Claim No. SCT 033/2020

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 AND DEPUTY REGISTRAR AYESHA BIN KALBAN

BETWEEN

LINSI

Claimant/Counter-Defendant

and

LIMDA BROKERS

Defendant/Counter-Claimant

Hearing	**: 7 April 2020**
Post-Hearing submissions	**: 28 April 2020**
Judgment	**: 19 May 2020**

JUDGMENT OF SCT JUDGE AND DEPUTY REGISTRAR AYESHA BIN KALBAN

UPON this Claim being filed on 2 February 2020

AND UPON the Defendant filing an Acknowledgment of Service intending to defend all of this Claim dated 13 February 2020

AND UPON a Consultation being held before SCT Judge Delvin Sumo on 24 February 2020

AND UPON the parties failing to reach a settlement at the Consultation

AND UPON the Defendant's Counterclaim dated 8 March 2020

AND UPON a hearing having been listed before SCT Judge Ayesha Bin Kalban on 7 April 2020 with the Claimant and the Defendant's representative attending

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

IT IS HEREBY ORDERED THAT:

1. The Claimant shall pay the Defendant the sum of USD 28,758.

2. The Claimant shall pay the Defendant the Court fee in the sum of USD 575.16.

Issued by:
Ayesha Bin Kalban
SCT Judge and Deputy Registrar
Date of issue: 19 May 2020
At: 10am

THE REASONS

The Parties

1. The Claimant/ Counter-Defendant is Linsi (the "Claimant"), an individual filing a claim regarding her employment at the Defendant company.

2. The Defendant/Counter-Claimant is Limda Brokers (the "Defendant"), a company registered in the DIFC.

Background and the Preceding History

3. The underlying dispute arises over the employment of the Claimant by the Defendant pursuant to an Employment Contract dated 17 June 2019 (the "Employment Contract").

4. On 23 November 2019, the Claimant's employment was terminated by the Defendant by way of a termination letter. The Defendant, on 9 December 2019, provided the Claimant with her final settlement which set out sums owed to the Defendant by the Claimant, and confirmed that these sums would need to be settled prior to the Claimant's exit.

5. On 17 December 2019, the Claimant approached the Defendant on the basis that she was seeking a settlement with the Defendant. The Claimant confirmed that she had sought legal advice from a DIFC registered lawyer and therefore the parties entered into a settlement, by way of an agreement dated 2 December 2019 but signed on 19 December 2019 (the "Settlement Agreement").

6. Pursuant to the Settlement Agreement, the Claimant was released from her notice period and the Defendant waived a non-compete clause set out in the Employment Contract. The Agreement further stipulated that the Claimant provide two post-dated cheques to the Defendant for the sum of USD 4,000, payable at the end of March 2020. The parties agreed that all financial claims between the parties had been settled and no party could proceed to make further financial claims.

7. On 2 February 2020, the Claimant filed a claim in the DIFC Courts' Small Claims Tribunal (the "SCT") claiming her salary, her one month notice period, and 10 days of accrued but untaken vacation leave. The Claimant further seeks the cancellation of post-dated cheques she had provided to the Defendant, in the amount of USD 4,000. The total value of the Claim set out by the Claimant is USD 15,240.

8. On 13 February 2020, the Defendant filed an Acknowledgment of Service intending to defend all of the claim. On 8 March 2020 and pursuant to the directions of the Court, the Defendant filed a counterclaim for the amount of USD 28,758 for the amounts allegedly owed to the Defendant by the Claimant as advance payments against commission that the Claimant has allegedly failed to generate.

9. The parties met for a Consultation with SCT Judge Delvin Sumo on 24 February 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 7 April 2020. Upon hearing from the parties, I directed there be further submissions filed by the Claimant, to which the Defendant had the opportunity to respond. The Claimant then filed a request to file a response, and this was completed on 28 April 2020. I then proceeded to reserve my judgment on this matter.

The Claim

10. The Claimant's case is that she was employed with the Defendant as a 'Senior Broker' from 17 June 2019 until her termination on 2 December 2019

11. The sum claimed by the Claimant as set out in the Claim Form is USD 15,240, and, as set out above, is for the Claimant's salary, one month notice period and 10 days of accrued but untaken vacation leave.

The Defence and Counterclaim

12. The Defendant, in responding to the Claimant's claims, submits that the Claimant is barred from making any financial claims against the Defendant, pursuant to the Settlement Agreement. The Defendant submits, and provides evidence, that the Claimant had confirmed that she had sought legal advice from a DIFC registered practitioner in relation to the Settlement Agreement and therefore the Defendant submits that the Claimant had compromised her entitlement to any purported salary, payment of notice period or payment in lieu of accrued but untaken vacation leave by entering into the Agreement. The Defendant therefore submits that the Court must dismiss the Claim, in accordance with the terms of the Settlement Agreement.

13. Alternatively, the Defendant submits that, in the event that the Court determines that the Settlement Agreement does not bar the Claimant from making any claims against the Defendant, the Defendant seeks to pursue its Counterclaim.

14. The Defendant submits that the Claimant has misconstrued the Employment Contract by stating that the Claimant was entitled to a basic wage of USD 5,000 on a monthly basis, and submits that the Claimant's monthly wage as agreed was USD 1,000. The Defendant states that any further sums paid monthly to the Claimant amounted to an advance on future commissions, in accordance with the Employment Contract.

15. The Defendant submits that, in relation to the Claimant's claim for payment in lieu of accrued but untaken annual leave, the Claimant had repeatedly taken unauthorised leave and therefore would have only been entitled to 6 days of annual leave, but for the Settlement Agreement.

16. In relation to the Counterclaim, the Defendant submits that the Claimant's annual wage was USD 12,000, and that the Claimant was lent USD 4,000 per month to be deducted against any commissions earned by the Claimant. Up to the point of the Claimant's termination in December 2019, the Defendant had advanced the sum of USD 28,758 to the Claimant as advance commission payment. The Defendant claims the abovementioned amount, stating that, in accordance with the Employment Contract, any sums owed to the Defendant by the Claimant must be deducted at the point of termination, whereby the Contract stipulates that the Claimant must repay any outstanding loan amount received by the Claimant in relation to any wages or entitlements.

17. The Defendant further submits that the parties had entered into a Loan Facility Agreement dated 10 September 2019 (the "Loan Agreement"), whereby the parties agreed that the Defendant would lend the Claimant the sum of USD 6,000 payable by way of a monthly deduction from the Claimant's monthly advance in the sum of USD 2,000 for a period of 3 months or until the Loan of USD 6,000 was paid in full. The Defendant states that it is entitled to the sum of USD 32,758 in total under the Loan Agreement, as well as the sums owed pursuant to the sums paid to the Claimant as an advance commission.

Discussion

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

19. The parties have submitted substantial documents in relation to this claim, and multiple arguments relating to the Claimant's previous employment, conduct, performance, and visa cancellation have been made. As these arguments do not have any bearing on the claims at hand, I shall refrain from addressing them in the course of this judgment and will only be determining issues of relevance to the matter at hand.

20. The Defendant submits that the Claimant must be barred from making any claims against it, in line with the terms of the Settlement Agreement.

The Defendant confirms that this is the primary basis upon which the Court must dismiss the Claim, and provides proof that the Claimant had confirmed to have sought legal advice upon entering into the Agreement.

21. Article 11 of the DIFC Employment Law reads as follows:

> "Nothing in this Law precludes:
>
> (a) an Employer from providing in any Employment Contract terms and conditions that are more favourable to an Employee than those required by this Law; or
>
> (b) subject to Article 66(13), an Employee from waiving any right, remedy, obligation, claim or action under this Law by entering into a written agreement with their Employer to terminate their employment or to resolve a dispute with their Employer, provided:
>
> (i) the Employee warrants in the written agreement that they were given an opportunity to receive independent legal advice from a Legal Practitioner as to the terms and effect of the written agreement; or
>
> (ii) the Employer and Employee took part in mediation proceedings provided by the Court prior to entering into the written agreement."

22. The DIFC Employment Law stipulates that an employee may waive any right, remedy, obligation, claim or action against an employer, provided that such a waiver is made pursuant to a written agreement wherein the employee confirms that it has had the benefit of seeking legal advice as to the terms of the agreement and the effects of it, or if the employer and employee have engaged in mediation proceedings before this court.

23. While the Claimant has confirmed within the evidence provided and before me at the Hearing that she had sought legal advice, this was not warranted in the Settlement Agreement. In light of the explicit wording requiring an employee's express confirmation of having sought legal advice as to the terms and effect of an agreement pursuant to which its rights would have been waived (as set out in Article 11), I find that the Claimant's waiver of her entitlements and right to make any claims against the Defendant is not in accordance with the DIFC Employment Law. I therefore order that the Settlement Agreement be set aside.

The Claim

24. It follows the above order that the Court must determine each of the parties' claims. The Claimant has claimed the amount of USD 15,240, seeking payment in lieu of her notice period, as well as payment in lieu of 10 days of accrued but untaken vacation leave. The Claimant submits that her monthly basic wage is USD 5,000, and provides evidence in the form of a WhatsApp conversation with her previous manager, Mr. Liud. The conversation was submitted in the French language, and was translated by the Claimant pursuant to the Courts' request. Mr. Liud, in the conversation states as follows:

> "Good. This is what I suggest to you. Start date 1st July (or earlier if you can). Basic draw of USD 5000 for 3 months renewable."

The Claimant relies on this by stating that her basic wage was USD 5,000 and did not contain any sums in the form of advance commission.

25. The Defendant alleges that the Claimant has misunderstood Mr. Liud's words, and submits a witness statement of Mr. Liud wherein he confirms that the Claimant's monthly basic wage was USD 1,000, with an amount of USD 4,000 paid in the form of advance commission.

26. Clause 5 of the Employment Contract provides as follows:

> "The Company shall pay to you an annual salary of US$ 12,000 (US Dollar Twelve Thousand only) in twelve (12) equal monthly payments ("Basic Wage") at the end of each month. For the avoidance of doubt, you acknowledge that for the purposes of your Contract of Employment, the Basic Wage is the only salary to which you are entitled.
>
> The Company shall pay to you an amount of US$ 4,000 (US Dollar Four Thousand only) as an advance on future commission generation ("Advance/Draw") on a monthly basis, payable on the same date as your monthly basic wage payment."

27. The abovementioned clause clearly stipulates the Claimant's monthly basic wage to be USD 1,000, and the amount of USD 4,000 was paid to the Claimant as an advance on commission to be generated by the Claimant in the future. Therefore, I must deem the Claimant's monthly basic wage to be USD 1,000.

28. Article 62 of the DIFC Employment Law reads as follows:

> "Minimum notice periods
>
> (1) An Employer or an Employee may terminate an Employee's employment without cause in accordance with this Article.
>
> (2) Subject to Articles 62(3), 62(4), 62(6) and 63, the written notice required to be given by an Employer or Employee to terminate the Employee's employment shall not be less than:
>
> .
>
> (b) thirty (30) days, if the period of continuous employment of the Employee is in excess of three (3) months but less than five (5) years, including any period of Secondment; or

The Claimant was employed with the Defendant for a period 5 months and 20 days, therefore the Claimant's notice period is 30 days. This is also

set out in Clause 4.1 of the Employment Contract.

29. In light of the above, I find that the Claimant be entitled to USD 1,000 as payment in lieu of her notice period.

30. In respect of the Claimant's claim for payment in lieu of accrued but untaken annual leave, and in review of the Defendant's submission of evidence demonstrating that, according to its records, the Claimant had taken a number of unauthorised absences, I find that the Claimant be entitled to 6 days of accrued but untaken annual leave, in accordance with the Defendant's records and in absence of any evidence submitted by the Claimant suggesting otherwise. The Claimant's daily wage was USD 46.15 (12,000/260) and therefore the Claimant is entitled to the amount of USD 276.92 (45.16 x 6 days) as payment in lieu of her accrued but untaken annual leave.

31. In summary, I find that the Defendant shall pay the Claimant the amount of USD 1,276.92 in respect of the Claimant's employment entitlements. The Defendant shall also pay a portion of the Court fee (in the sum of USD 100) being the fee applicable to the sums awarded to the Claimant pursuant to this Judgment.

The Counterclaim

32. The Defendant's Counterclaim is made in regards to sums that the Defendant alleges have been advanced to the Claimant for commissions to be generated by the Claimant in the future, as well as sums claimed pursuant to the Loan Facility Agreement. In response to the Counterclaim, the Claimant refutes the Defendant's submissions that the sum of USD 4,000 paid to her on a monthly basis were made on the basis of future commission, and submits that those amounts constituted as part of her salary. I have determined above that, in accordance with Clause 5 of the Employment Contract, the amount of USD 4,000, were advances to future commission generation, and therefore did not form part of the Claimant's monthly wages.

33. Clause 5 of the Employment Contract states as follows:

> "You will be entitled to a 50% commission of your allocated net PNL per quarter ("Commission"), from which your quarterly advance on commission of US$ 12,000 (US$ 4,000 * 3) and quarterly basic wage of US$ 3,000 (US$ 1,000 * 3) will be deducted. These commission entitlements are based on what you have generated from your client list. (For removal of doubt clients introduced and opened for trading with your desk).
>
> The Company and you agree that, Commission shall be sums payable to you pursuant to the calculations set out as per the below formula, which for the avoidance of doubt are expressly agreed not to constitute a salary or part of the Basic Wage.
>
> The Company will review your performance, should you fail to achieve a minimum Net PNL per quarter sufficient to cover the monthly advances on commission, basic wages and total desk costs (defined below as Trade and Administration Costs). As part of the performance review, the Company reserves the right to make changes to the remuneration terms of your Contract of Employment. These measures are taken to ensure that overpayments of any kind made by the Company to you are recovered in full from you such that no excess payments are made to you in any given quarter."

34. Clause 5.1 reads:

> "5.1 Deductions: Any Wages, Advances paid in excess or Wages, Advances paid in advance shall be deducted as agreed with you. All such deductions (including but not limited to) the ones identified herein shall be agreed in writing between you and the Company.
>
> If either party chooses to terminate the Contract of Employment before or at the end of your probationary period, monthly advances on commission for those three months and any other advances made by the Company will be refundable by you to the Company in the eventuality that your actual commission calculation does not cover these expenses.
>
> Furthermore, during the entire term of your employment, any overpayments (including but not limited to Advances and your share of costs) to you in relation to your actual commission generation and calculation shall be repayable in full by you to the Company"

35. The Defendant has provided evidence demonstrating that the Claimant had failed to generate any profit on behalf of the Defendant company, and therefore submits that it is entitled to be reimbursed for the advance payments made to the Claimant for future commission generation, seeing as the Claimant was not entitled to any commission. The Claimant has not provided any evidence to demonstrate that she had in fact generated profit, and therefore I am of the view that the Defendant is entitled to recover the sums owed to it by the Claimant, in the amount it has provided of USD 28,758.

36. The Defendant further alleges that it has lent the Claimant the amount of USD 6,000 under the Loan Facility Agreement, to which the Claimant has not made any submissions in response. The Defendant submits that the amount of the Loan had become due upon the termination of the Claimant's employment. In review of the case record, the outstanding sum in relation to the Loan is unclear, as the Defendant has made multiple references to the amount outstanding to it by the Claimant to be USD 32,758, however the Defendant has only claimed the amount of USD 28,758 in its Counterclaim form. Therefore, I am inclined to only award the Defendant the sums which it has formally claimed and to which it has paid a fee to the Court.

Conclusion

37. In light of the aforementioned, I find that the Defendant shall pay the Claimant the sum of USD 1,276.92 and the Court fee in the sum of USD 100. This amount is to be set off against the Claimant's payment to the Defendant in the sum of USD 28,758, in addition to the payment of the Court fee in the amount of USD 575.16.

38. I note that the Claimant has provided the Defendant post-dated cheques totalling the amount of USD 4,000. The parties are at liberty to agree on the method of payment, and the Claimant is to advise the Defendant whether said cheques can be encashed, or whether another method of

payment would be more agreeable.

39. I further note that the Defendant has sought its costs in relation to the Claim and the Counterclaim. I decline this claim in accordance with the standard procedure of the SCT, in which each party bears its own costs.

Issued by:
Ayesha Bin Kalban
SCT Judge and Deputy Registrar
Date of issue: 19 May 2020
At: 10am