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 MAHA ALMEHAIRI

BETWEEN

LALAN

Claimant

and

LEUNA RESTAURANT

Defendant

Hearing : **12 October 2020**
Judgment : **4 November 2020**

JUDGMENT OF SCT JUDGE MAHA ALMEHAIRI

UPON this Claim being filed on 14 September 2020

AND UPON a hearing having been listed before SCT Judge Maha Almehairi on 12 October 2020 with the Claimant and the Defendant's representative in attendance

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

IT IS HEREBY ORDERED THAT:

1. The Defendant shall pay the Claimant the amount of AED 68,733.79.

2. The Defendant shall pay the Claimant a portion of the Court fee in the amount of AED 1,374.67.

Issued by:
Ayesha Bin Kalban
SCT Judge and Deputy Registrar
Date of issue: 4 November 2020
At: 2pm

THE REASONS

The Parties

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

2. The Defendant is the Leuna Restaurant (the "Defendant"), a company registered in the DIFC.

Background and the Preceding History

3. The underlying dispute arises over the employment of the Claimant by the Defendant pursuant to an Employment Contract dated 21 April 2018 (the "Employment Contract").

4. On 1 June 2020, the Claimant resigned from the Defendant company by way of a resignation letter. In the letter, the Claimant requests that his resignation be tendered with immediate effect, and that his notice period be offset from any leave that the Claimant has accrued during his employment.

5. On 14 September 2020, the Claimant filed a claim in the DIFC Courts' Small Claims Tribunal (the "SCT") claiming his end-of-service gratuity, accrued but untaken annual leave, and salary for 30 days in lieu of a notice period. The total value of the claim set out by the Claimant is AED 89,823.

6. The parties met for a Consultation with SCT Judge and Deputy Registrar Ayesha Bin Kalban on 29 September 2020 but failed to reach a settlement with respect to the Claimant's claims. In line with the rules and procedures of the DIFC Courts' Small Claims Tribunal (the "SCT"), this matter was referred to me for determination, pursuant to a Hearing held on 12 October 2020.

The Claim

7. The Claimant's case is that he was employed with the Defendant in the position of Director from 21 April 2018 until the date of his resignation on 31 May 2020. The Claimant submits that has not received any payment towards his outstanding end of service entitlements and therefore claims amounts owed in relation to them.

8. The Claimant seeks the payment of AED 89,823, consisting of the following claims:

(a) End-of-service gratuity in the amount of AED 37,828;

(b) Accrued but untaken annual leave for 9.5 days in the sum of AED 12,493; and

(c) Salary for 30 days in lieu of a notice period in the amount of 39,542.

9. The claim set out in 10(c) above relates to the Claimant's request to serve a notice period by utilising accrued annual leave to do so. Therefore, while the Claimant has worked until 31 May 2020, his position is that his final working day was 30 June 2020, being 30 days from the date he last worked for the Defendant, which, he submits, are to be construed as a notice period.

10. During the course of the Hearing, the Claimant made submissions as to the fact that the Defendant had failed to pay the Claimant's full remuneration for the month of May 2020. This was not set out as a claim in the Claimant's claim form and therefore I shall not address it in my findings below.

The Defence

11. The Defendant, in responding to the Claimant's claims, submits that the Defendant restaurant was closed under the restrictions put in place by the Government of Dubai with respect to the closure of restaurants from March 2020, in line with the Government's efforts to prevent the spread of the COVID-19 Pandemic. The Defendant submits that the Claimant was asked to commence annual leave during the physical closure of the Defendant restaurant, and submits that the Claimant was paid in full during that time.

12. Furthermore, the Defendant submits that the Claimant is in breach of the Contract as he has failed to serve a 3-month notice period in accordance with the Contract. The Defendant has, in the course of its submissions, sought to claim the amount of AED 120,000 from the Claimant in regards to the Defendant's understanding that the Claimant is obligated to serve a 3 month notice period, and failure to do so would result in amounts being owed to the Defendant. The Defendant did not formalise this claim by way of a counterclaim lodged before this Court, therefore I will not address it in this judgment, other than to draw the Defendant's attention to the fact that the remedy in situations where an employee refrains from serving a notice period is to simply refrain from paying the Claimant any amount owed, and calculate any accrual of end-of-service entitlements up to the employee's last working day.

13. The Defendant does not dispute the Claimant's claim for gratuity, but does not provide any reasoning for failing to pay the Claimant these amounts. The Defendant however refutes the Claimant's other claims for salary and accrued but untaken annual leave, stating that the Claimant had already utilised his annual leave during the time the Defendant restaurant was closed, and has submitted that the Claimant had only accrued 7 days at the time of his resignation. The Defendant also states that the Claimant's last working day is 31 May 2020, being the date he resigned from the Defendant company, disputing the Claimant's claim for salary in lieu of a notice period served by way of annual leave.

Discussion

19. This dispute is governed by DIFC Employment Law No. 2 of 2019 (the "DIFC Employment Law") in conjunction with the relevant Employment Contract.

20. In order to determine the Claimant's claims for gratuity, accrued but untaken annual leave and salary in lieu of a notice period, the Court must first ascertain the Claimant's last working day with the Defendant, and must analyse the amount of untaken leave days that the Claimant had accrued in order to reach a conclusion in regards to the Claimant's entitlements.

Accrued but untaken annual leave

21. The Defendant has made unsupported submissions to the effect that the Claimant was on leave for the period of time that the Defendant restaurant closed, stating that the Claimant was asked to take annual leave at the time. In contradiction to these submissions, the Claimant has provided evidence in the form of WhatsApp conversations between himself and the Defendant's representative (the owner of the Defendant) to demonstrate that the Claimant was indeed working during the time that the Defendant restaurant was allegedly closed. The Claimant goes on to submit that, while the physical premises of the Defendant restaurant were closed in line with the Government's directives, business carried on in the form of home deliveries through various services and states that, in fact, the Defendant had turned profit during that time. In light of this, and in light of the fact that the Defendant failed to provide evidence of any records to demonstrate that the Claimant had utilised his accrued annual leave, the Claimant shall be entitled to his accrued but untaken annual leave.

22. As set out above, the Claimant claims that he was entitled to 39.5 working days at the time of his resignation, 30 of which he chose to utilise as a notice period, making 9.5 days outstanding. The Claimant, in the course of the Hearing, submitted that he is entitled to 30 days of annual leave for the year 2020, and states that he had carried forward 9.5 days from the year 2019. The Defendant refutes this claim by stating that the Claimant can only carry forward 5 days of accrued but untaken annual leave in accordance with the DIFC Employment Law, and had only accrued 2 days of annual leave for the year 2020, making the Claimant's entitlement to annual leave, from the Defendant's perspective, 7 working days. The Defendant reiterates that although the Claimant had accrued 7 working days of annual leave, the Claimant had, at the time of resignation, utilised said leave. As set out above, the Defendant has not provided any form of evidence to support this submission and I have dismissed this argument above.

23. I first turn to the days that the Claimant has allegedly carried forward from the year 2019. Article 27 of the DIFC Employment Law states as follows:

"An Employee is entitled to carry forward up to five (5) Work Days of accrued but untaken Vacation Leave into the next Vacation Leave Year for a maximum period of twelve (12) months after which any unused Vacation Leave shall expire."

24. In accordance with the above, the Claimant's entitlement to an annual leave can be carried forward to the following year, however, the amount of days that can be carried forward is limited to up to 5 working days only. Therefore, I find in favour of the Defendant insofar as the Claimant cannot claim to have carried forward 9.5 days from the year 2019, as the maximum amount he is able to seek is 5 working days only, with the remaining days having had expired at the start of the year 2020. For the purpose of clarity, I find that the Claimant is entitled to 5 working days of accrued but untaken annual leave for the year 2019.

25. In regards to the Claimant's entitlement to accrued but untaken annual leave in the year 2020, I turn to Article 28(1) of the DIFC Employment Law which states that:

"Where an Employee's employment is terminated, the Employer shall pay the Employee an amount in lieu of Vacation Leave accrued but not taken up to and including the Termination Date calculated in accordance with Article 28(3)."

26. The Claimant claims that he is entitled to 30 days of annual leave for the year 2020, said entitlement having been set out in the Employment Contract. The abovementioned Article sets out that, upon the termination of an employment relationship, an employee is eligible to receive payment for the amount of untaken days accrued up to and including the date of the employee's last working day. Therefore, the Claimant's position cannot be construed to be correct, and I shall calculate the Claimant's entitlements in respect of accrued vacation leave for the year 2020 below.

27. I have determined the Claimant's last working day to be 31 May 2020, the reasoning for which is set out below, in the course of this Judgment. The Claimant is entitled to 30 days of an annual leave in a calendar year, meaning that, until 31 May 2020, the Claimant had accrued 12.5 days of annual leave (30 days of annual leave/12 months in a year = 2.5 days per month x 5 months served = 12.5). As set out above, the Defendant's position was that the Claimant was only entitled to 2 days of annual leave for the year 2020, but has failed to provide any evidence to support this submission, and I find that in such a situation, the DIFC Employment Law would be the appropriate reference to determine the Claimant's entitlements.

28. To summarise my findings above, I have determined that the Claimant had accrued 17.5 days of annual leave at the time of his resignation. In the course of this Judgment and the determination made within, I have found that the Claimant must be paid in lieu of these leave days, in the amount of AED 32,307.69 (AED 40,000 monthly salary x 12 / 260 days in a year x 17.5 = 32,307.69).

The Claimant's last working day and payment in lieu of notice period

29. As set out above, the Claimant's position is that he has served a one-month notice period using accrued but untaken annual leave days making his last working day 30 June 2020, while the Defendant's position is that the Claimant's last working day was 31 May 2020, taking the view that the Claimant had no annual leave to utilise at the time and that the Claimant had failed to serve a notice period in accordance with the Employment Contract.

30. In light of my finding above, the Claimant had, at the point of resignation, accrued 17.5 days of annual leave, therefore it cannot be construed that the Claimant has served a notice period in the manner which he claims he has done.

31. Furthermore, the Claimant had made the decision to `off-set' his notice period against annual leave days that had accrued during the course of his employment until the time of his resignation, effectively deciding that he would only be serving a one-month notice period by way of a vacation that was not approved by his employer, the Defendant. I am of the view that does not reflect the spirit of the DIFC Employment Law, and the Claimant should not be permitted to determine the amount of notice he would be serving or the method in which he is to serve such a notice, without the Defendant's express consent. Therefore, I find that the Claimant's last working day is to be set at 31 May 2020 being the last day of his service to the Defendant. It is further determined that the Claimant has failed to serve any form of notice period, whether by way of annual leave or otherwise, and therefore I dismiss the Claimant's claim for salary for 30 days in lieu of a notice period.

End of Service Gratuity and Contributions to Qualifying Scheme

32. Article 19 of the DIFC Employment Law stipulates the following:

"(1) An Employer shall pay to an Employee, within fourteen (14) days after the Termination Date:

a. all Remuneration.

b. where applicable, any Gratuity Payment that accrued prior to the Qualifying Scheme Commencement Date under Article 66(1) not transferred to a Qualifying Scheme under Article 66(6)

c. . ;"

33. Article 66 of the DIFC Employment Law states, where relevant, that:

"(1) An Employee who is not required to be registered with the GPSSA under Article 65(`), and who completes continuous employment of at least one (1) year with their employer, before or after the Qualifying Scheme Commencement Date is entitled to a Gratuity Payment for any period of service prior to the Qualifying Scheme Commencement Date on the termination of their employment. .

(2) An Employee's Gratuity Payment shall be calculated as follows:

(a) an amount equal to twenty one (21) days of the Employee's Basic Wage for each year of the first five (5) years of service prior to the Qualifying Scheme Commencement Date; and

(b) an amount equal to thirty (30) days for the Employee's Basic Wage for each additional year of service prior to the Qualifying Scheme Commencement Date. .

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(7) From the Qualifying Scheme Commencement Date an Employer shall, on a monthly basis, pay to a Qualifying Scheme, for the benefit of each Employee who is not an Exempted Employee, an amount equal to as least the Core Benefits, which shall be calculated as follows:

(a) five point eight three percent (5.83%) of an Employee's Monthly Basic Wage for the first (5) years of an Employee's service, inclusive of any period of employment of Secondment served to prior to the Qualifying Scheme Commencement Date; and

(b) eight point three three percent (8.33%) of an Employee's Monthly Basic Wage for each additional year of service.

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34. The abovementioned clauses provide that an employer is required pay to an employee, within 14 days of the employee's termination date, a gratuity payment, in addition to amounts equal to the core benefits set out by the DIFC Employment Law, such amounts to be paid into a Qualifying Scheme. The gratuity payment to be paid must be for any period of service prior to the Qualifying Scheme Commencement Date, which is defined in the Law to be 1 February 2020. Therefore, I find that the Claimant is entitled to his gratuity payment, as accrued until 31 January 2020, calculated below.

35. The Claimant's basic wage is AED 25,000 and the gratuity payment is to be calculated against the period of service from the Claimant's first working day with the Defendant until 31 January 2020. The Claimant worked from 21 April 2018, meaning the period of service to be calculated for gratuity is 1 year, 9 months and 10 days.

Gratuity = AED 25,000 basic wage x 12 months / 365 days = AED 821.91 per day x 21 days = AED 17,260.27.

Gratuity for 9 months = 21 days per year/ 12 months a year = 1.75 days per month x 9 months = 15.75 days x AED 821.91 = AED 12,945.08.

Gratuity for 10 days = 1.75 days per month / 30 days = 0.05 days x 10 days = 0.5 x 821.91 = AED 410.955.

In accordance with the above, the Claimant is entitled to AED 30,616.30 for gratuity payment.

36. The parties have not provided any evidence to demonstrate that the Claimant has been enrolled into a qualifying scheme, nor has any evidence been provided to show that the Claimant would be exempted from being enrolled. In light of this, I order that the Defendant pay to the Claimant an amount equal to the minimum benefits set out by the DIFC Employment Law, which would reflect the contributions that the Defendant would have paid into the qualifying scheme had it complied with the requirements of the DIFC Employment Law. This is to be calculated as follows.

37. The Claimant's employment with the Defendant was for the amount of 2 years, 1 month and 10 days. Taking into consideration the period of service undertaken by the Claimant prior to the commencement date of the Qualifying Scheme, the Claimant would be entitled to contributions for the period between 1 February 2020 to 31 May 2020, being the termination date I have determined previously in the course of this Judgment.

Between 1 February 2020 - 1 May 2020

The Claimant's monthly basic wage is AED 25,000 x 5.83% (being the minimum contribution amount defined by the Employment Law) = AED 1,457.50 per month x 3 months = AED 4,372.50.

Between 1 May 2020- 31 May 2020

AED 821.91 (being the Claimant's daily basic wage) x 5.83%= AED 47.91 per day x 30 days = AED 1,437.30

38. Therefore, in accordance with the above, the Claimant's entitlement in regards to contributions that should have been made by the Defendant to a qualifying scheme is AED 5,809.80.

Conclusion

39. In light of the aforementioned, I find that the Defendant shall pay the Claimant the amount of AED 68,733.79 in respect of his end-of-service entitlements.

40. I am of the view that, as the Claimant has been unsuccessful on some of his claims, it should only be entitled to recover a portion of the fee in respect of the claim for which he has been successful. The Claimant shall pay the Claimant the amount of AED 1,374.67 being the court fee to be paid for the judgment sum granted to the Claimant.

Issued by:
Ayesha Bin Kalban
SCT Judge and Deputy Registrar
Date of issue: 4 November 2020
At: 2pm