Claim No. SCT 247/2018

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

IANTHA

Claimant/Counter-Defendant

and

INIGO CAPITAL PARTNERS

Defendant/ Counter- Claimant

Hearing:**3 September 2018**

Further Submissions:**10 October 2018**

Judgment: **14 October 2018**

JUDGMENT OF SCT JUDGE MAHA AL MEHAIRI

UPON this Claim having been called on 8 August 2018 for a Consultation before SCT Judge Ayesha Bin Kalban;

AND UPON the parties having not reached a settlement;

AND UPON a Hearing having been held before me on 3 September 2018, with the Claimant's and the Defendant's representatives attending in person;

AND UPON reading the documents submitted in the Court file and hearing the parties' arguments at the Hearing;

IT IS HEREBY ORDERED THAT:

1. The Claimant's Claims are accepted. The Defendant shall pay the Claimant AED 4,000 for her unpaid annual leave and AED 23,683 for her end of service gratuity.

2. The Defendant shall pay the Claimant AED 48,400 as a penalty pursuant to Article 18(2) of DIFC Employment Law and an additional AED 400 per day from the date of this Judgment, until payment is made.

3. The Defendant's Counterclaim against the Claimant is dismissed.

Issued by:

Ayesha Bin Kalban

SCT Judge

Date of issue: 14 October 2018

At: 4pm

The Parties

1. The Claimant is Iantha, a finance director that works for the Defendant

2. The Defendant is Inigo Capital Partners, a Dubai-based financial services firm, registered in the Dubai International Financial Centre ('DIFC').

Background

3. The Claimant started working for Ibycus Investment Management Limited (Ibycus) in 2010. Based on her tenure at the firm, the Claimant had a comfortable schedule working with Ibycus.

4. In light of the Claimant's comfortable workload at Ibycus, at her discretion, she decided that she was able to resume part-time employment elsewhere in addition to the job that she was occupying with Ibycus.

5. Ibycus's client base and funds advised on were from all external custodians and administrators. As such, Ibycus had no conflict of interest arising from the Claimant applying for a dual position job. This was reflected in the letter sent to the Dubai Financial Services Authority ("DFSA") on 12 June 2014 by Mr. Imanol, Executive Director of Ibycus.

6. On 6 July 2015, the Claimant signed a contract ("Employment Contract") with the Defendant to start working as a Finance Director with a monthly salary of AED 12,000. The Claimant was responsible for various duties relating to the day to day accounting and financing duties, as well as implementing a set of accounting books at Impario. The Claimant's working hours as per her Employment Contract were flexible as long as she dedicated a minimum of 16 hours per week to the Defendant in executing the proper performance of her duties. In addition, the Claimant was entitled to 25 working days holiday as per her Employment Contract with the Defendant in addition to all of the UAE private sector holidays.

7. In February 2018, the Claimant filed her resignation letter, serving up to the end of May 2018 to complete her notice period with the Defendant. As the Claimant was finalizing her handover, there were email discussions between the Claimant and the Defendant's CEO in relation to her end of service benefits which were disagreed upon between the parties.

8. The Claimant proceeded to file a claim on 4 July 2018 and amended it on 8 August 2018 seeking her end of service gratuity and 14 days of accrued untaken annual leave, in addition to the late payment fee of Article 18(2) under the DIFC Employment Law. On 23 July 2018, the Defendant acknowledged service intending to defend part of the claim.

9. On 30 July 2018 the Defendant filed a counterclaim seeking indemnification of AED 7,345 corresponding to the monthly fee that the Defendant is bound to pay to the new finance director for the month of April 2018.

10. The parties attended a Consultation with SCT Judge Ayesha Bin Kalban, but no settlement was reached by the parties and, consequently, a Hearing was set before me. On 3 September 2018, I heard submissions from the Claimant and the Defendant's representative.

The Claim and Reply to Counterclaim

11. The Claimant filed a claim for her end of service benefit, accrued leave of 10 days, and payment under Article 18, corresponding to an amount of AED 26,465,75. In her submission, she alleged that, from January 2018 to May 2018 "*no holidays were taken*".

12. The Claimant submits that pursuant to the DIFC Employment Law No. 6 of 2018 and Pursuant to Article 18(1), the Claimant is seeking a gratuity payment of AED 26,465.75 and accrued vacation leave of AED 8,000. Article 18(1) states that "*An Employer shall pay to an Employee all Remuneration, the Gratuity Payment and all accrued Vacation Leave not taken within fourteen (14) days after the Termination Date, provided that where the Termination Date falls during a Pay Period, an Employer shall be permitted to pro rate an Employee's Wages accordingly.*".

13. Pursuant to the provisions of Article 18(2), the Claimant is seeking payment of a penalty equal to the Employees Daily Wage of AED 800 accrued from the 15 June 2018, (14 days after the Termination Date of 31 May 2018). Article 18(2) states: *Subject to the provisions of Article 18(3), 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 with its payment obligations under Article 18(1).*

14. Article (19) that states that:

> "**No unauthorised deductions**
>
> 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) 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 over-payment of any Remuneration or expenses, or to recoup benefits utilised by an Employee in excess of what is permitted in an Employment Contract; or
>
> (d) the deduction or payment has been ordered by the Court."

15. The Claimant is disputing any attempt by the Defendant to deduct from the Employee's remuneration an amount of AED 6,000, as claimed by the Defendant to be a retroactive recovery in costs for the appointment of a New Finance Director for the month of April 2018.

Accrued Vacation Entitlement

16. As per the Employment Contract, the Claimant commenced employment with the Defendant as a part-time Finance Director on the 6 July 2015, contracted to work 16 hours per week. It was agreed that the position would be undertaken as a dual licensed role with the Claimant also being employed as a full-time Finance Director with Ibycus, an unconnected DIFC licensed firm.

17. As per the terms of the Employment Contract, the Claimant was entitled to a vacation entitlement of twenty-five working days with pay, each calendar year. The Claimant has confirmed that no vacation days were taken during the period of employment from January to May 2018 and as a result is claiming 10 days of accrued vacation, amounting to AED 8,000. The Claimant submits that her principal employer, Ibycus, with whom the Claimant is employed on a full-time permanent basis has further confirmed that no leave was taken by the Claimant during this period, as provided by the letter given by Ibycus.

18. The Defendant's `recollection' of leave taken for Easter 2018, is based purely on an email sent by the Firm's auditors to the Claimant asking if she had a nice Easter Holiday. This was in reference to the Claimant having Easter Sunday off as a result of Ibycus allowing Easter Sunday as an office holiday for all employees and was not considered to be a vacation day, as provided by email evidence advising of the Ibycus office closure for Easter Sunday.

Defence and Counterclaim

19. The Defendant filed a Counterclaim alleging 4 issues against the Claimant. The first issue related to the Claimant's behaviour which amounted to gross negligence and lack of professionalism. The extent of the behaviour was acknowledged by the Defendant after her notice period and in particular regarded her efforts with the VAT implementation and the Claimant's overall misbehaviour and breach of core values and principles.

20. The second issue concerned the Claimant's duty, as a licensed and authorized finance director, to cover monthly accounting and invoicing up until the end of her employment with the Defendant, which she failed to do, which, therefore, led to the Defendant hiring an alternative Finance Director for the month of April to conduct the work accurately and with great care and skill.

21. The third issue concerned the negligence of the Claimant with regard to the payments of Incendio invoices which led to the Defendant incurring a total loss of USD 673.52 due to late payments and wire transfer commissions, as well as lack of valid transfer payments. The Defendant alleges that the Claimant confirmed payment of an invoice, even though the bank statement showed that the funds were returned due to an invalid account, and she proceeded to paying a new bill with penalty confirming payment to the SEO of the company. Her misconduct led to the Defendant facing substantial loss which in turn caused detriment to the company.

22. The Defendant further submits that the Claimant, failed to take the initiative to raise the issue to the Defendant, making her an untrustworthy and unreliable finance director. The Claimant's conduct runs contrary to the DFSA principles and to Section 4.4. of the DFSA Rulebook which requires an authorized individual to observe Principle 1 `high standards of integrity' and `fair dealing' (4.4.1), and Principle 2 `due skill, care and diligence' (4.4.2). The Defendant's CEO raised the point that the Claimant's misconduct and misbehaviour is in clear breach of these core values and principles on which the DFSA was created.

23. Therefore, the Defendant claims indemnification for the double appointment of a finance director, corresponding to an alternative finance director monthly fee i.e. USD 2,000.

24. The CEO of the Defendant further submits that the Claimant's fourth issue is lack of integrity, as well as serious misbehavior and misconduct. The Defendant fails to agree to the Claimant's claims for accrued annual leave as the CEO of the Defendant has submitted emails relating to the Claimant's Easter vacation and thereby challenges the Claimant's claim to accrued vacation leave for 2018.

25. The Defendant denies the Claimant's payment for end of service gratuity, in compliance with Article 60(4) of DIFC Employment Law as per the employee's misbehaviour. It is acknowledged that under such circumstances, a reasonable employer, notably the Defendant, would have terminated the employee in such circumstances, as the Claimant's conduct warrants termination. As most of the Claimant's misconduct occurred during her notice period, the employment agreement was no longer in effect and therefore the Defendant was no longer in a position to terminate the employment agreement.

26. The Defendant submits that as per her employment, the Claimant was working 4 days a week, except for Thursdays which she had off, i.e. 2 hours per day. Therefore, she was working as an average of 16 days per month.

27. The Defendant submits AED 750 corresponds to the Claimant's daily salary. As per the Claimant's calculation, her daily salary would be AED 1,500 which would bring her salary to AED 24,000.

Reply to Counterclaim

28. The Claimant submits that whilst employed by the Defendant, the Claimant worked throughout two prior pregnancies in 2015/2016 and 2016/2017 without issue or cause for concern raised about the quality of work performed. Not only was there no issue in the quality of worked performed during the pregnancies, the Claimant also maintained all financial affairs of the Defendant whilst on both maternity leaves without any support cover provided. Despite both maternity leave periods falling during the busy audit and regulatory reporting period, this work was again performed without any issue or cause for concern raised by the Defendant.

29. In response to the Defendant's claim of work outstanding at the time of termination, the Claimant submits that during the busy audit and regulatory reporting period, which ran from January to May 2018, hours well in excess of those contractually obliged 16 hours per week were completed. For the financial accounting work of April and May to have been completed, at least one additional month of employment by the Claimant would have been required at a cost of AED 12,000 to the firm. As a result of an overrun in the finalisation of the annual audit and regulatory reporting which was due to be completed by the 30th April 2018 but overran until mid-May, it was agreed that the Claimant would extend her contractual notice period from two months to three months until 31 May 2018, to ensure that all audit and regulatory reporting requirements were satisfied prior to her departure and to finalise the handover with the new Finance Director whose appointment was only completed at the end of May 2018.

30. The Claimant submits that all financial accounts of the firm are prepared and maintained on a quarterly basis in line with DFSA reporting requirements and as such the April and May 2018 financial accounting would only have been due to be finalised in the month following the end of the quarter, when all available material relating to investment portfolio statements, bank statements, invoices and receipts would have been made available. To this end, the Quarter 2 financial accounting period of April to June 2018 would have been finalised only following the end of the quarter on 30 June 2018 which passed the Claimant's notice period.

31. The Claimant submits that for any change in employee of any organization, there is expected to be a period of transition wherein the handover of duties by the incoming and outgoing personnel are completed, especially, where financial accounting is concerned, due to the fact that financial accounts are prepared on a retroactive basis. The cost of this transition period should in no way be assumed by the departing individual. This

attempt by the Defendant to deduct an unauthorised amount from the Claimant's end of service entitlement, to retroactively recover the cost of her replacement for the month of April is disputed.

32. The Claimant submits that during the month of April 2018, hours well in excess of the contractual 16 hours per week were worked for the Defendant, as such, it should be considered totally unacceptable for the Defendant to attempt to retroactively deduct any portion of the Claimant's April salary, when the contractual hours had already been completed, albeit for the purpose of completing the Annual financial reports.

33. The Claimant disputes that there was any under performance in the Claimant's work during the months of April and May 2018 and should the Claimant have remained under the employment of the Defendant, all accounting work for the Quarter 2 period would have been completed in the months of June and July as with all prior years.

34. The Claimant also adds that if the replacing Finance Director was employed as a direct employee instead of through a consulting firm, the first monthly salary of the employee would have been June 2018 as per the engagement and the Quarter 2 accounts. It is also to be noted that due to severe pregnancy complications, the Claimant was put on two months medically instructed bed rest from 3 May 2018 up to and beyond 31 May 2018, as evidenced in the sick certificate provided by the Claimant, during which time the duties relating to the regulatory reporting as detailed above, in addition to the handover of work were still undertaken by the Claimant despite the pregnancy risk involved.

35. The Claimant submits that the Defendant was aware of the Claimant's resignation at the end of February 2018 and in line with the contractual two-month notice period, the original termination date was due to be 30 April 2018. This provided the Defendant with an adequate two-month period wherein the VAT assessment and the issuance of outward invoices would be completed for the first VAT reporting period of 1 Jan to 31 May 2018, the filing deadline for which was 28 June 2018.

Reply to Claim of misconduct

36. The Defendant first notified the Claimant, by way of email on 25 February 2018 that an invoice pertaining to annual registration fees was payable to Incendio. As can be noted within the body of the Defendant's email, the invoice was due for payment to Incendio on or before 29 December 2017. Furthermore, it is also to be noted that, on this same email, penalties would be incurred for the onward late payment of fees which were due to be paid to the Registrar of Companies by the 31 January 2018. Yet again, this payment deadline was missed as a result of the Defendant's instruction email not being received until 25 February 2018.

37. Following receipt of the Defendant's email instruction on 25 February 2018, the payment was immediately processed by the Claimant, that same day, and a confirmation of the payment was provided to the Defendant. Following the initial transfer, the payment was subsequently returned to the account of the Firm on the 1 March 2018 with the detail of `invalid account number'. As the bank transfer details used were correct as per the invoice instruction, the Claimant proceeded to investigate the reason for the return of funds which took some time. It was concluded with the beneficiary that there was no apparent reason for the return of funds and the payment was repaid by the Claimant on 18 April 2018. Confirmation of the payment was again provided to the Defendant as proof of payment.

38. The Claimant submits that despite the Defendant's attempts to propose any claim of misconduct, both invoices were paid on the same day or the next day that the instruction for payment was received by the Defendant, and a confirmation of the payment was provided by email. The penalty incurred was as a direct result of the instruction by the Defendant not being sent to the Claimant for payment prior to 29 December 2017 and 31 January 2018 deadlines.

39. The Claimant denies the Defendant's claim of gross negligence and requests that the Court rule in favour of the payment of the end of service entitlement to the Claimant.

Discussion

40. The DIFC Courts and the Small Claims Tribunal have jurisdiction over this case as it concerns employment within the DIFC and the amount in question does not exceed AED 500,000. Further, Clause 9.2 of the Amended Employment Contract states that any disputes shall be subject to the exclusive jurisdiction of the DIFC Courts.

41. This dispute is governed by the DIFC Law No. 4 of 2005, as amended by DIFC Law No. 3 of 2012 (the DIFC Employment Law) in conjunction with the relevant Amended Employment Contract.

The Claim

42. The material issue in this case concerns the question of whether the employee was a full-time employee in both organizations or a full-time employee in Ibycus and a part time employee with the Defendant.

43. The Court requested the parties to provide a copy (if any) of a contract between the two organizations to shape the nature of the Claimant's employment and to clarify the benefits that the Claimant is entitled to as per her two contracts. The parties came back denying any existence of a third contract between them.

44. As there is no third contract, the Court is satisfied that even though the Claimant is working a 16-hour workload per week as per her contract "*you will work part-time dedicating a minimum of 16 hours per week to the company as for the proper performance of your duties*", she is still considered a full-time employee with the Defendant and, as such, she is entitled to all the benefits that derive from her Employment Contract with the Defendant.

End of Service Benefit

45. I apply the principles set out in the DIFC Employment Law. Particularly I apply Article 64 which sets out the procedure for calculating Gratuity Payment.

46. The Claimant started working for the Defendant on 6 July 2015 and her last working day was 31 May 2018, which is a total of 2 years and 9 months and 25 days.

47. Pursuant to Article 64 of the DIFC Employment Law, I find that the Claimant is entitled to a total sum of AED 23,683 for 2 years, 9 months and 25 days service.

Accrued Vacation Entitlement

48. The Claimant's Employment Contract states under vacation entitlement ("the Company's current rules and procedures regarding holiday entitlement are set out in the Employee Handbook); "*Our holiday year runs from 1 January to 31 December (Holiday Year). You are entitled to twenty-five working days holiday (in addition to U.A.E private sector holidays) with pay in every Holiday Year at times convenient to the Company, including your holidays with Ibycus Capital."*

49. The Claimant provided a letter from Ibycus stating that no vacation leave was taken from the beginning of January 2018, as such the Claimant is entitled to the leave from January 2018 to May 2018.

50. The DIFC Employment Law states that under Article 27 - Compensation in lieu of vacation leave:

> "(1) Where an employee's employment is terminated, the employer shall pay the employee an amount in lieu of vacation leave accrued but not taken.
>
> (2) In the event that the employee has taken more vacation leave than has accrued at the termination date, the employee shall repay the employer the corresponding sum.
>
> (3) Compensation in lieu of vacation leave shall be calculated using the employee's daily wage applicable on the employee's last day of employment."

51. In her submissions the Claimant referred to the New Employment Law of 2018 which is still under consultation and submitted that her daily wage is AED 800, the Court finds that Claimant miscalculated her daily wage as her monthly salary is AED 12,000 and if you divide that with 30 days, AED 400 will be the Claimant's daily wage.

52. As such since the Claimant's daily wage is AED 400 based on a 12,000 monthly salary and she worked the total of 5 months giving her 10 days annual leave. The Claimant is entitled to AED 4,000 (daily wage x 10 days annual leave).

Article 18 of the DIFC Employment Law

53. In her Claim Form and at the Hearing, the Claimant confirmed that she sought the penalty under Article 18 of DIFC Employment Law to be activated. It provides:

> "(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."

54. Article 18 penalties are contingent upon "wages or any other amount owing" failing to be paid by the Defendant within 14 days of the termination date. As the Claimant's termination date was 31 May 2018, the Defendant has not shown any attempts to pay the Claimant what she was owed within 14 days of her termination. Therefore, in accordance with the DIFC Courts precedent set by the judgment of Justice Roger Giles in *Asif Hakim Adil v Frontline Development Partners Limited* [2014] DIFC CFI 015 and the Judgment of H.E. Justice Ali Al Madhani in *Pierre-Eric Daniel Bernard Lys v Elesco Limited* [2014] DIFC CFI 012, the Claimant is entitled to Article 18 penalties running from 14 days after her official date of termination until the date payment is made. For the purpose of Article 18, the relevant date to calculate the 14 days from, is that of termination. Accordingly, the Defendant has been in arrears since 15 June 2018 (14 days following termination on 31 May 2018) and the penalty began to accrue at the daily rate of AED 400 from this date.

55. As of the date of this Judgment, the penalty is owed for 122 days from 15 June 2018 until 14 October 2018, totaling AED 48,400 with the daily penalty of AED 400 continuing to accrue until the date of payment.

The Counterclaim

56. The Defendant's Counterclaim is premised on the fact that there was negligence with three topics, the Claimant failed to meet the requirements of setting up the VAT for the Company, she has neglected to meet the requirements of submitting the reports and misconduct relating to payment of an invoice to Incendio.

57. The Court is satisfied with the explanation of the Claimant in relation to why the work was not submitted, due to the fact that the numbers were not ready and that she had fallen ill in the last month before her departure.

58. The Court is also satisfied that there should be a time where both employees will have to perform the same job in order for the handover from one employee to another is successful as the new finance director needs to understand the requirements of the job and have an opportunity to ask questions to the previous finance director that need to be addressed to fully understand the nature of role.

59. As such the Court sees no negligence from the Claimant's side, therefore, the Counterclaim must be dismissed.

Conclusion

60. For the above-mentioned reasons, it is hereby ordered that the Claimant's Claim is accepted. The Defendant shall pay the Claimant AED 4,000 for her unpaid annual leave and AED 23,683 for her end of service gratuity.

61. The Defendant shall pay the Claimant AED 48,400 as a penalty pursuant to Article 18(2) of DIFC Employment Law and an additional AED 400 per day from the date of this Judgment, until payment is made.

62. The Defendant's Counterclaim against the Claimant is dismissed.



Issued by:

Ayesha Bin Kalban

SCT Judge

Date of issue: 14 October 2018

At: 4pm