendants relied upon a subsequent Contract of Employment contract, dated 30 October 2008, between CAROL and CIRO. With effect from the date of that Contract, CAROL employer became CIRO: he was no longer employed by Dubai Investment Group LLC. If he had ever been employed by CHRIS, he was no longer so employed. It was said that any claim against CIRO did not fall within Article 5A of the Judicial Authority Law; and that, by reason of the October 2008 Employment Contract, CAROL no longer had any claim against CIRO.

7. Paragraph 2 of the Employment Contract of 30 October 2008 was in these terms;

> "Date of Transfer
>
> Should you accept this offer of employment you will join the employer on 1 November 2008, However, your original joining date with CHRIS will be applicable for EOSB [End of Service Benefit], Leave and other discretionary entitlements will be transferred from CHRIS."

The October 2008 contract then set out the compensation which CAROL is to receive from his new employer and provisions in relation to annual leave, tickets, schooling allowances similar to those in the earlier, May 2006, contract, At paragraph 8 there was a provision relating to performance bonus:,

> "Performance bonus payable of such amount at such intervals and subject to such conditions as remain in our absolute discretion from time-to-time. Any bonus payment made to you shall be purely discretionary and shall not form part of your contractual remuneration under this offer letter. If we make a bonus payment to you we are not obliged to make subsequent bonus payments. With respect to the foregoing, you shall in any event have no right to a bonus or a time apportioned bonus if you have not been employed throughout the whole of our relevant financial year or your employment terminates for any reason or you are under notice of termination, whether given by you or us, or prior to the date when a bonus might otherwise have been payable. Where bonuses are paid, if any, they don't form part of the total annual compensation but are for calculation of end of service gratuity or otherwise and are not pensionable."

As I have said, there was no comparable provision in the May 2006 contract.

8. The Defendants' application contesting the jurisdiction of the DIFC Courts to entertain CAROL claim came before the Small Claims Tribunal. The judge acceded to that application. He held that the DIFC Courts had no jurisdiction to hear and determine the claim. He reached that conclusion for reasons which he set out in a Judgment dated 6 February 2012, Put shortly, he accepted, at paragraphs 10 and 18 of that judgment, the Defendants' submission that the Employment Contract of May 2006 was replaced in its entirety by the Employment Contract of October 2008. He pointed out that, under paragraph 2 of the October 2008 Contract "any obligations on the employer are transferred to the Second Defendant CIRO"; and he accepted, at paragraph 19 of his judgment, that CIRO was an entity which at all times is and was established and operated outside the DIFC, Accordingly, the matter did not fall within Article 5A of the Judicial Authority Law.

9. The Judge went on to hold that, in any event, CAROL claim was governed by Article 6 of the UAE Labour Law; and so should have been brought before a Labour Department Tribunal before being litigated.

10. As I have said, the letter of April 2008 was signed by the Chief Executive Officer of CHRIS and, on its face, was written on behalf of that company. There is nothing in that letter which suggests that it was written on behalf of either Dubai Investment Group LLC (CAROL employer at that time) or on behalf of CIRO. CAROL claim is based upon that letter: it is, necessarily in the circumstances, a claim against CHRIS.

11. It follows that the principal issue on this appeal, therefore, is whether the Judge was right to take the view that the obligation which (as CAROL contends) was assumed by CHRIS in the letter of April 2008 had been transferred (with his consent) from CHRIS to CIRO by paragraph 2 of the Employment Contract dated 30 October 2008.

12. In addressing that issue, it is important to have in mind that the obligation which CAROL seeks to enforce in these proceedings was not an obligation under an Employment Contract. The only relevant Employment Contract in April 2008 - so far as appears in the material put before the Court - was the Contract of May 2006. That Contract contained no provision for incentive bonuses. It was a contract made with Dubai Investment Group LLC: CAROL entered into no Contract of Employment with CHRIS.

13. The question, therefore, is whether the award made by CHRIS in the letter of April 2008 is an "other discretionary entitlement" within the meaning of paragraph 2 of the October 2008 Employment Contract. In my view, the answer to that question is "No". There are, I think, two

factors which point to that conclusion.

14. First, "other discretionary entitlement" - in the context of the expression "Leave and other discretionary entitlements" in a paragraph dealing with the date of transfer of employment rights - should be construed as a reference to discretionary rights under an earlier employment contract. As I have said, the obligation which CAROL seeks to enforce in these proceedings is not an obligation under an earlier employment contract.

15. Second, the obligation which CAROL seeks to enforce in these proceedings was not, as at October 2008, "a discretionary entitlement". The letter of April 2008 makes it clear that the discretion whether or not to make an award of bonus in respect of the year 2007 had already been exercised. The award made in that letter is in a specified amount: USD $350,000, payable in three installments. Payment of the second and third installments is deferred; but payment of those installments is not discretionary. There is an obligation to pay the installments due in January 2009 and January 2010. A "discretionary entitlement", as it seems to me, is an entitlement which is due only upon the exercise of a discretion by the employer or some other party. In the context of this case, as at October 2008, a bonus in respect of the year 2008, to be awarded in 2009, would have been a discretionary entitlement: a bonus in respect of the year 2007, which had already been awarded in April 2008, was not a discretionary entitlement. It was an entitlement to which CAROL had a vested right. That vested right was, of course, subject to the adjustment provision in the letter of April 2008. But that adjustment provision was not dependent upon the exercise of a discretion; it was referable to the performance of a shadow fund, into which the deferred payment was to be invested. The payments due in January 2009 and January 2010 were deferred payments: they were not discretionary payments. Had it been the intention of the parties to the contract of October 2008 that CIRO should take over the obligations of CHRIS in respect of deferred payments then outstanding, it would have been easy so to provide. But, for whatever reason, that was not done.

16. It follows that I am satisfied that the Small Claims Tribunal erred in taking the view that CAROL'sclaim lay against CIRO; and that he had no claim against CHRIS. On a proper analysis, the claim is based on an obligation assumed by CHRIS in the letter of April 2008. That was - and, notwithstanding the contract of October 2008, has remained - an obligation of CHRIS. It was not - and has not become - an obligation of CIRO.

17. Obligations of CHRISdo fall within Article 5A of the Judicial Authority Law. CHRIS is based in the DIFC: indeed, the letter of April 2008 gave the DIFC as its address. CHRIS is licensed to carry on business in the DIFC. This is a commercial claim arising out of or relating to a contract included within the DIFC within paragraph 5A(1)(b) of the Law. I do not understand the Defendants to submit otherwise.

18. In those circumstances, it seems to me that the Small Claims Tribunal did have jurisdiction to hear and determine CAROL's claim to the final installment of bonus that had been awarded to him in April 2008. Accordingly, I allow this appeal and set aside the order of 6 February 2012.

19. I should add, for completeness, that the DIFC Courts are not deprived of jurisdiction in the present case by the provisions of Article 6 of the UAE Labour Law. On a true analysis Article 6 of the Labour Law applies to the enforcement of employment rights which accrue to the employee under the provisions of the law itself. In the present case, first, the right which CAROL seeks to enforce is not a right which accrues to him under Article 6 of the UAE Labour Law. Second, it is not a right which is arises out of his Employment Contract. Third, it is not a right which he seeks to enforce against a Defendant which has been his employer. It is a right which arises under the letter of April 2008.

20. In the circumstances that the appeal is allowed and the order of the Small Claims Tribunal dismissing the proceedings for lack of jurisdiction, is set aside, it is necessary for this Court to consider what steps should now be taken to determine CAROL's claim? In particular, should the proceedings continue to a trial before the Small Claims Tribunal; or can they, now, be determined summarily in this Court.

21. CAROL's claim is for payment of the third installment of the award of bonus in respect of the year 2007: an installment quantified in the amount of $87,500, subject to whatever reduction of that amount falls to be made pursuant to the third paragraph of the letter of April 2008. The reduction to be made is to be determined on the hypothesis that, with effect from April 2008, USD 87,500 has been "invested into a shadow fund that will have a return determined by reference to the aggregate performance of Dubai Group". The phrase "invested in a shadow fund" suggests that that sum, $87,500, will not actually be invested for the benefit of the person to whom the award has been made; and so will not, in fact, be represented by assets held in a fund. Rather, there will be a notional investment in a fund which will be treated as if it had acquired assets of equivalent value. That is why it is described as a "shadow fund". If the "shadow fund" is to have a return "determined by reference to the aggregate performance of Dubai Group", the hypothesis must be that the fund will be treated as if it had acquired assets the value of which are, from time to time, referable to the performance of the xxxas a whole. The most obvious method of giving effect to that hypothesis would be to treat sum, $87,500, as having been notionally invested made in shares of the holding company of the CIRO; but there may be other methods. That would give effect to the second sentence in that third paragraph, which explains that there will be no capital protection applied to the award, and so future negative returns achieved by CIRO will result in reduction of the deferral award. That would, indeed, be the effect if future negative returns achieved by CIRO had the effect were reflected in a diminution in the value of its shares.

22. The Defendants have been given the opportunity to explain how a shadow fund has performed; and to quantify what reduction (if any) should be made to the value of the third installment of bonus to reflect the hypothesis that it had been invested in a shadow fund in accordance with the third paragraph of the letter of April 2008. But they have not chosen to take that opportunity. They did not respond to Carol's inquiries (referred to in his letter of claim); and their counsel was unable to assist this Court, in response to inquiry, on that question.

23. It was suggested by counsel that the effect of the third paragraph of the letter of April 2008 was that payment of the second and third installments of the bonus awarded in that letter were entirely discretionary: that is to say, that it was for the management of the Carol, in their absolute discretion, to decide how the shadow fund had performed. That suggestion - which, in fairness to counsel, I should record was not pursued with much enthusiasm - seems to me wholly misconceived. The third paragraph of the letter of April 2008 provides for the deferred installments to be invested in a shadow fund, which will have a return which will be objectively referable to the performance of the Dubai Group: that is quite inconsistent with an intention that the management of the group can decide, in their discretion, whether or not any payment

is to be made at all. Had the Chief Executive Officer of CHRIS wished to say, in his letter of April 2008, that payment (or the amount) of the deferred installments would be wholly within the discretion of the management of CIRO, he could have done so. He did not do so.

24. That was the only indication as to what defence to Carol's claim might be advanced on behalf of CHRIS might be advances at a trial. It is not suggested either

(i) that C had forfeited his right to the third installment because, in 2009, he left the employment with Carol under a voluntary retirement scheme or

(ii) that the shadow fund has performed so badly that that any notional investment in it is now valueless.

25. In those circumstances, as it seems to me, this Court must ask whether there is any purpose in allowing this claim to return to the Small Claims Tribunal in order to be determined at a trial. In asking itself that question, this Court must have in mind the powers referred by the Rules of the DIFC Courts; and, in particular, the overriding objective set out in Part 1 of those Rules. The overriding objective requires the Court to deal with cases justly. Dealing with a case justly includes, so far as is practicable, saving expense, dealing with a case in a way that is proportionate to the amount of money involved and the financial position of each party, ensuring that it is dealt with expeditiously and fairly and allotting to it the appropriate share of the Courts' resources: see RDC Rule 1.5.

26. I ask myself, therefore, what purpose is to be served by allowing the matter to go back to the Small Claims Tribunal; rather than dealing with it here and now? It is said that it would not be fair to deal with the matter now because the Defendants are entitled to have their defence considered at a trial. That submission would have force if it had been explained what defence would be advanced at a trial. The only defence that has been put forward is based on the construction of the third paragraph of the letter of April 2008. It has not been shown that the Small Claims Tribunal would be in a better position than this Court to determine that question of construction: in particular, it has not been shown, or even suggested, that the question turns on disputed facts. In those circumstances there is nothing unfair in this Court deciding a point of construction which would otherwise have to be decided by the Small Claims Tribunal.

27. Every other factor - and, in particular, the amount in issue, the financial position of the claimant and the need to ensure that matters be dealt with expeditiously - points to the matter being dealt with here and now. This claim was brought in November 2011. We are now in August 2012. Carol has not yet been told why he has not been paid the amount that was promised to him by CHRIS back in April 2008. The Court has been given no reason of substance why Carol has not been paid. It is, in my view, time that the third installment promised in April 2008 - and due in January 2010 - is paid.

28. Accordingly, I will make an order for payment to Carol of US$87,500. That was the initial amount of the installment; and nothing has been put forward to suggest why it should be reduced. CHRIS has chosen not to put forward any basis for a reduction in that amount; and they must accept the consequences of that choice.

29. Accordingly, I set aside the Order of 6 February 2012. I order payment by CHRIS of US$87,500 - or the equivalent in UAE Dirhams - to be made to Carol within 14 days.

Issued by
Mark Beer
Deputy Registrar
Date of Issue: 9 September 2012
At: 4 pm