محاكم DIFC COURTS

Claim No: CFI-018-2018

THE DUBAI INTERNATIONAL FINANCIAL CENTRE COURTS

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

IN THE COURT OF FIRST INSTANCE

BEFORE H.E JUSTICE ALI AL MADHANI

BETWEEN:

JOHN VITALO

Claimant

and

ATLAS MARA MANAGEMENT SERVICES LIMITED

Defendant

Hearing: **5 September 2018**

Counsel: Mr Graham Lovett instructed by Gibson Dunn & Crutcher LLP assisted by Mr Shane Jury for the Claimant

Mr Farhaz Khan instructed by Hadef & Partners assisted by Mr Saaman Purghadiri for the Defendant

Judgment: **5 September 2019**

JUDGMENT

UPON the Claimant's Claim submitted 9 April 2018

AND UPON the Defendant's Counterclaim submitted 8 May 2018

AND UPON the Claimant's Application seeking Immediate Judgement dated 24 May 2019

AND UPON the Case Management Order of 20 June 2018

AND UPON the Order of H.E. Ali Al Madhani dated 26 June 2018 dismissing the Immediate Judgement Application and ordering the hearing to go to full trial

AND UPON the Disclosure Order of Judicial Officer Maha Al Mehairi dated 29 August 2018

AND UPON the Hearing of 5 September 2018

AND UPON all other documentation and evidence uploaded onto the Court File

IT IS HEREBY ORDERED THAT:

1. The Claimant's claims are dismissed in their entirety.

2. The Defendant's Counterclaim is dismissed in its entirety, however UBN fees of USD1 only are awarded to the Defendant.

3. Costs of the Claim and counterclaim are to be paid by the Claimant on the standard basis to be assessed by the Registrar if not agreed by parties.

Issued by:
Amna Al Owais
Registrar
Date of Issue: 5 September 2019
At: 12pm

JUDGMENT

The Parties

1. The Claimant John Vitalo is a United States national, resident in Dubai. By an employment contract dated 1 April 2014 (the "**Contract**"), the Claimant was employed by Atlas Mara Co-Nvest Limited, ("Atlas Mara") as the Chief Executive Officer (CEO) of that company and its affiliates (in effect, its Group Chief Executive Officer).

2. The Defendant Atlas Mara Management Services Limited is a company incorporated in the DIFC under register number 1761, located on Level 6, Burj Daman Office Tower, DIFC, Dubai.

The Claim

3. The Claimant's contends that he was originally employed at Barclays PLC ("Barclays") as Chief Executive Officer (CEO) for the Middle East and North Africa (MENA) region, and that prior to his acceptance of the offer of a role with Atlas Mara, he made it clear that a pre-requisite to his prospective employment at Atlas Mara was medical benefits for himself and his family, that were at least to the same standard as those enjoyed during his employment at Barclays.

4. On the Claimant's account he was only willing to move from Barclays to Atlas Mara when he was given assurances and guarantees concerning medical cover, due to the fact that his wife suffers from Crohn's Disease, (a chronic auto-immune disease primarily affecting the digestive system with possible debilitating effects on the circulatory and muscular systems) and as such requires ongoing medical attention including regular outpatient treatments as required. The continuation of comprehensive and high-quality medical cover was therefore critical to the Claimant and his family, particularly the Claimant's wife. On his account, without such medical cover he would not take the position at Atlas Mara.

5. By way of a letter dated 15 February 2017, the Claimant was informed that his employment with the Defendant was to be terminated on six months' written notice. The date for termination was stated to be 14 August 2017. The letter was accompanied by a document entitled "Separation Agreement", an agreement that was pre-signed and dated by Mr. Diamond of the Defendant, which the Claimant was also invited to sign. The Separation Agreement contained terms that were not originally included in the Contract, including those relating to intellectual property and restrictions on non-solicitation. It also included a waiver of the Claimant's right to initiate any legal proceedings against the Defendant.

6. The Separation Agreement was not acceptable to the Claimant, and therefore he did not sign it and its terms did not become effective.

7. The Claimant contends the Defendant is in breach of the Contract due to the alleged:

i) failure to offer the Claimant the opportunity to purchase continuation of medical cover under the COBRA scheme in breach of Article 5.5 of the Contract;

ii) failure to increase the Claimant's allowance by an amount that should have been adjusted annually in accordance with Clause 5.1.2 of the Contract; and

ii) failure to pay the Claimant an amount equating to unused vacation leave in breach of Article 28(1) of the DIFC Employment Law.

8. Accordingly, the Claimant brought his Claim, seeking the following remedies;

a. damages in the sum of AED 13,161, being the difference in cost between the healthcare cover that the Defendant was contractually bound to provide under the COBRA scheme, and the additional amount that the Claimant had to pay to secure cover. The damages claimed will also include the difference for six months' cover from April 2018, in an amount to be determined;

b. the sum of AED 341,764, being the shortfall in the indexation allowances that should have been applied to the Claimant's annual allowances for 2015, 2016 and 2017 (i.e. starting with an annual allowance in 2014 of AED 168,345 X 12 = AED 2,020,140 and applying an indexation uplift for subsequent years). The total shortfall is therefore AED 341,764.

c. the sum of 30 x AED16,544 = AED 496,308 being the sum to which the Claimant was entitled in lieu of unused vacation;

d. in relation to the sums due to the Claimant under (b) and (c) above, the Claimant is entitled to a penalty payment pursuant to Article 18(2) of the DIFC Employment Law. This is a sum equivalent to the last daily wage that was payable to the Claimant from 29 August 2017 (the date which is 14 days after the Claimant's date of termination (14 August 2017)) to the date on which payment is made. The penalty is AED 6,104,649, as of 3 September and will continue to occur at a daily rate of AED 16,544.

e. Interest on the sums at (a), (b) and (c) above at 8% above EIBOR; and 3,556,873 and continues to accrue at a daily rate of AED 16,544;

The Defence and Counterclaim

9. Atlas Mara denies the entirety of the Claimant Claims, citing the following grounds for defence;

i) the Contract does not provide for the extra-contractual and post-termination medical cover as claimed by the Claimant;

ii) Atlas Mara lawfully exercised a contractual discretion not to 'uprate' allowance payments, as provided for under the Contract, which the Claimant was notified of;

iii) the Claimant took all accrued vacation leave prior to termination, which was mutually agreed between the parties;

iv) the Claimant is not entitled to any statutory penalty under Article 18 of the DIFC Employment law nor any kind of interest.

10. Consequently, the Defendant brings a Counterclaim comprised of two limbs. The first limb concerns clause 1.1 of the Contract and specifically the Director's fees with the Claimant has allegedly held unlawfully. The Defendant contends that the Claimant, in his capacity as representing Atlas Mara he performed the role of Director at Union Bank of Nigeria, an affiliate of Atlas Mara. As such, he would receive incoming Directors fees due to Atlas Mara from Union Bank of Nigeria into his personal bank account; fees which he must pass on (less taxes) to Atlas Mara.

11. Atlas Mara's case is that the Union Bank of Nigeria paid the Claimant Director's fees of approximately AED 451,410 (pertaining to the period September 2015 up to February 2017). Allegedly, the Claimant has not returned said fees. Accordingly, Atlas Mara claims the sum of AED 451,410 plus interest, to be determined by the Court.

12. The second limb of the Defendant's Counterclaim pertains to Article 28(1) of the DIFC employment Law, which provides that "*in the event that the employee has taken more vacation leave than has accrued at the termination date, the employee shall repay the employer the corresponding sum*". Upon investigating this claim, the Defendant contends that it has identified that the Claimant has taken at least 41 days of annual leave in 2017 of which at least 5.25 days are excess days leave within the meaning of the second sentence of Article 28(1).

13. The Defendant requests that if the Claimant claims for pay in lieu of annual vacation leave (which is denied) succeeds, it be 'set off' against the Claim and Counterclaim.

Discussion

14. In the interests of a prosaic approach, I shall deal with each part of the Claimant's Claim in detail, step-by-step, before turning to deal with the Counterclaim. I shall therefore divide the claim into separate sections, dealing with the evidence and findings of each section before

moving on to the next. This is simply a pragmatic way of structuring the judgment via subheadings.

Post-termination medical cover

15. The Claimant seeks damages in the sum of AED 13,161 the sum which is the alleged discrepancy in cost between the healthcare cover that the Defendant was contractually bound (as per clause 5.5 of the Contract) to provide under the COBRA scheme, and the additional amount that the Claimant was required to pay to secure the cover required. The amount claimed is also include the difference for six months' cover (commencing from April 2018), in an amount to be determined by the Court.

16. The Claimant makes this claim upon the argument that the Defendant's failure to offer the Claimant the opportunity to purchase a continuation of medical cover under the COBRA scheme towards the end of his employment is in direct breach of article 5.5 of the Contract.

17. The Claimant's evidence is that under his previous scheme at his previous employer (Barclays), one of the benefits that he was able to enjoy was a benefit of continuation of medical cover under a US statutory regime known as COBRA. Under the COBRA scheme the employee pays the cost of cover extension (i.e. it is not a cost that is borne by the employer).

The relevant section is as follows:

> "5.5 The Employee and his spouse and children (up to age 24) shall all benefit from the Company's group medical scheme, subject to the terms and conditions of the applicable plans. The Company shall offer the Employee and his eligible dependents a group medical scheme with benefits at least as favourable as those under the Employee's previous employer's group medical scheme (including coverage of dependents to at least the maximum age at which they were covered under such a scheme)."

On the Claimant's account, the meaning and effect of the clause is that the Defendant was to offer a group medical scheme to the Claimant with benefits which were *at least* as favourable as those under the Claimant's previous employer's group medical scheme (at Barclays).

18. The Claimant's evidence is that the previous employer offered to extend COBRA benefits to the Claimant when he left the previous employer in around July 2014 as the new employer the Defendant) did not provide medical cover itself at that time.

19. The Claimant argues that the Defendant's contractual obligation was such that it should have allowed him to extend COBRA (post-termination) at his own expense, but at the reasonable cost at the time of termination as had been offered by the previous employer. The Claimant advances this argument by submitting that even if there is any ambiguity in the meaning of

clause 5.5, articles 49 and 50 of DIFC Contract Law clearly apply; that is, a contract shall be interpreted according to the common intention of the parties and the background discussions are thus relevant in accordance with article 51 of DIFC Contract Law.

20. The Claimant asserts that this is a question of construction, i.e. in determining whether the clause imposes obligations that survive post-termination. On the Claimant's account, clause 5.5 does impose such obligations (insofar as the Defendant must ensure continuation of the Claimant's medical coverage for a maximum period of 18 months). In any event, the initial onus to arrange the continuation of the cover needed to be complied with *prior* to termination.

21. The Claimant submits that the Defendant was therefore in a position to offer the COBRA benefit (or its equivalent) when the Claimant's previous employ was terminated and did indeed offered the benefit to the Claimant, however the Defendant subsequently changed its position and sought to pressure the Claimant to enter into a new separation agreement as a precondition to advancing the COBRA benefit.

22. Conversely, the Defendant denies that the Contract should be construed in the manner suggested above by the Claimant, not least because there was simply no provision for COBRA in the Contract. On their account, the Claimant's entitlement to medical cover was set out at clause 5.5 of the August 2015 Contract, which does not mention COBRA at all.

23. The Defendant submits that the Claimant is required to either argue that the Contact *ought* to be construed to include COBRA or alternatively, argue that such a term is to be *implied*. For the former to be argued is, on their account, hopeless, given the words used in the clause. The latter is also problematic, given the high threshold for implication of a term, and the presence of an entire agreement clause at 12.6 states which provides;

> "[t]here are no ... terms ... implied ... between the Parties other than as expressly set out in this Contract."

Pursuant to Article 53, this term is to be given effect and excludes the possibility of a term being implied.

24. The Defendant argues that clause 5.5 of the Contract required Atlas Mara to offer the Claimant "*a group medical scheme with benefits at least as favourable as those under the Employee's previous employer's group medical scheme.*" They contend it is clear from the term itself that:

(1) "*benefits at least as favourable*" relates to "*the terms and conditions of the applicable plans*" that is the contractual benefits under the policy;

(2) an example of this is coverage of dependants by age "*coverage of dependents to at least the maximum age at which they were covered under such scheme*".

25. The arguments put forth by the Defendant suggest that COBRA (being a provision of US statute) was not a benefit provided pursuant to the Claimant's previous employers' group medical scheme. It was, rather, an *extra-contractual statutory provision* which applied to US employers and, that the effect of COBRA in that instance was to extend the period over which benefits are to be provided (under a group plan), it was not a benefit in of itself.

26. The Defendant further argues that Barclays' group medical scheme (or policy) was operated by CIGNA and COBRA is not mentioned. Instead, the Defendant offered the Claimant membership of CIGNA's platinum programme (i.e. the highest-quality most comprehensive package available). The benefits the Claimant received under this particular scheme were *at least* as favourable as those under the CIGNA plan with Barclays. In particular, the coverage was global and covered pre-existing medical conditions. Accordingly, the Defendant contends it has complied with its obligations pursuant to clause 5.5.

Pre-contractual conversations

27. At the hearing, Claimant's Counsel took great effort to persuade the Court of the relevance of pre-contractual negotiations, taking us through those discussions in great detail. Whilst it is indeed true that in reliance on Article 51(a) of the Contract Law "*[i]n applying Articles 49 and 50, regard shall be had to all the circumstances, including (a) preliminary negotiations between the parties*" it cannot be ignored that clause 13.6 of the August 2015 Contract precludes this reliance. The Court must therefore construe the agreement from the four corners of the contract, not previous discussions. Clause 13.6 clearly states:

> "This Contract constituted the entire agreement between the Parties with respect to the subject matter of this Contract and cancels and supersedes any prior understandings and agreements between the Parties with respect to the provisions of services to the Company by the Employee.
>
> There are no representations, warranties, terms conditions, undertakings or collateral agreements, express or implied or statutory, between the Parties other than as expressly set out in this Contract."

28. In light of the above agreement clause I find that pre-contractual negotiations between the parties cannot be taken into account. Notwithstanding this finding, it is important here to go through a few pertinent observations of those discussions.

29. Firstly, the negotiations do not discuss the provision of COBRA benefits *after* the Claimant's employment with Atlas Mara, nor did the Claimant give evidence that COBRA benefits for the period *after* the termination of his employment were discussed, let alone agreed. Evidently, the Claimant places great reliance on certain pre-contractual discussions which took place between the parties, but notably, even in the absence of clause 13.6, there is a lack of evidence before the Court which would persuade me on the veracity of the alleged agreements for the continuation of COBRA benefits *after* the Claimant's employment.

30. In my consideration of the evidence before the Court, the references to COBRA clearly concern the transition period between the Claimant leaving his prior employer Barclays, and Atlas Mara establishing a health plan. These had no bearing on Atlas Mara's post-termination obligations.

31. At the very most, the pre-contractual negotiations simply show that medical cover was incredibly important to the Claimant, but those pre-contractual negotiations show nothing more. Given that the Claimant had lawyers assisting him in the negotiations, any fault for the absence of an express and clear post-Atlas Mara termination COBRA provision lies at the lawyer's door, not Atlas Mara's.

32. The Contract places obligations on Atlas Mara to provide medical benefits to be *"at least as favourable"* are those provided by the Barclays medical scheme. The Claimant has no complaint about that during the course of employment. Furthermore, as the COBRA benefit is one which the employee enjoys after termination of his employment, it would be surprising for such an entitlement to arise in usual contracts. Very clear clauses would be required for such an extra-territorial, post-termination obligation to be imposed upon the parties.

33. It was suggested by the Claimant throughout the Hearing and within closing submissions that the Ms Hamza-Bassey's email dated 10 August 2017 was an offer, that the Claimant's email in response amounted to acceptance of that offer, and this amounts to a binding contract. There are however are a number of reasons why this interpretation of the evidence is not accepted.

34. Firstly, it is not part of the Claimant's case that such a collateral contract arose, such a case is not pleaded. Nor has there been an application for amendment. For there to be an agreement, it must be in writing and signed by the parties as required by contract. No such agreement exists or has been identified.

35. Secondly, there is no consideration established by the Claimant to support any putative contract.

36. Thirdly, Ms Hamza-Bassey's email cannot be construed as an "offer". Article 14 of the DIFC Contract Law requires an offer to indicate an "*intention … to be bound in case of acceptance*" there is no such indication in Ms Hamza-Bassey's email.

37. Finally, the entire agreement clause precludes such a collateral arrangement and therefore in the circumstances, the Claimant's claim in respect of COBRA must fail.

Holiday entitlement

38. The Claimant claims a further AED 496,308, being the sum to which the Claimant was entitled in lieu of unused vacation "unused vacation leave" of 30 days in 2017 and 2016) The claim is brought for breach of Article 28(1) of the DIFC Employment Law No.4 of 2005, (2) The claim is also brought for breach of clause 6 of the August 2015 Contract.

39. The Defendant's first argument in defence is that it had in fact legally required the Claimant to take annual vacation leave pursuant to Article 29(2) of the Employment law (*the employer may require the employee to take vacation leave on 7 days' notice*). The Defendant refers to the email of 4 August 2017 which required the Claimant to take his post-notice paid leave as holiday rather than Garden Leave.

40. Relying on the Claimant's own evidence that he had long holiday planned during this period, (including trips to France and the US), the Defendant contends that in real terms it made no difference to the employer, as employee (i.e. the Claimant) would have been on leave, (i.e. absent from work) regardless of the contractual position of that leave. The Defendant's position is that it was not open to the Claimant to decline holiday during his Garden Leave and therefore the Claimant has no outstanding holiday entitlement.

41. The Defendant argues that the Claimant had a duty to co-operate such that he did not prevent Atlas Mara from performing its contractual obligation of allowing the Claimant 22 days holiday per year; this would include not unreasonably refusing to take holiday, as in accordance with Article 58 Contract Law;

> "[e]ach party is bound to co-operate with the other party when such co-operation may reasonably be expected for the performance of that party's obligations."

In the same respect, the Defendant further argues that the August 2015 Contract was subject to mutual duties of good faith. If it was suitable for the Claimant to take holiday, in the sense that there was no obstacle or good reason preventing him from doing so, refusing to take holiday would be in bad faith and itself a breach of contract.

42. Consequently, the Defendant submits that the Claimant did not have accrued but untaken leave at the date of termination and so Article 28(1) is not engaged; on the Defendant's account the Claimant had in fact taken more leave than he was entitled to, and as such, the Defendant contends that it did not breach clause 6 as the leave taken by Claimant in 2017 was "*mutually acceptable*" between the parties. As required by Clause 6.1 of the August 2015 Contract provides that,

> "the Employee will be entitled to 22 paid days' holiday (workdays) in each calendar year of completed employment, pro-rated for any partial

years of employment" and "[t]he holidays are to be taken at times which are mutually acceptable."

43. The second argument is that there is no contractual right to pay in lieu of holiday. The Defendant takes the view that the contractual right is to holiday, and the right to pay in lieu is a statutory right provided by Article 27(5)(a) and 28. These provisions are akin to reg. 13 and reg. 14 of the English Working Time Regulations 1998/1833, which in turn transposes Directive 2003/88. In C-341/15 *Maschek v Magistratsdirektion* [2016] IRLR 801, the CJEU held that pursuant to Art 7(2) EC Page 16 of 27 Directive 2003/88 a person on garden leave was not entitled to an allowance in lieu of paid annual leave not taken during that period (see [35]). The Defendant is therefore inviting this court to follow the English approach to such matters.

44. The Defendant's third argument within its Counterclaim is that Atlas Mara was not aware at the time that some of the periods were being taken as holiday (as the Claimant failed to properly input his vacation time as he was required to do). Where these periods cover time prior to the Claimant being placed on Garden Leave, there appears to be a consensus that they ought to be treated as holiday. However, there is a principled dispute over those periods of time during the Claimant's Garden Leave.

45. Accordingly the Defendant claims for excess holiday leave, covering the precise same period taken by the Claimant but not accounted for; pursuant to Article 28(1) ("in the event the employee has taken more vacation leave than has accrued at the termination date, the employee shall repay the employer the corresponding sum").

46. The Claimant, on the other hand, contends that he is entitled to payment for at least 5 days of vacation in 2016 and although he was claiming for 16.5 days before the trial, and 14.7 days of vacation for 2017.

47. With regards to 2017, the position is simple: (a) the Claimant did not take any vacation leave in 2017 because he was on Garden Leave; and (b) the Defendant cannot force the Claimant to take vacation leave, as any periods of vacation leave needed to be "mutually acceptable" as per the Contract, and the Claimant did not accept the periods.

48. The Claimant also addresses his refusal to take annual leave on the Defendant 's proposed date of 13 May 2017 reason; the reason for this, on the Claimant's account, is as follows; that whilst the he was on "Garden Leave" (in accordance with clause 7.4 of his Employment Contract until termination of his employment on 14 August 2017) he was relieved of attendance at "the Company's offices" and performance of his daily duties. It was the Defendant who exercised its right to put the Claimant on paid "Garden Leave" without any restrictions and therefore it is nonsensical to assert that the Claimant was on holiday whilst he was already in fact on "Garden Leave'.

49. In order to support his argument, the Claimant makes various submissions regarding the issue of mutually acceptability. Though taken entirely out of context, as I shall explain at paragraph 67, he quotes myself at the Hearing stating:

> "...that does not say why it is convenient to deprive [the Claimant] the enjoyment of the new leave you have given him [Garden Leave] and then you ask him to take two leaves at once. Why would you call that convenient, because even if you look at it from a financial prospect, it is not convenient for him from a financial prospect?"

50. With regards to travelling outside of the UAE during his Garden Leave, the Claimant refers to what Ms Hamza Bassey acknowledged under cross-examination; (a) the Claimant was never told *not* to leave the UAE whilst on Garden Leave; and (b) the Claimant never said that he was unavailable for transition matters during his "Garden Leave". The Claimant's interpretation of the situation was that the he did not need to be in the UAE, and the Defendant did not care where the Claimant was during the Garden Leave and the mere fact that the Defendant was abroad for part of the Garden Leave period did not mean that he was on holiday.

51. The Claimant further submits that if indeed the Defendant had genuinely thought that any travel during this period might have constituted vacation then the Defendant would have asked about this period as, on its own case, it could have deducted any such travel time as vacation leave.

52. In the Claimant account the Defendant's interpretation of the words "mutually acceptable" has fluctuated and shifted throughout the proceedings and must not be considered, the claimant argument as such is that In Ms Hamza Bassey's first witness statement, she asserted that this meant "mutually suitable", yet the Defendant's Counsel now suggests in his skeleton argument that this means "convenient, or capable of being treated as a holiday"..

53. The Claimant then says that This inconsistency denotes the Defendant's unsuccessful search for a way to avoid the obvious meaning of "acceptable", which is something which was originally agreed upon by both parties. "Acceptable" has an entirely different meaning from "suitable" or "convenient". for the Claimant it may be *acceptable* for a person to take holiday but neither suitable nor convenient to do so.

54. In the Claimant's submissions, it is clear that the Defendant considered that there was a requirement for any period of vacation to be agreed prior to it being taken: why else would the 4 May 2017 letter be accompanied by a signature page for the Claimant to confirm that he accepted the terms set out in the letter? To the extent that the Court considers the meaning of clause 6 of the Employment Contract to be ambiguous (which it is not) the Court can have regard to this post-contractual conduct.

55. The Claimant further argues that he did not return the signature page accompanying the 4 May 2017 letter, nor did he sign the draft separation agreements that required him to take vacation prior to his termination. For the Claimant, these facts illustrate that the Claimant did not, in fact, accept to take vacation during his Garden Leave. Such is illustrated further by an email which followed on from that letter, dated 5 June 2017 from the Claimant to the Defendant.

56. Though the Claimant's position as above is that he is entitled to compensation for unused vacation leave, the claim for alleged excess vacation must fail, (his alternative argument), is that to the extent that the Court considers that the Claimant was on vacation during the period of Garden Leave then the Claimant should only be treated as being on vacation to the extent required to extinguish his leave entitlements (which was the plain purpose of the 4 May 2017 letter as noted above).In my view the first issue for the Court to consider is whether, under contract or law, the Defendant was entitled to direct the Claimant to take any untaken leave during the time of the Claimant's notice period, also known as "Garden Leave". The easy way to deal with such issue is to ask whether or not the clause 6.1 of the Employment Contract require the Claimant consent to the period of leave.

57. Clause 6.1 of the August 2015 Contract provides that,

> "the Employee will be entitled to 22 paid days' holiday (work-days) in each calendar year of completed employment, pro-rated for any partial years of employment" and "The holidays are to be taken at times which are mutually acceptable."

The key phrase in this clause is, aforementioned, "*mutually acceptable".*

58. We have seen above what the Claimant tried to attribute the meaning of this phrase to being consent or agreement to take such leave. The Defendant, on the other hand, argues the phrase can only mean convenient or mutually suitable.

59. In my judgment, I favour the Defendant's interpretation of the phrase "*mutually acceptable"* as it must indeed only mean convenient or mutually suitable. My reasons for this finding are given in full below.

60. Firstly, I favour the Defendant's interpretation due to the fact that article 29(2) of the DIFC Employment law clearly provides that

> "[t]he employer may require the employee to take vacation leave on 7 days' notice."

61. The second reason is that, if the phrase was to mean what the Claimant has suggested, the parties surely would have used the word 'agreed' instead of the phrase "mutually acceptable" in the contract, yet they chose not to. Indeed, the word "acceptable" is inconsistent with the

requirement that there would definitely be an agreement, because there is of course a linguistic distinction between acceptable (capable agreement) and accepted (finally agreed).

62. Thirdly, I find The Claimant's construction is both impractical and highly unlikely. Why would either party give the other (in effect) a *veto* over times when holiday is to be taken? There would be no holiday for the employees unless there is both parties' agreement. The parties post-contractual conduct suggests that there appears to have been no expectation of an agreement before a period of time which would be treated as holiday. Most of the time that the Claimant took holiday during his employment, he did not even tell his employer, or record when he was on holiday.

63. During the cross-examination, it transpires that the Claimant oscillated between holiday and work, seemingly these were fluid concepts to serve his own exclusive interests, and he has attempted to place blame it on his secretaries when he was faced with the issue of unrecorded holidays. The parties conduct suggests that there was no contractual requirement for holiday to be agreed. Therefore, the appropriate construction for the Contract is that Atlas Mara can direct the Claimant to go on leave at mutually acceptable time.

64. My fourth reason is that on the Claimant's account, his refusal to take annual leave based on the Defendant's proposed date of 13 May 2017, which was a paid leave of absence i.e. Garden Leave and he was relieved of the requirement to attend the company's offices and performance of his daily duties without any travel restrictions. However, in my judgment the 13 of May letter clearly represents an instruction made by an employer to a full-time employee which the employee must obey in accordance with Article 58 of the Contract Law which provides;

> "[e]ach party is bound to co-operate with the other party when such co-operation may reasonably be expected for the performance of that party's obligations."

65. My fifth and final reason in this matter is that in circumstances where clause 1.4 of the August 2015 Contract determined that the Claimant's ordinary place of work as being the UAE, the Claimant was in fact only required to travel abroad for "*the proper performance of [his] duties*", and thus travelling abroad for holiday can only objectively be construed as the Claimant's acceptance that such a period of time be treated as holiday.

66. With regards to the issue of convenience raised by the Claimant where he quoted me as mentioned above in paragraph 50, this was a mere hypothetical assertion I put before the Defendant while discussing that matter. Immediately after, I said quite the opposite;

> "It would be inconvenient if he was not, let us say, on garden leave and he is still working with the company and he has still tasks to accomplish. That would be inconvenient."

That was not my view at the time of the hearing but rather discussion.

67. Having reflected on the hearing and the evidence before the Court, given circumstances surrounding the termination and the Claimant being in "Garden Leave", I conclude that it was not convenient for him to refuse to take any unutilised holidays during his notice period, based on his employer instructions.

68. Having reached the above conclusions, I find that the Claimant was indeed obligated to take leave during his "Garden Leave" and as the Defendant had given 30 days, the Claimant is not any more entitled to claim any unpaid holidays.

69. The abovementioned reasons are sufficient to drop any argument put forth by either party with regards to whether the Defendant, under contract or law, was entitled to direct the Claimant to take any untaken leave during the time of Claimant's notice period, (i.e. "Garden Leave").

70. I shall turn on now to deal with the Defendant's counterclaim for excess holiday leave, covering the precise same period mentioned above, a period of absence taken by the Claimant but not accounted for.

71. In my judgment The Claimant should only be treated as being on vacation to the extent he was required by contract to exhaust (i.e. 'use up') his leave entitlements. The 4 May 2017 letter as detailed above shows this was clearly the purpose of such instruction to take whatever unutilised leave.

72. It is also a plainly deficient approach to differentiate between the dates in which the Claimant was actually on holiday compare to the dates that were to be counted as Garden Leave but holidays per se, for the a very simple reason that he asked not to attend office yet had no travel restrictions upon him at that time.

73. My finding above regarding the Claimant's entitlements to require the Claimant to take leave during his notice period must not go further than the extent that he was required to 'use' his leave entitlements. Therefore, the Claimant's counterclaim for excess holiday leave must be dismissed.

Indexation uplift on allowances

74. This aspect of the Claimant's case seeks payment of the sum of AED 341,764, being the alleged shortfall in the indexation allowances that should have been applied to his annual allowances for 2015, 2016 and 2017. The Claimant submits that the indexation adjustment for 2015 was 5.36%, 4.53% in 2016 and 2.53% in 2017, upon the basis for calculating the

indexation adjustment, which are figures published by the Government of Dubai. The underpaid indexation allowance is therefore calculated as follows:

> At the end of 2014, the annualised allowance of AED 2,020,140 should have been increased to AED 2,128,436;
>
> At the end of 2015, the annual allowance that should have been 2,128,436 during 2015 should have increased to AED 2,224,922;
>
> At the end of 2016, the annual allowance that should have been AED 2,224,922 during 2016 should have increased to AED 2,281,182; and
>
> For 2017, the annualised allowance should have been AED 2,281,182 up until the Claimant's termination

75. The Claimant reference to such entitlement is Clause 5 of his Employment Contract is as follows:

> a. "5.1 In consideration of the Employee undertaking the Employment, and during the Employment term, the Company shall pay to the Employee as follows:
>
> b. 5.1.1 The Employee shall receive a basic monthly salary of United Arab Emirates Dirhams one hundred fifty-three thousand, forty-one (AED 153,041) which shall be payable in arrears on the last day of each month14; and
>
> c. 5.1.2 An allowance in the monthly amount of United Arab Emirates Dirhams one hundred sixty-eight thousand three hundred forty-five (AED 168,345), payable in semi-annual instalments of AED 1,010,070, to be used for housing, car, education costs, utilities etc. **Such allowance will be adjusted annually for local (Dubai) inflation (as determined by the Company) based on education, housing and utilities cost indexes."**

76. The Claimant submits that the clear wording of the clause states that the indexation allowance *"will"* be adjusted annually for local Dubai inflation (as determined by the Company), based on education, housing and utilities cost indexes. The Claimant adds, as a matter of contractual interpretation, that it is only those indices that are relevant and only those indices that should be taken into account in accordance with Article 53 of the Contract law which states that:

> "Contract terms shall be interpreted so as to give effect to all the terms rather than to deprive some of them of effect".

77. The Claimant further submits that to include other (non-specified) indices in the calculation of the indexation is to deprive the words used in the Contract (specifically the reference to "*education, housing and utilities cost indexes*") of their specific intent, meaning and effect.

78. On the Claimant's account, even if there is any ambiguity in the meaning of clause 5.1.2, Articles 49 and 50 of the DIFC Contract Law apply that a contract shall be interpreted according to the common intention of the parties, and the background is therefore relevant. In this respect, the claimant drew the Court's attention to the time at which the Employment Contract was being negotiated, when the Claimant's legal adviser requested that:

a. "the Employment Contract should also provide that the basic salary and specific allowances or benefits shall be adjusted annually for inflation as reported by the UAE Ministry of Finance".

79. There is also no discretion as to whether or not to apply an indexation adjustment in the Claimant view. He argues that the mandatory wording of the Contract is clear that the allowance "will" be subject to an adjustment.

80. Furthermore, the Claimant argues that despite the clear wording, the intention and meaning of the clause is also equally clear when compared to other clauses where the Defendant is to have an absolute discretion as to whether or not to do something and reference is given to Clause 5.2 (Bonus), Clause 7.2 (Change of CEO's duties) and Clause 7.4 (Pay in lieu of notice) as parties have used different wording in different clauses, such as the distinction in language between clause 5.1.1 and these other clauses, it must be assumed that they intended different things.

81. In the wording "*as determined by the Company*" it is the Claimant's view that this relates to the determination of the amount of the adjustment to the allowance. He argues that in making that determination, the Company is under an obligation to act reasonably and in good faith. On the Claimant's account, the wording does not permit the Defendant to:

(a) decide not to apply the inflation uplift at all (as the Defendant purported to do in this case); or

(b) take into account indices extraneous to those specifically mentioned in the Employment Contract in determining that amount which the Defendant proposes in the alternative to its primary position.

82. Finally, the Claimant argues that the Defendant has already undertaken this exercise in relation to other employees who have been terminated. On the Claimant's account, the Defendant has already undertaken this exercise for existing employees in January 2018 and applied an indexation uplift of 4% which is significantly higher than the headline inflation rate.

83. As to the method or matrix that should apply to the claimed allowance or uplift, the Claimant submits that the specific indices for education, housing and utilities are available from the Government of Dubai.

84. Conversely, the Defendant submits that the wording of clause 5.1.2 means that the allowance "*will be adjusted*" but only if Atlas Mara has "determined" or exercised a contractual discretion in favour of such an uplift in any given year. The words "*as determined by the company*" have been selected and inserted deliberately. The Defendant insists they have important discretion, and *expressly* place that discretion in the hands of company, and as such there is no absolute right to increases to the living allowance.

85. The Defendant argues that the Claimant, as an employee, were well aware of this discretion, and what would be the common practice prior to his termination, having himself been the decision maker for the purposes of such a discretion. The Defendant's case then is that in the present case, a decision was taken by the company in each of 2015 and 2016 to give the Claimant no uplift to his allowance, and that the Claimant himself had made such a determination in respect of his direct employees, including Ms Hamza Bassey, the witness in this case.

86. The Defendant's alternative argument on this point concerning interpretation is that if the Court did find against its primary interpretation, then the precise choice of inflation index must be at its discretion. As such, if the Defendant did not apply the uplift, it would have breached the Employment Contract and the Court's task would in that case be to quantify the damages arising from that breach. It does this by putting itself in the position of Atlas Mara to identify how in practice the company would have fulfilled its obligation to undertake a fair and rational assessment of the appropriate index to use.

87. Furthermore, in the alternative argument, the Defendant insists that a discretion to identify the appropriate uplift may lawfully result in there being a zero rate of inflation applied, because inflation may be zero or a negative rate, as was the case in Dubai in 2009/2010.

88. Finally, the Defendant argues that in any event, the remedy for such a breach is damages and no penalty is payable in respect of this entitlement.

89. Both parties then exchange evidence and indexes to show what relate should the Defendant apply to the uplift if the its mandatory.

90. In order to resolve the dispute regarding the indexation uplift on allowances, the Court is to determine first whether the contract gives the Defendant a discretion to apply an adjustment to the allowances paid to the Claimant. Thereafter, *if* the answer is positive and adjustment to the allowance should have been made, the question flowing from this is: how was the adjustment to be calculated, and how much is the Claimant owed?

91. My view in the interpretation of clause 5.1.2, which cites

> "[s]uch allowance will be adjusted annually for local (Dubai) inflation (as determined by the Company) based on education, housing and utilities cost indexes"

is that the Defendant did indeed have a discretion as to whether there would be any increase, and so one must as what the value of that increase would be. In my judgment, the Claimant's interpretation is too wide and unsupported by the evidence one would need to support such arguments.

92. My conclusion is supported by the conduct of both parties during the course of empioyment, and the relationship between the parties. It was advanced by the Defendant that a decision was to be taken by the company in each of 2015 and 2016 to give the Claimant no uplift to his allowance. The Claimant never contested such determination nor did he raise any objection to the Defendant for the two consecutive years that the company exercised that discretion. It appears the Claimant only takes issue with the employer's decision not to increase his allowance upon filing the Claim.

93. In the evidence of Ms Hamza Bassey gave during cross-examination, she illuminated the fact that the company's decision not to give the uplift was even upon the Claimant's recommendation to the board of the company. It is notable that this evidence given by Ms Hamza Bassey is not contested by the Claimant.

94. Furthermore, there is clear evidence that the Claimant had himself chosen to exercise the company's discretion and *not* to provide and uplift in respect of other employees in the same period. The Claimant has provided no evidence to dispute that this was discretionary nor to explain why the Claimant himself exercised this discretion in respect of junior employees when it was convenient for him to do as CEO.

95. In my judgment, it is not helpful for the Claimant to argue that other employees received such uplift, as he has not furnished the Court with documentary of any sort, and thus the argument falls flat. Even if the Claimant was able to establish such a line of argument with documentary proof and evidence, the matter still stands that it was within the Defendant's discretion whether to grant such allowances or not. In essence, it is thus a moot point.

96. In the Claimant's interpretation the Defendant has no discretion to refuse the uplift allowance, and the Matrix for that is the indexes that he refers to, which are provided by the government of Dubai. Such an interpretation must lead to the harsh conclusion that the Defendant have no discretion as to the uplift and the indexes used giving no effect to the wording "*as determined by the Company*". In my view this is simply not acceptable and against the real practices in the company's record and history, all information with which the Claimant himself was familiar.

97. Finally, I will simply reiterate that the Claimant's arguments pertaining to various other clauses in his contract concerning construction and language (i.e. used for discretion) are not helpful to his case, as we have seen in the above, the wording in the current clause 5.1.2 are not vague and capable of delivering the meaning I have found.

Claim for statutory penalty

98. I now turn to the Claimant's claim for a penalty payment pursuant to Article 18(2) of the DIFC Employment Law, equivalent to the daily wage that was payable to the Claimant from 29 August 2017 (i.e. the date which was 14 days after the Claimant's date of termination) to the date on which payment was made by the Defendant.

99. The Claimant submits that as of 3 September 2018, the penalty is AED 6,104,649 and continues to accrue at a daily rate of AED 16,544. In the event that the DIFC Court finds that any amount was owing to the Claimant following his termination but remained unpaid then the Court has no discretion in deciding whether or not to award that penalty to the Claimant.

100. The Claimant brought such claim for two kind of amount owing, the first is that the Defendant owing amount of unpaid holidays while the second is that the Defendant owing amount being the shortfall in the indexation allowances that should have been applied to his annual allowances for 2015, 2016 and 2017.

101. This Court have dismissed both limbs of the Claimant case therefore this part of the Claimant case must also fail.

Claim for UBN Fees

102. The Defendant in its counterclaim alleges that the Claimant owes considerable fees in excess of USD 100,000 which the Claimant received as part of his role acting as a Director of United Bank of Nigeria (UBN) in 2015, 2016 and 2017; and that the Defendant agreed to indemnify the Claimant in respect of any personal taxes he may have owed as a result of receiving those fees in his American Bank account. The Claimant has not paid these fees to Atlas Mara.

103. The Defendant submits that this is an outstanding debt, the calculation for which is a simple formula which applicable US tax that the Claimant aware off) in which the Claimant has no good reason to withhold the net amount.

104. The Defendant further argues that any amount awarded to the Claimant must be set-off against any amounts owing to the Defendant, otherwise paid to them direct by the Claimant. Any reasonable time to pay these sums has long since passed, and therefore the Defendant argues it is also entitled to interest on those sums.

105. The Claimant admits this but denies that he can pass the fees on because he is unable to calculate the tax owed. The Claimant acknowledges that once he receives required information from the Defendant, he will be able to calculate his tax and make a return to the International Revenue Service (IRS) based on complete and accurate information. Until that time the Claimant can only make an estimated filing to the US Internal Revenue Service.

106. The Claimant submits that he is not due to file his US tax return for 2017 until 15 October 2018 and will not know precisely how much his tax liability will be *until* the information requested from the Defendant is provided. The Claimant has already paid an estimated tax advance on his receipt from UBN of USD 42,692 in order to prevent himself being charged interest and penalties by the US Internal Revenue Service.

107. Furthermore, the Claimant argues that there can be no legal set-off of an unascertained sum, or one that is not due and payable; there can be no equitable set-off as the sums are not part of closely related transactions, given that the Claimant's claims arise directly from the termination of his employment and breaches of the Employment Contract by the Defendant, whereas the Defendant's claim for UBN fees arise in respect of a collateral arrangement between the Claimant and Defendant entered into by the Claimant in his capacity as a director of the Board of UBN.

108. Although the Defendant has stated in its counterclaim that the amount owed by the Claimant in this particular claim is AED 451,410, parties during the trial appeared, albeit loosely, to agree that the amount paid to the Claimant actually USD 100, 267.10 or approximately AED 368,230.92.

109. The agreement between parties dictates that the Claimant must return the sum while the Defendant indemnify him for any personal taxes he may have owed as a result of receiving those fees in his American bank account.

110. In my Judgment therefore that there is no agreement between parties that the Claimant must pay interest on the amount returned.

111. I note that for the period of 16 of October and 27 of December 2018 the Claimant's evidence establishes that out of USD 100,267 (the amount received in respect of UBN), he has paid USD 42,691 in US taxes. The Claimant filed a witness statement and letters sent to the Court support this fact. After deducting the amount the Claimant had already paid to the Defendant on 15 October 2018, (USD 57,575 and the net amount owing to the Defendant in respect of UBN fees) the amount left is, ironically, just USD 1.

112. Although I will award the Defendant this 1 USD, in my judgment it would not be unreasonable for the Defendant to bring its counterclaim for USD 100,000 (less tax deducted). I shall take this into account when deciding cost.

113. Since there was no foreseeable due date for this sum to be paid, no certainty on the amount to be paid, and a lack of any agreement as to the interest, in the absence of evidence that the Claimant could repay such amount earlier, I order the Claimant to pay USD 1 to the Defendant free of any interest.

114. Having rejected and dismissed all of the Claimant claims, there is no need to open the issue of the set-off.

Costs

115. Based in my findings above, as the Defendant was successful in the majority of the original Claim, and the counterclaim as they only lost part, (payment in excess of holiday leave which represents really a very small amount compared to the Claimant claims), I order the Claimant to pay the cost of the Claim and counterclaim in the standard basis to be assessed by the Registrar if not agreed by parties.

Issued by:
Amna Al Owais
Registrar
Date of Issue: 5 September 2019
At: 12pm