Claim No. CFI 052/2020

THE DUBAI INTERNATIONAL FINANCIAL CENTRE COURTS

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

IN THE COURT OF FIRST INSTANCE

BETWEEN

LUCILA

Claimant/Appellant

and

LINKALINKA

Defendant/Respondent

Hearing : **17 August 2020**
Counsel : The Claimant was a litigant in person
Sarah Malik of SOL International Ltd for the Defendant
Judgment : **11 November 2020**

JUDGMENT OF H.E. JUSTICE SHAMLAN AL SAWALEHI

ORDER

UPON reviewing the judgment of the Small Claims Tribunal Judge Nassir Al Nasser dated 19 April 2020 (the **"Judgment"**)

AND UPON the Appeal Notice of the Claimant dated 30 April 2020

AND UPON the Order of Small Claims Tribunal Judge Nassir Al Nasser dated 15 June 2020 granting the Claimant permission to appeal the Judgment on the basis that he had demonstrated that the appeal would have a real prospect of success

AND UPON reviewing the submissions of the Claimant and the Defendant

AND UPON hearing the Claimant and counsel for the Defendant at the hearing of the appeal on 17 August 2020

AND UPON considering the Defendant's Further Submissions dated 8 November 2020

IT IS HEREBY ORDERED THAT:

1. Paragraph [1] of the order of the Judgment is set aside.

2. The Defendant shall pay the Claimant AED 270,937.

3. The Defendant shall pay the Claimant AED 1,183.56 per day upon issuance of this judgment until the Defendant has discharged its payment obligations under Article 19(1) of the DIFC Law No. 2 of 2019.

4. No order as to costs.

Issued by:
Nour Hineidi
Registrar
Date of issue: 11 November 2020
Time: 11am

JUDGMENT

1. This appeal from the DIFC Small Claims Tribunal (the **"SCT"**) concerns a narrow issue - narrower than is suggested by the relatively extensive argument of both the Appellant (**"Lucila"**) and the Respondent (**"Linka"**) - and that narrow issue is this: having found in his judgment dated 19 April 2020 (the **"Judgment"**) that Lucila "captured" three potentially commissionable contracts with clients (the **"Contracts"**) during the tenure of his employment with Linka, did the judge below (the **"Judge"**) proceed to incorrectly conclude that Lucila had nevertheless failed to pass the threshold that would entitle him to commission?

2. Both Lucila and Linka made submissions in the appeal in relation to the Contracts - regarding whom had in fact captured them, whether in any event they were capable of triggering commission, and so on - but these arguments concerned factual questions that had already been settled by the Judge at first instance and that were therefore outside of the remit of the appeal. Indeed, neither Lucila nor Linka sought to challenge the

Judge's factual findings by way of the appeal, a respondent's notice or otherwise. The starting position in this appeal is, therefore, the facts of the case as determined by the Judge.

3. At [52] to [55] of the Judgment, the Judge outlined his findings in respect of the Claimant's claim for commission. For context, the three types of client engagement capable of triggering commission concerned "proof of concept" (**"POC"**), "pilots" and "productions," with each engagement required to be secured in a contract. The details of each category need not been outlined. Furthermore, contracts would need to be closed with so called "Tier 1" or Tier 2" clients, the two most lucrative types of clients. At [52] to [55] the Judge below found:

> 52. Upon reviewing the evidence in the case file, I am of the view that the Claimant closed a POC with Smart Dubai, 2 Productions with Mashreq Bank and DIFC. However, the question arises as to whether the Claimant met his full yearly and/or quarterly targets.
>
> 53. Going back to paragraph 48 of this Judgment, it appears that the Claimant failed to meet his targets for Tier 1 and Tier 2. He only signed 1 POC and 2 productions which consisted of Tier 1 and Tier 2 clients during the whole course of his employment with the Defendant.
>
> 54. . it appears that Clause 4.2 of the Employment Contract provides that "the Employee will be eligible to receive an annual variable pay of AED 288,000 (`Variable Salary') if the Employee's individual goals within a fiscal year, as agreed by The Company and the Employee from time to time, are fully met".
>
> 55. In light of the above clause, I find that the Claimant failed to meet his targets during the course of his Employment and therefore, he is not entitled to variable compensation.

The Judge accordingly dismissed Lucila's claim at [1] of the order of the Judgment.

4. The Judge had, however, made the following factual findings: firstly, that the Claimant captured a proof of concept contract with Smart Dubai and two production contracts with Mashreq Bank and the DIFC; and, secondly, that these were Tier 1 and Tier 2 clients. The Judge did not make explicit in the Judgment whether each client was, on his finding, Tier 1 or instead Tier 2, but it is apparent from the Judgment that he had accepted Lucila's submissions in this regard: see [21] and [49].

5. In Lucila Particulars of Claim, he had submitted that each of the clients was graded as follows: Smart Dubai, Tier 1; Mashreq Bank, Tier 1; and DIFC, Tier 2. This is obviously the grading that the Judge had accepted as being correct and had paraphrased in [52] and [53] (Linka's position on this question was that each of the three clients was neither Tier 1 nor Tier 2).

6. As such, I find, the Judge's findings of fact were these: Lucila had closed a proof of concept contract with a Tier 1 client and two production contracts, one with a Tier 1 client and the other with a Tier 2 client. These are the factual findings of the trial judge which I am bound to accept.

7. As is seen in [54] and [55] of the Judgment, the Judge held that the Contracts did not qualify Lucila for any commission. It appears that Clause 4.2 of Lucila's Employment Contract was of particular importance for the Judge in this regard. That provision provides that "the Employee will be eligible to receive an annual variable pay of AED 288,000 (`Variable Salary') if the Employee's individual goals within a fiscal year, as agreed by The Company and the Employee from time to time, are fully met." (emphasis added) It appears that the Judge had determined that Lucila's goals were partially but not fully met.

8. Lucila's individual goals for the purposes of Clause 4.2 were set out in a document entitled the Variable Compensation Guidelines. The Judge summarised the goals at [17] as follows:

> (a) POC: 8 engagements per year or 2 per calendar quarter;
>
> (b) Pilot: 3 engagements per year or 0.75 per calendar quarter; and
>
> (c) Production: 2 engagements per year or 0.5 per calendar quarter.

Needless to say, the Contracts did not collectively meet these requirements - he had not satisfied (a), (b) and (c) - and so the Judge found accordingly found that Lucila had not qualified for commission.

9. And herein lies Lucila's contention. He says that the Judge had incorrectly cited his targets as set out in the Variable Compensation Guidelines. Specifically, in Mr Norville's's submission, paragraph (c) of the targets was not supposed to be preceded by the conjunction "and"; in other words, Lucila says, he was not required to satisfy (a), (b) and (c) in order to qualify for commission, and it would suffice if he satisfied any of (a), (b) or (c) or any combination thereof.

10. To cite directly from the Variable Compensation Guidelines, Lucila's targets were as follows:

> 4. The targets per category of engagement for a Tier 1 client for Lucila, Head of MENA, are as follows:
>
> a. PoC: 8 engagements per year or 2 per calendar quarter
>
> b. Pilot: 3 engagements per year or 0.75 per calendar quarter
>
> c. Production: 2 engagements per year or 0.5 per calendar quarter
>
> 5. The scoring mechanism for Tier 2 clients is as above but with targets doubled in each category, e.g. 16 for a PoC.

As such, it seems correct to say, as Lucilahas, that the word "and" did not in fact appear before paragraph (c) in the Variable Compensation Guidelines. This of course does not settle the question of whether paragraphs 4(a) to (c) of the Variable Compensation Guidelines are properly to be read conjunctively or not: while 4(c) is not preceded by "and," it is also not preceded by "or"; the list is capable of being read, in my view, either

way.

11. With that said, Lucilahas been explicit about his contention that he did not need to satisfy all of the requirements in paragraphs 4(a) to (c) of the Variable Compensation Guidelines in order to qualify for commission while Linka has not argued otherwise, and it has had ample opportunity to do so if Mr Norville was incorrect in his position. Instead, the thrust of Linka's defence to Lucila claim and now to his appeal is that he did not qualify for commission on the bases that, firstly, he had not captured the Contracts and, secondly, that even if he had, the Contracts were not with Tier 1 and Tier 2 clients. The inference is that, as a matter of construction, Lucila's position regarding what he had to achieve according to the Variable Compensation Guidelines in order to qualify for commission is correct and the same is accepted as a matter of principal by Linka.

12. It follows, in my judgment, that Lucila is properly to be considered as having qualified for commission during his employment with Linka on the basis of the proof of concept contract closed with a Tier 1 client and the two production contracts closed with Tier 1 and Tier 2 clients.

13. This finding gives rise to two final questions, both of which concern the amount of money now due to Lucila from his former employer, Linka. The first question concerns how much commission he should be paid on account of the Contracts. The second question concerns the amount of money due to Lucila under Article 19 of DIFC Law No. 2 of 2019, being the DIFC Employment Law, on account of late payment of the commission.

14. Again, Lucila has been explicit with respect to his position and in particular the exact amount which he says is due to him; and again, Linka has not attempted to impeach his position in principle, instead doubling down on its view that he does not qualify for commission. The inference is that, as a matter of calculation, Lucila's position regarding what would be due to him if he had captured the Contracts is correct and the same is accepted as a matter of principal by Linka.

15. I will therefore give judgment for the amounts claimed by Lucila, except that part of it which is interest, in as much as the Court has not been shown any contractual or legal basis for the application of interest on the amount owed to Lucila. The amounts Linka shall pay Lucilaare therefore as follows: AED 252,000 in respect of commission and an Article 19 penalty of AED 18,937.

16. Under Article 19(2) of the DIFC Employment Law, Lucila is entitled to and Linka must pay a penalty equal to Lucila's daily wage for each day Linka is in arrears of its payment obligations under Article 19(1) of the law. Under Article 19(4)(a), the Article 19 penalty is waived in respect of any period during which a dispute is pending in the Court. Upon issuance of this judgment, the dispute between Lucilaand Linka is no longer pending in the Court. Accordingly, Lucila will be entitled to an amount equal to his daily wage, being AED 1,183.56, until Linka has discharged its payment obligations under Article 19(1) of the DIFC Employment Law.

17. I make the following orders -

1. Paragraph [1] of the order of the Judgment is set aside.

2. Linka shall pay Lucila AED 270,937.

3. Linka shall pay Lucila AED 1,183.56 per day upon issuance of this judgment until Linka has discharged its payment obligations under Article 19(1) of the DIFC Law No. 2 of 2019.

4. No order as to costs.

Issued by:
Nour Hineidi
Registrar
Date of issue: 11 November 2020
Time: 11am