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 NOUR HINEIDI

BETWEEN:

KADER

Claimant

and

KACHINA

Defendant

Hearing:**26 August 2019**

Judgment:**23 September 2019**

JUDGMENT OF SCT JUDGE NOUR HINEIDI

UPON the Claim Form being filed on 8 May 2019;

AND UPON the Consultation before SCT Judge Maha Al Mehairi on 30 May 2019;

AND UPON the Defendant's request dated 19 June 2019 seeking to set aside the Order of 30 May 2019, which was approved on the 19 June 2019;

AND UPON the hearing before Small Claims Tribunal Judge Nour Hineidi on 26 August 2019;

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

IT IS HEREBY ORDERED THAT:

1. The Defendant shall pay the Claimant a total sum of **AED 432,370.88** (plus AED 1,643.84 per day until date of payment) to include:

   (a) unpaid salary in the sum of AED 50,000;

   (b) original Court administration fee in the sum of AED 1,000; and

   (c) penalties pursuant to Article 18(2) of the DIFC Employment Law in the sum of AED 381,370.88 (plus AED 1,643.84 per day until date of payment).

2. The Defendant shall return all personal items[1] to the Claimant within 14 days from the date of this judgment.

Issued by:

Nassir Al Nasser

SCT Judge

Date of issue: 23 September 2019

At: 9am

THE REASONS

Parties

1.Kader (the "**Claimant**") is an individual previously appointed as Chief Financial Officer ("**CFO**") of Kachina Capital DIFC Limited (the "**Defendant**").

2. The Defendant is a company registered in the Dubai International Finance Centre ("**DIFC**"). The Defendant's DIFC office is located in

3. The Defendant and is a subsidiary of Kachina Companies & Establishments Management, a Limited Liability Company ("**Kachina Group**"), a diversified private equity fund registered in Dubai, with interests in healthcare, IT and retail across the MENA region.

Procedural Background

4. On 8 May 2019 the Claimant filed a claim in the DIFC Courts' Small Claims Tribunal (the SCT) for sums allegedly owed to him as a result of his employment with the Defendant; namely, one month's unpaid wages (the "**Original Claim**").

5. On 16 May 2019 the Claimant uploaded a Certificate of Service onto the Court file stating that the Defendant had been served via Aramex.

6. On 30 May 2019, and in the absence of any response from the Defendant, SCT Judge Maha Al Mehairi issued a default judgment. The Defendant was ordered to pay the Claimant one month of unpaid wages in the sum of AED 50,000 and the court filing fee sum of AED 1,000 (the "**Default Judgment**").

7. On 19 June 2019 the Defendant made an application to set aside the Default Judgment on the basis that the Defendant had not received notice of the claim filed on 8 May 2019. The application to set aside the Default Judgment was granted by SCT Judge Maha Al Mehairi on the same date, 19 June 2019.

8. On 27 June 2019 the Defendant filed an Application Notice contesting the jurisdiction of the DIFC Courts and seeking to transfer the case to the Dubai Courts (the "**Transfer Application**"). The Defendant contested the jurisdiction of the DIFC Courts on several grounds, including:

> i) the Claimant was not an employee of Kachina Capital;
>
> ii) the Claimant did not complete compliance interviews and did not receive approval from the Dubai Financial Services Authority ("**DFSA**") as is required to for work in the DIFC; and
>
> iii) the Claimant worked from the Kachina Group offices, located outside of the DIFC, and not the Kachina Capital offices located in the DIFC, and the Claimant's pay cheques reveal he was paid by the Kachina Group.

9. On 16 July 2019 the Transfer Application was called for a Jurisdiction Hearing before SCT Judge Nassir Al Nasser.

10. On 18 July 2019 SCT Judge Nassir Al Nasser denied the Defendant's Transfer Application, finding that based on the employment contract, the Claimant was an employee of Kachina Capital, and as Kachina Capital is registered and located in the DIFC, and such, pursuant to Article 5(A) of the judicial authority law No. 12 of 2004 as amended, the DIFC Courts has the jurisdiction to hear the Original Claim.

11. On 27 July 2019 the Claimant amended the Original Claim to seek penalties pursuant to Article 18 of the DIFC Employment Law, bringing the total amount claimed to AED 356,000. The Claimant also sought the return of the following personal items left at the Defendant's offices: a financial calculator, a computer monitor, and a table lamp (the "**Amended Claim**").

12. On 1 August 2019 the Claimant filed a further application seeking default judgment with respect to the Amended Claim.

13. On 6 August 2019, the Defendant filed an Appeal Notice seeking leave to appeal the decision of SCT Judge Nassir Al Nasser dated 18 July 2019. The Defendant's application for permission was denied in accordance with RDC 53.75 and ARDC 44.19 and by virtue of SCT Judge Nassir Al Nasser's order issued on 6 August 2019

14. On 26 August 2019 the matter was listed for a hearing before me.

15. Upon reviewing all documentation on the Court file to date, I set out my decision in the paragraphs below.

The Claim

16. The Claimant alleges he commenced his employment as CFO of Kachina on 15 November 2018 and was dismissed on 21 January 2019.

17. The Claimant alleges the Defendant did not pay his AED 50,000 salary for the month of January 2019, and that he was given no notice nor any warnings prior to his dismissal.

The Defence

18. The Defendant has not filed a defence in this matter but has made various submissions in defence of this claim, including that the Claimant was not an employee of Kachina Capital as he did not participate in any compliance interviews and did not obtain DFSA approval as an authorised individual (SCT Application Notice filed by the Defendant on 27 June 2019), and was "re-routed" to work for the Kachina Group (SCT Appeal Notice filed by the Defendant on 6 August 2019).

19. On 25 August 2019, the Defendant uploaded various documents onto the Court file, including an Opening Statement which stated the following:

> "1. We offer Mr. Kader what we have on our books as his entitlement of AED 51000 (fifty one thousand)
>
> 2. This amount was even reflected in the kimb courts initial judgement.
>
> 3. In all honesty an employee of ours mistakenly asked for the verdict to be set aside, we wish that the court reconsiders this initial verdict [sic]."

The Hearing

20. As above, the hearing took place before me on 26 August 2019.

21. At the hearing, the representative for the Defendant reiterated the position from the Opening Statement that the Claimant was entitled to the sum of AED 51,000, but stated that the Claimant was not entitled to any other sum, including any sum pursuant to Article 18 of the DIFC Employment Law. In his oral submissions, the representative for the Defendant submitted that this was on the basis that the Claimant was not entitled to act, and in fact did not act, as the CFO or SEO of Kachina Capital, as he was not approved by the DFSA as an authorised person.

22. The Claimant submitted that as he had a valid employment contract with the Defendant, he was entitled to penalties pursuant to Article 18 of the DIFC Employment Law. The Claimant also referred to the fact that the Defendant had not made any concessions as to the validity of the claim, or the Claimant's entitlement to AED 51,000 until the day before the hearing.

Conclusion

23. The first issue to address is that of the unpaid salary. The Defendant has conceded that the Claimant is entitled to AED 51,000, and has also sought that the Default Judgment in the Claimant's favour be reinstated, and so its position in this regard is clear. Therefore, I find the Defendant should pay the Claimant the sum of **AED 51,000** (one month's wages and original Court filing fee).

24. As to the balance of the claim, I now turn to the issue of Article 18(2) Penalties. As the Defendant does not contest that the wages are owed, the Claimant should not be denied the penalty for the period during which he was awaiting payment of his wages. The question is, for how long a period should the penalty be applied.

25. The Defendant submits that the Claimant's rejection of the offers made to him evidences his attempts to delay the progress of the claim. It is correct that the Claimant did reject the Defendant's offer of AED 51,000 after the Default Judgment was set aside, seemingly after learning that he may be entitled to penalties pursuant to Article 18(2) and filing his Amended Claim thereafter. However, the Defendant itself put forth various interlocutory applications, including seeking to set aside the Default Judgment (which it now seeks to reverse), and an application contesting jurisdiction.

26. It is not within the spirit of Article 18(2) to either punish the Defendant, nor award superfluous sums to the Claimant. However, in my assessment of the award, and my determination of how long a period the penalty should be applied, I turn to the DIFC Court of Appeal in *Frontline Development Partners Limited v Asif Hakim Adil* (2016) DIFC CA 006, which held that if Article 18(2) becomes too punitive or harsh for employers, it is for the legislator to amend the law, not for the Court to redraft the article through judicial decision. The legislator has indeed amended the law, and we now await the instatement of Article 19, however, Article 18 still stands. I am not in the position to apply a wide discretion for these penalties. Indeed, it is not for this Court to redraft the article through judicial decision.

27. In this case, I shall simply apply the law as per Article 18(2) which provides that the employer shall pay the employee a penalty equivalent to the last daily wage for each day the employer was in arrears, from 14 days after the date of termination (which was 21 January 2019) until the date of payment of the sum owed.

28. The calculation is as follows:

> Penalty Calculation till date period is 4 February 2019 - 23 May 2019 (or until date of payment)
>
> Last monthly wage = **AED 50,000**; therefore,
>
> Daily Wage = 50,000 x 12 = 600,000 /365 = **AED 1,643.84**
>
> Number of days from 4 February 2019 - 23 September 2019 (date of judgment) = **232 days**
>
> Penalty for 232 days based on Daily Wage = **AED 381,370.88**

29. Consequently, I order the Defendant to pay the Claimant the following sums:

> (a) unpaid salary of AED 50,000;
>
> (b) claim fee of AED 1,000; and

(c) Article 18(2) penalties in the sum of AED 381,370.88 plus AED 1,643.84 per day until date of payment.

In total, the claim amounts to **AED 432,370.88** (plus AED 1,643.84 per day until date of payment).

30. The Defendant shall return all personal items[2] to the Claimant within 14 days from the date of this judgment.

Issued by:

Nassir Al Nasser

Deputy Registrar

Date of issue: 23 September 2019

At: 9am