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 APPEAL
BEFORE CHIEF JUSTICE ZAKI AZMI, H.E. JUSTICE SHAMLAN AL SAWALEHI AND JUSTICE ROBERT FRENCH**

BETWEEN

EXPRESSO TELECOM GROUP LTD

Appellant

and

TARIG H.A.G RAHAMTALLA

Respondent

JUDGMENT OF THE COURT OF APPEAL

Hearing : 29 June 2022

Counsel : Mr Stephen Doherty instructed by HFW Middle East LLP for the Appellant.
Mr Michael Patchett-Joyce instructed by SOL International for the Respondent.

Judgment : 2 September 2022

UPON reviewing the Judgment of Justice Sir Peter Gross dated 8 August 2021 in Claim No. CFI-069-2020 (the **"Judgment"**)

AND UPON reviewing the Defendant's Appeal Notice filed on 30 August 2021 ("**Permission Application**")

AND UPON reviewing the Claimant's written submissions in opposition to the Permission Application dated 14 December 2021

AND UPON reading the Order with Reasons of Justice Sir Peter Gross dated 28 December 2021 refusing the Permission Application

AND UPON reviewing the Defendant's Second Appeal Notice filed on 18 January 2022 applying for permission to appeal against the Judgment (the **"Second Permission"**)

AND UPON reviewing the Claimant's written submissions in opposition to the Second Permission application dated 18 February 2022

AND UPON the Order of Chief Justice Zaki Azmi dated 5 April 2022 granting the Second Permission to appeal

AND UPON hearing Counsel for the Appellant and the Respondent at the appeal hearing on 29 June 2022

AND UPON reading the submissions and relevant documents on the Court file

AND UPON the Rules of the DIFC Courts (**"RDC"**)

IT IS HEREBY ORDERED THAT:

1. The Appeal is dismissed.

2. The Appellant is to pay the Respondent's costs of the Appeal to be assessed by the Registrar if not agreed.

Issued by:
Nour Hineidi
Registrar
Date of Issue: 2 September 2022
At: 12:30pm

JUDGMENT

Introduction

1. This appeal concerns the interpretation and application of Article 19 of the DIFC Law No 2 of 2019, the DIFC Employment Law 2019 (the **"Employment Law"**). Article 19 is located in Part 3 of the Employment Law entitled `Protection of Remuneration'. Article 19(1) sets out certain payment obligations upon an employer where an employee is terminated. Article 19(2) provides for the employer to pay a penalty for each day the employer is in arrears of its payment obligations. Under Article 19(4) the penalty is waived in respect of any period in which a dispute is pending in the court regarding any amount due to the employee under Article 19(1) or the employee's unreasonable conduct is a material cause of the

employee failing to receive the amount due from the employer.

2. In this case the Appellant employer was found by the Court of First Instance (**"CFI"**) to be liable for a penalty in the amount of USD379,511.67, arising out of its failure to pay statutory benefits to the Respondent following the termination of the Respondent's employment on 28 April 2020. The Appellant contends that at the time of the termination of the Respondent's employment it owed the Respondent nothing because of a counterclaim that exceeded the Respondent's contractual and statutory entitlements. Further, it was said, that the penalty should have been waived because of a dispute pending in the Court regarding the amounts due to the Respondent under Article 19(1). For the reasons that follow, the Court is of the opinion that the appeal should be dismissed with costs.

Factual Background

3. The Appellant is a corporation registered in the Dubai International Financial Centre (the **"DIFC"**). The Respondent is a United Kingdom citizen. By an agreement dated 1 February 2013, the Appellant employed the Respondent as its Vice President, International Operations. The place of work was to be the company's Dubai office although the Appellant reserved the right to require the Respondent to work at, or be relocated for business reasons, to any such other work locations which the Appellant deemed necessary. The Appellant was required to support the Respondent's displacement in a reasonable manner reflective of his status within the company.

4. There was a remuneration package comprising a monthly salary, living allowance, transportation and fuel allowance, housing allowance, and child education allowance. A one-off relocation allowance was also provided. The Appellant also agreed to provide the Respondent with round-trip air tickets to him and his family members (spouse and children) in business class once every year to travel to the UK. There was a provision for an annual bonus:

> *"Annual Bonus will be tied to developing of new revenue channels, the implementation of a performance management system, subject to Management discretion and board approval."*[1]

5. By clause 4.1 the term of the employment was to commence on 1 September 2013 and to continue indefinitely unless terminated pursuant to clause 11 by the Respondent's resignation under the relevant termination provisions of the agreement or the Appellant terminating his employment in accordance with the termination clauses of the agreement.

6. Clause 10 of the agreement provided for termination of the Respondent's employment without cause. Under clause 11 the notice required to be given by the Appellant was three months.

7. Clause 12 provided for termination with cause.

8. Clause 14 provided for an End of Service Gratuity upon termination of employment according to the applicable Employment Law, provided that the termination was not due to any of the circumstances listed in clause 12.1 relating to termination for cause and provided that the employee had not abandoned the employment without notice.

9. By a letter dated 28 April 2020, addressed to the Respondent, the Chairman of the Appellant terminated his employment for cause. This followed a suspension of the Respondent by a letter dated 12 March 2020, and the formation of an Investigation Committee by the Appellant to investigate the Respondent's performance. The decision to terminate was said, in the letter of termination, to have followed a review of the Preliminary Report of the Investigation Committee and to be necessary because the Respondent had:

> *"Failed [on] many occasions to abide by the travel policy;*
>
> *Neglected your rules and responsibilities towards the operating subsidiaries of the company."*

The letter stated that the Respondent was entitled to his salary up until the termination point.

10. On 3 September 2020, the Respondent made a claim in the CFI for an amount of USD 480,402.17, said to be due and payable by the Appellant pursuant to the Employment Contract. The claim was defended by the Appellant and a hearing was conducted before Justice Sir Peter Gross in the CFI. In the event, and following the issue of a first judgment, followed by a slip judgment to correct an arithmetical error,[2] Justice Gross directed that the Appellant pay the Respondent the sum of USD 379,511.67 within 28 days of the date of the judgment. He also declared that the Respondent was entitled to a daily payment of USD1,052.30 for the period between 18 May 2021 and the date of the judgment and ordered that the sum thus calculated should be paid by the Appellant to the Respondent within 28 days of the judgment. The date of issue was 7 December 2021, with the relevant order being reissued on 9 December 2021.

The legislative framework

11. The relevant legislation is the Employment Law, DIFC Law No 2 of 2019. Article 19 of the Law provides:

> ***"19. Payments following termination***
>
> *(1) An Employer shall pay to an Employee, within fourteen (14) days after the Termination Date:*
>
> *(a) all Remuneration, excluding, where applicable, any Additional Payments deferred in accordance with Article 18(2);*
>
> *(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) a Daily Wage for each day of accrued Vacation Leave not taken; and*
>
> *(d) all outstanding amounts due in respect of the Employee under Article 66(7) not yet paid to a Qualifying Scheme.*

(2) Subject to the provisions of Article 19(3) and 19(4), an Employee shall be entitled to and the Employer shall pay a penalty equal to an Employee's Daily Wage for each day the Employer is in arrears of its payment obligations under Article 19(1).

(3) A penalty pursuant to Article 19(2) may only be awarded to an Employee if the amount due and not paid to the Employee in accordance with Article 19(1) is held by a Court to be in excess of the Employee's Weekly Wage.

(4) A penalty pursuant to Article 19(2) will be waived by a Court in respect of any period during which:

(a) a dispute is pending in the Court regarding any amount due to the Employee under Article 19(1); or

(b) the Employee's unreasonable conduct is the material cause of the Employee failing to receive the amount due from the Employer."

"20. Deductions

(1) An Employer shall not deduct from an Employee's Remuneration or accept payment from an Employee, unless:

(a) the deduction or payment is permitted under this Law, or agreed to in an Employment Contract not in contravention of this Law;

(b) the prior written agreement of the Employee has been obtained in respect of the deduction or payment, provided that such deduction or payment is not prohibited under this Law;

(c) the deduction or payment is a reimbursement for an overpayment of any Remuneration or expenses, or to recoup benefits utilised by an Employee in excess of their accrued entitlement under their Employment Contract;

(d) the deduction or payment has been ordered by the Court."

Article 20(2) relates to limitation periods for bringing claims under Article 20(1) and is not material for present purposes.

12. Schedule 1 to the Act deals with the interpretation of terms used in the Act. Relevant definitions are as follows:

"Court	*any relevant court or tribunal established in the DIFC or, in relation to any proceedings under Part 9 of this Law, the DIFC Court of First Instance;*
Employee	*an individual referred to in Article 4(1)(b) or (c)*
Employer	*an establishment or entity referred to in Article 4(1)(a).*
Gratuity Payment	*the end of service gratuity payment entitlement for any period of service by an Employee prior to the Qualifying Scheme Commencement Date under Article 66(1).*
Termination Date	*(a) in relation to an Employment Contract terminated by notice under Article 62(2), the date on which the notice period expires.* *(b) in relation to an Employment Contract terminated without notice during probation or pursuant to Articles 36 or 63 the date on which the termination of employment takes effect;* *(c) in relation to an Employment Contract concluded for a fixed term, the date on which the term expires; and* *(d) in relation to a Secondment, the earlier of the cancellation of the Secondment Card by the DIFCA or the date of expiry of the Secondment Card."*

13. Article 58 provides for the General duties of Employees as follows:

"58. General duties of Employees

(1) An Employee shall:

(a) serve their Employer faithfully;

(b) comply with their Employer's reasonable and lawful instructions;

(c) exercise reasonable skill and care in performing their duties for their Employer;

(d) not, without the consent of their Employer, disclose an Employer's confidential information or trade secrets or personal data of other Employees of the Employer; and

(e) not disrupt an Employer's business.

(2) An Employee has a duty, while at work, to take reasonable care of the Employee's health and safety and that of other persons who may be affected by the Employee's conduct."

14. The entitlement to a Gratuity Payment arises under Article 66 of the Employment Law, which relevantly provides:

"66. Gratuity Payment and Qualifying Scheme Benefits

(1) An Employee who is not registered with the GPSSA under Article 65(1), and who completes continuous employment of at least one (1) year or more 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."

Article 66(2) and (3) deal with the mode of calculation of the Gratuity Payment which cannot exceed an amount equal to twice the annual wage of the employer.

15. Article 66(5) provides:

"An Employer may deduct from a Gratuity Payment any amounts due and owing to the Employer by an Employee pursuant to the provisions of Articles 20 or 28(2)."

16. Reference should also be made to Articles 158(2), 159 and Schedule 3 to the DIFC Law of Obligations (DIFC Law No 5 of 2005) which, as the CFI held, provides that unless demonstrated to the contrary a person acting as an employee owes fiduciary duties to his employer.

Factual Findings by the Court of First Instance

17. The factual findings made by the CFI are not in dispute on this appeal.

18. It was not in dispute, and the CFI so found, that the Respondent had benefited himself by retaining a USD71,000 commission for a company called Kool Communications FZE ("Kool") which he had established in January 2016. Kool acted in its capacity as a collector of money owing to Expresso Telecom Group Ltd ("ETG"). Its interposition as a collector was justified by the Respondent as providing a benefit to ETG. The CFI found that the Respondent's actions in this respect served to benefit ETG and resolve a collection problem which ETG had been facing.[3]

19. The CFI nevertheless concluded, as appears from par 49 of the Judgment:

"Pulling the threads together, I have concluded that: (1) as is admitted, TR through Kool retained some US$71,000 in the course of collecting payments for ETG; (2) that sum constituted a secret profit; it was not confined to compensating TR for Kool's expenses; it should have been but was not accounted for to ETG; (3) the sum in question cannot be dismissed as de minimis; (4) proper disclosure to ETG of the existence, operation and ownership of Kool, and the retention of the US$71,000 had not taken place."

20. The CFI then referred to Article 63(1) of the Employment Law and concluded that the Appellant had satisfied both limbs of the test for termination pursuant to that provision.

21. The Respondent's conduct was seriously incompatible with his employment relationship with the Appellant and, in the opinion of the CFI, repudiatory of it. Viewed objectively, as required by the second limb of Article 63(1) a reasonable employer would have had little hesitation in dismissing an employee for taking or retaining a secret commission of this nature, even taking into account the Respondent's motives and a benefit to ETG arising from his conduct overall. On the ground of fiduciary duty, the Appellant made good its case that it was entitled to dismiss the Respondent for cause.

22. The CFI then went on to consider the remaining claims and counterclaims in light of that conclusion. The CFI rejected the Appellant's claim for USD140,957 being the cost of travel undertaken in 2018 and 2019. The CFI found that the Appellant was entitled to nothing under that heading, save that the Respondent was liable to it in the sum of USD8,241 for what was admittedly personal travel.

23. The CFI then turned to consider the Respondent's claim for late payment of an End of Service Gratuity and of the Accrued Annual Leave Salary balance.

24. The Respondent had claimed USD392,507.90 under each of those heads, a total of USD785,015.80. Those sums were calculated by running the penalty for each claim cumulatively from 11 May 2020, namely 14 days from the date the Respondent's employment was terminated until 18 May 2021, a total of 373 days. The Appellant had denied the claims, contending that nothing was due and alternatively no more than a single penalty payment (the **"Penalty claim"**) should be imposed for the time the payments had been outstanding. Importantly, the Appellant's liability for the payment of the Gratuity and the Accrued Annual Leave was admitted.

25. Before the CFI, the Appellant had raised a number of defences in resisting the Penalty claim. The first was that its counterclaim exceeded the Respondent's claim so that nothing was due as the Appellant was entitled to set-off the counterclaim against sums otherwise owing to the Respondent. The Appellant relied upon Article 20(c) and (d) of the Employment Law. The Appellant also relied upon the waiver provision in Article 19(4) of the Employment Law. Further, it submitted that the Respondent's breach of fiduciary duty constituted unreasonable conduct and was responsible for him failing to receive those amounts.

26. The Appellant also submitted that under the Penalty Payment Scheme in Article 19, what was envisaged was an overall daily penalty rather than a separate penalty for each of the heads contained in Article 19(1).

27. The Appellant's counterclaim, the quantum of which was set out in an Annex 1 to the Judgment of the CFI, comprised the following elements:

(1) For recovery of secret profits USD77,714.

(2) For breach of travel policy - unauthorised travel expenses: USD140,957;

(3) For the cost of air tickets in respect of the Respondent's personal travel: USD 8,241;

(4) For repayment of a personal loan: USD40,386.

This made a total of USD259,057. However, the claim was only made out to the extent of USD126,341 when the claim for unauthorised travel expenses is taken out.

28. The CFI was not persuaded on the facts the Appellant could bring its case within either Article 20(c) or (d). No question arose for a reimbursement of an overpayment of remuneration, nor was the Appellant recouping benefits. No deduction from the Respondent's remuneration was ordered by the CFI over the relevant period when payment was late. Had the defence relied on Article 20 it would have failed. The CFI acknowledged that the Appellant was not confined to Article 20. It was satisfied that to the extent that the counterclaim was well founded, the Appellant must be entitled to set-off the amount of the counterclaim against any sum otherwise due to the Respondent in respect of his claims, including the Penalty claim.

29. Critically, however, the CFI did not accept the Appellant's contention that the counterclaim stopped the Penalty claim clock from running. The CFI held:

> *"First, in the light of this Judgment it is apparent (see below), the counterclaim does <u>not</u> now overtop the claim unless the Penalty claim is left out of account, for which there would be no justification. Secondly, it is possible that there may have been some earlier points in time when the counterclaim did overtop the claim, depending on when particular items of the claim and counterclaim crystallised, before being overtaken by the Penalty claim."*[4]

30. The CFI went on to exclude the possibility of calculating a previous point in time when the counterclaim overtopped the claim. The CFI did not accept that the Employment Law, considered in the employment context, envisaged calculations of the kind that would be required by that approach. It found:

> *"Whatever the position may have been had [the Appellant] come within Art. 20(c) or (d), at least on the facts of the present case, reliance on the counterclaim is justified in assessing the overall balance between the parties but not for the purpose of attempting to stop the Penalty claim time clock from running."*[5]

31. On the question of Article 19(4) and waiver, the CFI held that there was no dispute pending in the Court as to any relevant amount due to the Respondent under Article 19(1). The amounts in respect of both the Gratuity and the Accrued Annual Leave were admitted. The existence of live disputes in the proceedings in the CFI as to other amounts due to the Respondent did not bring the matter within Article 19(4)(a): "[t]he purpose of Art. 19(1) is to protect the employer against the imposition of a penalty where the amount owing to the employee upon which the penalty will bite is itself in dispute; that is not this case." [6]

32. The CFI went on to hold that assuming in the Appellant's favour that the Respondent's breach of fiduciary duty constituted unreasonable conduct within Article 19(4)(b), it could not be accepted that such conduct was "the material cause" of the Respondent failing to receive, timeously, the amount due from the Appellant. The CFI held:

> *"To reiterate, payments in respect of the Gratuity and Accrued Annual Leave are admittedly due to [the Respondent] regardless of his breach of fiduciary duty; there was nothing to prevent [the Appellant] making those payments punctually and stopping the Penalty continuing to accrue; the means of extinguishing or reducing the Penalty lay in [the Appellant's] own hands."*[7]

33. The Court did, however, accept the Appellant's submission that if the Respondent was entitled to a penalty, it was an overall daily penalty not a separate penalty for each of the heads containing in Article 19(1). The Court held that, as a matter of language, Article 19(2) draws a distinction between the employer's payment "obligations" - a plural term - and a "penalty" - a singular term. So, although the employer may be in breach of a number of payment obligations the employee's entitlement is to a single overall daily penalty equal to the employee's daily wage. There was nothing in the language of Article 19(2) warranting a penalty for each head within Article 19(1). Thus, the Respondent's Penalty claim was to be reduced from the total figure of USD785,015.80 claimed.

34. On that basis, the CFI held that the Respondent was entitled to a single overall amount on the Penalty claim of USD392,507.90 quantified as of 18 May 2021, covering both the Gratuity and Accrued Annual Leave. From that sum there fell to be deducted the amount in which the Appellant's counterclaim succeeded. The period between 18 May 2021 and the date of the judgment had to be accounted for. The simplest way of doing so, was to grant the Respondent a declaration entitling him to a daily payment of USD1,052.30 for that period, coupled with an order that the Appellant should pay the Respondent the sum thus calculated.

35. The CFI went on to dismiss the Respondent's claim in respect of the late payment of his March 2020 salary and a claim for payment of his 2019 bonus. Nor did the Respondent's claim for a *per diem* allowance succeed.

36. In summary, the Respondent's claim succeeded in the following amounts:

(1) The gratuity	USD76,265.71
(2) Accrued Annual Leave	USD7,693.54
(3) The penalty claim	USD392,507.90
(4) Annual return airfare	USD7,671.52
(5) Repatriation ticket	USD15,000.00
Total	**USD499,138.67**

36. The Appellant's counterclaim succeeded in the following amounts:

(1) Breach of fiduciary duty	USD71,000.00
(2) Air tickets - personal travel	USD8,241.00
(3) Repayment of personal loan	USD40,386.00
Total	**USD119,627.00**

37. The difference between the amount in which the Respondent's claim succeeded and the amount in which the Appellant's counterclaim succeeded was USD379,511.67 plus the entitlement of the Respondent to a daily payment of USD1,052.30 for the period between 18 May 2021 and the date of the judgment.

The Appellant's Amended Grounds of Appeal

"Ground 1 - Pending Court Dispute

1. The Honourable Court erred in its interpretation of Article 19(4)(a) of the DIFC Employment Law when concluding that "As to Art. 19(4)(a), there was no dispute pending in the Court as to any relevant amount due to TR under Art. 19(1)".

2. On the contrary, there were multiple amounts in dispute prior to the Judgment, relating to Remuneration, End of Service Gratuity and Accrued Annual Leave.

Ground 2 - Respondent's Unreasonable Conduct

3. The Honourable Court erred in its interpretation of Article 19(4)(b) of the DIFC Employment Law. The Court was wrong to conclude that:

"Assuming in ETG's favour (without deciding) that TR's breach of fiduciary duty constituted "unreasonable conduct" within Art. 19(4)(b), I am unable to accept that such conduct was "the material cause" of TR failing to receive, timeously, the amount due from ETG. To reiterate, payments in respect of the Gratuity and Accrued Annual Leave are admittedly due to TR regardless of his breach of fiduciary duty; there was nothing to prevent ETG making those payments punctually and stopping the Penalty continuing to accrue; the means of extinguishing or reducing the Penalty claim lay in ETG's own hands."

4. The Respondent's unreasonable conduct, when considered in its entirety, was the material cause of non-payment of his post termination entitlements.

5. Further, the Appellant could not extinguish or reduce the penalty claim as it was unclear how much was payable in respect of Gratuity and Accrued Annual Leave prior to issuance of the Judgment.

Ground 3 - Recouping of Benefits

6. The Honourable Court erred in its interpretation of Article 20(c) of the DIFC Employment Law, which states the following:

An Employer shall not deduce from an Employee's Remuneration or accept payment from an Employee, unless:

(a) .

(b) .

(c) the deduction or payment is a reimbursement for an overpayment of any Remuneration or expenses, or to recoup benefits utilised by an Employee in excess of their accrued entitlement under their Employment Contract; or

(d) the deduction or payment has been ordered by the Court.

7. The Court was incorrect to say that ETG is (not) recouping benefits.

8. The Court failed to give adequate consideration to the meaning of "benefit". In the view of the Appellant, the amounts payable by the Respondent to the Appellant in respect of "Air tickets - personal travel" and "Repayment of personal loan" constituted benefits, which need to be recouped.

Ground 4 - Set Off [or] Counterclaim

9. The Court was wrong in concluding that "reliance on the counterclaim is justified in assessing the overall balance between the parties but not for the purpose of attempting to stop the Penalty claim time clock from running."

10. If no monies were owed to the Respondent on termination, then the Appellant was not "in arrears of its payment obligations under Article 19(1)" and therefore no Penalty under Article 19(2) of the DIFC Employment Law was payable by the Appellant. If no Penalty was payable then the Penalty claim time clock would never have started running in the first place." (emphasis in original) (footnotes omitted)

Permission to Appeal

37. Permission to appeal was refused by the CFI Judge on the ground that the appeal did not have any real prospect of success. Justice Sir Peter Gross referred to the observations in his judgment that the remedy with respect to the penalty lay in the Appellant's own hands, namely paying the sums admittedly due for the Gratuity and Accrued Annual Leave.

38. Justice Gross considered that the question of whether there was "some other compelling reason" why the appeal should be heard was best considered by the Court of Appeal itself, should the Appellant decide to pursue the matter further.

39. It may well be that Justice Gross had in mind the circumstances of the particular case. It should not, however, be thought that a Trial Judge, asked to consider an application for permission to appeal, cannot consider whether there is "some other compelling reason" why permission to appeal should be granted.

40. There is a question about the circumstances in which permission should be given for "some other compelling reason" even though there is no real prospect of success on the appeal. It might be the case that the reason that there is no real prospect of success is that there is a decision of the Court of Appeal, binding on the CFI, which would, if it stands, mean that the appeal must fail. But the Appellant might say that there are compelling reasons for the decision to be reconsidered by the Court of Appeal. The categories of "some other compelling reason" are not closed but are hard to define in circumstances where there is no real prospect of success. In the end, the Second Permission to appeal was granted by the Chief Justice on the ground that there was "some other compelling reason" why the appeal should be heard. The Chief Justice stated shortly in his Schedule of Reasons for granting the Second Permission that:

> *"Going through the Appellant's submission, I am of the opinion that there are several points raised by the Appellant that deserve to be determined by the Court of Appeal. These relate to the imposition penalties (sic) set out at Article 20 of the DIFC Employment Law (see for example: Elseco Ltd v Ltd (sic) v Lys [2016] DIFC CA 011."*[8]

41. The Respondent submitted that the scope of the appeal in this case is limited to the Second Permission to appeal granted by the Chief Justice. In this respect it is worth noting that in its skeleton argument, in support of its application to the Chief Justice, the Appellant stated:

> *"The only aspect of the Judgment which the Appellant wishes to appeal relates to the Penalty claim. In the Court's own words, `the amount of the Penalty claim is a strikingly large figure, especially given ETG's success on the issue of termination for cause."*[9]

42. The Appellant sought permission to appeal in this Court in reliance on both grounds upon which the Second Permission could be granted, namely that the appeal did have a reasonable prospect of success and that there were other compelling grounds. The Chief Justice made no finding on the first ground.

43. The Appellant submitted that there were "compelling public policy reasons why this case should proceed to a full appeal". It submitted that employers and employees in the DIFC would benefit from "further clarity on the imposition of penalties under Article 19(2) of the Employment Law."[10] The Appellant referred to *Elesco Ltd v Lys* [2016] DIFC CA 011 as a case in which construction of the penalty provision of the previous DIFC Employment Law was sufficient to support the grant of the Second Permission as a matter of public importance.

44. To use the compelling reasons ground to pursue a hopeless appeal because there is no important issue of statutory construction involved, comes close to using the appellate jurisdiction to obtain an advisory opinion from the Court when it is clear that however the statute is construed the appeal must still fail on the facts.

45. That is not this case. There is a question of statutory construction involved and it cannot be said that the appeal is hopeless.

The Respondent's Procedural Point

46. It is useful to refer to a threshold point taken by the Respondent in its skeleton argument. That is that the Appellant may only pursue the appeal on the basis that there is "some other compelling reason" why the appeal should be heard and not on the basis that the appeal has a real prospect of success. That proposition, with respect, is close to meaningless. Once permission is granted, the appellant is free to pursue the appeal on the grounds set out in its Grounds of Appeal before the Judge who granted permission. That Judge may, of course, according to the circumstances of the case, limit permission to a subset of the grounds of appeal in the notice.

47. However, on obtaining permission on the "other compelling reason" it is permission to appeal notwithstanding the prospects of success. The nature of the constraint advanced by the Respondent did not emerge with any clarity from its submissions.

The Appellant's Case

48. The Appellant attacked one aspect only of the judgment and that related to the Penalty claim.

49. The Appellant argued that the Respondent's claim was less than the Appellant's counterclaim once the Penalty claim was not taken into account. As at 28 April 2020, when the Respondent's contract was terminated, the Appellant did not owe the Respondent anything. It was, in fact, the Respondent who owed money to the Appellant.

50. The Appellant referred to Article 20(1)(c) of the Employment Law and based on that provision contended that the Respondent had no statutory entitlement to post-termination payments because any such right to payment was exhausted by the amounts which the Appellant was entitled to set-off in accordance with Article 20(1)(c). The Appellant also referred to Article 20(1)(d), which permitted deductions of the kind contemplated by Article 20(1)(c) to be set-off against sums owed to an employee. It also invoked Article 19(4) providing for the waiver of accrual of penalties where a dispute is pending in the Court regarding any amount due to an employee under Article 19(1).

51. The Appellant submitted that in such circumstances it would be wholly unjust, and commercially unreasonable, to impose penalties on the Appellant where it was asserting and was ultimately found to have been entitled to, a right to set-off in sums greater than what was owed to the Respondent.

52. The CFI was said to have erred in its reasoning. If the Respondent had no entitlement to any post-termination payments on 28 April 2020, then the Penalty claim time clock would never start, let alone stop running. No moneys were owed to the Respondent as of 26 April 2020, the date of termination, which meant that the Appellant was not "in arrears of its payment obligations under Art. 19(1)". Thus, no penalty under Article 19(2) of the Employment Law was payable by the Appellant.

53. The Appellant submitted that a penalty is imposed if an employer fails to pay the employee his or her statutory dues. If there are no statutory dues or they are de minimis, penalties are not payable. By its very nature, therefore, the Penalty claim should be treated differently than the other heads of claim as it does not exist but for non-payment of the other heads of claim.

54. It was submitted that contrary to the findings of the CFI, the Appellant's reliance on the counterclaim should be sufficient to stop the Penalty

claim from running (or more accurately, to stop it from starting). The alternative construction under which the Appellant was obliged to pay the Respondent in order to avoid penalties in circumstances where it was in fact the Respondent who owed the Appellant was manifestly unjust and inconsistent with the principle of set-off.

55. The Appellant also invoked Article 19(4)(a) relating to a pending court dispute. The Appellant argued that the purpose of the Article was clear. It was intended to limit penalties by stopping the clock from running while a dispute was pending before the Court. It was entirely reasonable, therefore, to suspend penalties during a period of formal legal dispute between the parties.

56. The Appellant drew a contrast between the current DIFC Employment Law and the previous DIFC Employment Law (DIFC Law No 4 of 2005 as amended by DIFC Law No 3 of 2012). Under the former Law, the penalty provision in Article 18(2) was not limited in the way that the penalty provision is now limited in the current Employment Law. The mandatory nature of the old penalty provision had led to criticism from legal practitioners and the judiciary regarding the extent of penalties which, in some cases, dwarfed the extent of the underlying claim. Reference was made in this context to *Frontline Development Partners Ltd v Adil* [2016] DIFC CA 006/2016.

57. Commentary on the current Law was said to support the Appellant's position that Article 19(4) had been included expressly for the purpose of limiting penalties for non-payment of employee dues during protracted employment litigation. Reference was made in this context to *Kaapro v Kacee (Dubai) LLC* [2019] DIFC SCT 470, *Michael v Mattida* [2020] DIFC SCT 381, *Lucila v Linkalinka* [2020] DIFC CFI 052, *Lyricia v Lexi* [2021] DIFC CFI 076 and *Landry v Langston Restaurant & Bar* [2020] DIFC SCT 201.

58. The Appellant focussed on the reasoning of the CFI in which it concluded that there was no dispute pending in the Court "as to any relevant amount due to TR under Art. 19(1)". The Gratuity and the Accrued Annual Leave entitlements had been admitted.

59. The Appellant's position was that there was a dispute pending in the CFI as to a relevant amount due to the Respondent, the amounts in dispute being:

(1) Bonus;

(2) Per diem allowance;

(3) Secret profits;

(4) Unauthorised travel expenses.

A bonus is classified as an Additional Payment under the DIFC Employment Law. Such payments are expressly excluded in the definition of "remuneration" under the Employment Law and remuneration is expressly listed at Article 19(1). On that basis it was submitted that the correct interpretation of Article 19(4)(a) is to waive penalties during the period where there is a pending case before the Courts relating to "any amount due" under Article 19(1). Here, there was a dispute over remuneration so the imposition of penalties under Article 19(2) should be waived during the period of that dispute. There was also a dispute over the End of Service Gratuity and Accrued Annual Leave. They were only undisputed if a finding of termination for cause was made. As set out in Annex 1 to the Judgment there was still disagreement over those amounts in the event that the Court found for termination without cause.

60. The net effect was that the Appellant said it was not in a position to pay the Respondent any amount in respect of End of Service Gratuity or Accrued Annual Leave before judgment as the amount to be paid in respect of those heads of claim was unclear.

61. In relation to the unreasonable conduct finding, the Appellant argued that the Respondent's breach of fiduciary duty in and of itself qualified as unreasonable conduct for the purposes of the Employment Law. That conduct went beyond the breach of fiduciary duty but also extended to the failure to repay the benefits obtained from the Appellant which were not in dispute, and which exceeded the amount owed by the Appellant to the Respondent in respect of his post-termination entitlements. The unreasonable conduct was also said to extend to the Respondent's decision to commence premature and expensive legal proceedings in circumstances where his entitlement to any post-termination compensation was at best in the balance. Also thrown into the mix was the Respondent's decision to dispute the amount owing in respect of End of Service Gratuity and Accrued Annual Leave. Thus, it was said to be the Respondent's unreasonable conduct which was the material cause of him not receiving the amount due from the Appellant.

62. On the question of recoupment of benefits, the Appellant accepted that there was no issue of overpayment of remuneration as contemplated by Article 20(c) of the Employment Law. However, it was submitted that there were benefits to recoup and that the CFI had failed to give adequate consideration to the meaning of "benefit". The benefits were benefits in excess of the Appellant's permitted benefits for air travel and a personal loan from the Appellant which the Respondent had failed to pay back. The Appellant therefore contested the CFI's view that it was not "recouping benefits."

The Respondent's Case

63. The Respondent's case can be stated shortly. The Appellant's case was said by the Respondent to depend upon the proposition that the Appellant didn't actually owe the Respondent anything. That proposition was based upon what the Respondent characterised as disregard of the Penalty claim. The Respondent quoted the Learned Judge's statement said to have been disregarded by the Appellant that:

> *"Payments in respect of the Gratuity and Accrued Annual Leave are admittedly due to [the Respondent] regardless of his breach of fiduciary duty; there was nothing to prevent [the Appellant] making those payments promptly and stopping the Penalty continuing to accrue; the means of extinguishing or reducing the Penalty claim weigh in [the Appellant's] own hands."*[11]

64. The Law, as the Learned Judge pointed out, permits deductions from an employee's remuneration "in only a limited number of instances all tightly drawn."[12]

65. The Respondent adopted the reasoning of the CFI in relation to the application of the Penalty waiver provision in Article 19(4)(a). On the Appellant's invocation of the "unreasonable conduct", ground for waiver of penalty under Article 19(4)(b), the Respondent again adopted the reasoning of the CFI. The breach of fiduciary duty could be characterised as "unreasonable conduct" but it was not a material cause of the Respondent not being paid the sums to which he was entitled.

66. The final ground relied upon by the Appellant with which the Respondent dealt, related to Article 20(1)(c) which allows for a reduction which is a reimbursement for overpayment of any Remuneration or Expenses or to recoup benefits used by an employee in excess of their accrued entitlement under their employment contract.

67. The Respondent said the Appellant needed to invoke Article 20(1)(c) to identify the benefits to which the employee is entitled under the Employment Agreement. The second is to identify payment in excess of the entitlement. The Appellant relied upon the personal travel undertaken by, and the personal loan made to, the Respondent. The Respondent submitted that these were personal matters outside the scope of the Employment Agreement and thus not covered by Article 20(1)(c).

Consideration

68. The primary question for consideration is the proper construction and application of the Penalty provisions of Article 19 where there are admitted entitlements and the employer asserts a counterclaim which exceeds them.

69. The answer to that question is relatively straight-forward and involves the following steps:

(1) The employer is under a statutory obligation under Article 19 to pay, within 14 days of termination, all remuneration and any gratuity payment that has accrued prior to the Qualifying Scheme Commencement Date under Article 66(1) not transferred to a Qualifying Scheme under Article 66(6).

(2) The employer's obligation to pay remuneration under Article 19(1) is not the source of the employee's entitlement to that remuneration. That must come from the employment contract or perhaps some other statutory source. It is not in dispute that the Respondent had an entitlement to accrued annual leave. The Respondent having such an entitlement, the Appellant was obliged to pay it within 14 days.

(3) The source of the entitlement to the End of Service Gratuity will not be found in Article 19. It will be found in Article 66. The Appellant's obligation to pay it within 14 days of termination was imposed by Article 19(1)(b). The contractual and statutory entitlements were not extinguished by the Appellant's assertion of a counterclaim. If the Appellant had commenced court proceedings disputing the Respondent's entitlement to the accrued leave and gratuity, then the waiver provisions of Article 19(4)(a) would have been engaged. But the counterclaim did not dispute the amounts due to the Respondent in that respect.

69. The statutory mechanism for suspension of the Appellant's obligation under Article 19(1) is limited in its application to the circumstances set out in Article 19(4)(v). The existence of a counterclaim which did not go to the admitted entitlements to remuneration and gratuity did not negate the obligation to pay them within 14 days of termination.

70. As to the misconduct by the Respondent said to attract the application of Article 19(4)(b), the CFI found correctly that that was not a material cause of the Respondent failing to receive, within time, the amount which the Appellant was obliged to pay.

71. The statute is no doubt capable of working what employers might perceive as an injustice where an employee has been terminated for cause. On the other hand, the statutory obligations imposed by Article 19 do provide protection against an employer raising a claim against an employee and using it as a basis for evading its obligations.

72. The preceding reasoning covers Grounds 1, 2 and 4. The Court accepts the Respondent's submissions on Ground 3 relating to recoupment of benefits.

Conclusion

73. In the opinion of the Court, the appeal should be dismissed, and the Appellant should pay the Respondent's costs to be assessed by the Registrar, if not agreed.