Claim No. SCT 087/2017

THE DUBAI INTERNATIONAL FINANCIAL CENTRE COURTS

In the name of His Highness Sheikh Mohammed Bin Rashid Al Maktoum,

Ruler of Dubai

IN THE SMALL CLAIMS TRIBUNAL OF DIFC COURTS

BEFORE SCT JUDGE NASSIR AL NASSER

BETWEEN

HARISH

Claimant/Counter-Defendant

and

HAUKEA LIMITED

Defendant/Counter-Claimant

Hearing:**1 June 2017**

Judgment: **11 June 2017**

Amended Judgment:**15 June 2017**

AMENDED JUDGMENT OF SCT JUDGE NASSIR AL NASSER

UPON hearing the Claimant and the Defendant

AND UPON reading the submissions and evidence filed and recorded on the Court file

AND UPON the amendments made to paragraph 32, 33, 34, 44, 46, 66 and 87 of this Judgment

IT IS HEREBY ORDERED THAT:

1. The Claimant shall pay the Defendant the sum of AED 96,924.19 being the total sum of AED 116,774.19 towards advance commission, minus AED 19,850 owed to the Claimant as Gratuity and vacation leave.

1. ~~The Defendant shall pay the Claimant the sum of AED 23,189 as Gratuity and vacation leave payments.~~
2. ~~The Claimant shall pay the Defendant the sum of AED 116,774.19 as repayment of advanced commission.~~

4. All other claims and counterclaims are dismissed.

1. ~~The Defendant shall reimburse the Claimant for the DIFC Courts' Fees in the sum of AED 874.75.~~ Each party shall bear their own costs.

Issued by:

Lema Hatim

SCT Judge

Date of issue: 11 June 2017

Date of re-issue: 15 June 2017

At: 4pm

THE REASONS

The Parties

1.The Claimant is Harish (herein the "Claimant"), an individual filing a claim against the Defendant regarding his alleged employment at the Defendant company.

2. The Defendant is Haukea Limited (herein the "Defendant"), a company registered in the DIFC located in DIFC, Dubai.

Background and the Preceding History

3. The underlying dispute arises over the employment of the Claimant by the Defendant as a "Consultant" by an Employment Agreement dated 4 January 2015 (the "Employment Agreement") with an effective starting date of 13 January 2015.

4. Pursuant to the Employment Agreement, the Claimant's basic Salary is AED 10,000 per month, living allowance of AED 7,000 per month, housing allowance of AED 7,000 per month and transportation allowance of AED 3,000 per month. The Claimant, pursuant to the Employment Agreement, shall be entitled to receive an advance on projected future commissions. In addition to the salary the Claimant shall receive an additional AED 10,000 per calendar month, during the first twelve months of employment only. this amount shall be repaid to the company by way of deduction from any commission due to be paid to the Claimant in relation to invoices issued during the first two years of employment. However, the Claimant acknowledges that the sum of AED 120,000 must be repaid to the company upon termination or whatever reason, if it has not been offset by way of such deduction against commission.

5. On 23 January 2017, the Claimant resigned due to alleged breaches made by the Defendant.

6. On 17 April 2017, the Claimant filed a claim in the DIFC Courts' Small Claims Tribunal (the "SCT") claiming the sum of AED 71,677.99 which consists of: payment of Gratuity in the sum of AED 39,784; Parking Cost in the sum of AED 26,000; Vacation accrued but not taken in the sum of AED 5,769.86; unused holiday for 2017 in the sum of AED 124.13; and an additional penalty for every day that the Defendant has been in arrears since 22 February 2017, pursuant to Article 18(2) of the DIFC Employment Law.

7. On 22 May 2017, the Claimant amended his claim form by increasing the amount claimed to AED 363,141.00. The Claimant also attached further clarification regarding the amount claimed, as follows: (i) Ramadan Hours in the sum of AED 9,000; (ii) Medical in the sum of AED 14,000; (iii) Commission in the sum of AED 120,000; (iv) loss of salary in the sum of AED 81,000 (estimation to date); and penalties under Article 18(2) of the DIFC Employment Law until 22 May 2017 in the sum of AED 67,463.01.

8. The Defendant responded to the Claim on 27 April 2017, defending against the claim and filing a Counterclaim for the return of the advance commission in the sum of AED 105,148. This amount was reached following the deduction of gratuity and other payments out of the original amount claimed as a commission, in the sum of AED 120,000. Therefore, the remaining balance is AED 105,148.

9. The parties met for a Consultation with SCT Officer Ayesha Bin Kalban on 9 May 2017 but were unable to reach a settlement.

10. Both parties attended the hearing before me listed on 1 June 2017.

The Claim

11. The Claimant's case relates to the Employment Agreement dated 4 January 2017. The Claimant resigned on 23 January 2017 with one month notice period, the employment relationship ended on 22 February 2017.

12. The Claimant alleges that prior to joining the Defendant, he had indicated that he wouldn't want to agree on a monthly allowance lower than AED 30,000. He alleges that he was told that it will be more than AED 30,000 due to the company's platform, database, contracts signed with law firms and its ability to make placements. Therefore, the Defendant agreed to award the Claimant a monthly advance commission that would be offset against future commission that he would earn over the first 2 years. In addition, the Claimant alleges that he mentioned to the Defendant that he would not want it to be considered a debt and was reassured that it was not a loan, it would only be recovered from future commissions.

13. The Claimant alleges that he was persuaded to forgo a higher salary for a payment of advance commission of AED 10,000 per month, which amount would be adjusted against any future commission earned during the first two years. The Claimant also alleges that he was not paid AED 120,000 in advance commission, he was only paid AED 116,774.19 of advance commission for the first 12 months because he alleges that he commenced his employment on 13 January 2015, although the Employment Agreement was signed on 4 January 2015. Therefore, the Claimant alleges that during the first month he did not receive the Salary and the commission in full. The Claimant alleges that both parties agreed that the Claimant will not be obliged to repay the AED 116,774.19 beyond his second year of employment, and that Clause 6.4 of the Employment contract exists to ensure that the Claimant will not be resigning during the first two years of employment.

14. The Claimant also adds that he is not required to repay the amount demanded as an advance commission and that his liability in this regard should be considered as settled, as he completed two years of employment with the Defendant. In addition, the Claimant alleges that pursuant to the email dated 30 January 2017, the Defendant waived the right to recover the advance commission in an email dated 30 January 2017, subject to the condition that the Claimant would not breach the post termination covenants. The Claimant also alleges that he did not ask for this advance commission but it was given to him as a guarantee that he would earn a large commission with the Defendant.

15. Furthermore, the Claimant asserts that during his course of employment he had made profit for the company which exceeds the amounts paid to him by way of salary and advance commission. In addition, the Claimant alleges that he had a lot of administrative work to do which affected his ability and performance to make deals and earn commission. He adds that he was also not able to earn commission due to the incomplete database and database program.

16. The Claimant alleges that in the email dated 30 March 2017, the Defendant calculated his end of service gratuity to be AED 39,784 and that the Defendant should not be entitled to offset his gratuity against the advance commission repayment. He alleges that he should be awarded and paid his gratuity.

17. The Claimant adds that in the same email mentioned above, the Defendant has calculated his unused holiday entitlement for 2017 being 3.6 days but the figure should be 3.74 days and that the Claimant is entitled to AED 124.13 which should be paid to him.

18. The Claimant alleges that during his first year with the Defendant, he took 18.5 days of holiday out of 25 days of holiday and that he had 6.5 days to take. However, due to the company's policy, the employee is unable to carry forward their holidays. However, the Claimant alleges that as

per Article 27(2) of the DIFC Employment Law, he can carry over up to 20 working days' worth of holiday. Therefore, the available leave during the employment period which he was unable to carry forward is 6.5 days, which is calculated to AED 5,769.86.

19. The Claimant also alleges that Clause 15 of the Employment Agreement restricts the employee from engaging in, being concerned or interested in any business with competes with or will at any time compete with the Defendant for a period of 6 months from the date of termination date. The Claimant adds that the non-compete clause in the Employment Agreement is overly broad and that does not clearly and narrowly define the type and scope of work which is subject to the non-compete clause.

20. The Claimant also alleges that the Defendant is in breach of Article 11 of the DIFC Employment Law by misrepresenting the work opportunity to the Claimant at the time of joining in order to persuade him to join the company.

21. The Claimant alleges that prior to joining the Defendant he was informed that the Defendant would provide him with a parking space at DIFC. Upon joining, the Claimant alleges that he used the metro as he did not want to waste his time looking for parking while he was waiting for the Defendant to complete the parking procedure with DIFC .However, the Claimant was subsequently told that if he needed a parking space it would cost him AED 1,000 per month, which for the period of two years of employment would amount to AED 26,000. As a result, the Claimant alleges that he personally paid for this expense.

22. The Claimant claims the sum of AED 9,000 in respect of Ramadan hours. It is alleged that the Manager Director of the Defendant had ordered employees to work for a continuous 8 hours, without a break for the two Ramadan periods that the Claimant worked for the Defendant.

23. The Claimant alleges that he was told that a family medical policy would be provided and that the policy would remain active even if either party terminated the employment. However, the Claimant alleges that the Defendant requested that he pay if he wanted to keep it active, otherwise it would be cancelled. The Claimant also alleges that the Defendant was in breach of Article 53 of the DIFC Employment Law because he was left for 4 months without medical cover. Furthermore, that the medical cover provided was not sufficient and only covered certain Hospital and Clinics, leading the Claimant to request that the Defendant provide better medical cover. The Defendant agreed and the Claimant alleges that he spoke to 4 brokers which resulted in a 4 month period where he and his family did not have any medical cover.

24. The Claimant also alleges that the Defendant was in breach of Article 20 of the DIFC Employment Law during his 2 years of employment.

25. The Claimant requested the Court's permission to ask for statements from the Managing Partners/HR Managers of law firms in the UAE to demonstrate to the court that the Defendant oversold the opportunity to the Claimant in regard to the brand, type of work and key information.

The Defence and Counterclaim

26. The Defendant alleges that the Claimant's compensation package included an advance commission, agreed by both parties at the time of their negotiation. The advance commission was in the sum of AED 120,000 per annum (AED 10,000 per month) paid to the Claimant which would be set off against future commissions earned by the Claimant as per Clause 6.4 of the Employment Agreement, which states the following:

> "the Employee shall be entitled to receive an advance on projected future commissions. In addition to the salary payments under clause 6.1, the Employee shall receive an additional AED 10,000 per calendar month (to be paid at the time as salary under clause 6.1), during the first twelve months of employment only (i.e. an additional AED 120,000 in year one). This amount shall be repaid to the company by of deduction from any commission due to be paid to the employee in relation to invoices issued during first two years of employment and which are attributable to work under taken (fully or in part) by the Employee. The Employee acknowledges that the sum of AED 120,000 must be repaid to the company in full before he becomes entitled to any additional commission. Upon termination of his employment for whatever reason, the Employee agrees to repay the company forthwith upon demand any part of the AED 120,000 received by him that has not been offset by way of such deduction against commissions, and clause 6.5 shall also apply to any such amount accordingly".

27. Clause 6.5 of the Employment Agreement states that:

> "the Employee hereby consents to the deduction by the company from his salary and from any other amounts due to him from the company of any sums owing by him to the company at any time."

28. In addition, the Defendant alleges that the Claimant failed to reach his reasonable commission threshold. The Defendant denies the Claimant's assertion that the Defendant made money from the Claimant's employment. It is alleged that the Claimant generated a total income of AED 202,800 in 2015 and AED 288,108 in 2016 which amounts to AED 490,908 over two years, which does not cover the cost of the Claimant's salary.

29. Furthermore, the Defendant alleges that the Claimant did not earn any commission during his time in employment with the Defendant, no amount was offset against the AED 120,000 and the Claimant is therefore contractually obliged to repay the entire amount, pursuant to the Employment Agreement. Accordingly, the Defendant filed a counterclaim claiming the sum of AED 105,148.03 which will be discussed in further detail below.

30. In relation to Gratuity entitlement, the Defendant alleges that the email sent on 30 January 2017 by the CFO of the Defendant to the Claimant demonstrates that the calculation of gratuity was based on gross salary, however, the correct method is to calculate gratuity based on the basic wage. Therefore, the Defendant submits that the correct calculation for the Claimant's gratuity entitlement is as follows (21/365 x 120000 x 2) + (49/365 x 120,000) = AED 14,733.

31. The Defendant alleges that the Claimant is entitled to a gratuity payment of AED 14,733 as set out in Clause 6.1 of the Employment Agreement as the Claimant's basic wage is AED 10,000 per month.

32. The Defendant alleges that he had legally set off the gratuity amount against the amount owed by the Claimant pursuant to Clause 6.5 of the Employment Agreement and Article 62(2) of the DIFC Employment Law as provided by the Defendant where is states that "the employer may

deduct from the gratuity any amounts owed to the employer by the employee." The Defendant therefore provided a calculation that the Claimant owes the Defendant a total amount of AED 105,267 calculated as follows: AED 120,000 - AED 14,733 = ~~AED 105,276.00~~ AED 105,267.00

33. Furthermore, the Defendant alleges that the Claimant has been paid all dues relating to holiday entitlement in his February salary. In addition, the Claimant failed to identify or substantiate the method of calculation used and has failed to provide any details relating to the sum of AED 124.13. the Defendant also adds that upon calculating it again, he discovered an error in their calculation in reaching 3.6 days and that the correct calculation is 3.71 days as per the calculation provided (2.08 + (22/28 x 2.08) = 3.71. Therefore, the Defendant argues that the right calculation for the difference is ~~Defendant is entitled to~~ AED 118.97 which is calculated as follows: (3.71 x (27000x12/262)) - (3.6 - 27000x12/262) = AED 118.97.

34. The Defendant provided sufficient evidence that he has paid the difference in the sum of AED 118.97. ~~In addition, the Defendant argues that the unused holiday amount of AED 118.97 should be set off against the amount due to the Defendant. In this way, the Defendant alleges that the Claimant owes him the sum of AED 105,267 - AED 118.97 = 105,148.03.~~

35. With respect to the holidays carried over, the Defendant argues that pursuant to Clause 10.2 of the Employment Agreement, no carry over for unused holiday will apply. The Defendant adds that this is the company's policy. Furthermore, the Defendant argues that pursuant to Clause 10.3 of the Employment Agreement, there is no entitlement to payment in lieu of unused holiday except upon termination of employment, which the Defendant alleges was paid to the Claimant.

36. In response to the Claimant's claim of non-compete/post restrictive covenants, the Defendant argues that such provisions are standard in the legal recruitment industry and the Claimant is aware of it. He also added that the restrictive covenants in place are designed to protect the business by reducing the risk of confidential information being shared with unauthorised third parties and/or competitors.

37. In response to the claim made by the Claimant for misrepresentation, the Defendant argues that the Claimant was not required to undertake any additional role or responsibility outside of the scope of his job description and what a reasonable person would expect from such a job. The Defendant also adds that the Claimant did not raise such issues during the period of his employment.

38. In response to the claim made by the Claimant for parking costs, the Defendant alleges that there is no provision within the Employment Agreement nor are there any requirements under the DIFC Employment Law to provide parking for employees. This is a discretionary benefit that the Defendant can choose to offer or not as the case may be. However, the Defendant agrees that it considered the possibility of providing parking but it was deemed too expensive and could not be offered to the Claimant.

39. In response to the claim made by the Claimant for Ramadan timing, the Defendant alleges that during 2015 only two fee earners, namely the Claimant and a director were Muslims and fasting. The Defendant did not set a normal working hour, but was more flexible. The Defendant also adds that the nature of their business involves meeting people outside the office and the Claimant was often out to meetings.

40. The Defendant also denies the Claimant's suggestion that no breaks were offered. The Defendant argues that the Claimant took regular breaks which included walking around and going to pray in the DIFC.

41. In 2016, the Defendant hired a third fee earner (non-Muslim) and set some guidelines for working hours. The Defendant alleges that the Claimant had a regular habit of coming to work late and leaving early. Therefore, the Defendant denies that the Claimant worked for lengthy periods without a break and he also denies that any damages are due to the Claimant with respect to working hours during Ramadan.

42. In response to the Claimant's claim for Medical cover, the Defendant provided insurance from a well-known and internationally reputed provider, namely HANG. The Defendant argues that it is not for the Claimant to decide the type of insurance provided by the Defendant. However, the Defendant accepted the Claimant's request not to renew the same existing policy with HANG so that he may find alternative cover that would better suit his family. The Defendant argues that despite numerous reminders to the Claimant about the cover, the Claimant took four months to do this and failed to provide a suitable policy at a similar price. Subsequently, the Defendant renewed the same existing policy as soon as the Defendant was notified that the Claimant was unable to find an alternative medical cover.

43. In response to the Claimant's claim of client/ law firm relationships, the Defendant argues that he did not understand such a claim.

45. The Defendant along with his defence filed a counterclaim. The Defendant claimed the sum of ~~AED 105,148.03~~ AED 105,267.00 as advance commission already paid to the Claimant (which is mentioned in more details in paragraph 26, 27, 28 and 29 of this Judgment) in which it sets out the basis of the counterclaim as alleged by the Defendant.

46. The Defendant argues in his counterclaim that since the Claimant left, the Defendant discovered that the Claimant had breached his Employment Agreement and post-termination Covenants more than once. The Defendant alleges that the Claimant continued to contact a candidate beyond his termination date whilst holding himself of as a full-time employee of the Defendant. In addition, he did not update his employment details in LinkedIn and maintaining his employment status with the Defendant. The Defendant also argues that he received calls from individuals informing him about a recruitment approach made by the Claimant to him via linked in. However, the Defendant on numerous occasions requested the Claimant to change his status on LinkedIn with immediate effect and to cease contacting other candidates.

47. Therefore, the Defendant alleges that the Claimant has breached his contractual obligations and as a result of bringing forward this claim, the Defendant is now filing a counterclaim for the repayment of ~~AED 105,148.03~~ AED 105,267.00 as mentioned in the Defendant's submission of defence and counterclaim and any damages the court sees fit in respect of the Claimant's multiple breaches.

Discussion

48. This dispute is governed by the DIFC Employment Law in conjunction with the relevant Employment Agreement.

49. The main question is whether the Claimant is entitled to advance commission of AED 120,000 or whether the Claimant breached the post

termination covenants. The advance commission issue is the main issue in this claim, upon which all remedies sought are dependable.

50. Clauses 6.4 and 6.5 of the Employment Agreement explain in detail when the advance commission is paid and when it shall be repaid.

51. The Claimant argues that the Defendant by an email dated 30 January 2017, stated that it would not be seeking repayment unless the Claimant breached post termination covenants. Therefore, the Defendant waived the repayment of the advance commission payment under Clause 6.4 of the Employment Agreement. Furthermore, the Claimant states that the email dated 30 January 2017 is an agreement made by the Defendant and accepted by the Claimant.

52. On the other hand, the Defendant argues that the Claimant breached the post termination covenants, contravening Clause 15.2 of the Employment Agreement:

> "the Employee shall not without prior written consent of the board directly or indirectly at any time within the relevant period engage or be concerned or interested in any business within the relevant area which (a) competes or (b) will at any time during relevant period compete with the business."
>
> Clause 15.3.1 states that the Claimant shall not solicit or facilitate the solicitation or deal with any customer or prospective customer.

53. The Defendant argues that the Claimant has breached his Employment Contract and Post termination covenants more than once. One of the incidents provided by the Defendant is that the Claimant continued to contact candidates beyond his termination date, he was holding himself out as a full time employee of the Defendant. He adds that the Claimant continued to represent himself as an employee of the company. In addition, a Director of the Defendant was contacted by an individual stating that he was approached by the Claimant. The Defendant also adds that he requested the Claimant to change his employment status on LinkedIn with immediate effect and to cease contacting other candidates. However, he alleges that the Claimant refused to do this at first and claimed that he is a freelancer.

54. Furthermore, the Defendant argues that the Claimant left defamatory and libelous comment on his profile page. He also adds that the Defendant contacted the Claimant to remove such defamatory comments from his profile and that such action is a breach to the post termination covenants. The Defendant submitted a screenshot into evidence, showing the following comment made by the Claimant: "due to issues, I have resigned from my role with my previous employer in the DIFC. Hopefully it will be resolved in a fair manner." He also wrote "in the meantime, should any former contacts wish to get in contact for a catch up or info, feel free to send me a message". The Defendant argues that the above is also another clear breach of the Claimant's Employment Agreement, especially the post-termination covenants.

55. I am of the view that the Claimant acted in bad faith towards the Defendant by making private issues between the parties public on LinkedIn. The Claimant is also indirectly approaching former contacts. In my opinion, the above action made by the Claimant is a breach of post-termination covenants. I am also of the view that with respect to the offer made by email dated 30 January 2017, as the Claimant did not provide evidence to show that he had accepted the offer, he is obliged to repay the advance commission pursuant to Clause 6.4 and 6.5 of the Employment Agreement.

56. The Claimant argued that he was only paid 116,774.19 as advance commission as the amount AED 3,225.81 was deducted in January 2015 because the Claimant commenced work on 13 January 2015. The Claimant also provided evidence of the amount received for the month January 2015. Although the payment made was not itemized, I am satisfied with the calculations made by the Claimant. Therefore, the Claimant shall repay the Defendant the sum of AED 116,774.19.

The Claim

1.Gratuity

1. Article 62(2) of the DIFC Employment Law states as follow:

> "(a) twenty one (21) days' basic wage for each year of the first five (5) years of service."

57. The Claimant argues that he is entitled to gratuity in the amount of AED 39,784.70 as the Defendant, in an email dated 30 January 2017, calculated the gratuity on the gross salary. The Defendant acknowledged that this was in fact a mistake and that the right calculation is that which is stated in the DIFC Employment Law.

58. The Claimant's basic wage is AED 10,000 per month and the Claimant was in employment for two years. Therefore, the calculation pursuant to the Law is: (10,000/30 x 21) x 2 = AED 14,000.

59. Accordingly, the Claimant is entitled to a gratuity payment of AED 14,000. However, pursuant to Clause 6.4 and 6.5 of the Employment Agreement and pursuant to the decision made above in paragraph 54, the Defendant shall deduct the sum of AED 14,000 from the advance commission amount of AED 116,774.19. As a result, the total advance commission owed becomes AED 102,774.19.

Holiday Carry Over

60. Article 27(2) of the DIFC Employment Law, states that the employee can carry over up to 20 days of unused holiday entitlement to be used within 12 months. However, the Defendant argues that the Employment Agreement and the company policy are against what is mentioned in Article 27(2) of the Law.

61. The Claimant argues that he is entitled to 6.5 days of holiday which have not been taken in 2015 and 2016.

62. Article 10 (2) of the DIFC Employment Law, states that:

> "nothing in this law precludes an employer from providing in any contract of employment, terms and conditions of employment that are more

favorable to the employee than those required by this Law."

Therefore, I am satisfied that the Claimant is entitled to compensation in lieu of vacation leave pursuant to Article 28(2) of the DIFC Employment Law. As such, the Claimant is entitled to (27,000/30 = 900 per day) AED 900 x 6.5 days = AED 5,850.

63. Accordingly, the Claimant is entitled to compensation in lieu of vacation in the sum of AED 5,850. However, pursuant to Clause 6.4 and 6.5 of the Employment Agreement and pursuant to the decision made above in paragraph 54, the Defendant shall deduct the sum of AED 5,850 from the advance commission of AED 102,774.19. As a result, the total amount becomes AED 96,924.19.

Vacation Time

64. Pursuant to Article 28 of the DIFC Employment Law:

"Where an employee's employment is terminated, the employer shall pay the employee an amount in lieu of vacation leave accrued but not taken."

65. The Claimant argues that he is entitled to vacation days for 2017. The Defendant provided a calculation which I am satisfied with (2.08 + (22/28 x 2.08) = 3.71.

65. ~~Therefore, the payment to be made by the Defendant is (900 x 3.71 = AED 3,339). However, pursuant to clause 6.4 and 6.5 of the Employment Agreement and pursuant to the decision made above in paragraph 52. The Defendant shall deduct the sum of AED 3,339 from the advanced commission of AED 96,924.19 as a result the total amount becomes AED 93,585.19.~~ This payment has been made by the Defendant in February 2017 in the sum of AED 4,468.97, followed by additional payment in the sum of AED 118.97, being the difference in calculation. Therefore, I will not deduct the remaining amount from the advance commission of AED 96,924.19.

67. The Claimant argues that the Defendant was in violation of the Article 23 of the DIFC Employment Law which states that:

"Reduced hours during Ramadan

- during the Holy month of Ramadan, a Muslim employee who observes the fast shall not be required to work in excess of six (6) hours each day. There shall be no reduction in compensation as a result.
- Fasting employees who choose to work for more than six (6) hours a day shall be entitled to rest breaks referred to in Article 26."

Article 26 of the DIFC Employment Law states that:

"where an employee's daily working time is more than six (6) hours, the employee is entitled to rest and prayer breaks not less than one (1) hour in aggregate.

68. The evidence provided by the Claimant for such allegation is an email sent by a director of the Defendant in regard to Ramadan hours for 2016 which are from 9am to 5pm instead of 9am to 6pm. However, this email did not state whether the employee was not entitled to a break pursuant to Article 26 of the DIFC Employment Law. Therefore, I dismiss the Claimant's claim for extra hours worked in Ramadan.

Visa Cancellation and Right to Employment Reference

69. The right to employment reference was not raised by the Claimant in the claim form and was not addressed at the hearing or in the submissions filed prior to the hearing. However, I am of the view that every employee has the right to receive an employment reference.

70. With regard to visa cancellation, the Defendant produced an email demonstrating that the Defendant covered the cost of issuance of the Claimant and his family's visa, which is not a cost factored into their budget, Employment Agreement or the DIFC Employment law. However, both parties agreed in writing that the visa cancellation costs would be paid by the Claimant. Therefore, the Claimant is responsible for his visa cancellation costs.

Parking costs

71. The Claimant argues that the Defendant confirmed and promised to provide him with parking in DIFC. The Claimant also submitted an email from Hazan's personal account I assume (the address is covered), which I am not satisfied amounts to sufficient evidence establishing that the Defendant promised to provide the Claimant with parking. Another email provided is from Hazan's email address in which she asks the Claimant to provide price comparisons of parking options but nothing to confirm that he will get parking.

72. The Defendant also argued that there is no provision within the Employment Agreement nor are there any requirements under DIFC Employment Law requiring the provision of a parking facility to an employee.

73. Therefore, for the reasons mentioned above, I dismiss the Claimant's claim for Parking costs.

Medical Cover

74. The Claimant argues that the Defendant was in violation of Article 53 of the DIFC Employment Law which states that:

"An employer is required to obtain and maintain health insurance cover for its employees."

The Claimant added that the Defendant delayed the process of issuing a medical cover for 3 months when the Claimant first joined the Defendant. In addition, there was also a delay upon renewal of the insurance policy with a higher premium as requested by the Claimant.

75. The Defendant argues that the 4 months delay upon renewal of the medical cover policy was in fact a delay caused by the Claimant, since he requested a more comprehensive medical insurance policy, the task was given to him to find a good one. However, it has been argued that it took the Claimant 4 months to provide a comparison of prices of medical insurance.

76. For the reasons mentioned above, the Defendant was not in violation of the DIFC Employment Law. Although there was a delay of three months at the beginning of the employment, the Defendant did provide insurance policies. If the Claimant suffered from this delay and had to pay for any medical treatment as a result, he should have provided invoices relating to such treatment and the Defendant would be obliged to reimburse the Claimant for the treatment needed while the Defendant was in the process of issuing medical insurance.

77. Regarding the delay which occurred during the renewal of the medical cover, it is the Claimant who asked for different medical cover and again, he should have provided invoices of any medical treatment received during the period of processing the medical insurance in order to seek reimbursement. I dismiss the Claimant's claim for damages with respect to not having medical cover.

Misrepresentation / Loss of Commission for Second Year of Employment

78. The Claimant argues that the Defendant is in breach of Article 11 of the DIFC Employment Law by misrepresenting the work opportunity to the Claimant at the time of joining in order to persuade him to join the company. On the other hand, the Defendant argues that the Claimant was not required to undertake any additional role or responsibility outside the scope of his job description and what a reasonable person would expect from such a job. Therefore, I dismiss the Claimant's claim for misrepresentation and loss of commission.

Article 18 Late Payment Penalty

79. The Claimant claims late payment penalty equal to his daily wages from the date of termination of his employment until the date of payment to be determined by the Courts.

80. Article 18 of the DIFC Employment Law states that:

> "(1) An employer 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."

81. In my view, there is no delay of payment, as the Defendant owes the Claimant the advance commission which pursuant to the Employment Agreement, may be offset. Therefore, I dismiss the Claimant's claim for penalties pursuant to Article 18 of the DIFC Employment Law.

Post Termination Restriction Covenants / Loss of Salary

82. The Claimant argues that the Post Termination Covenants from the Employment Agreement, upon which the Defendant is relying, is enforceable as per *Camellia vs Callister [2012] SCT 005*. However, I adopt the view taken in *Griet v. Guido [2016] DIFC SCT 172*:

> "There appears to be no dispute that both parties agreed to the terms of the Employment Contract upon entering into it. The Claimant contends that the Non-Compete Clause is unfair and will prevent him from finding work in his field and location. However, the Claimant acknowledged that he has yet to find a job and has yet to seek the permission of the Defendant as open to him under the contested Non-Compete Clause, which provides that the Claimant must first seek "permission from the Company" before taking any job or any action which may violate the other provisions of the Clause. Therefore, at this juncture when the Claimant has not been prevented from seeking alternative employment pursuant to the Non-Compete Clause and has presented no convincing legal argument as to why he should be blanketly excused from the Non-Compete Clause in the future, I find it inappropriate to grant any relief in this connection."

The Counterclaim

83. The Defendant alleges that the Claimant's compensation package included an advance commission, agreed by both parties at the time of their negotiation. The advance commission was in the sum of AED 120,000 per annum (AED 10,000 per month) paid to the Claimant, which would be set off against future commissions earned by the Claimant as per Clause 6.4 of the Employment Agreement, which states the following:

> "the Employee shall be entitled to receive an advance on projected future commissions. In addition to the salary payments under clause 6.1, the Employee shall receive an additional AED 10,000 per calendar month (to be paid at the time as salary under clause 6.1), during the first twelve months of employment only (i.e. an additional AED 120,000 in year one). This amount shall be repaid to the company by of deduction from any commission due to be paid to the employee in relation to invoices issued during first two years of employment and which are attributable to work under taken (fully or in part) by the Employee. The Employee acknowledges that the sum of AED 120,000 must be repaid to the company in full before he becomes entitled to any additional commission. Upon termination of his employment for whatever reason, the Employee agrees to repay the company forthwith upon demand any part of the AED 120,000 received by him that has not been offset by way of such deduction against commissions, and clause 6.5 shall also apply to any such amount accordingly".

84. Clause 6.5 of the Employment Agreement states that:

> "the Employee hereby consents to the deduction by the company from his salary and from any other amounts due to him from the company of any sums owing by him to the company at any time."

85. In addition, the Defendant alleges that the Claimant failed to reach his reasonable commission threshold. The Defendant also rejects the Claimant's submission that the Defendant made money from the Claimant's employment. He alleges that the Claimant generated a total income of AED 202,800 in 2015 and AED 288,108 in 2016 which is total to AED 490,908 in his two years employed by the Defendant, which does not

cover the costs of the Claimant's salary.

86. Furthermore, the Defendant alleges that the Claimant did not earn any commission during his time in employment with the Defendant, no amount was offset against the AED 120,000 and the Claimant is therefore contractually obliged to repay to the Defendant the whole amount of AED 120,000 as agreed between the parties in their Employment Agreement.

Conclusion

87. In light of the aforementioned, I find that the Defendant is liable to pay the Claimant his dues in the amount of ~~AED 23,189.00~~ AED 19,850.00 for gratuity and vacation leave for 2015, 2016 and 2017. I also find the Claimant liable to repay the Defendant the sum of AED 116,774.19 in relation to the advance commission. All other claims and counterclaims are hereby dismissed.

88. Each party shall bear their own costs.

Issued by:

Lema Hatim

SCT Judge

Date of Issue: 11 June 2017

Date od reissue: 15 June 2017

At: 4pm