Claim No: SCT 347/2018

THE DUBAI INTERNATIONAL FINANCIAL CENTRE COURTS

In the name of His Highness Sheikh Mohammad Bin Rashid Al Maktoum, Ruler of Dubai

IN THE SMALL CLAIMS TRIBUNAL OF DIFC COURTS

BEFORE SCT JUDGE MAHA AL MEHAIRI

BETWEEN

JABRIL

Claimant

v

JULIET (U.K.) LIMITED

Defendant

Hearing:**11 December 2018**

Judgment:**24 January 2019**

JUDGMENT OF SCT JUDGE MAHA AL MEHAIRI

UPON the Claim Form being filed on 31 October 2018;

UPON the parties being called on 13 November 2018 and 19 November 2018 for Consultations before SCT Judge Nassir Al Nasser;

UPON the parties not having reached settlement;

UPON a Hearing having been held before SCT Judge Maha Al Mehairi on 11 December 2018, with the Claimant attending in person and the Defendant's representative participating via telephone;

AND UPON reviewing all documents and evidence submitted in the Court file;

IT IS HEREBY ORDERED THAT:

1.The Claimant's claims are dismissed in full.

2. The parties shall bear their own costs.

Issued by:

Maha Al Mehairi

SCT Judge

Date of issue: 24 January 2019

At: 10am

THE REASONS

Parties

1.Jabril (hereafter the "Claimant") is an individual formerly employed at Juliet (U.K.) Limited in Dubai starting in 2012. His employment was then transferred to the DIFC around April 2014, where he worked until leaving the company in 2018.

2. Juliet (U.K.) Limited (hereafter the "Defendant") is a company located, operating, and registered within the DIFC.

Preceding History

3. On 31 October 2018, the Claimant filed a claim in the DIFC Courts' Small Claims Tribunal (the "SCT") for certain sums and declarations allegedly entitled to him as a result of his employment with the Defendant. The total claim value of AED 474,896.85 included penalties allegedly due to him pursuant to Article 18(2) of the DIFC Employment Law. He also sought declarations as to his termination date and certain commissions allegedly owed to him.

4. The Defendant filed an Acknowledgment of Service indicating its intent to defend against all of the claim on 7 November 2018 and filed its defence that same day.

5. The parties were called for a First Consultation with SCT Judge Nassir Al Nasser on 13 November 2018 however the Defendant did not attend this First Consultation. A Second Consultation was scheduled for 19 November 2018 at which time the parties met with SCT Judge Nassir Al Nasser but were not able to agree on a settlement.

6. Thus, a Hearing was scheduled before me, SCT Judge Maha Al Mehairi on 11 December 2018 with a corresponding submission schedule. After SCT Judge Nassir Al Nassir issued an Order stating the Claimant's right to submit confidential information into the case file, the Claimant made submissions on 28 November 2018. The Defendant made responding submissions on 9 December 2018 after which time the Hearing commenced. Following the Hearing the case was reserved for judgment.

The Claim

7. The Claimant outlines the relevant facts of the case, stating that he was hired by the Defendant on 17 June 2012 as a Business Development Manager working in Dubai Media City. Once the Defendant moved into the DIFC, the Claimant signed a new DIFC employment contract dated 19 March 2014 (hereafter the "Employment Contract"). The Claimant was given a termination letter on 9 April 2018 listing a termination date of 6 July 2018 (hereafter the "First Termination Letter"). The First Termination Letter purported to terminate the Claimant "for cause" however, the Defendant failed to provide particulars as to the details of the "for cause" termination. Instead, the Defendant provided a new termination letter on 24 April 2018 listing a 7 May 2018 termination date (hereafter the "Second Termination Letter"). However, an additional letter was received by the Claimant on 2 May 2018 which included a termination date of 30 May 2018 (hereafter the "Third Termination Letter").

8. The Claimant states that he had no option but to accept the Third Termination Letter with a termination date of 30 May 2018. The Claimant contends that he received his end of service gratuity, pro-rata salary and March commissions on 26 May 2018. He received his outstanding April commissions on 26 June 2018. On 25 July 2018, the Claimant received allegedly overdue commissions (hereafter the "2017 Commission Payment") stemming from a 2017 transaction (hereafter the "2017 Transaction"). The Claimant argues that this commission fell due prior to the Claimant's termination.

9. While the Defendant maintains that the 2017 Commission Payment was discretionary, the Claimant contends that it was owing at the time of termination and thus it should have been paid within 14-days of his termination, pursuant to Article 18 of the DIFC Employment Law. As the payment was made well after 13 June 2018, being 14-days from his termination date, the Claimant argues he is owed penalties pursuant to Article 18. As he received the 2017 Commission Payment on 25 July 2018, this amounts to a 41-day late penalty.

10. The Claimant argues that his daily wage should be calculated using his annual salary of AED 666,000, his annual allowance of AED 55,200, and his annual commission of AED 2,290,343.69, all divided by the number of working days in the year. Based on this calculation, the Claimant argues that his daily wage was AED 11,582.85 and he is owed a total of AED 474,896.85 for the 41-day late payment of his 2017 Commission Payment.

11. As a result of this, the Claimant seeks payment of AED 474,896.85 as well as declarations that the Third Termination Letter was effective with termination date of 30 May 2018. He also seeks declarations that his 2017 Commission Payment fell due prior to his termination date and that the Defendant was required to pay this commission prior to 13 June 2018. The Claimant also seeks any further relief as deemed appropriate.

12. After the Defendant submitted its defence, the Claimant submitted an additional pleading before the Hearing on 28 November 2018. The Claimant reiterated his case, arguing that by accepting that his termination date was 30 May 2018, the Defendant admitted that all payments were required to be made before 13 June 2018. The Claimant also provided a detailed response to the Defendant's two main arguments that the 2017 Commission Payment was discretionary and that in any event, the Article 18 penalty should be calculated differently than the Claimant's suggested calculation.

13. As to the details of the 2017 Transaction relevant to the 2017 Commission Payment, the Claimant submitted a document entitled the NIOC Transaction Background after stating that he was permitted to reveal confidential information as per the Order of Nassir Al Nassir dated 25 November 2018. At the Hearing, the Claimant asked that this NIOC Transaction Background document be accepted as a sworn witness statement, although it was not submitted in a form indicating that it was meant to be a witness statement.

14. In sum, the Claimant argues that the 2017 Commission Payment is a contractual right pursuant to the offer letter the Claimant received when promoted to the position of Interim Sales Director in December 2015 (hereafter the "Offer Letter"). Furthermore, the 2017 Commission Payment was earned in September 2017 and should have been paid in November 2017 rather than in July 2018. This is outlined in an 8 November 2017 email from Juin, Head of Finance at the Defendant company. The delay that the Defendant experienced in receiving the payment from the client was due to the Defendant's choice for mitigating risk. Furthermore, the payment relevant to the 2017 Transaction was received by the Defendant on 11 May 2018 through a third party.

15. As to the relevant calculation of the Article 18 penalty, the Claimant reiterates that his calculation is based upon the wording of the law. At the Hearing, the Claimant argued that the various prior SCT cases that the Defendant has provided do not include employment circumstances analogous to his own circumstances and thus should not be given inordinate weight when deciding his case.

The Defence

16. The Defendant filed a statement of defence and a supplemental pleading in advance of the Hearing, both detailing its arguments against the

entirety of the Claimant's claims. The Defendant's main claim is that the Claimant is not contractually entitled to receive commission payments. Thus, the 2017 Commission Payment that was paid to him in July of 2018 is not an amount falling within the scope of Article 18 of the DIFC Employment Law and no penalties are therefore owed to the Claimant. Furthermore, and without prejudice to its first argument, the Defendant argues that the Claimant uses an incorrect method to calculate the penalties in his pleadings.

17. The Defendant's main argument is that the Claimant is not contractually owed any commission payments, as per the Commission Plan implemented by the Defendant company for its employees (hereafter the "Commission Plan"). This Commission Plan outlines the terms of commission payments and the Claimant is subject to this plan. The Commission Plan states in relevant part:

> "A. . . . For purposes of the Plan, no element of Incentive Compensation is earned or vested until paid by the Company and may be reduced or forfeited prior to payment under circumstances outlined in the Plan.
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> . . .
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> 1. . . . For purposes of the Plan, no element of [Over-Plan Inventive] is earned or vested until paid by the Company and may be reduced or forfeited prior to payment under circumstances outlined in the Plan.
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> . . .
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> 1. SALES OPERATIONS POLICY
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> The Company reserves the right at its sole discretion to change or amend any and all provisions of the Plan at any time including the Plan Participant's responsibilities, teams, regions, territories, product, market segment, and account/client assignments, the commission eligibility of products, commission rates, incentives, bonus rates, and Annualized Contract Value (ACV) goals or to discontinue the Plan entirely. In the event there are changes or amendments, the Plan Participant will be notified at the time and in the manner determined to be appropriate by the Administrator.
>
> . . .
>
> VIII. GUIDELINES FOR TERMINATION, MATERNITY, OTHER LEAVE OF ABSENCE, MEDICAL INCAPACITY AND REDUCED WORK SCHEDULES
>
> Termination for the purposes of this Plan is defined to include, but is not limited to, transfer to another job, transfer to a position ineligible for this Plan, death, dismissal for cause, dismissal on a severance eligible basis, medical incapacity, no-fault termination, resignation, and retirement.
>
> . . .
>
> Upon termination of employment during the effective period of this Plan, final settlement of incentives shall be based on goal achieved and target opportunity up to the date of termination, calculated at the Company's discretion.
>
> . . .
>
> The final incentive payment for terminated Plan Participants may be reasonably delayed beyond the normal payment cycle, up to 6 months following the termination date, so as to properly account for any necessary reconciliations, adjustments, and credits."

18. The terms of the Commission Plan outline that no commission payment is actually earned until it is paid out by the Defendant. Terminated employees may see their commissions delayed. Furthermore, the Defendant has discretion to modify any provision of the plan. It is the Defendant's position that it had the right to refuse to pay the Claimant any commission for the 2017 Transaction, however it decided to pay the 2017 Commission Payment although not required to do so.

19. More specifically, as regards the details of the 2017 Transaction in question, the Claimant is incorrect in arguing that the commission should have been paid in 2017. The Defendant argues that the funds relevant to that transaction were not received into its accounts until June 2018 and company policy is not to pay any commission at least until the funds relevant to the transaction are received by the company from the client.

20. As to the calculation of the daily wage to determine any Article 18 penalties, the Defendant argues that only the Claimant's basic salary, exclusive of any allowances or commission, should be used in the calculation. Beyond that, the Defendant cites numerous SCT cases where the daily wage calculation is made by dividing the annual salary by 365. The Defendant's position is that there is no reason to deviate from this precedent for this case.

Discussion

21. 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 is less than AED 500,000. This dispute is governed by the DIFC Law No. 4 of 2005, as amended by DIFC Law No. 3 of 2012 (hereafter the "DIFC Employment Law") in conjunction with the relevant Employment Contract and other agreements between the parties.

22. In sum, there is one main issue in this case: does the 2017 Commission Payment fall within the scope of Article 18 of the DIFC Employment Law and if so, how should the relevant penalty be calculated?

23. Article 18 of the DIFC Employment Law states:

> "18. Payment where the employment is terminated

(1) An employee 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."

24. Based on the language of Article 18 above, the question remains whether the 2017 Commission Payment qualifies as "any other amount owing" to the Claimant. The Claimant argues that it falls squarely within "any other amount" while the Defendant argues that it was not in fact "owing" to the Claimant as it was not contractually obligated. Based on a detailed review of the submissions and arguments, I must find in favour of the Defendant that the 2017 Commission Payment was not an amount owing to the Claimant at the time of his termination and therefore failure to make that payment within a designated time does not trigger any Article 18(2) penalties.

25. While the Claimant may be correct that the commission payments fall within "any other amount" they must actually be "owing" for Article 18(2) to be triggered. In this case, I am convinced by the detailed provisions of the Commission Plan that the 2017 Commission Payment was not owing, and in fact, the Defendant was entitled to withhold that payment should it have deemed appropriate in its discretion. Instead, the Defendant decided to make the payment, under no contractual obligation to do so.

26. The Claimant argues that commission payments were contractually obligated according to the Offer Letter he was given in 2015. However, it is quite clear that this Offer Letter was labeled "interim" with an expressed effective date of "Interim Period: January 1 - June 30 2016." Furthermore, the Offer Letter states that "During the interim period you will be eligible for an additional monthly commission based on $150,000 annual OTC with 6m annual target." This statement clearly applies only to the "interim period" and furthermore only states that the Claimant will be "eligible" for commission payments. I do not find it convincing that this Offer Letter served to create contractual obligations for commission payments above and beyond the terms of the Employment Contract and Commission Plan in place.

27. Instead, I have reviewed the Commission Plan in detail and find that it provides the Defendant with sufficient discretionary powers to ensure that commission payments are not contractually owing unless and until further action is taken to make them owing. While the Commission Plan, which allows for up to 6-months delay in commissions payments for terminated employees, cannot serve to contractually extend the mandatory period of payment outlined in Article 18 of the DIFC Employment Law, it does not do so. Instead, it grants the ability to delay payments that are not "owing" until actually paid, as per the other terms of the Commission Plan. Thus, these amounts are not "owing" as per the terms of Article 18 and are therefore not subject to the 14-day payment period outlined therein. In fact, the Commission Plan leaves room for the Defendant to change or amend the terms of the Plan at its sole discretion provided it gives the employee appropriate notice, presumably even after the employee had been terminated. While the Commission Plan itself states that commission payments are not owing until they are actually paid out, there is certainly room for the Defendant to amend the plan or otherwise make additional contractual agreements to create an obligation to pay certain commission payments should it deem appropriate.

28. In this case, there can be some argument that the Defendant did in fact make a separate agreement to pay the Claimant the 2017 Commission Payment in communications between the parties. I make reference to the case of *Haripa v Harpith* FZ LLC, [2017] SCT 337 (hereafter the "Haripa Case"), in which I found that a claimant was in fact "owed" a commission payment based upon the defendant's repeated communications stating that she was entitled to that payment. In the Haripa Case, the claimant was told repeatedly over a six-month period by members of both the HR and Finance teams of her former company that a specific commission would be paid to her, although she did not actually meet the agreed requirements to earn that commission. Confirmation was made well in advance of her termination and was repeated after termination. In that case, I found that the commission payment was contractually due according to binding agreements made in these communications and therefore the payment was "owing" pursuant to Article 18(2) of the DIFC Employment Law. Thus, penalties accrued when the Defendant failed to make the payment in time.

29. I cannot find that this case is analogous to the Haripa Case. While the Claimant did receive some communications from the Defendant regarding the 2017 Commission Payment, I do not find that these specific communications amounted to a separate contractual agreement between the parties such that the 2017 Commission Payment became a contractual obligation.

30. On 8 November 2017, the Claimant received an email from Juin, the Defendant's Head of Finance, stating that "When the cash is safely cleared with [the Defendant] and assuming that the deal remains on the same terms (billing from September 1st 2017), we would calculate the commission against the 2017 scheme and policy, even if the payment issues were not resolved until 2018." This email clearly states that the Defendant had every intent to pay the 2017 Commission Payment in line with the Commission Plan, provided certain contingencies occurred. Thus, this email cannot be deemed to have created a contractual obligation to pay the 2017 Commission Payment. Instead, it served to reiterate that, even in an unusual circumstance, the commission relevant to the 2017 Transaction would be treated similarly to any other commission payments. This email only showed an intent to pay commission according to the Commission Plan already in place, not a promise or contractual obligation to pay the 2017 Commission Payment without regard to subsequent activities regarding the 2017 Transaction.

31. The Claimant also received an email from HR on 24 April 2018 outlining his end of service benefits in advance of his termination date. This email has a subject of "Termination Agreement" and states as to the 2017 Commission Payment "In the event payment is received and cleared by the end of the 3rd Quarter (1 year from the contract signature), we will honor it against your 2017 targets and pay accordingly against the 2017 scheme and policy. If the payment is not received by the end of the 3rd Quarter, the payment will deemed null and void and no payment will be due to you." The Claimant received this email and wrote back regarding the 2017 Commission Payment on 30 April 2018 stating, "with all due respect, your offer is, by all means, nonsensical and therefore unacceptable . . . my position is that you shall pay me the USD 237,000 owed to me by 6 July 2018." It is clear from this back and forth that the Claimant took the email of 24 April as an offer and he rejected that offer. His counteroffer, as included in his 30 April email, was also not accepted by the Defendant. Thus, I find that, unlike the Haripa Case, no separate agreement was made between the parties as to this specific commission payment.

32. Instead, both parties rejected the relevant offers of the other concerning the 2017 Commission Payment and thus the terms of any agreement regarding commission fall back on the Employment Contract and Commission Plan. Furthermore, the Defendant's email offer does not indicate that

the 2017 Commission Payment would become owing to the Claimant before his termination, rather it specifically makes the "owing" contingent on payment from the client. The offer from HR states that the 2017 Commission Payment would be made according to the "2017 scheme and policy" which I take to mean the 2017 Commission Plan. I find that the email from HR does not seek to make any agreement above and beyond what is already included in the 2017 Commission Plan. In any event, the Claimant rejected this offer and no specific and separate agreement as to termination was agreed between the parties.

33. The Claimant received another email from HR on 10 July 2018 stating that "I can also confirm that the [2017 Commission Payment] is in process." Again, this statement does not serve to create a contractual obligation that the 2017 Commission payment was owing prior to the Claimant's termination nor does it make it owing at the time of the email. Instead, this email just serves to inform the Claimant that the payment, which is not contractually obligated, is in process.

34. All of these communications serve to differentiate this case from the Haripa Case. In the Haripa Case, the claimant's management made a specific exception to the relevant commission policy and listed targets to agree on numerous occasions to pay the claimant commission on an exceptional basis. In this case, the Defendant has communicated numerous times to indicate that it will follow its Commission Plan in addressing the 2017 Commission Payment. The Defendant made no indication that it would agree to deviate from the plan or agree to make the 2017 Commission Payment contractually obligated. Instead, the Defendant sought to apply the Commission Plan to a somewhat unusual circumstance given the delayed payment received from the client through a third party. However, at no time did the 2017 Commission Payment become "owing" to the Claimant under the terms of Article 18 of the DIFC Employment Law. By making recurrent references to the Commission Plan, the Defendant always left open the option to change or amend the plan or otherwise use its discretion to determine not to make the relevant payment.

35. The Claimant makes great effort to show that the client payment relevant to his 2017 Commission Payment was made earlier than the Defendant allows. However, I do not find the timing of the client's payment relevant to the issue at stake based upon a review of the Commission Plan. Instead, regardless of when the client payment was made, the Defendant was free to follow its own Commission Plan and delay the payment or even adjust the Commission Plan or refuse to make the payment at all. In any event, I am convinced by the evidence shown by the Defendant that the 2017 Transaction payment was not received from the third party until June 2018. I saw nothing concrete from the Claimant to prove otherwise.

36. The Claimant may argue that this finding that the 2017 Commission Payment was not "owing" under the terms of Article 18 is unjust and allows the Defendant to essentially exclude a portion of payment from the scope of Article 18(2). However, it is not envisioned that discretionary payments that could not otherwise be successfully sued for in a claim would trigger Article 18(2) penalty payments. The Claimant also pled that the Court should take the stance most favourable to the employee in employment cases. While this is generally true in instances of unclear or uncertain contract terms or in circumstances where there is no contractual agreement, this case does not fall into that category. Instead, the Claimant has a clear Employment Contract and Commission Plan in place. Thus, the Court is to read those documents as they were written and intended between the parties, only determining issues of an ambiguous nature in terms more favourable to the employee. However, I do not find any ambiguous issues of interpretation relevant to this case. Instead, the case is determined on the clear language of the agreements made between the parties.

37. As I have found that the 2017 Commission Payment was not owing to the Claimant at the time of his termination, there is no need to discuss the issue of the correct calculation of the Article 18(2) penalty. Furthermore, I do not find it necessary to discuss or make any of the requested "Declarations" included in the Claimant's claim. These declarations, such as the Claimant's relevant termination date and effective termination letter, are not needed to resolve the main issue at stake in the claim and thus it is judicially prudent to refrain from comment.

38. The Claimant made amended relief claims for certain document production by the Defendant relevant to the 2017 Transaction. I dismiss this claim as unnecessary to determination of his Article 18 claim, considering that according to the Commission Plan, the specific details of the transaction are largely irrelevant to a determination of whether a commission payment is contractually owing at any given moment. Certainly, as the Defendant acknowledges, the details of a transaction are relevant to the discretionary determination of when and how a commission payment will be made. However, these details are not necessary for determination of this claim.

39. The Claimant also made reference to Article 60 of the DIFC Employment Law and sought reasons for his termination. Article 60 states "Upon the request of an employee who has been continuously employed for a period of not less than one (1) year on the date of termination of employment, an employer shall provide the employee with a written statement of the reasons for the employee's dismissal." While the Claimant is correct that he would qualify to make such a request, he was not terminated for cause. Thus, under the DIFC Employment Law, employees who are not terminated for cause and are thus given their end of service and other rights pursuant to the DIFC Employment Law, are not required to be terminated for any specific reason. Thus, I dismiss this claim.

40. Finally, there is the issue of the Claimant's employment visa. I find that his visa should be cancelled as it is clear that an employment relationship no longer exists between the parties. The parties are directed to cooperate to cancel the visa by no later than 31 January 2019.

Conclusion

41. Accordingly, I must dismiss the Claimant's claims in full and require that the parties bear their own costs.

Issued by:

Maha Al Mehairi

SCT Judge

Date of issue: 24 January 2019

At: 10am