Claim No. SCT 290/2020 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 COURTSBEFORE SCT JUDGE MAHA AL MEHAIRI BETWEEN LUKYINI MIDDLE EAST FZ LLC Claimant and LISTIYANA Defendant Hearing : 22 September 2020 Judgment :

Claim No. SCT 290/2020

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 AL MEHAIRI

BETWEEN

LUKYINI MIDDLE EAST FZ LLC

Claimant

and

LISTIYANA

Defendant

Hearing : **22 September 2020**
Judgment : **25 October 2020**

JUDGMENT OF SCT JUDGE MAHA AL MEHAIRI

UPON this Claim being filed on 20 August 2020

AND UPON a hearing having been listed before SCT Judge Maha Al Mehairi on 22 September 2020, with the Claimant's and the Defendant's representatives attending

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 sum of AED 100,800.

2. The Defendant shall pay the Claimant the Court fee in the sum of AED 5,040.

Issued by:
Ayesha Bin Kalban
SCT Judge and Deputy Registrar
Date of issue: 25 October 2020
At: 11am

THE REASONS

The Parties

1. The Claimant is Lukyini Middle East FZ LLC (the "Claimant"), a recruitment services company located in Dubai Internet City, Dubai.

2. The Defendant is Listiyana (the "Defendant"), a multi-specialty clinic registered in Dubai.

Background and the Preceding History

3. On 3 November 2019, the Defendant approached the Claimant to conduct a search for two vacancies for which the Defendant was seeking recruitment. The first vacancy being for a doctor for the time of 5 days per week and a fixed monthly remuneration. The sec-ond with a fixed monthly income, and the second vacancy for a part-time doctor on a prof-it-sharing basis with no guaranteed income.

4. On 7 November 2019, the parties signed a `Terms of Business Permanent Recruitment Services' (the "Contract"), which details the scope of the services which were to be car-ried out by the Claimant.

5. On 12 November 2019, the Defendant contacted the Claimant by way of Whatsapp requesting that the Claimant provide a full-time doctor for the second vacancy, rather than a part-time doctor, maintaining the previously determined profit-sharing remuneration.

6. On 17 November 2019, the Defendant sent the Claimant a document detailing the job description of the dermatologist that they were seeking to

hire, namely to state that the recruited candidate, if hired, would be working full time with a guaranteed monthly compensation of AED 35,000 to AED 40,000 in addition to commission.

7. The Claimant presented a few candidates to the Defendant including Liun ("Dr. Liun") that is currently employed by the Defendant. Before being hired by the Defendant, Dr. Liun had minimum requirements that he was looking for in his future employer being a full-time job and a guaranteed monthly income of AED 40,000.

8. On 22 December 2019, Dr. Liun received an employment offer ("Offer Letter") from the Defendant offering him a position as a dermatologist with a guaranteed monthly compensation of AED 40,000.

9. On 30 December 2019, the Defendant contacted the Claimant and informed it that the Claimant is rejecting Dr. Liun's candidacy and suggested that it wished to recruit another candidate. At that point in time, Dr. Liun had already signed the Offer Letter and was looking to resign from his role to join the Defendant in February 2020.

10. The Claimant attempted to communicate with the Defendant to confirm whether the Offer Letter remained in effect or whether the Defendant had rescinded its offer, to which the Claimant received no response from the Defendant. As a result of this, the Claimant sent the Defendant an invoice with cancellation fees to be borne by the Defendant.

11. Upon receiving no response, the Claimant suggested that Dr. Liun contact the Defendant directly to clarify the position as to his status.

12. The Defendant hired Dr. Anuj on 12 February 2020. Consequently, the Claimant sent the Defendant an invoice in relation to the recruitment of Dr. Liun. The Defendant rejected this invoice stating that the recruitments fees should reflect the fact that Dr. Liun was hired or a profit or commission-based position, and the invoice should reflect said position accordingly.

13. On 20 August 2020, the Claimant filed a claim in the DIFC Courts' Small Claims Tribunal (the "SCT") pertaining to an unpaid invoice for hiring a recruitment candidate. The Claimant is seeking the fee of AED100,800 for the introduction and placement of Dr. Liun in the position of Dermatologist.

14. On 27 August 2020, the Defendant filed an Acknowledgment of Service intending to defend part of the claim.

15. The parties met for a Consultation with SCT Judge Delvin Sumo on 2 September 2020 but were unable to reach a settlement. In line with the rules and procedures of the SCT, this matter was referred to me for determination, pursuant to a Hearing held on 22 September 2020.

The Claim

16. On the Claimant's account, they fulfilled their part of the contract; and certainly, enough to warrant payment for their services. The Defendant refused to pay the fees associated with the Contract, stating that the fee for recruiting the Dr. Liun should be AED 25,000, stating that Dr. Liun was recruited on a commission-based remuneration, and would not be entitled to a monthly fixed remuneration.

17. The Claimant, pursuant to the Contract, had sought to agree an amount to be paid to the by the Defendant. The amounts proposed by the Claimant were denied by the Defendant and therefore the Claimant proceeded to file his Claim with the SCT. The Claimant's claim is discussed in further detail below.

18. The total sum claimed by the Claimant as set out in the Claim Form is AED 100,800, in addition to the court fees applicable to the filing of the Claim.

The Defence

19. The Defendant confirms that its understanding of the Contract is that all the candidates are hired on a profit-sharing basis only, and that the applicable fees as per the Contract is AED 25,000 on a profit-sharing basis and not a percentage of the candidate's annual sal-ary. The Defendant argued that hiring on a full time or part time basis does not play a role in determining the Claimant's owed fees and the imperative consideration to take is whether the role to be recruited for held a remuneration on a profit sharing basis, meaning the Defendant would share the profit with the doctor depending on how much income the doctor has generated.

20. The Defendant's defence to the Claimant's claim is set out in the Discussion below.

Discussion

21. The dispute is governed by DIFC contract law and the relevant case law and principles concerning a breach of contract. The parties have opted-in the jurisdiction of the DIFC Courts, in accordance with Clause 6 of the Contract, which reads as follows:

> "Any dispute arising out of or in connection with this Terms of Business, including any question regarding its existence, validity or termination, shall be subject to the exclusive jurisdiction of the Courts of the Dubai international Financial Cen-tre.
> This Terms of Business shall be governed by and constructed in accordance with the law of Dubai International Financial Centre.
> The Terms of Business, once signed by the Client, supersede any and all previ-ous agreements between the Parties."

22. The Contract is signed and initialed by both parties on 7 November 2019. Its terms are not disputed.

23. This is therefore a relatively straightforward matter; the only issue of contention between the parties is the interpretation of the mechanism in invoicing the Defendant, and whether or not Dr. Liun's remuneration is to be determined to be on a monthly fixed basis or on a commission basis.

24. Clause 10 of the Contract contains the details in relation to the mechanism of invoicing based on annual remuneration or commission.

"10. The fee payable by the Client (Permanent Placement Fee), at the relevant percentages listed below, will be invoiced upon offer acceptance by the candi-date"

Gross Annual Salary (AED per month)	Percentage of Annual Gross Salary
12,000 to 14,999	12%
15,000 to 17,999	14%
18,000 to 24,999	16%
25,000 to 44,999	20%
45,000 and above	23%
Doctor/Consultants on Part-time & profit-sharing basis	AED 25,000 Fixed Fee

25. The Claimant submits that whilst the title in the Offer Letter is a `Partnership role' the sal-ary and role offered is as per the job description received on 17 November 2019 from the Defendant, being a full-time position, regardless of the fact that Dr. Liun had been offered a role under the label of partnership. The Claimant submits that is the role is a full-time one and not a part-time position at all, therefore, the full-time fee according to the table in Clause 10 applies.

26. In addition, the Offer Letter also makes reference to a `guaranteed Commission' of AED 40,000 or 40% profit, whichever is greater. Therefore, I interpret the AED 40,000 remuneration to be guaranteed income that Dr. Liun would receive on a monthly basis. The Claimant, in generating the invoice, based its fee on the minimum salary being AED 100,800.

27. In reply, the Defendant argues that its requirement from the commencement of the negotiations was for a commission-based doctor. The Offer Letter states that Dr. Liun is hired on the basis of a partnership. The relevant section is set out as follows.

"Dear Dr. Liun Taneja,

Lean and Linsi Clinic is pleased to offer you the position of Dermatologist on partnership basis effective February 15, 2019 (sic). Your monthly remuneration will be as follows.

- You are entitled to a guaranteed monthly commission of Aed40,000 or 40% on net profit from your total monthly net revenue generation which-ever is higher.
- 10% referral commission on net profit from product sales.
- 3% commission on net sales generated by referring Hair Transplant cli-ents.
- 2.5% commission on net sales generated by referring Plastic surgery cli-ents.

."

28. In review of Clause 10 of the Contract, I note that the Defendant did use the word `Partnership' and `Commission', however, in setting out the mechanism in which Dr. Liun would have been paid, the remuneration does not follow the usual practice of a commission based scheme. By the nature of a commission based role, an employee that is hired in such a position is required to achieve a number of sales or meet specific tar-gets, pursuant to which an amount would be paid out to that employee, and the higher the amount of sales or targets reached, the higher the amount paid to the employee.

29. The Offer Letter states that Dr. Liun is entitled to a "guaranteed monthly commission of AED 40,000". However, the term `guaranteed' leads the Court to conclude that Dr. Liun's remuneration does not depend on the amount of income he has generated or the number of clients that he examines on a monthly basis. In the situation, that Dr. Liun's exceeds the sales target set out in the Offer Letter then he would be entitled a 40% on net profit on the income generated. The 40% in this context is described as a motivation incentive for the doctor to attract more clients to the Defendant's clinic.

30. The Contract does not make mention as to whether the doctor shall depend on commission as a source of income but determines that Dr. Liun be entitled to guaranteed monthly commission of AED 40.000. As such, if he examines 1 patient or 100 patients, he would receive the amount of AED 40,000 as remuneration. This is also confirmed in a WhatsApp conversation between the parties when the Defendant sent the following:

"Hi Liya! Good morning

There has been a slight change in our requirement! Instead of partime dermat.. We are now seeking full time one with aesthetic experience (3-4) yrs. We offer 35,000 aed to 40,000 aed per month plus commissions!

."

31. The term `plus' leads the Court to conclude that the remuneration of the doctor to be pro-vided by the Defendant would be AED 35,000 to AED 40,000, in addition to commissions based on income generated by the doctor directly.

32. In further review of the Contract, I find that it specifies if the candidate has signed an agreement with the prospective employee and the monthly income is specified then an invoice would be generated by the Claimant accordingly. In addition, the name that is given to a payment would not take precedence over the actual nature of the payment, and the burden would be on the Defendant to prove why, when the payment has the characteristics of salary and not of commission, a payment is not to be construed to be a fixed monthly salary.

33. In light of this, I have determined that the invoice generated as a result of the terms and conditions of the Contract is valid, and the Defendant shall pay the Claimant the amount of AED 100,800, being 20% of Dr. Liun's yearly guaranteed income plus vat.

AED 40,000 x 20% = 96,000 + 5% vat = AED 100,800

Conclusion

34. In light of the aforementioned, I find that the Defendant shall pay the Claimant the sum of AED 100,800.

35. The Defendant shall pay the Claimant the Court fee in the amount of AED 5,040.

Issued by:
Ayesha Bin Kalban
SCT Judge and Deputy Registrar
Date of issue: 25 October 2020
At: 11am