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 NASSIR AL NASSER

BETWEEN

KYLE

Claimant/Counter-Defendant

and

THE KAITLYN INVESTMENT OFFICE

Defendant/Counter-Claimant

Hearing:**16 October 2019**

Judgment:**23 October 2019**

JUDGMENT OF SCT JUDGE NASSIR AL NASSER

UPON hearing the Claimant and the Defendant's representative

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

IT IS HEREBY ORDERED THAT:

1. The Defendant shall pay the Claimant the sum of AED 66,259.24 in relation to his end of service gratuity.

2. The Defendant's counterclaim shall be dismissed for lack of jurisdiction

The Defendant shall pay the Claimant the Court fee in the sum of AED 1,325.18.

Each party shall bear their own costs in relation to the counterclaim.

Issued by:

Nassir Al Nasser

SCT Judge

Date of issue: 23 October 2019

At: 4pm

THE REASONS

The Parties

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

2.The Defendant is The Kaithlyn Investment Office (herein "the Defendant"), a company registered in the DIFC, located in, DIFC, Dubai.

Background and the Preceding History

3. The underlying dispute arises over the employment of the Claimant by the Defendant pursuant to an mployment contract dated 19 October 2017 with a commencement date of 9 November 2017 (the "Employment Contract").

4. The Claimant resigned as an employee of the Defendant and his last working day was on 13 June 2019.

5. On 21 July 2019, the Claimant filed a claim in the DIFC Courts' Small Claims Tribunal (the "SCT") claiming his end of service entitlements in the sum of AED 77,500.

6. By 29 July 2019, the Defendant filed an acknowledgment of service with an intention to defend the claim and filed its defence.

7. On 15 August 2019, the Defendant filed a counterclaim claiming the sum of USD 43,042.

8. The parties met for a Consultation with SCT Judge Maha Al Mehairi on 5 August 2019 but were unable to reach a settlement.

9. Both parties attended the hearing before me listed on 16 October 2019.

The Claim

10. The Claimant's case is that he was employed with the Defendant as a `Founding Partner' from 9 November 2017 to 13 June 2019, being the Claimant's last working day.

11. The Claimant alleges that the Defendant at its sole discretion deducted his end of service entitlements and he is outstanding the sum of AED 77,500.

12. The Claimant alleges that the Defendant has deducted his labour dues and has failed to differentiate between his rights as an employee of the company in accordance with his employment agreement and his rights and capacity as an investor and partner of the company.

13. Therefore, the Claimant claims his end of service entitlements pursuant to the DIFC Employment Law in the sum of AED 77,500.

The Defence

14. The Defendant does not dispute the accuracy of the Claimant's calculation of his end of service entitlements and confirmed that the figure claimed by the Claimant is correct.

15. However, the company alleges that the Claimant owed the Defendant the sum of USD 18,042 (equivalent to AED 66,259.24), which represented a series of late repayments on certain loan facilities that he had agreed to pay as a founding partner.

16. The Defendant alleges that all founding partners, including the Claimant, signed a contractual obligation to contribute equity, which the Claimant funded in full and in loan notes as part of his commitment to the firm pursuant to an investment agreement and loan

note instrument.

17. The Defendant also alleges that the Claimant's contribution was initially USD 25,000 of equity and a commitment to fund USD 50,000 of loan notes when called by the company. Furthermore, the Defendant alleges that the Claimant bought a further USD 12,500 of equity and a further commitment to fund USD 25,000 of loan notes from a founding partner employee who left the Defendant's company.

18. The Defendant alleges that during the Claimant's employment he only funded loan notes in the amount of USD 31,958 despite the company's request to fund the full sum of USD 75,000.

19. The Defendant also alleges that upon departure either through termination or resignation, the company had agreed for all founding partners to pay the outstanding balance of the loan up to their last working day, rather than the full amount of loan notes. Therefore, the Defendant alleges that the Claimant still has an outstanding balance of USD 25,000 which the company has not yet requested the Claimant to repay out of this total entitlement.

20. The Defendant also alleges that the Claimant was the only founding partner to have built up material past due payments under the founding partner loan facilities. This amounted to USD 18,042 on his last working day.

Counterclaim

21. The Defendant alleges that as a founding partner, the Claimant had a contractual obligation to contribute equity to the company. Upon commencing his employment contract, he agreed to commit USD 25,000 in equity, with a further commitment to fund USD 50,000 through subscription to unsecured loan notes, which required him to make payment when called to do so by the company.

22. The Defendant also alleges that an application form describing the arrangement was signed by the Claimant at or around the time he commenced his employment. Furthermore, the Defendant alleges that in accordance with the application form, on 20 December 2017, an investment agreement was entered into between the Defendant and the Claimant, together with other founding partners and investors.

23. The Defendant also added that on the same date, 20 December 2017, a loan instrument was also executed by deed. The loan instrument provided that the redemption date for the loan notes was the fifth anniversary of the date of the instrument (20 December 2022).

24. The Defendant also alleges that on 14 February 2019, by a deed of transfer, the Claimant acquired a further USD 12,500 of equity from another former founding partner together with a commitment to fund a further USD 25,000 of loan notes.

25. The Defendant alleges that on 30 May 2018, the loan notes were called by the company, triggering the obligation of the Claimant, as a founding partner, and other investors to make payments in accordance with the investment agreement and their respective application forms.

26. The Defendant adds that the founding partners were able to access a credit facility that deferred the requirement to pay loan notes in accordance with the investment agreement, and the respective application form, over a period of time, usually one year.

27. The Defendant alleges that the Claimant, as a founding partner, availed this facility in relation to the amounts he owed to the company pursuant to the terms of the investment agreement and his application form.

28. The Defendant asserts that the Claimant made payments in accordance with the facility agreement. However, his payment record was poor and substantial sums remain due to be paid to the company. In total, the Claimant paid only USD 31,958 out of a total commitment of USD 75,000, in respect of the loan note.

29. The Defendant alleges that in failing to make the requisite payments the Claimant is in breach of the facility agreement and, further or alternatively, his obligation under the investment agreement, application form, loan note instrument, and transfer deed.

30. The Defendant alleges that to date the Claimant owes outstanding sums totalling USD 43,042 to the company, which consists of the following:

    (a) USD 18,042 in respect of the Claimant's commitment under the application form;

    (b) USD 25,000 in respect of the Claimant's additional commitment under the transfer deed.

31. The Defendant also alleges that as of 20 June 2019, the Claimant also owed USD 2,389 interest in respect of his commitment under the application form.

32. Therefore, the Defendant filed its counterclaim for recovery of the outstanding sum of USD 43,042, together with interest, owed in accordance with the facility. Further or alternatively, the Defendant seeks repayment of the sum of USD 43,042 in accordance with the Claimant's obligations under the investment agreement, application form, loan note instruments and transfer deed.

The Claimant's defence to the counterclaim

33. In response, the Claimant alleges that the Defendant has illegally and at its sole discretion deducted the dues of his end of service gratuity based on the following:

a. The Defendant did not provide the Court with any written agreement between the parties confirming that the Defendant is authorized to deduct the end of service benefits against any alleged liabilities as an investor.

b. The Defendant did not provide any written proof of any transaction of funds being transferred to the Claimant's personal account as part of the alleged facility agreement. The Claimant alleges that no facility agreement exists.

c. The minutes of the board were never formalised officially via the execution of a facility agreement nor were there any monies advanced to the Claimant as a loan under the alleged facility agreement.

d. Neither the Employment Contract nor the investor or shareholders contracts mention any terms and conditions that the Claimant's shares in the company as an investor are related to the Claimant's end of service benefits as an employee.

34. The Claimant alleges that without his consent and approva,l the Defendant has sought to deduct his labour dues and attempted to combine his rights as an employee formerly working for the company in accordance with his Employment Agreement under the DIFC Law with his rights and capacity as an investor and partner in the company based in the United Kingdom which is a UK entity.

35. The Claimant alleged that his capacity as an investor is a matter that must be discussed before a commercial court in the jurisdiction of England and Wales (exclusively) as highlighted in the investment agreement at Clause 25 which stipulates the following:

> "25.1 this agreement and any dispute or claim arising out of or in connection with it or its subject matter shall be governed by and construed in accordance with the laws of England and Wales.
>
> 25.2 the Parties irrevocably agree that the Courts of England and Wales shall have exclusive jurisdiction to settle any dispute or claim that arises out of or in connection with this agreement or its subject matter."

36. Therefore, the Claimant requests that the court dismiss the Defendant's counterclaim for lack of jurisdiction.

Discussion

The Claim

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

38. The Claimant filed a claim, claiming the sum of AED 77,50 arguing that the Defendant at its sole discretion deducted his end of service entitlements and claimed the sum of AED 77,500.

39. The Claimant argues that the Defendant has deducted his labour dues and failed to differentiate between his rights as an employee of the company in accordance with his Employment Contract signed between the parties dated 19 October 2017 and his rights and capacity as an investor and partner of the company pursuant to an investment agreement.

40. The Defendant does not dispute the accuracy of the Claimant's calculation of his end of service entitlements and confirmed that the figure claimed by the Claimant is correct.

41. However, the Defendant argues that the Claimant owed the Defendant the sum of USD 18,042 (equivalent to AED 66,259.24), which represented a series of late repayments on certain loan facilities that he had agreed to pay as a founding partner.

42. Upon reviewing the evidence provided by the parties, I am of the clear view that there are three contracts signed between the parties.

43. The first contract is the Employment Contract dated 19 October 2019, between the Claimant and the Defendant as `TheKaithlyn's Investment Office Limited - DIFC Office'. It is also stated in the Employment Contract that "the eligibility of this Contract is subjec to the company establishing a full legal entity in the Dubai International Financial Centre and your employment visa being

successfully transferred across to this entity".

44. The other two contracts were in relation to an investment agreement and loan note instrument both signed on 20 December 2017 and both related to The Kaithlyn's Investment Office Limited and company Incorporated and Registered in England and Wales with Company No 72567 whose registered office is at London.

45. Therefore, the Claimant argues that the subject matter of this claim is that the Defendant illegally deducted his end of service gratuity.

46. Article 19 of the DIFC Employment Law stipulates the following:

> "An employer shall not deduct from an employee's wage or accept payment from an employee, unless:
>
> a. The deduction or payment is required or authorised under a statutory provision or the employee's contract of employment;
>
> b. The employee has previously agreed in writing to the deduction or payment;
>
> c. The deduction or payment is a reimbursement for an overpayment of wage or expenses; or
>
> d. The deduction or payment has been ordered by the Court."

47. The Defendant failed to provide any evidence that supports the deduction of the Claimant's end of service gratuity. However, the Defendant argues that the deduction was in relation to a repayment pursuant to the investment agreement and loan note instrument.

48. In response, it is argued by the Claimant that the investment agreement and the loan note instrument has no relation with his employment with the Defendant. Furthermore, the Claimant adds that the investment agreement and the loan note instrument are in relation to Kaithlyn's Investment Office Limited entity in the UK and his relationship with the UK entity is founded upon an investor and shareholder relationship and not an employment relationship.

49. The Claimant also contested the jurisdiction in relation to the investment agreement and the loan note instrument on the basis that both agreements have no relation whatsoever with the DIFC. The Claimant also referred to Clause 25 of the investment agreement which stipulates the jurisdiction of the agreement as mentioned above.

50. Clause 15 of the loan note instrument agreement also refers to the jurisdiction of England and Wales and that the Court of England shall have non-exclusive jurisdiction to settle any dispute or claim arises out of, or in connection with, this instrument.

51. In the absence of the parties' consent to such deduction, I find that the Claimant is entitled to his end of service gratuity as calculated and agreed by both parties.

52. At the hearing, the parties confirmed that the Claimant received the sum of AED 11,240.76. Therefore, the Defendant shall pay the Claimant the sum of AED 66,259.24 which was deducted from the Claimant's end of service gratuity.

The Counterclaim

53. The Defendant filed a Counterclaim claiming the sum of USD 43,042 pursuant to the investment agreement and the loan note instrument.

54. The Claimant contested the jurisdiction of the DIFC Courts on the basis that the investment agreement and the loan note instrument are in relation to a UK based entity and in both agreements the Governing Law is the Law of England and Wales and the jurisdiction is the Courts of England. Therefore, the Claimant argues that the DIFC Courts has no jurisdiction to hear and determine the Counterclaim.

55. The jurisdiction of the DIFC Courts is determined by Article 5(A) of the judicial authority law, Dubai Law No. 12 of 2004, as amended, which provides a number of limited gateways through which the DIFC Courts have jurisdiction over a claim, which are, as relevant:

> (1) "(a) Civil or commercial claims and actions to which the DIFC or any DIFC Body, DIFC Establishment or Licensed DIFC Establishment is a party;
>
> (2) (b) Civil or commercial claims and actions arising out of or relating to a contract or promised contract, whether partly or wholly concluded, finalised or performed within DIFC or will be performed or is supposed to be performed within DIFC pursuant to express or implied terms stipulated in the contract;
>
> (3) (c) Civil or commercial claims and actions arising out of or relating to any incident or transaction which

has been wholly or partly performed within DIFC and is related to DIFC activities; . . .

(4)(e) Any claim or action over which the Courts have jurisdiction in accordance with DIFC Laws and DIFC Regulations. . .

. . . civil or commercial claims or actions where the parties agree in writing to file such claim or action with [the DIFC Courts] whether before or after the dispute arises, provided that such agreement is made pursuant to specific, clear and express provisions."

56. In the absence of the parties' consent for the DIFC Courts to hear and determine the claim,I am of the view that the DIFC Courts, pursuant to Article 5A of the Judicial Authority Law No. 12 of 2004, as amended, has no jurisdiction to hear and determine this Counterclaim.

Conclusion

In light of the aforementioned, I find that the Defendant shall pay the Claimant the sum of AED 66,259.24 in relation to his end of service gratuity.

The Defendant's counterclaim shall be dismissed for lack of jurisdiction

The Defendant shall pay the Claimant the Court fee in the sum of AED 1,325.18.

Each party shall bear their own costs in relation to the counterclaim.

Issued by:

Nassir Al Nasser

SCT Judge

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