Claim No. SCT 059/2020

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
BEFORE SCT JUDGE AND DEPUTY REGISTRAR AYESHA BIN KALBAN

BETWEEN

LUCIANE

Claimant

and

THE LUTERLUTER FITNESS CLUB LTD

Defendant

Hearing	**: 31 March 2020**
Post Hearing Submissions	**: 20 April 2020**
Judgment	**: 26 April 2020**

JUDGMENT OF SCT JUDGE AND DEPUTY REGISTRAR AYESHA BIN KALBAN

UPON this Claim being filed on 23 February 2020

AND UPON the Defendant filing an Acknowledgment of Service intending to defend all of this Claim dated 1 March 2020

AND UPON a Consultation being held before SCT Judge Delvin Sumo on 9 March 2020

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

AND UPON the Order of SCT Judge and Registrar Nassir Al Nasser dated 16 March 2020 consolidating this Claim with the Claim brought by the Defendant under SCT-070-2020

AND UPON a hearing having been listed before SCT Judge Ayesha Bin Kalban on 31 March 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's claim is dismissed.

2. The Claimant shall pay the Defendant the amount of AED 611.68.

3. The Claimant shall bear his own costs for the filing of his Claim.

4. The Claimant shall pay the Defendant a portion of the Court fee in the amount of AED 367.50.

Issued by:
Ayesha Bin Kalban
SCT Judge and Deputy Registrar
Date of issue: 29 April 2020
At: 10am

JUDGMENT

The Parties

1. The Claimant is Luciane (the "Claimant"), an individual filing a claim regarding his employment at the Defendant company.

2. The Defendant is The LuterLuter Fitness Club Ltd (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 from September 2018 to June 2019.

4. The Claimant's claim relates to sums that he is seeking pursuant to his termination by the Defendant, which was carried out by way of a termination letter.

5. On 23 February 2020, the Claimant filed a claim in the DIFC Courts' Small Claims Tribunal (the "SCT") claiming sums owed for accrued but untaken annual leave, overtime, and his notice period.

6. On 1 March 2020, the Defendant filed an Acknowledgment of Service intending to defend all of the claim. Furthermore, on the same date, the Defendant also filed a Claim against the Claimant seeking sums owed pursuant to the Claimant's alleged breach of contract by approaching customers of the Defendant and selling competitors' products, which, the Defendant submits, caused a direct revenue loss to the Defendant. This Claim was filed under the case SCT-070-2020.

7. The parties met for a Consultation with SCT Judge Delvin Sumo on 9 March 2020 but were unable to reach a settlement. A Consultation was also held before SCT Judge Delvin Sumo on 11 March 2020 in relation to Claim SCT-070-2020. On 16 March 2020, an Order was issued by SCT Judge and Registrar Nassir Al Nasser that both Claims be consolidated and the Claim SCT-059-2020 be the lead case for the purposes of consolidation.

8. In line with the rules and procedures of the SCT and in light of the parties' failure to reach settlement, this matter was referred to me for determination, pursuant to a Hearing held on 31 March 2020.

The Claim

9. The Claimant's case is that following his termination, the Defendant failed to pay him his accrued but untaken annual leave, his notice period, and sums owed to him for overtime. He submits that he had stayed back on numerous occasions to cover shifts when a colleague was away, and that the Defendant was aware of the time spent. It is prudent to note that the Claimant has not provided any time sheets or logs evidencing the time, nor has any proof demonstrating the Defendant's knowledge and approval of overtime been submitted. The sum claimed by the Claimant as set out in the Claim Form is AED 12,126.

10. The Claimant submits that he had been forced to resign, and when he refused, the Defendant terminated his employment. There has been no termination letter provided, however the date agreed between the parties to be the date of termination is 24 June 2019.

The Defence and Counterclaim

11. The Defendant, in responding to the Claimant's claims, alleges that the Claimant had signed a document whereby he has confirmed that he has received all dues owed to him, and confirmed that no claims will be made by the Claimant against the Defendant in relation to said dues. The Defendant relies on this document in submitting that the Claimant has received all amounts to which he is entitled and therefore there should be no payments made to him by the Defendant.

12. In its Counterclaim, the Defendant submits that it has received communication from its customers regarding the Claimant's alleged sale of products to them belonging to competitors of the Defendant. The Defendant alleges that payments were made to the Claimant to his personal bank account, and the transactions were carried out to the Claimant's individual benefit causing a loss of revenue to the Defendant. The Defendant also submits that the Claimant was misappropriating the Defendant's telephone lines by making personal calls, and has made payments to the Defendant in several cheques that have remained unpaid. These payments were by way of post-dated cheques addressed to the Defendant from the Claimant, and the parties have confirmed that this relates to an agreement between the parties for the Claimant to remain on the Defendant's visa in exchange for the payment of AED 5,000 to the Defendant through monthly instalments in the amount of AED 1,000. Further details about the Counterclaim are set out in the discussion below.

Discussion

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

The Claim

14. In response to the Defendant's submissions that the Claimant has released his right to make any claims against the Defendant having received all dues owed to him within the document submitted by the Defendant, the Claimant states that he was forced to sign the document in order to proceed with the cancellation of the visa.

15. The document in question reads as follows:

> "I, Luciana, hereby confirm that, I have received all my dues, my full and final settlement amount from The Luter, details provided below.
>
> I, Luciana, hereby confirm that, I will not claim any dues from The Luter, Fitness Club Ltd."

The document is then signed by the Claimant and contains details of his Emirates ID and bank account.

16. Having reviewed the document, I find that this document does not make any mention of the visa cancellation proceedings claimed by the Claimant to have been the incentive for him to have signed the document. The Claimant has unequivocally stated that he has received all dues to which he is owed, and therefore I find that this bars him from seeking additional monies from the Defendant relating to his employment.

17. In light of the above, I find that the Claimant's claims must be dismissed, and the Claimant bear his own costs for the Claim.

The Counterclaim

Sale of Products Resulting in Loss of Revenue

18. As set out above, the Defendant submits, and provides proof, that the Claimant had been in contact with clients of the Defendant in relation to the sale of an Lacktor machine to said clients. The Defendant alleges that the Claimant has facilitated the sale of the abovementioned machine belonging to a competitor of the Defendant, and states that the Claimant had initially requested from the purchasing client for the payment to be made to his personal bank account. The client, however, refused and the Claimant referred her to make the payment directly to the Defendant's competitor, providing an invoice of 10,000 Euros. The Defendant seeks compensation for the sale, deeming it to be a loss of revenue to the Defendant, seeing as the Claimant, being an employee of the Defendant, cannot engage in revenue-generating transactions with competitors of the Defendant.

19. In response to this allegation, the Claimant submits that the Defendant does not engage in the activity of selling machinery, and that the Defendant is not an authorised reseller of such products. The Claimant further states that, at no point during his employment, was he provided with any inventory and pricing list for the sale of products and therefore submits that he has not caused any loss of revenue to the Defendant, seeing as such an activity is not one undertaken by the Claimant

20. In its Counterclaim, the Defendant suggested that the Claimant's above-mentioned misconduct amounted to a breach of trust. The Claimant was the manager of the Defendant's premises and therefore was in a position of trust and power, which the Defendant claims was abused.

21. In light of the Defendant's submissions, it is important to consider DIFC Law No 5 of 2005 (the "Law of Obligations") which sets out the nature of fiduciary obligations. Article 158 of the Law of Obligations confirms that an employee owes a fiduciary duty to the employer, as there is presumed to be a relationship of trust and confidence between them.

22. Article 159 of the same Law states that a fiduciary's obligation of loyalty comprises of the following duties listed in Schedule 3, as appropriate in all the circumstances:

> "1. Loyalty
>
> A fiduciary must act in good faith in what he considers to be the interests of the principal without regard to his own interests.
>
> 2. Conflict of interest
>
> (a) A fiduciary must not place himself in a position where his own interest conflicts with that of his principal.
>
> (b) If there is a conflict between an interest or duty of a fiduciary, and an interest of the principal in any transaction, he must account to the principal for any benefit he receives from the transaction.
>
> (c) A Fiduciary does not have to account for the benefit if the interest or duty has been disclosed to and approved by the principal.
>
> 3. No secret profits
>
> A fiduciary must not use the principal's property, information or opportunities for his own or anyone else's benefit unless his principal has consented or the use has been fully disclosed to the principal and the principal has not objected to it.
>
> 4. Confidentiality
>
> A fiduciary must only use information obtained in confidence from his principal for the benefit of the principal, and must not use it for his own advantage or for the benefit of any other person.
>
> 5. Care, skill and diligence
>
> A fiduciary owes the principal a duty to exercise the care, skill and diligence which would be exercised in the same circumstance by a reasonable person having both:
>
> (a) the knowledge and experience that may reasonably be expected of a person in the same position as the fiduciary; and
>
> (b) the knowledge and experience which the fiduciary has."

23. During the course of this judgment and specifically above, I have summarised the allegations made by the Defendant against the Claimant and the Claimant's responses, if any. Although I am not convinced that any of the misconduct outlined would amount to a breach of the Claimant's fiduciary obligations to the Defendant on their own, I am of the view that taken cumulatively with the other actions undertaken by the Claimant, they do constitute a breach of the fiduciary duties owed by an employee to its employer.

24. By failing to notify the Defendant of the clients who were interested in obtaining machinery and training upon it, the Claimant breached his duty of loyalty and care, skill and diligence. The benefit that the Claimant could have received as commission constitutes a conflict of interest as there is a distinct lack of evidence to show that this activity had been disclosed to and approved by the Defendant.

25. Article 160 of the Law of Obligations sets out the consequence of a breach of fiduciary obligations:

> "(1) Where a fiduciary breaches his obligation of loyalty:
>
> (a) he is liable to pay damages to his principal in respect of any loss suffered by the principal in accordance with the Law on Damages and Remedies; and
>
> (b) he is liable to account to his principal for any benefit he has acquired in consequence of the breach."

26. There is clearly a fiduciary relationship between the parties and as I have found the Claimant's misconduct to amount to a breach of his duty to the Defendant, it is in the interests of justice for there to be consequences resulting from that breach. This, however, leaves the question of the appropriate remedy to grant the Defendant for the Claimant's breach of his fiduciary obligation to it. Part 2 of the DIFC Law of Damages and Remedies, Law No. 7 of 2005, states:

> "8. Right to damages
>
> Any non-performance gives the aggrieved party a right to damages either exclusively or in conjunction with any other remedies except where the non-performance is excused under the Law of Contract.
>
> 10. Measure of damages
>
> Subject to the limitations stated in this Part 2 of the Law, the injured party has a right to damages as measured by:
>
> (a) the loss in the value to him of the other party's performance caused by its failure or deficiency, plus
>
> (b) any other loss, including incidental or consequential loss, caused by the breach, less
>
> (c) any cost or other loss that the injured party has avoided by not having to perform.
>
> 11. Certainty of harm
>
> (1) Compensation is due only for loss, including future loss, that is established with a reasonable degree of certainty.
>
> (2) Compensation may be due for the loss of an opportunity in proportion to the probability of its occurrence.
>
> (3) Where the amount of damages cannot be established with a sufficient degree of certainty, the assessment is at the discretion of the Court."

27. In review of the case file and the post hearing submissions, I have not found any evidence to demonstrate that the Defendant had indeed suffered a loss of revenue. The Claimant has repeated its claims that the Defendant does not engage in the sale of products in his written as well as his oral submissions, however the Defendant has failed to provide evidence to show that it could have indeed generated profit from the clients who purchased the machinery.

28. As the loss to the Defendant cannot be established with certainty, I am left with no choice but to dismiss this Claim, despite having established that the Claimant has breached his fiduciary obligations towards the Defendant.

The telephone bills

29. The Defendant further claims the amount of AED 611.68 for its telephone costs incurred by the Claimant in making personal calls. The Claimant does not dispute this Claim, and therefore I find that the Claimant shall pay the Defendant the amount of AED 611.68.

Payments for Unpaid Cheques

30. The Defendant makes a further claim for the payment of AED 5,000, which, it submits, the Claimant has agreed to pay to the Defendant. Upon review of the Counterclaim after the Hearing, I directed that the Defendant provide the underlying agreement to which the Claimant was liable for such payments to the Defendant. The Defendant provided a Whatsapp conversation between the Claimant, setting out the nature of the agreement to be as follows:

> "Good Afternoon Mr. Len
>
> Hope this mail finds you well and all is great , am writing in regards to my visa suggestions as you asked Miss Lena for me to put in writing , I would love to request you instead of you cancelling the visa why don't I pay part of it a fee of up to 5000 AED per month beginning the ending of the next month , I will offer you post five dated cheques for 1000 AED every month for it to be as smooth as you like .." [sic]

31. From reading the conversation, the agreement appears to be an arrangement for the Claimant to remain on the Defendant's visa in exchange for payment to be made to the Defendant in monthly instalments.

32. Article 57 of the DIFC Employment Law reads as follows:

> "Visas and permits
>
> (1) If an Employee is required to work in the DIFC, their Employer is required to obtain and maintain, at the Employer's own cost, the requisite sponsorship documentation (including UAE and DIFC identity documentation), visas, authorisations, licenses, permits and approvals as may be required from time to time by Federal Law, Dubai Law, a Competent Authority or a Personnel Sponsorship Agreement, to enable the Employee to work lawfully for the Employer in the DIFC and comply with any such requirements.
>
> (2) An Employer is not permitted to:
>
> (a) recoup any costs and expenses incurred pursuant to Article 57(1) from an Employee; or
>
> (b) retain the passport or other original personal documents of an Employee.
>
> (3) If an Employee is sponsored for UAE residence visa purposes by their Employer, the Employer and the Employee must cooperate to ensure the cancellation of the Employee's UAE residency visa as soon as reasonably practicable following the Termination Date and by no

later than thirty (30) days following the Termination Date.

(4) An Employer who contravenes Articles 57(1), (2) or (3) is liable to a fine as set out in Schedule 2."

33. The abovementioned article sets out the requirement for employers to obtain employment visas for their employees. It also restricts an employer from seeking any remuneration for its costs or expenses incurred in obtaining said visa for the employee and sets out that an employment visa must be cancelled within 30 days from the employee's termination date.

34. In light of this, I find that the arrangement between the parties for the Defendant to be compensated for continuing to maintain the Claimant's visa despite his termination to be in contravention of the DIFC Employment Law. This practice should not be encouraged and therefore I must dismiss the Defendant's claim for said payment, although the Claimant has agreed or in fact proposed it.

35. It is also prudent to note that the parties have confirmed that the Claimant's employment visa has since been cancelled, therefore there is no reason for which the Defendant should be compensated.

Conclusion

36. In light of the aforementioned, I find that the Claimant shall pay the Defendant the sum of AED 611.68.

37. I am of the view that, as the Defendant has been unsuccessful on most of its claims, it should be entitled to recover a portion of the fee in respect of the claim for which it has been successful. Therefore, the Claimant shall pay the Defendant the amount of AED 367.50.

38. The Claimant's claim is hereby dismissed.

Issued by:
Ayesha Bin Kalban
SCT Judge and Deputy Registrar
Date of issue: 29 April 2020
At: 10am