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 H.E. JUSTICE SHAMLAN AL SAWALEHI

BETWEEN

ENVER

Claimant

and

ENRICA

Defendant

Hearing:**25 August 2014**

Parties: The Claimant is Enver, litigant in person

Defendant is Enrica. represented by Enrica

Judgment: **17 September 2014**

JUDGMENT OF H.E. JUSTICE SHAMLAN AL SAWALEHI

Parties

1. The Claimant is Enver, a former employee of the Defendant, Enrica.

2. The Defendant is Enrica, a brokerage company incorporated in the DIFC that arranges credit or investment deals and advises on financial products or credit.

Factual Background

3. On 29 April 2013, the Claimant entered into an employment agreement with Enrica as a "Senior Broker-Bonds," and was entitled to a salary of USD 160,000 per annum based on a monthly draw against commission in addition to a USD 10,000 welcome bonus and guaranteed bonus of USD 70,000 for the first year payable in four installments of USD 17,500 each quarter. The Claimant's employment with Enrica officially commenced on 1 July 2013.

4. On 10 June 2014, the Claimant tendered his resignation with Enrica. It was later agreed with the CEO, Enrica that the Claimant would not serve the full three months' notice period and in exchange, that the Claimant would forego his final bonus of USD 17,500. The Claimant's last working day with Enrica was 3 July 2014.

5. On 2 July 2014, the Claimant was informed by Enrica that he was not entitled to an end of service gratuity because Enrica had the right to net gratuity against any losses or funds owed to the company which would result in no end of service payout.

6. On 14 July 2014, the Claimant filed a claim with the DIFC Courts requesting his end of service gratuity in the amount of USD 9,205.00.

7. On 5 August 2014, a consultation was attended by both the Claimant and the Defendant before Judicial Officer Nassir al Nasser but no settlement was reached. A hearing was scheduled for 25 August 2014 before H.E. Justice Shamlan Al Sawalehi.

The Hearing

8. On 25 August 2014, the hearing was held before H.E. Justice Shamlan Al Sawalehi, attended by the Claimant Enver and xxxx, the representative of the Defendant. At the hearing, the Claimant reiterated his position for an end of service gratuity while xxxx on behalf of the Defendant denied any right of the Claimant to a gratuity.

9. Both the Claimant and the Defendant were instructed by H.E. Justice Shamlan Al Sawalehi to decide if they wanted to settle the claim out of Court before a judgment was issued. Both parties declined to settle the claim and awaited the Judge's ruling.

Court's Finding

10.A slight misunderstanding existed between the two parties as to whether or not the Claimant served an entire year with Enrica due to the fact that the Claimant, had tendered his resignation on 10 June 2014, before the one year period had lapsed. The notice period of an employee shall be counted towards the total number of days worked and thus the Claimant exceeded one year in employment as his formal start date with Enrica was 1 July 2013 and his final working day was 3 July 2014.

11. According to DIFC Employment Law No. 4 of 2005, Article 62 (1) and (2), employees who complete continuous employment of one year or more are entitled to a gratuity payment at the termination of employment, calculated as twenty one days' basic wage for each year of the first five years of service. Article 62 provides as follows:

> **"62. End of Service Gratuity**
>
> 1) Subject to Article 62(5), and (6), an employee who completes continuous employment of one (1) year or more is entitled to a gratuity payment at the termination of the employee's employment.
>
> 2) The gratuity payment shall be calculated as follows:
>
> a) twenty one (21) days' basic wage for each year of the first five (5) years of service."

12. The Claimant's basic wage for his first year was USD 160,000, which would entitle him to USD 9,205 or AED 33,830 in end of service gratuity.

13. According to the DIFC Employment Law there are four circumstances that may authorise an employer to deduct from an employee's wages or accept payment from an employee. Article 19 of the DIFC Employment Law No. 4 of 2005 states as follows:

> **"19. No unauthorised deductions**
>
> An employer shall not deduct from an employee's wages 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 wages or expenses; or
>
> d) the deduction or payment has been ordered by the Court."

14. As regards Article 19(a) cited above, there is no statutory provision that authorises the deduction of end of service gratuity. Additionally, and more importantly, the employment contract between the Claimant and the Defendant does not include a provision in which a deduction of any kind is authorised; whether from the monthly salary or from the end of service gratuity. Furthermore, Clause 8 of the employment contract in issue states:

> **"8. End of Service Benefit**
>
> If you have completed continuous employment for one year or more, you will be entitled to the end of service gratuity payment as set out in Article 60 of the DIFC Employment Law."

15. As for Article 19(b) of the Employment Law, the Defendant has not produced any evidence proving that the Claimant agreed in writing to the deduction of his gratuity or that it was justified as a result of overpayment by way of forfeiting his end of service gratuity.

16. Article 19(c) provides that a deduction or payment may be authorised as a reimbursement for an overpayment of wages or expenses. The Defendant Enrica alleges that the Claimant has been overpaid and provides documents purporting to show that the Claimant was overpaid during the four quarters in which the latter worked for Enrica. What has not been proved by either the Claimant or the Defendant is whether the "draw against commission" plan was recoverable or non-recoverable. The Claimant asserts that the draw (USD 160,000 per annum) was guaranteed and therefore non-recoverable, while the Defendant asserts that the overpaid draw was recoverable. The fact that the Claimant received the full draw amount in addition to guaranteed quarterly bonuses without deductions leads conclusively to the fact that the "draw against commission" plan was non-recoverable for the first year of employment with Enrica.

17. This Court emphasises that the Defendant Enrica and any other companies implementing the "draw against commission" plan with their employees must provide clear and comprehensive information in writing, whether in the employment contract or otherwise, outlining the deductions or over payments that could reasonably be expected in a "draw against commission" salary plan. It is widely practiced in recoverable "draw against commission" plans to deduct the draw amount the employee owes from other amounts the company would normally pay, such as unused vacation allowance, end of service benefits, etc., however these policies must be clearly written and communicated to employees so as to be within the full ambit of the law.

18. For the reasons cited above, it is hereby ordered that the Defendant pay the Claimant the outstanding end of service gratuity pursuant to DIFC Law No. 4 of 2005 being a total of **AED 33,830**, and the Courts fees.

Issued by:

Nassir Al Nasser

Judicial Officer

Date: 17 September 2014

Time: 12pm